The Wisconsin Practitioner's Handbook to Criminal Appeals

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by

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About the Author

Jeffrey W. Jensen has been practicing criminal defense in Milwaukee for nearly twenty-three years. In that time he has handled in excess of one hundred criminal appeals. He is admitted to practice before the Wisconsin Supreme Court, the Circuit Court of Appeals (7th Cir.) and before the United States Supreme Court. He he argued a number of times before the Wisconsin Supreme Court.

I. Overview

The starting point for any criminal appeal is Sec. 809.30, Stats. A careful reading of this statute will tell you much of what you need to know about the process. Here is a summary of the procedural requirements:

- Notice of intent to pursue postconviction relief must be filed within twenty days of the entry of the judgment of conviction. Usually, this is the day of sentencing.
- Counsel must order the transcripts within thirty days of filing the notice of intent to pursue postconviction relief.
- The court reporters must file the original transcript with the court and serve a copy on postconviction counsel within sixty days of the date the transcript is ordered
- Once postconviction counsel has received the last transcript counsel must either file a postconviction motion in the trial court or a notice of appeal. The notice of appeal is filed in the circuit court.
- If a postconviction motion is filed the court must decide the motion within sixty days or it is deemed denied. Counsel must then file a notice of appeal within twenty days.
- The clerk will assemble the file and send counsel a notice of the items that will be transmitted to the court of appeals.
- Once the file is received in the court of appeals counsel will received a notice and

the appellant's brief must be filed within forty days.

- The State has thirty days to file their brief
- The appellant has ten days to file any reply brief
- A petition for review in the Supreme Court must be filed (i.e. "received") by the Clerk of the Supreme Court within thirty days of the date of the opinion of the Court of Appeals.

II. Starting the Appeal

A. Notice of Intent. The appeal/postconviction process is started by the filing the notice of intent to pursue postconviction relief.

The notice of intent need only describe the date of conviction, the nature of the conviction, and the court in which it was entered. It is necessary to provide only enough detail to reasonably identify the judgment or order that is being challenged. It is the better practice to hand file this document and be sure that a copy of it is served upon the district attorney. If you are appointed counsel (or if you have reason to believe that the defendant is now indigent) you must immediately forward a copy of the notice of intent to the State Public Defender- Appellate Division[1] and ask them to appoint postconviction counsel.

B. Ordering the Transcript. Generally speaking, postconviction counsel should order the transcript of every court appearance that occurred during the case. In Milwaukee County, especially, this could mean sending letters to numerous court reporters. In other words, you should not simply send one document to the "court reporter" ordering the transcript. Since the ordering of the transcript has a deadline it is a good idea to file a copy of your letter ordering the transcript with the court. That way, if the court reporter fails to serve the transcript within sixty days it will be a matter of record that it was timely ordered (i.e. that postconviction counsel is not the cause of

1 State Public Defender-Appellate Division. P.O. Box 7862, Madison, WI 53707-7862

the delay).

Postconviction counsel should *not* rely on the court reporters to timely serve the transcripts. It is imperative that counsel calendar the date on which all transcripts are due (i.e. sixty days after they are ordered). The easiest way to get into trouble with the Office of Lawyer Regulation for "delay and neglect of a legal matter entrusted to the lawyer" is to fail to monitor the serving of the transcripts. This usually occurs when counsel orders the transcripts and then simply waits for the reporters to serve the transcripts before taking the next step in the postconviction process. If this is the procedure that counsel follows it may be six months before the lawyer realizes that a transcript has not been served.

PRACTICE TIP: Use a web service such as www.backpack.com to send yourself emails on the dates of critical deadlines. For example, set up the service to send you an email on the 60th day after the transcripts are ordered reminding you to check the file and to contact any reporters who have not served their transcripts.

As explained later in this handbook, all deadlines (except the deadline for filing a petition for review) are subject to extension by the Court of Appeals under Sec. 809.82(2), Stats. Therefore, if counsel is missing transcripts on the sixtieth day the best practice is to write a letter to the reporter informing him/her that the transcript is delinquent and demanding that either the transcript be served immediately or the reporter file a motion for extension.[2]

III. Reviewing the Record

A. Reading the Transcript

By far, the most time-consuming and tedious task in handling an appeal is

2 It is the reporter's obligation to file for an extension if one is necessary

reading the transcript. Probably the best advice is to outline what should *not* be done.

It is a mistake to simply read through the transcript with highlighter the way one might read through biology text book. Bear in mind that you will later be required to provide page number citations to the record when writing the statement of facts in your appellate brief. Also, very few lawyers have to luxury of reading a trial transcript from front-to-back in one sitting.

Therefore, a good way to proceed to create a summary and index to the record, with page number citations, as one reads. When you encounter a significant fact write a summary of it preceded by a page number. That way, when writing the statement of facts it will usually not be necessary to sit at a computer keyboard while balancing a transcript on one's lap. Additionally, when you pick the transcript to read again it is possible to get back to speed by reviewing your notes.

Finally, when you come across a significant objection and ruling by the judge you may want to note that as a potential appellate issue.

B. Meeting the Client

Much of what doctors, lawyers, and other service professionals do is done to keep the client happy. A surgeon sits at the bedside of a patient and explains the procedure for an appendectomy not because it will help the doctor perform a better operation- or because the patient may have some helpful suggestions about how the procedure should be done- but because it makes the patient feel better. Doctors are, after all, business men and it pays to keep the customers happy. The same is true for lawyers.

It is fairly unusual for a person convicted of a crime to have any helpful suggestions about the legal issues that should be raised on appeal. In fact, the client's suggestions are usually counterproductive because sometimes the lawyer must then research the issue and provide the client with documentation about why the issue is not being raised.

Nonetheless, a personal meeting with the client is necessary. It keeps the

attorney-client relationship on an even keel and every now-and-then the client will have a good idea. If you suspect ineffective assistance of trial counsel the meeting with the client is mandatory. There will be occasions where important conversations occurred between trial counsel and the defendant that are not apparent in the appeal record. For example, where the client asked the attorney to investigate the testimony of a certain witness and the lawyer neglected his obligation to do so. You can discover such an issue only by talking to the client.

Bear in mind, though, that practically every person convicted of a crime is convinced that his lawyer was ineffective but that the actual incidence of ineffective assistance of counsel (the kind requiring a new trial, that is) is rare.

C. Talk to Trial Counsel

In the federal system the United States Court of Appeals has expressed a "strong preference" that trial counsel handle the appeal. For many years in Wisconsin this was also the case. However, following *State ex rel. Rothering v. Mc Caughtry*, 205 Wis. 2d 675, 676 (Wis. Ct. App. 1996), the preference changed in Wisconsin (at least as far as the appellate division of the State Public Defender is concerned). Although there is no legal nor ethical impediment to trial counsel handing postconviction and appellate matters, there seems to be a preference that the defendant obtain new counsel following conviction.

The reason, of course, is the belief that if trial counsel handles the appeal he or she will be unwilling to raise ineffective assistance of counsel. The benefits of having trial counsel handle the appeal, though, as set forth below, seem to strongly outweigh this danger. Firstly, the state policy appears to assume that the attorney will behave unethically by failing to zealously advocate all meritorious issues on appeal.[3] There does not seem to be a lot of evidence for this proposition. Secondly, true ineffective

3 The author's experience is quite the opposite. Most criminal defense lawyers would not shy from referring a case to new counsel where there is the possibility of ineffective assistance of counsel. Few lawyers would want it on their conscience that they allowed an unfair conviction to stand merely because counsel would be too embarrassed to admit an error.

assistance of trial counsel is relatively rare (though every person convicted of a crime seems to believe that his lawyer was ineffective).

On the other hand, the benefits of having trial counsel handle the appeal are numerous. Trial counsel can be more efficient on appeal because he or she need not read the transcripts with the same scrutiny that a new lawyer on the case will be required to do. Trial counsel ought to be familiar with the legal issues that arose during trial court proceedings. Therefore, trial counsel is far less likely to overlook a meritorious issue. Additionally, trial counsel will not have to reinvent the legal arguments. Presumably counsel researched and submitted legal briefs on the significant issues. An appeal presents an opportunity to refine and to expand upon those legal arguments.

Therefore, if you are new to the case on postconviction or appeal it is critical that you talk to trial counsel about the issues and to obtain counsel's file materials.

D. Notice of Appeal or Postconviction Motion?

Some cases will require a motion before the trial court prior to proceeding to appeal. The general rule is that whenever an issue requires the presentation of evidence a postconviction motion is required. Additionally, where in fairness a trial judge ought to be permitted to correct an error a postconviction motion is required.

The most frequent example of a situation that requires a postconviction motion is the claim of ineffective assistance of counsel. Where this claim has merit is is necessary to create a record concerning whether trial counsel had any strategic reason for proceeding as he did. Additionally, the defendant may be required to establish that counsel's error made a difference. Typically this will involve the decision not to present certain evidence. Trial counsel will be required to explain why he or she failed to present the evidence. Then the evidence must be presented so that the judge may determine whether, had the evidence been presented, it would have made a difference in the outcome.

Another example of a claim that requires an evidentiary hearing in the trial court

is the claim of newly-discovered evidence. Again, the defendant must present the evidence and then he must establish the claim that the evidence is "newly discovered" (i.e. that the failure to discover and present the evidence was not done deliberately or negligently).

A postconviction motion is required when the claim is that the trial judge abused his sentencing discretion by failing to place on the record the factors that were considered or failed to explain why those factors required the sentence that was imposed. Defendants dislike making such a motion because, in their minds, it give the judge the opportunity, *ex post facto,* to justify their decision. This is not the case, though, because even if the issue were raised for the first time on appeal, and even if the appellate court found an abuse of discretion the remedy would be to remand the matter back to the trial court for a proper exercise of discretion. As a matter of strategy, it is a better idea to give the judge an opportunity to *avoid* an appellate finding of abuse of sentencing discretion by filing a postconviction motion. When the judge is forced to justify her decision on the record the defendant may be rewarded with a lowered sentence. After an appellate finding of abuse of discretion and a remand there is a strong incentive for the judge to justify- that is, "rationalize"- the sentence that was originally imposed.

E. Common issues for Appeal/Postconviction Motions

It certainly is not possible to outline all of the possible issues for appeal; however, it is possible to discuss broad categories of issues and whether raising those types of issues is desirable.

1. Errors in ruling on evidence. There is a strong temptation is scour the transcripts and to locate every overruled evidentiary objection and to raise it as an issue on appeal. This is almost always fruitless. The reason is two-fold: (1) Whether to admit evidence at trial is left to the discretion of the trial court and, therefore, the standard of appellate review is "abuse of discretion"; (2) Even if the appellate court finds that the trial court did abuse its discretion the error is harmless unless, but for the

error, the result would have been different. This is an extremely long row to hoe. Therefore, resist the temptation to raise every overruled evidentiary objection as an issue on appeal.

Therefore are two exceptions to this general rule: (1) Rulings on other "other acts" evidence under Sec. 904.04, Stats[4]; and, (2) Objections to hearsay that also include and objection under the confrontation clause. Pay close attention to the other acts evidence. Usually the state pays only lip-service to the idea that the evidence is offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity" and the courts seem inclined to allow such evidence against defendants. Frequently, though, motive, opportunity, plan, etc., are not material issues in the case. Thus, the unfair prejudice of admitting the evidence will outweigh any probative value. For a full

4 **904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.**

(1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) Character of victim. Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) Character of witness. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) Other crimes, wrongs, or acts.

(a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

discussion of other acts evidence see, *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998),

2. Sufficiency of the evidence

Virtually every person convicted of a crime believes that the evidence was insufficient. Unfortunately, the standard of appellate review on a question of the sufficiency of the evidence is so high that it is usually very difficult to succeed. The appellate court will find the evidence to be legally insufficient only where there is no credible evidence in the record, including all reasonable inferences therefrom, which would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.

This does not mean that if the appellant can find a reasonable doubt in the record he is entitled to reversal. It means literally that there has to be no evidence in the record concerning one or more elements of the offense. Sometimes this occurs where, for example, the defendant is charged with first degree intentional homicide and there is no evidence has to how or when the victim was shot. In that case there may be no evidence as to whether the shooter intended to kill the victim.

PRACTICE TIP: If there is an issue of arguable merit on the sufficiency of the evidence, especially where there are other issues on appeal, the issue should be raised. This is because if the conviction is reversed for some other reason under the Double Jeopardy Clause the defendant cannot be retried on any charge for which the evidence was legally insufficient.

3. Ineffective assistance of counsel

Virtually every convicted defendant in a criminal case believes that his attorney was ineffective. When you meet with the client this will likely be the first thing out of his or her mouth. Although there certainly is a wide variance in the competence of lawyers representing criminal defendants the incidence of true ineffective assistance of

counsel is rather rare. In order to succeed on an ineffective assistance of counsel claim the defendant must establish that (1) his lawyer committed an error of either commission or omission that was so egregious that it was tantamount to no legal representation at all (the "effectiveness prong"); and, (2) that but for the attorney's error the result of the proceedings would have been different (the "prejudice prong"). Any decision on the part of the attorney that was a matter of trial strategy or professional judgment cannot be the basis of an ineffective assistance claim.

4. Withdrawal of guilty plea

When a defendant has entered a guilty plea the options for postconviction and appeal are extremely limited. As a practical matter only the following potential issues exist:

- Appeal the denial of any pretrial motions that involved a motion to suppress evidence on constitutional (usually Fourth or Fifth Amendment) grounds; *see* 971.31(10) [5]; see also subsection five below
- Motion to withdraw the guilty plea
- Motion for modification of sentence

Generally speaking, a guilty plea may be withdrawn after sentencing only if the defendant is able to establish that it is necessary to correct a manifest injustice. (Citation) The "manifest injustice" standard is usually met in one of the following ways: (1) The defendant can establish that he is "actually innocent" through DNA analysis or some other such compelling and incontrovertible evidence; (2) The defendant can establish ineffective assistance of counsel on some significant matter such as failing to adequately investigate the case; and, (3) The court's guilty plea colloquy was statutorily defective and the State is unable to prove at an evidentiary hearing that the defendant was actually aware of the information that was missing from the court's colloquy

5 971.31(10) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty .

(elements of the offense, maximum penalties, that the court need not follow the plea agreement, etc.) *see Sec.* 971.08, Stats.

Motions to modify sentence must be based on one of the following grounds: (1) The sentence was unduly harsh; (2) The court abused its sentencing discretion by considering an improper factor; (3) The court abused its sentencing discretion by failing to lay out on the record the factors it considered and explain the reasons why these factors require the sentence that was imposed; or, (4) A new sentencing factor exists.

Almost nothing needs to be written about a motion to modify sentence on the grounds that it is unduly harsh. Firstly, the defendant must establish that the sentence is so severe that it "shocks the conscience of the community." The law, though, provides that the statutory maximum penalties are the primary guard against unduly harsh sentences. Although such a case may exist, a fairly exhaustive search of Wisconsin appellate cases by the author has failed to discover even one case where an sentence was actually found to be unduly harsh.

Likewise, modification of sentence on the basis of a newly-discovered sentencing factor is also an extremely rare occurrence. A "new factor" justifying sentence modification is a fact that is highly relevant but not known by the judge at the time of sentencing because it did not exist or was unknowingly overlooked. The new factor must operate to frustrate the sentencing court's original intent. *State v. Johnson*, 210 Wis. 2d 196, 565 N.W.2d 191 (Ct. App. 1997), .

Abuse of sentencing discretion, though, presents much greater opportunity for the defendant on postconviction/appeal. The law requires that before the court may accept a guilty the court must conduct a detailed colloquy with the defendant to ensure that the defendant understands the nature of the charge (the "elements of the offense"), the maximum possible penalties, that the court is not required to follow any sentencing recommendation called for by a plea agreement, that the defendant understands the immigration consequences of a criminal conviction, that there is an adequate factual basis for the plea, and that the plea is being entered freely, voluntarily, and intelligently.

If the plea colloquy fails to establish each of these requirements it is defective. The burden then shifts to the State to establish at an evidentiary hearing that the defendant actually understood the information that was missing from the colloquy.

Additionally, in passing sentence the court is required to set forth on the record the factors it is considering and to provide an explanation as to why those sentencing factors require that sentence that is being imposed. If the court considers some improper sentencing factor (such as the religion or race of the defendant) the sentence will be vacated and resentencing ordered. Likewise, if the court either fails to state on the record the factors it is considering or fails to offer an explanation as to why those factors require the sentence that is being imposed an abuse of sentencing discretion will be found.

5. Fourth amendment pretrial motions

In almost every case where the defendant has filed a pretrial motion seeking suppression of evidence on fourth amendment grounds, and where the court has conducted an evidentiary hearing, the issue should be raised on appeal. There are several reasons for this.

Firstly, appellate counsel has an obligation to raise all issue of *arguable* merit. A fourth amendment motion that has proceeded to an evidentiary hearing is very likely to have at least arguable merit. Secondly, under Sec. 974.06, Stats., (post-appeal motion) a defendant may raise only jurisdictional or *constitutional* issues and, additionally, the defendant must show "good cause" for failing to raise the issue in his original appeal. A fourth amendment motion that was not pursued on appeal is a prime candidate for a Sec. 974.06, Stats., motion and, undoubtedly, the "good cause" that the defendant will argue is that appellate counsel was ineffective for failing to pursue it on appeal. At best such a motion may required an afternoon of uncompensated testimony from the lawyer explaining why the issue was not pursued. At worst, counsel may be embarrassed by the court finding that it was, in fact, ineffective for counsel to fail to pursue a constitutional issue on appeal.

Obviously, though, this advice should not be construed as encouraging appellate counsel to raise patently frivolous issues on appeal merely because the issue was raised in a pretrial motion. Arguing frivolous issues in an appellate brief tends to soften the impact of the legal arguments on the more substantial legal issues. The bottom line is that a fourth amendment issue should be raised on appeal unless there are compelling reasons not to do so.

IV. Motions for Extension of Time

Sometimes as criminal defense lawyers we feel like the opportunities for "wins" are few and far-between. One time this is not true is when it comes to motions for extension of time during the postconviction/appeal process. Sec. 809.82(2)(a), Stats., provides, "Except as provided in this subsection, the court upon its own motion or upon good cause shown by motion, may enlarge or reduce the time prescribed by these rules or court order for doing any act, or waive or permit an act to be done after the expiration of the prescribed time." The Court of Appeals is exceedingly liberal in granting such requests. The following deadlines are routinely extended:

- The time for filing the notice of intent to pursue postconviction relief
- The time for ordering transcripts
- The time for serving the transcripts
- The time for filing the postconviction motion or notice of appeal
- The time for filing appellant's brief

The most common reason for requesting an extension is simply the press of other business including work on other appellate briefs and jury trials. Other reasons include the need for further factual investigation before deciding to file a postconviction motion, the need to review the motion/brief with the client who is incarcerated in a prison, and, less often, the need to await decision on a similar appeal that is currently pending.

The motion should state the length of the extension that is requested and a brief statement of the reasons why the extension is required. The motion is filed in the Court of Appeals even if the notice of appeal has not yet been filed. A copy of the motion must also be served upon opposing counsel and upon the clerk of the circuit court of the county in which the matter is pending. *See* 809.82(2)(d)

PRACTICE TIP: The thirty day deadline for filing a petition for review in the Wisconsin Supreme Court is jurisdictional and cannot be extended. Additionally, the petition must be received and filed in the Supreme Court within the time limit (i.e. the petition is not deemed filed on the day it is put into the mail) See 809.62(1)

V. Who Represents the State?

To the uninitiated perhaps the most perplexing problem that faces them in a criminal appeal is the question of who represents the State. Generally speaking, here are the rules:

- The district attorney represents the state in all postconviction actions in the trial court
- The attorney general represents the state in felony appeals in the Court of Appeals
- The district attorney represents the state in misdemeanor appeal in the Court of Appeals
- The attorney general represents the state in all matters in the Wisconsin Supreme Court whether it is a felony or a misdemeanor
- Chapter 980 (sexual violent persons commitments) appeals present a more complex situation. Generally, in Milwaukee County the district attorney represents the state on appeal (except in the Supreme Court). In many other small counties it is the attorney general who represents the State. The best rule

of thumb for Chapter 980 cases is this: Whoever represented the state in the trial court will represent the state on the appeal.

VI. Writing the Brief

The appellant's brief is due forty days after the record on appeal is received in the Court of Appeals. Sec. 809.19(1), Stats. You will received a formal notice from the court when this occurs. In calculating the forty day period weekends are not included unless the fortieth day falls on a weekend; however, it does include the extra three days provided for notice by mailing.

The sections of the brief that are required by law are set forth in Sec. 809.19, Stats. You must read that statute carefully before beginning.[6] The requirements of each section are explained in greater detail below.

A. Statement on Oral Argument and Publication

The Statement on Oral Argument and Publication is required by the statute. 809.19(1)(c), Stats. Even after hundreds of criminal appeals this requirement is still perplexing. Firstly, oral argument before the Wisconsin Court of Appeals is extremely rare. Secondly, the court's decision to publish a decision seems to be completely independent of any recommendation made by the appellant.

However, there is a client relations element to this requirement. When a client reads a draft of his appeal brief and finds that his appellate lawyer has told the court that, "the issues on this appeal are controlled by well-settled law and, therefore, neither oral argument nor publication is recommended," he suspects that this is legal code language informing the court that the appeal is bogus. Every person convicted of a crime believes that his appeal will be a landmark decision and he wants to court to believe that as well. Therefore, in order to maintain a good relationship with your client, it is a good idea to recommend oral argument and publication in every case.

6 To view numerous examples of criminal appellate briefs that have actually been filed in criminal cases visit: http://www.jensendefense.com/resources/criminalappealbriefs.html

B. Statement of the Issues

This is, perhaps, the most difficult section of the brief to write. The difficulty lies in conveying as much information as possible in a concise statement. The goal is to inform the court of the legal issue while, at the same time, putting it into some factual context.

It is probably not enough, for example, to use the following as your statement of the issue: Whether the evidence was sufficient as a matter of law to convict the defendant of first degree intentional homicide. A better formulation of the issue might be: Whether the evidence was sufficient as a matter of law to convict the defendant of first degree intentional homicide where the uncontroverted testimony was that the defendant's pistol discharged accidentally when it dropped to the floor.

The difference between the two statements was the use of a "where" statement. This creates a factual context for the legal issue and focuses the judges' attention on the important point of your argument.

An additional difficulty in writing a statement of the issues is the decision concerning what issues to raise. Criminal defendants judge the value of an appeals brief by weight and not by content. They believe that if raising three issues is good then raising fifteen issues is five times better. In their mind it conveys the idea that the trial judge was completely incompetent because some many errors were committed.

Although there is some authority for the idea that the accumulation of errors may operate to deny a criminal defendant a fair trial the general rule is that if you cannot obtain a reversal with one of the three strongest issues then you will not obtain a reversal with the remaining twelve weaker issues. Writing a brief in which fifteen issues are raised tends to soften the impact of the strong issues.

Like everything in practicing law, though, therefore are some considerations to the contrary. Firstly, there is the ever-present "client relations" consideration. The clients *do* believe that an eighty page brief is better than a twenty page brief even though we, as lawyers, know this is untrue. Nonetheless, this is their appeal and they

should be happy with it. Secondly, if an issue is not raised in an original appeal then it is abandoned forever. It cannot be raised in a federal petition for habeas corpus because one requirement for such petitions is that the petitioner "exhaust all state remedies" on the issue before proceeding to federal court.

It is not always possible to accurately assess the "strength" of an issue. Therefore, the best approach is to include all issues that have arguable merit while, at the same time, eliminating those issues that will clearly not result in a reversal (rulings on the admission of trivial evidence, etc.)

C. Summary of the Argument

This section is not required by the state statute; however, it is required in federal appellate briefs. I have included a summary of the argument in all of my briefs for the past ten years and I have never had the court complain. I think the summary is very helpful. It requires you to distill the argument into its essence and it gives the reader of the brief an understanding of the important legal points while reading the argument section. The section should be the equivalent of the "headnotes" found in cases published by Westlaw or Lexis.[7]

D. Statement of the Case

The statement of the case consists of two parts- the procedural background and the statement of the facts. Each section should be given is own subheading.

The statement of the procedural background is intended to give the appellate court an understanding of how the case came to be before the appeals court. Thus, when writing the procedural background one should touch on the following matters of procedural history:

- The charges alleged in the criminal complaint with a *brief* description of the facts alleged in the complaint; for example, "The defendant-appellant, John Doe

7 All lawyers are trained to carefully read the entire published case. We must never rely only on the headnotes. This can be difficult, though, given the ringing telephone, colleagues walking into our offices with questions, and time deadlines. Likewise, appeals court judges should carefully read appeals briefs- but there can be no harm in providing them with a "nutshell" version of the appellant's argument. The judges have the same distractions and time constraints that the lawyers have.

("Doe") was charged in a criminal complaint alleging first degree intentional homicide arising out of an incident that occurred in Milwaukee on May 1, 2007. Doe was alleged to have shot Marcus Victim during an argument in a tavern.

- The plea(s) entered by the appellant
- If pretrial motions were filed the motions should be described and the result should be set forth;
- Whether the case was resolved with a plea or by trial (court trial or jury trial);
- The verdict on each count;
- The sentence imposed by the court;
- Any postconviction motions should be described and the outcome of the motion set forth
- If, during the trial, there was some unique procedural issue that arose, such as a motion for a mistrial, the trial motion should be described in the procedural history section.

Writing an effective "statement of the case" is much more of an art. Technically, the statement of the facts should merely set forth all of the facts, with citations to the record for each fact, that are relevant to an understanding of the issues on appeal. Much like an opening statement in a trial, though, the statement of the facts presents counsel with an opportunity to begin to persuade the court of the merits of the appellants position.

The reason this is an art is because if counsel blatantly omits unfavorable facts or if the writing is bombastic the effect on the court is quite the opposite.

For example, when describing the testimony of a witness that appellate counsel believes not to be credible one must refrain from writing that, "Jane Smith offered the preposterous testimony that the appellant, Doe, pointed the pistol directly at victim's head from six inches away and then fired." A better way to convey the same point is as follows: "Jane Smith testified that Doe pointed the gun directly at Victim's head from a distance of six inches and then fired (R:23-45). However, on cross-examination,

Smith conceded that the bar room was crowded and that she was approximately twenty feet away from where the shooting occurred (R:23-77). When pressed, Smith admitted that could not state with any certainty where Doe was pointing the gun when he fired (R: 23-78)."

Likewise, completely omitting facts that are unfavorable to the appellant's position is a poor strategy. Rest assured, if counsel employs such a strategy, in its responsive brief the State will spend numerous pages setting forth *verbatim* quotations of the damaging evidence. The best way to handle damaging testimony is to simply put it front-and-center in the statement of the facts and to then argue later in the brief why this damaging testimony does not defeat the appellant's legal argument.

The final matter of "art" that is involved in writing the statement of the facts is to judge the correct amount of detail. A statement of the facts that gives too little information will make it difficult for the appeals judges to understand the appellant's legal arguments. Too much detail is boring and may not be read carefully by the judges which results in the same effect- the judges will have difficulty putting the appellant's legal arguments into context.

The best advice that may be offered in this regard is to tell an interesting story and to make sure that each part of the story is relevant. Human beings are hard-wired to absorb stories and to retain the details. Therefore, tell the appellant's story in chronological order. Tell the story in an interesting manner. Tell only those parts of the story that are relevant and do not leave out the bad parts.

E. Argument

In order to write an effective legal argument one need only follow one simple rule: Tell the reader what you are going to argue; logically make the argument; and then summarize for the reader what was argued. Remember that, in writing an appellate brief, the purpose is to persuade the appeals court of the client's legal position.

The three elements of effective persuasion are *logos, pathos,* and e*thos.*

"*Logos",* according to Aristotle, is persuasion that uses an appeal to logic that

requires one to draw one's own conclusion based upon the argument presented. Thus, organize your argument logically. Avoid the shot-gun approach to presenting legal points. It will take some time, and a number of redrafts, to ensure that the legal argument flows logically from point to point. In presenting the legal argument avoid bombastic terms like, "The state's conclusion is preposterous. Undoubtedly, the trial court abused its discretion . . . (i.e. allow the reader to draw her own conclusions)"[8]

"*Pathos",* according to Aristotle, is persuasion that uses an appeal to feelings, values, or emotions. This is not an invitation to use the bombastic terms discussed in the preceding paragraph. Rather, it is an entreaty that the author write with the conviction that the appellant's position is legally correct. One should appeal to the fundamental principle of fairness. Directly address the question of why the trial court's ruling was *unfair* to the appellant. Explain why the error of the trial court undermined the *integrity* of the fact-finding process. Although the rules of ethics require the author of an appellate brief to alert the court to any case law that undermines the appellant's legal argument do not forget that there is also a legal rule requiring one to be a zealous advocate for the client. The existence of negative case law is a perfect opportunity to begin attacking the state's case. Explain why the court should not follow the negative case law.

"Ethos" according to Aristotle, is persuasion based upon an appeal that concentrates on the source of the message rather than the source itself. Obviously, the author of an appellate brief should not begin by setting forth the attorney's *curriculum vitae*, and then argue that the appeals court must accept the appellant's arguments because the attorney is such a prominent member of the bar. This does not mean, though, that *ethos* is not important. The reader of an appellate brief forms opinions about the source of the message by the manner in which the brief is written. A well-

8 This advice is sometimes difficult for even the best authors to follow. There is a thin line between legal writing that is dry and boring and legal writing that is bombastic. Try to strike a reasonable balance between the two using the powerful words to emphasize the powerful points only. Allow the reader to draw his or her own conclusions.

researched and well-argued brief conveys much about the *ethos* of the author. Therefore, it is critical to draft and to then redraft the arguments[9]. Make sure that the brief flows logically. Make sure there are no spelling errors nor errors of grammar. The reader of such a brief will naturally conclude that the author knows that of which he writes- that is, the brief will have *ethos.*

Generally, the argument section of the brief should be arranged in outline form with a major heading corresponding to each "issue presented". There should then be subheadings for each major point of the argument. The first subheading should be the standard of appellate review. For example:

Argument

I. The evidence was insufficient as a matter of law to sustain the jury's guilty verdict on first degree intentional homicide.

(Here is a good place to paraphrase the entirety of the argument in the same manner as was done in the summary of the argument)[10]

A. Standard of Appellate Review

The standard of appellate review on a sufficiency of the evidence issue is the same as it is before the trial court. A jury's verdict must be sustained if there is any credible evidence in the record that would permit a reasonable jury to conclude that the defendant was guilty. *State v. Poellinger . . .*

B. There was no credible evidence that would permit a reasonable jury to conclusion that Appellant ever formed the intent to kill Victim.

9 Word processing software makes redrafting exceedingly easy. Personally, I redraft as I write. I tend to write a paragraph, or perhaps an entire section of the brief, and then I go back and read it making necessary changes as I go. I still come across legal briefs, though, that were obviously orally dictated by the lawyer and then typed by a secretary. If an attorney is unable to type then she should consider not handling appeals. There are major differences between speaking well and writing well. An appellate brief should never be orally dictated.

10 This is consistent with the general idea that in a legal brief that the author should inform the reader of what is going to be argued; then make argument; and the summarize for the reader what was argued.

PRACTICE TIP: Do not make over-use of headings and subheadings. In bad appellate briefs one will find that the author essentially creates a subheading, and then a sub-sub-heading, and so on, for each point of the argument. The effect of this is the same as if there were no subheadings at all. The reader must plod through this mish-mash of text endeavoring to discover what is the author's point. In good writing a paragraph break serves the purpose of separating the main points much better.

Of course, there is the remaining issue of presenting the law. With digital legal research available on-line and word processing software readily available to all there is the temptation to "cut-and-paste" a brief together. Avoid this temptation at all costs.

Find law that supports the legal proposition you need, set forth that quotation with an appropriate legal citation, and then *argue* why that legal proposition requires the conclusion you seek. It is not persuasive to set forth fifteen different iterations of the same legal principle complete with string cites. When writing the brief remember that the appeals court reverses on the order of two percent of the criminal appeals that come before it. In other words, a reversal occurs only when there was a "big mistake" in the trial court. Explain why, in your case, there was a "big mistake." This should not require hair-thin legal distinctions and a litany of every appellate case addressing the legal point. If your issue does require this sort of argument then you should consider not raising it.[11]

F. The Appendix

As of January 1, 2008, Sec. 809.19, Stats., provides:

(2) **Appendix.**

(a) **Contents**. The appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court and limited

11 Of course, this is sometimes not possible because the client is insisting that the issue be raised or the issue is of constitutional magnitude that should be preserved in the appeal (see the Issues for Appeal section)

portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

(b) **Certification**. An appellant's counsel shall append to the appendix a signed certification that the appendix meets the content requirements of par. (a) in the following form:

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.
Signed: _____

Do not neglect the appendix. Firstly, the clerks at the Court of Appeals seem to enjoy returning briefs that do not comply *exactly* with the requirements of the statute. This is probably only a reflection of the importance that the judges place on the appendix.

Although I cannot speak authoritatively about the internal procedures of the Wisconsin Court of Appeals, I believe I am an accomplished student of human nature. If an appeals judge is forced to wade through a poorly-written legal brief and to then hunt through the transcript and the record on appeal to discover the appellant's point it is a safe bet that the appellant's point will not be discovered.

On the other hand, if the appellant's point is clear and the relevant excerpts of the transcript are readily available in the appendix to the brief, the appellant has already taken a huge step forward by making the process easy for the court.

VII. Petition for Review

A. What is a petition for review?

A petition for review is governed by Sec. 809.62., Stats. The purpose of the petition is to give the Supreme Court an idea of the facts of the case and of the issues that were litigated in the lower court. Whereas a criminal defendant may appeal to the Court of Appeals as a matter of right the Wisconsin Supreme Court chooses to hear only a small number of the cases that come before it. The Court of Appeals is an error-correcting court whereas the Supreme Court has greater latitude to decide matters of public policy and to interpret the constitution. Thus, the purpose of a petition for review is to convince the Supreme Court that the case presents some important issue that requires the attention of the highest court (i.e. that the appeal presents more than a mere "error correcting" analysis). A petition for review is not an opportunity to re-argue the issues from the Court of Appeals.

B. The requirements for a petition for review.

The requirements for a petition for review are set forth in detail in Sec. 809.62, Stats., and any person endeavoring to file a petition for review should consult the statute.

Generally, though, a petition for review consists of a "petition" section in which the Supreme Court is formally asked to review the matter; a statement of the issues; a statement of the case; and a short discussion of why the Supreme Court should review the matter.

The petition page must include a brief description of why the issue requires the attention of the Supreme Court. For example, one might suggest that the issue presented is one of substantial constitutional law that is not squarely controlled by existing case law and, therefore, the Supreme Court should review the matter.

In creating the "issues for review" section t is not absolutely required that you include every issue presented to the Court of Appeals; however, one should be sure to include all constitutional issues. Also, the reasoning of the Court of Appeals sometimes changes the complexion of the issue. In writing the petition one should restate the issue in light of the opinion of the Court of Appeals. The statute also requires that the original statement of the issue in the Court of Appeals be set forth, though.

The statement of the case is, essentially, identical to the statement of the case presented to the Court of Appeals. This is one of the rare exceptions where it is acceptable to simply cut-and-paste from the Court of Appeals brief. The statement should be up-dated to include a description of the result in the Court of Appeals and a brief discussion of the opinion of the Court of Appeals.

Finally, the discussion section is where one attempts to persuade the Supreme Court that the issue presented is important enough to require the attention of the highest court. Generally, the Supreme Court does not seem to be impressed by the suggestion that the Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals'

decisions. *See,* 809.62(1)(d), Stats. As a practical matter, offering this is a reason for Supreme Court review is the same as re-arguing the case. Certainly, though, one could imagine the rare circumstance where the Court of Appeals simply did not follow the law.

In the realm of criminal appeals, one is much more likely to draw the attention of the Supreme Court if the issue is one of constitutional magnitude that truly is not governed by existing case law. Not every case has such an issue, though.

C. Time limit for filing

"A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 within 30 days of the date of the decision of the court of appeals." Sec. 809.62(1), Stats.

PRACTICE TIP: The thirty day time limit for filing a petition for review is jurisdictional- that is, it may not be extended by motion. Moreover, unlike other filing requirements that are complete upon mailing, a petition for review must be *received* by the Supreme Court within the thirty day time limit.

D. Should I file a petition for review?

In almost every instance a petition for review should be filed following an unsuccessful appeal to the Wisconsin Court of Appeals. In other words, do not tell your client that you are not going to file a petition for review because, even though the appeal had arguable merit, the issue is not important enough for the Supreme Court.

Firstly, your client will not appreciate knowing that you do not consider his criminal case as being very important.

Secondly, the filing of a petition for review is a requirement for "exhausting state remedies" for purposes of a federal habeas corpus petition. If the appellant fails to file a petition for review he forfeits his right to later purse the issue in federal court.

Thirdly, after twenty-three years and hundreds of petitions for review- some of which of very dubious merit- I have never been criticized by the court for filing the petition. Costs are never awarded.

Put simply, there is no reason not to file a petition for review except laziness.[12]

VIII. Formatting/Typesetting the Brief

I must confess that the opinions set forth in this section are newly-formed for me. Until recently I was as guilty as any other lawyer of violating the typesetting suggestions set forth here. What changed my mind was reading the federal *Practitioner's Handbook for Appeals.* I am now totally convinced of the merits of these typesetting suggestions.

A. Printing/duplicating the Brief.

Sec. 809.19(8)(b)1, Stats., provides that appeals brief must be, "Produced by a duplicating or copying process that produces a clear, black image of the original on white paper. Briefs shall be produced by using either a monospaced font or a proportional serif font. Carbon copies may not be filed." Any means of producing text that yields 300 dots per inch or more is acceptable. Daisy-wheel, typewriter, commercial printing, and many ink-jet printers meet this standard, as do photocopies of originals produced by these methods. Dot matrix printers and fax machines use lower resolution, and their output is unacceptable.

B. The font

Sec. 809.19(8)(b)3.c, Stats., provides that, "If a proportional font is used: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. Italics may not be used for normal body text but may be used for citations, headings, emphasis and foreign words."

12 Again, I cannot speak with any authority about the internal procedures of the Supreme Court; however, rumor has it that there is an initial screening process done by law clerks. Only a small fraction of the petitions actually make it to the desk of a Supreme Court Justice. Thus, you are not bogging down the Supreme Court by filing a petition of dubious merit.

The font used in this booklet is Arial, a sans serif font, because it is intended as a reference material. Some professional typographers, though, belief that reading long passages of a serif font is easier than reading a long passage of sans serif font. Therefore, consider using a serif font in appeals briefs. An example of a serif font is Book Antiqua which looks like this: The quick brown fox jumped over the fence.

The font aside, there are certain rules of presentation that will give your brief a professional appearance[13]:

- Use italics, not underlining, for case names and emphasis. Case names are not underlined in the United States Reports, the Solicitor General's briefs, or law reviews, for good reason. Underlining masks the descenders (the bottom parts of g, j, p, q, and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.
- Use real typographic quotes (" and ") and real apostrophes ('), not foot and inch marks. Reserve straight ticks for feet, inches, and minutes of arc.
- Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, extra spaces lead to what typographers call "rivers"—wide, meandering areas of white space up and down a page. Rivers interfere with the eyes' movement from one word to the next.
- Do not justify your text unless you hyphenate it too. If you fully justify unhyphenated text, rivers result as the word processing or page layout program adds white space between words so that the margins line up.
- Do not justify monospaced type. Justification is incompatible with equal character widths, the defining feature of a monospaced face. If you want variable spacing, choose a proportionally spaced face to start with. Your computer can justify a monospaced face, but it does so by inserting spaces that make for big gaps

13 Taken from the *Handbook for Federal Appeals.*

between (and sometimes within) words. The effects of these spaces can be worse than rivers in proportionally spaced type.

- Indent the first line of each paragraph º inch or less. Big indents disrupt the flow of text. The half-inch indent comes from the tab key on a typewriter. It is never used in professionally set type, where the normal indent is one em (the width of the letter “m”).
- Cut down on long footnotes and long block quotes. Because block quotes and footnotes count toward the type volume limit, these devices do not affect the length of the allowable presentation. A brief with 10% text and 90% footnotes complies with Rule 32, but it will not be as persuasive as a brief with the opposite ratio.
- Avoid bold type. It is hard to read and almost never necessary. Use italics instead. Bold italic type looks like you are screaming at the reader.
- Avoid setting text in all caps. The convention in some state courts of setting the parties’ names in capitals is counterproductive. All-caps text attracts the eye (so does boldface) and makes it harder to read what is in between— yet what lies between the parties’ names is exactly what you want the judge to read. All-caps text in outlines and section captions also is hard to read, even worse than underlining. Capitals all are rectangular, so the reader can’t use shapes (including ascenders and descenders) as cues. Underlined, allcaps, boldface text is almost illegible.

One common use of all-caps text in briefs in argument headings. Please be judicious. Headings can span multiple lines, and when they are set in all-caps text are very hard to follow.

IX. Sec. 974.06, Stats Motion

If an attorney does any amount of appellate work a frequent request will be from a convicted defendant whose time for appeal has expired to file a "974.06 motion". Those convicted of crimes seem to be of the believe that this statute provides an opportunity to continue to "fight" the conviction indefinitely. Nothing could be farther from the truth. A successful "collateral attack" under Sec. 974.06, Stats. is relatively rare. The legislature and the appellate courts have made clear that the procedure is intended to be in the nature of an extraordinary remedy similar to habeas corpus or mandamus.

Sec. 974.06, Stats. provides that, "After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence"

Case law has added a requirement that the defendant establish "good cause" for having failed to raise the issue in his original appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

In reviewing a case after the time for appeal has expired it is relatively easy to identify a constitutional issue that was not raised in the defendant's original appeal. The difficult part is establishing "good cause" for the issue having not been raised in the original appeal. In almost every meritorious case the "good cause" will be ineffective assistance of postconviction or appellate counsel. That is, the issue is apparent in the record, is not harmless error, and the postconviction or appellate lawyer failed to raise

the issue.

Even a change in the law is usually not considered good cause. Generally new rules of law will not be applied retroactively to cases on collateral review under this section. *State v. Horton*, 195 Wis. 2d 280, 536 N.W.2d 155 (Ct. App. 1995),

Appendix

A. Sec. 809.30, Stats

B. Notice of intent to pursue postconviction relief

C. Sec. 974.06, Stats

Appendix A

809.30. **Rule (Appeals in criminal, ch. 48, 51, 55, and 938 cases).**

(1) DEFINITIONS.

In this subchapter:

(a) "Final adjudication" means the entry of a final judgment or order by the circuit court in a ch. 48, 51, 55, or 938 case, other than a termination of parental rights case under s. 48.43 or a parental consent to abortion case under s. 48.375 (7)

(b) "Person" means any of the following:

1. A defendant seeking postconviction relief in a criminal case.

2. A party, other than the state, seeking postdisposition relief in a case under ch. 48, other than a termination of parental rights case under s. 48.43 or a parental consent to abortion case under s. 48.375 (7)

3. A party, other than the state, seeking postdisposition relief in a case under ch. 938

4. A subject individual or ward seeking postdisposition relief in a case under ch. 51 or 55

5. Any other person who may appeal under ss. 51.13 (5), 51.20 (15), or 55.20

(c) "Postconviction relief" means an appeal or a motion for postconviction relief in a criminal case, other than an appeal, motion, or petition under ss. 302.113 (7m), 302.113 (9g), 973.19, 973.195, 974.06, or 974.07 (2) In a ch. 980 case, the term means an appeal or a motion for postcommitment relief under s. 980.038 (4)

(d) "Postdisposition relief" means an appeal or a motion for postdisposition relief from a circuit courts final adjudication.

(e) "Prosecutor" means a district attorney, corporation counsel, or other attorney authorized by law to prosecute a criminal case or a case under ch. 48, 51, 55, or 938

(f) "Sentencing" means the imposition of a sentence, a fine, or probation in a criminal case. In a ch. 980 case, the term means the entry of an order under s. 980.06

(2) APPEAL; POSTCONVICTION OR POSTDISPOSITION MOTION.

(a) Appeal procedure; counsel to continue. A person seeking postconviction

relief in a criminal case; a person seeking postdisposition relief in a case under ch. 48 other than a termination of parental rights case under s. 48.43 or a parental consent to abortion case under s. 48.375 (7); or a person seeking postdisposition relief in a case under ch. 51, 55, or 938 shall comply with this section. Counsel representing the person at sentencing or at the time of the final adjudication shall continue representation by filing a notice under par. (b) if the person desires to pursue postconviction or postdisposition relief unless counsel is discharged by the person or allowed to withdraw by the circuit court before the notice must be filed.

(b) Notice of intent to pursue postconviction or postdisposition relief. Within 20 days after the date of sentencing or final adjudication, the person shall file in circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief. The notice shall include all of the following:

1. The case name and number.

2. An identification of the judgment or order from which the person intends to seek postconviction or postdisposition relief and the date on which the judgment or order was entered.

3. The name and address of the person and his or her trial counsel.

4. Whether the persons trial counsel was appointed by the state public defender and, if so, whether the persons financial circumstances have materially improved since the date on which his or her indigency was determined.

5. Whether the person requests the state public defender to appoint counsel for purposes of postconviction or postdisposition relief.

6. Whether a person who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the person has retained counsel to pursue postconviction or postdisposition relief, counsels name and address shall be included.

(c) Clerk to send materials. Within 5 days after a notice under par. (b) is filed, the clerk of circuit court shall:

1. If the person requests representation by the state public defender for purposes of postconviction or postdisposition relief, send to the state public defenders appellate intake office a copy of the notice that shows the date on which it was filed or entered, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.

2. If the person does not request representation by the state public

defender, send or furnish to the person, if appearing without counsel, or to the persons attorney if one has been retained, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.

(d) Indigency redetermination. Except as provided in this paragraph, whenever a person whose trial counsel is appointed by the state public defender files a notice under par. (b) requesting public defender representation for purposes of postconviction or postdisposition relief, the prosecutor may, within 5 days after the notice is served and filed, file in the circuit court and serve upon the state public defender a request that the persons indigency be redetermined before counsel is appointed or transcripts are requested. This paragraph does not apply to a child or juvenile who is entitled to be represented by counsel under s. 48.23 or 938.23

(e) State public defender appointment of counsel; transcript and circuit court case record request. Within 30 days after the state public defender appellate intake office receives the materials from the clerk of circuit court under par. (c), the state public defender shall appoint counsel for the person and request a transcript of the reporters notes and a copy of the circuit court case record, except that if the persons indigency must first be determined or redetermined the state public defender shall do so, appoint counsel, and request transcripts and a copy of the circuit court case record within 50 days after the state public defender appellate intake office receives the material from the clerk of circuit court under par. (c)

(f) Person not represented by public defender; transcript and circuit court case record request. A person who does not request representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the reporters notes, and may request a copy of the circuit court case record, within 30 days after filing a notice under par. (b) A person who is denied representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the reporters notes, and may request a copy of the circuit court case record, within 90 days after filing a notice under par. (b)

(fm) Transcript and circuit court case record request in chs. 48 and 938 proceedings. A child or juvenile who has filed a notice of intent to pursue relief from a judgment or order entered in a ch. 48 or 938 proceeding shall be furnished at no cost a transcript of the proceedings or as much of the transcript as is requested, and may request a copy of the circuit court case record. To obtain the transcript and circuit court case record at no cost, an affidavit must be filed stating that the person who is legally responsible for the childs or juveniles care and support is financially unable or unwilling to purchase the transcript and a copy of the circuit court case record.

(g) Filing and service of transcript and circuit court case record.

1. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 60 days after receipt of the request for the circuit court case record.

2. The court reporter shall file the transcript with the circuit court and serve a copy of the transcript on the person within 60 days of the request for the transcript. Within 20 days after the request for a transcript of postconviction or postdisposition proceedings brought under sub. (2) (h), the court reporter shall file the original with the circuit court and serve a copy of that transcript on the person. The reporter may seek an extension under s. 809.11 (7) for filing and serving the transcript.

(h) Notice of appeal, postconviction or postdisposition motion. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal or motion seeking postconviction or postdisposition relief within 60 days after the later of the service of the transcript or circuit court case record. The person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised. A postconviction or postdisposition motion under this section may not be accompanied by a notice of motion and is made when filed. A notice of appeal filed under this section shall conform to the requirements set forth in s. 809.10

(i) Order determining postconviction or postdisposition motion. Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the persons motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.

(j) Appeal from judgment and order. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal from the judgment of conviction and sentence or final adjudication and, if necessary, from the order of the circuit court on the motion for postconviction or postdisposition relief within 20 days of the entry of the order on the postconviction or postdisposition motion. A notice of appeal filed under this section shall conform to the requirements set forth in s. 809.10 Appeals in cases under chs. 48, 51, 55, and 938 are subject to the docketing statement requirements of s. 809.10 (1) (d) and may be eligible for the expedited appeals program in the discretion of the court.

(k) Transmittal of record. Except as otherwise provided in ss. 809.14 (3) and 809.15 (4) (b) and (c), the clerk of circuit court shall transmit the record on appeal to the court of appeals as soon as prepared but in no event more than 40 days after the filing of the notice of appeal. Subsequent proceedings in the appeal are governed by the procedures for civil appeals.

(L) An appeal under s. 974.06 or 974.07 is governed by the procedures for civil appeals.

(3) APPEALS BY STATE OR OTHER PARTY; APPOINTMENT OF COUNSEL.

In a case in which the state of Wisconsin, the representative of the public, any other party, or any person who may appeal under s. 51.13 (5), 51.20 (15), or 55.20 appeals and the person who is the subject of the case or proceeding is a child or claims to be indigent, the court shall refer the person who is the subject of the case or proceeding to the state public defender for the determination of indigency and the appointment of legal counsel under ch. 977

(4) MOTION TO WITHDRAW AS APPOINTED COUNSEL.

(a) If postconviction, postdisposition, or appellate counsel appointed for the person under ch. 977 seeks to withdraw from the case, counsel shall serve a motion to withdraw upon the person and upon the appellate division intake unit in the Madison appellate office of the state public defender. If the motion is filed before the notice of appeal is filed, the motion shall be filed in circuit court. If the motion is filed after a notice of appeal has been filed, the motion shall be filed in the court of appeals. Service of the motion to withdraw on the state public defender is not required when the motion is filed by an assistant state public defender or when a no-merit report is filed with the motion.

(b) Within 20 days after receipt of the motion under par. (a), the state public defender shall determine whether successor counsel will be appointed for the person and shall notify the court in which the motion was filed of the state public defenders determination.

(c) Before determining the motion to withdraw, the court shall consider the state public defenders response under par. (b) and whether the person waives the right to counsel.

(d) When the motion to withdraw is filed in circuit court, appointed counsel shall prepare and serve a copy of the order determining counsels motion to withdraw upon the person and the appellate division intake unit in the Madison appellate office of the state public defender within 14 days after the courts determination.

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Appendix B

STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY:

STATE OF WISCONSIN,

Plaintiff,

Case No.

v.

JOHN DOE

Defendant.

Notice of Intent to Pursue Postconviction Relief

PLEASE TAKE NOTICE, that the above-captioned defendant intends to pursue post-conviction relief from the judgment of conviction and sentence entered on *** in the Milwaukee County Circuit Court, the Honorable ***, presiding, finding the defendant guilty of *** and sentencing him to ***.

The defendant's trial counsel was:

Jeffrey W. Jensen
633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203
(414) 224-9484

The defendant currently resides at: Dodge Reception Center

The defendant's trial counsel was appointed by the State Public Defender and, upon information and belief, the defendant's financial circumstances have not materially improved since the date the defendant was determined to be indigent.

The defendant hereby requests that the State Public Defender appoint post-conviction counsel.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484

Appendix C

974.06 Postconviction procedure.

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the district attorney who shall file a written response within the time prescribed by the court.

(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the person as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the person or resentence him or her or grant a new trial or correct the sentence as may appear appropriate.

(4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard under s. 807.13.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the person.

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

(8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

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