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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP000387-CR

In the matter of sanctions imposed in
State v. Gregory Nielsen:

STATE OF WISCONSIN,
Plaintiff-Respondent,

STATE OF WISCONSIN COURT OF APPEALS,
Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant-Petitioner.

Review of an Opinion and Order of the District II Court of Appeals which Imposed a Monetary Sanction on the Office of the State Public Defender

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Office of the State Public Defender believes oral argument will be useful and that publication of the court's decision will clarify substantive and procedural aspects of court rules pertaining to appellate briefs and will further clarify how alleged violations of court rules are to be resolved. Consequently both are requested.

ISSUES PRESENTED

1. Did the court of appeals decision to find or declare a court rules violation and impose a monetary sanction in its opinion and order, without first providing notice of the alleged violation and an opportunity to be heard, violate the Office of the State Public Defender's right to due process?

   Not answered below.

2. Are the provisions of Wis. Stat. (Rule) §§ 809.19(2)(a) & (b) insufficiently definite to provide fair notice of the conduct required and therefore unconstitutionally vague for purposes of imposing monetary sanctions.

   Not answered below.

3. Is an appendix certification "false" and does it violate SCR 20:3.3 candor to a tribunal, when the court's subjective view of what should have been included differs from that of counsel and is the Office of Lawyer Regulation the proper entity to decide lawyer conduct issues?

   Not answered below.

4. Did the appendix and certification filed by Mr. Nielsen's appellate attorney violate the requirements of Wis. Stat. (Rule) § 809.19?

The court of appeals ruled that they did and imposed a $150 sanction on the Office of the State Public Defender.

STATEMENT OF THE CASE

On August 17, 2009, the Office of the State Public Defender appointed an Assistant State Public Defender to provide postconviction representation in ***State v. Gregory K. Nielsen***, Racine County Case No. 08-CF-982. Mr. Nielsen's attorney filed a postconviction motion alleging that the circuit court erred when it failed to explain why it rejected the sentence recommended in the presentence investigation (PSI) report, failed to explain the rationale for the sentence it did impose, and imposed a sentence that was excessive. The circuit court denied the motion.

Mr. Nielsen appealed from the judgment of conviction and from the order denying his postconviction motion. On appeal Mr. Nielsen raised a single issue alleging that the circuit court failed to fulfill the mandate articulated in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to explain the rationale for the particular sentence the court imposed.

The appellant's court of appeals brief, with citation to the record, set forth in the "statement of facts" the points from the arguments and the PSI the court mentioned before imposing sentence (Appellant's COA brief, pp. 2-3; App. 109-110). The statement of facts then, with record cites, set forth direct quotes of the particular points the court made (*Id*., pp. 3-4; App. 110-111). The argument portion of the brief

quotes or paraphrases, with citation to the record, what Mr. Nielsen's attorney believed to be the material points made by the sentencing court. (*Id*., pp. 7-10; App. 112-117). In the appendix to the brief Mr. Nielsen's attorney provided, among other things, photocopies of the three transcript pages in which the court announced what it was "consider[ing]" in pronouncing sentence. (*Id.*, Appendix 103-05; App. 123-125). The brief contained the appendix certification required by Wis. Stat. Rule 809.19(2)(b). (*Id.*, App. 118).

On December 22, 2010, the court of appeals, District II, issued an "opinion and order" summarily affirming the judgment. The opinion, in relevant part, states:

> To begin with, the sentencing court examined the circumstances of the crime and noted that Nielsen was twenty years old when the accident occurred and yet he had a .13 blood alcohol concentration. Nielsen's criminal record was detailed by the court. The court observed that Nielsen had not been honest with police about the fact that he had been drinking on the night of the crime, that he had a history of untruthfulness while on probation, and that in the past he had minimized his alcohol use and his need for treatment.

State v. Gregory K. Nielsen, 2010AP387—CR (Opinion issued December 22, 2010, at pp. 2-3) (App. 102-103).

At the end of this paragraph, the court inserted a footnote which reads:

> Notably, the appellant's appendix includes only a select portion of the sentencing court's pronouncement and excludes that portion where the court discussed these aspects of Nielsen's character. The appellant's brief contains the required certification by staff counsel from the Office of the State Public Defender that the appendix contains the "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." *See* Wis. Stat. Rule 809.19(2)(a). By omission of the entirety of the sentencing court's remarks, the certification is false. The false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and is grounds for imposition of a penalty. ***State v. Bons***, 2007 WI App 124 301 Wis. 2d 227, 731 N.W.2d 376; *see also* Rule 809.83(2). Accordingly, we sanction the Office of the State Public Defender and direct the payment of $150 to the clerk of this court within thirty days of the release of this opinion.

State v. Gregory K. Nielsen, *Id.* at p. 3, n. 2 (App. 103).

The opinion concludes:

> IT IS FURTHER ORDERED that for a violation of Wis. Stat. Rule 809.19(2)(a), the Office of the State Public Defender shall pay a $150 penalty within thirty days of the date of this decision. Rule 809.83(2).

Id. at p. 4 (App. 104).

The Office of the State Public Defender filed a petition for review or, in the alternative, petition for supervisory writ challenging the sanctions aspect of the opinion and order. This court granted the petition for review and dismissed the petition for supervisory writ as moot.

ARGUMENT

I. The Court of Appeals Practice of Imposing a Monetary Sanction Summarily in a Final Opinion and Order for What the Court Deems to be a Violation of Court Rules Governing Appendices in Appellant's Briefs, Without First Providing Notice and an Opportunity to be Heard, Violates Due Process.

The court of appeals in its final opinion and order imposed a $150 sanction against the "Office of the State Public Defender" because the attorney appointed by the state public defender did not include copies of "the entirety" of the sentencing court's comments in the appendix to her brief. ***State v. Gregory K. Nielsen***, 2010AP387-CR at n. 2. The court averred that the omission violated Wis. Stat. (Rule) § 809.19(2). However, because the court imposed the sanction without first providing notice of the alleged violation and an opportunity to be heard, the sanctions aspect of the opinion and order violated the public defender's right to due process, and therefore must be vacated.

The court of appeals' authority to impose a sanction for non-compliance with court rules is not in dispute. Wisconsin Stat. (Rule) § 809.83(2) provides that "Failure of a person to comply…with a requirement of these rules…is grounds for…imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate." The rule, however, does not authorize the imposition of a monetary sanction by fiat.

It is fundamental to our system of laws that the government cannot deprive a person of liberty or property without due process of law. U.S. Const. amend. XIV; Wis.

Const. Art. I, § 1. The United States Supreme Court has "stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" ***Groppi v. Leslie***, 404 U.S. 496, 502, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972) (citations omitted). The Court has "emphasized this fundamental principle where rights of less standing than personal liberty were at stake." *Id.*

This court, in ***Howell v. Denomie***, 2005 WI 81, 282 Wis. 2d 130, ¶ 19, 698 N.W.2d 621, ruled that the court of appeals may on its own motion raise an issue regarding violation of court rules, "but it must give notice that it is considering the issue and grant an opportunity for the parties and counsel to be heard before it makes a determination." The fundamental right to be heard must be given *before* any sanction is imposed so as to permit the judge to find no error or to impose a more lenient sanction after considering any mitigating factors that might be presented. ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418, 533 N.W.2d 819 (1995).

The casualness with which the court of appeals here urges disregard of basic due process rights in its response to the public defender's petition, stating that it "considers the existing notice" (which is none) and "opportunity to contest costs" (after the fact by motion to reconsider or petition to this court) to be "constitutionally adequate," is troubling. *See* Court's Response at p. 2. (App. 224).

As this court long ago observed, the power of courts "is, perhaps, nearest akin to despotic power of any power existing under our form of government" and "such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded, so that they may

not be overstepped." ***State ex rel. Attorney General v. Circuit Court for Eau Claire County***, 97 Wis. 1, 8, 72 N.W. 193 (1897). The court added "The greater the power, the greater the care required in its exercise." *Id.* This is particularly so in the context of sanctions or contempt proceedings where the court perceives itself to be the aggrieved party and "becomes the accuser, judge, and jury." *Id.* at p. 12.

The court of appeals, in the context of reviewing a circuit court's decision to impose sanctions, has indicated that courts should use caution when imposing sanctions against attorneys. ***Strong v. Brushafer***, 185 Wis. 2d 812, 822, 519 N.W.2d 668 (Ct. App. 1994). The ***Brushafer*** court acknowledged that even when an error or mistake has occurred, particularly through inadvertence, inexperience or misunderstanding, it can "almost always…be corrected without resort to sanctions." *Id.*

The court of appeals now asserts that this court should not look to contempt cases like ***Oliveto v. Crawford County*** or other rules violation cases like ***Howell v. Denomie*** because appendix violation issues are not complex and only impact "appellate lawyers." *See* Court's response, pp. 15-17. (App. 237-239). Instead, the court argues that the case should be decided under the law interpreting Wis. Stat. § 805.03 because "§ 809.83(2) is closely akin to § 805.03, Wis. Stat., which deals 'with the failure of a party to comply with statutes governing procedure in civil actions or to obey any order of a court.' ***Neylan*** [***v. Vorwald***], 124 Wis. 2d [85] at 93 [(1985)]." *See* Court's response, p. 13. (App. 235).

It is important to note that while the court of appeals here cites language from ***Neylan***, it overlooks that in ***Neylan*** this court overturned the sanction orders on the basis that they

were imposed in violation of due process.[1] This court held that the sanctions "ordered by the trial court without actual notice before entry precluded the opportunity to be heard. Therefore, they were lacking in that fundamental requisite of due process" and were "void and ordered vacated." ***Neylan v. Vorwald***, 124 Wis. 2d 85, 95, 100, 368 N.W.2d 648 (1985).

The State Public Defender believes that law governing contempt is both applicable and useful. *See*, ***Lasar v. Ford Motor Co.***, 399 F.3d 1101, 1109, n. 5 (9th Cir. 2005):

> The due process requirements for contempt citations and monetary sanctions are similar. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137 (9th Cir. 2001) ("Although contempt and sanctions are not identical, the principles the Supreme Court articulated for cases of contempt in *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 129 L. Ed. 2d 642, 114 S. Ct. 2552 (1994), guide our determination of what procedural protections are necessary in imposing sanctions under a court's inherent powers.").

However, the public defender also agrees with the court of appeals that case law interpreting Wis. Stat. § 805.03 is useful.

Section 805.03 and the ***Brushafer*** sanctions case noted above intersect in ***Anderson v. Circuit Court for Milwaukee County***, 219 Wis. 2d 1, 568 N.W.2d 653 (1998). In ***Anderson***, the defense lawyer in a criminal case arrived eight minutes late for a trial scheduled to begin at 8:30 a.m. The judge called the case, noted on the record that the attorney was eight minutes late, and asked the attorney his reason.

[1] The sanctions in ***Neylan*** involved the dismissal of actions for failure to prosecute and did not involve deprivation of liberty or property.

When the attorney did not provide an acceptable response, the judge imposed a monetary sanction of $50.

This court in ***Anderson*** ruled that circuit courts have authority to impose a sanction for violation of court rules or court orders under § 805.03 and that the power to sanction is independent of the court's contempt power. ***Anderson***, 219 Wis. 2d 1, ¶ 19. The court added that while the circuit court has discretion to determine an appropriate sanction, it also has a duty to ensure that such orders "are just." *Id.* at ¶ 20.

The ***Anderson*** court reiterated the points from ***Brushafer*** that "A court should use caution in imposing sanctions against attorneys" and that mistakes or errors "can often be corrected without sanctions." *Id.* at ¶ 22. The court emphasized that courts must "tailor sanctions to the severity of the misconduct." *Id.* The court added:

> Arbitrary action by a circuit court undermines attorney and public confidence that they will receive fair treatment by the circuit court. This court has stated as follows:
>
> > [B]oth the sheer volume and the type of cases respondent [judge] has heard can lead to the kind of exasperation and impatience he has shown. Be that as it may, the conduct of those who aspire to be judges, both off the bench but particularly on the bench, must be such as to warrant the respect of the public and the confidence of litigants that they will be treated fairly, impartially and considerately.
>
> *In Re Complaint against Seraphim*, 97 Wis. 2d 485, 512-13 (1980).

The ***Anderson*** court stated that "For a reviewing court to determine whether the sanctions imposed in a particular case are just, the [sanctioning] court must make a record of the reasons for imposing sanctions in that case." *Id.* at ¶ 24. To make the record, the court imposing the sanction must "give the attorney an opportunity to explain his or her tardiness. The record must address the disruptive impact on the court's calendar resulting from the attorney's late arrival, the reasonableness of the attorney's explanation and the severity of the sanction to be imposed." *Id.*

Counsel for the circuit court on appeal argued that the circuit court has power to sanction for tardiness regardless of whether there was any actual harm "in order to create a particular courtroom atmosphere or 'culture.'" ***Anderson***, 219 Wis. 2d 1, ¶ 25. This court ruled that the sanctioning court's "interest in creating a particular courtroom 'culture' does not outweigh the need for fairness or the need for the [sanctioning] court to make a record when imposing sanctions for an attorney's tardiness." *Id.*

The ***Anderson*** court, citing ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), held that a sanctioning "court's failure to delineate the factors that influenced its decision [to impose a monetary sanction] constitutes an erroneous exercise of discretion." 219 Wis. 2d 1, ¶ 26. The ***Anderson*** court noted that the sanctioning court did not state how the eight-minute delay would affect the court's ability to conduct the court's business that day or "why those eight minutes warranted a 50 dollar sanction." *Id.* The record did not show whether the eight-minute delay caused problems for any of the other participants in the trial. And, the record did not show whether the attorney was "frequently tardy." *Id.* The ***Anderson*** court stated that "Because the [sanctioning] court…did not articulate its

reasoning on the record, we are unable to conclude that the sanction imposed…was just. We therefore conclude that the [sanctioning] court erroneously exercised its discretion." *Id.* at ¶ 27.

In the present case, Mr. Nielsen's attorney on appeal raised a single issue alleging that the circuit court failed to fulfill the mandate articulated in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to explain the rationale for the particular sentence the court imposed. Mr. Nielsen's attorney supplied the court a complete transcript of the proceedings below. Mr. Nielsen's brief contained accurate references to the transcript and record for all factual points made. Mr. Nielsen's attorney included in the brief's appendix copies of the limited portions of the transcript she deemed necessary to an understanding of the issue she raised, and signed the required certification stating that she had done so. What she provided was consistent with what this court in ***Gallion*** seems to indicate was essential to an understanding of the issue.

The court of appeals accepted the brief as filed, and decided the case on the parties' briefs. Mr. Nielsen's attorney first learned of the court's charge, judgment and sentence, for what the court *sua sponte* concluded was an appendix rules violation, upon receiving a copy of the court's final opinion.

The ***Nielsen*** opinion states that the appendix included "only a select portion of the sentencing court's pronouncement" and excluded "that portion where the court discussed [certain] aspects of Nielsen's character." ***State v. Gregory K. Nielsen***, 2010AP387—CR (Opinion issued on December 22, 2010, p. 3, n. 2) (App. 103). It continues that since the brief included the required certification indicating the appendix contained "portions of the record essential to an

understanding of the issues raised," by "omission of the entirety of the sentencing court's remarks, the certification is false." *Id.*

The ***Nielsen*** court then ruled that "The false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and is grounds for imposition of a penalty." *Id.* The court concluded: "Accordingly, we sanction the Office of the State Public Defender and direct the payment of $150 to the clerk of this court within thirty days." *Id.*

The court of appeals' failure here to provide notice to the public defender that the court believed a rules violation had occurred and that it was considering imposing a sanction violated the requirements of due process. *See*, ***Anderson***, 219 Wis. 2d 1, ¶ 24; ***Groppi v. Leslie***, 404 U.S. 496, 502, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972); ***Howell v. Denomie***, 2005 WI 81, 282 Wis. 2d 130, ¶ 19. In this same vein, the court of appeals' failure to provide the public defender an opportunity to be heard before a determination on the alleged infraction was made and a monetary sanction was imposed violated the requirements of due process. *Id.* And, finally, by failing to make a record delineating the factors that influenced its decision and explaining the specific reasons why a $150 sanction was warranted, the court of appeals here erroneously exercised its discretion. ***Anderson***, *Id.* at ¶¶ 26-28.

In the response to the public defender's petition for review, counsel for the court posits that "the value of any additional procedure is unlikely to reduce the already low risk of erroneous deprivation…." Court's response, p. 14. (App. 236). The public defender has a more optimistic view of the court of appeals' willingness and ability to listen to reason and apply the law. Had the Office of the State Public

Defender been afforded its due process right to be heard, it may have been able to persuade the court that:

> (1) Section 809.83 permits "imposition of a penalty or costs on a party or counsel" and the "Office of the State Public Defender" upon whom the sanction was imposed is neither; [2] or,
>
> (2) As will be argued in more detail in Issue II of this brief, infra, there was no error because the rule in question does not require an attorney to provide what the court of appeals claimed was missing; or,
>
> (3) As also will be argued in more detail in Issue II, infra, because an attorney can only provide certification as to his or her own, and not the court's, subjective view of what is essential to an understanding of the issues he or she has raises, there was no violation of the certification rule or SCR 20:3.3(a) Candor to the tribunal; or,
>
> (4) A sanction was not warranted because in a another single-issue-***Gallion*** case that involved a previously sanctioned attorney and a brief which contained less than what Mr. Nielsen's attorney provided, the District II Court of Appeals ruled it was "dangerously close"

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[2] *See* ***Martineau v. State Conservation Comm'n***, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972) ("costs may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute."). The public defender does not concede that costs or sanctions can be imposed against the agency in this context in future cases, but did not raise this issue in its petition for review and thus waives that claim here based upon the SPD's decision that its financial exposure in this case is subordinate to its interest in obtaining a ruling on the procedural and substantive issues the case otherwise presents.

but there was no error and therefore was no sanction. ***State v. Knaus***, 2008AP2599-CR, (App. 149-154).[3]

Additional procedure or process would also, in turn, have afforded the court of appeals the opportunity to "articulate its reasoning" and "delineate the factors that influenced its decision" to find a rule violation and impose a $150 sanction, as it is required to do under ***Anderson v. Circuit Court for Milwaukee County***, 219 Wis. 2d 1, at ¶¶ 26, 27.

The additional process would have allowed the court of appeals to explain, for example, how its claimed omission prevented the court from understanding the issue raised in Mr. Nielsen's brief. Or, it would have allowed the court to explain what the "unwarranted burden" was or how or why, despite having a complete transcript, a brief containing quotes or paraphrased references with record cites to the claimed omitted material, and an appendix containing copies of the transcript pages ***Gallion*** seems to establish are the ones essential to understanding or resolving the issue raised, a $150 sanction was warranted. And, it would have allowed the court to explain why a sanction was warranted here but

[3] Wisconsin Stat. § 809.23(3)(a) states that generally "An unpublished opinion may not be cited in any court of this state as precedent or authority…." This unpublished opinion is not being cited as precedent or authority or "being used to convince the court to accept [its] legal holding." ***State v. Higginbotham***, 162 Wis. 2d 978, 998, 471 N.W.2d 24 (1991). Rather, it is being used to "alert this court to the 'fact' of a conflict" between decisions of the court of appeals" and the fact of the existence of the court praocess or practice being challenged here. ***Id.*** For that reason, this case does not appear in the table of authorities of this brief. While ***Higginbotham*** involved a petition for review, the same rationale should apply to a brief which flows from or follows a petition for review.

not in ***Knaus*** where a previously sanctioned attorney provided less to the court than was provided here.

In short, the additional process would have allowed the court of appeals to make a record so that this court could evaluate whether the sanctioning court "examined the relevant facts, applied a proper standard of law or used a demonstrated rational process to reach a conclusion that a reasonable [court] could reach." ***Anderson***, *Id.* at ¶ 26.

The court of appeals in its petition response repeatedly refers to the sanction it imposed as being "modest," indicates there was no "'irreparable' harm," and argues that this therefore means less process is required. Court's response, pp. 10, 12, 25, 26. (App. 232, 234, 247, 248) Obviously, the term "modest" is relative but for a public defender with a starting salary of $ 23.673/hr. or $49,240/yr. or who, 10 years into his or her career makes a little over $26/hr. or $54-55,000/yr., or for a private attorney who accepts public defender appointments at $40/hr. the sanction imposed is roughly equivalent to two days' take-home pay.[4] For the person whose wallet is being stripped the sanction is not "modest" and the harm, unless the money taken in appendix rules violation cases is returned, is "irreparable."

The court of appeals cites ***Devaney v. Cont'l Am. Ins. Co.***, 989 F.2d 1154 (11th Cir. 1993), in support of its argument that some "reduced level of process" is sufficient when monetary sanctions are imposed. Court's response, p. 12. However, in ***Devaney,*** motions, briefing, multiple hearings before a fact-finding magistrate, and written findings occurred or were produced before the court decided the rules violation issue and imposed the sanction. ***Devaney*** actually

[4] State employee salary information can be found at: http://www.jsonline.com/watchdog/dataondemand/33532074.html

reaffirms that notice and a hearing is required before a court imposes a monetary sanction.

In many instances, due process for an alleged court rules violation is satisfied with less process than that provided in ***Devaney***. In many situations due process requirements can be met by the issuance of an "order to show cause" which states the charge and contemplated action and offers the accused the opportunity to file or present a response in defense or mitigation before any action is taken. *See e.g.*, ***Abner v. Scott Memorial Hospital***, 634 F.3d 962 (7th Cir. 2011).

Here however, because the court of appeals' characterized the attorney's briefing as both an alleged appendix procedure rule violation and an ethical SCR violation relating to candor or veracity fact-finding is required, which the court of appeals cannot do. Consequently, the process that is due in these cases must include notice and an opportunity to be heard before a fact-finding body such as a circuit court or the Office of Lawyer Regulation before any decision is reached or sanction is imposed.[5]

The court of appeals here, and in most of its other appendix sanction cases, cites ***State v. Bons***, 2007 WI App 132, 301 Wis. 2d 227, 731 N.W.2d 367, and Wis. Stat. (Rule) 809.83(2) as the basis for its authority to *sua sponte* find an appendix rule and SCR ethics rule violation and summarily impose a monetary sanction. Rule 809.83 should not be read to authorize summary action in monetary sanctions cases

[5] *See* SCR: 60.04(3)(b) ("A judge having personal knowledge that a lawyer has committed a violation of the rules of professional conduct for attorneys that raises a substantial question as to the lawyer's honesty…shall inform the appropriate authority.").

because doing so would, for all the reasons stated above, render it unconstitutional. To the extent ***Bons*** is interpreted to authorize imposition of summary sanctions, that aspect of ***Bons*** was wrongly decided and should be reversed.

For all of the above reasons, the Office of the State Public Defender asks that this court find that the court of appeals' summary imposition of a monetary sanction violated the public defenders' right to due process and that the court erroneously exercised its discretion by failing to delineate the factors that influenced its decision to impose the sanction.

II. The Provisions of Wis. Stat. (Rule) §§ 809.19(2)(a) & (b) are Insufficiently Definite to Provide Fair Notice of the Conduct Required Leading to Their *Ad Hoc* or Arbitrary Application. As a Result, the Rules are Unconstitutionally Vague.

Wisconsin Stat. (Rule) § 809.19(2)(a) provides, in relevant part, that an "appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court and limited 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." Section 809.19(2)(b) requires that the appellant's attorney sign a specifically worded certification attesting that he or she has complied with the requirements of sub. (a).

The Office of the State Public Defender submits that Wis. Stat. (Rule) §§ 809.19(2)(a) & (b) is unconstitutionally vague and therefore cannot be used as a basis for imposing a monetary sanction.

It is well established that all persons "are entitled to be informed as to what the State commands or forbids" and that

no one may be required at peril of liberty or property to speculate as to the meaning of a government rule or statute. ***Lanzetta v. New Jersey***, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939). While most cases resolving void-for-vagueness claims involve statutes, the same principles apply to administrative regulations, ***United States v. Mersky***, 361 U.S. 431, 80 L. Ed. 459, 4 L. Ed. 2d 423 (1960), and to court rules where a liberty or property interest is at stake. *See* Referee's Report, Feb. 5, 2008, 2008 Wis. LEXIS 1181, adopted by ***Office of Lawyer Regulation v. Stephen P. Hurley***, 2007AP478-D (Issue III, concluding that the rules of professional conduct at issue were vague as applied by OLR's failure to enforce them consistently or at all). (App. 128-148).

This court has applied a two-part analysis when determining whether a statute or rule is void for vagueness. First the statute or rule "must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited." ***State v. McManus***, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). Second, the statute or rule must provide "standards" so that those who enforce it can avoid "arbitrary and erratic" application. ***Id.***; ***Bachowski v. Salamone***, 139 Wis. 2d 397, 406, 407 N.W.2d 533 (1987).

The scope of what § 809.19(2)(a) requires in an appendix is both vague and highly subjective. Its first command is that the appendix be "short," indicating a presumption of exclusion rather than inclusion. It commands inclusion of "limited" portions of the record, not entire portions or comprehensive portions. But then it further commands that only those "limited portions" deemed "essential," and therefore not those that are merely relevant, be included. Further still it commands that only those limited

portions deemed essential to an "understanding" of, and not resolution of, the issue raised be included.

The court of appeals apparently views the rule very differently. The court of appeals seems to be reading "limited" to mean "entire" (as it did here) and "essential to an understanding of the issue raised" to mean "relevant to a resolution of the issue raised."

The way in which the court of appeals has interpreted the seemingly more concrete aspects of the appendix rule compound the vagueness problem. The rule states that the "opinion of the circuit court" and the "written rulings" are among the items the appendix "shall include." Yet in its seminal case, ***State v. Bons***, 2007 WI App 124, 301 Wis. 2d 227, ¶ 27, the court of appeals stated that a copy of the "judgment" and the "formal written findings of fact and conclusions of law" are "meaningless." The court stated that "the judgment and motion papers" are "NOT relevant court entries." ***Id.*** at ¶ 29. And, while in a suppression case it would seem that the motion to suppress would be one of the limited portions of the record essential to an understanding of the issue, the ***Bons*** court, too, deemed inclusion of the motion to be "meaningless." ***Id.*** at ¶ 22.

Because of the appendix rule's vagueness and inherent subjectivity, the rule is insufficiently definite to provide notice to appellate attorneys of what specific conduct is "required or prohibited." ***State v. McManus***, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). Further, the rule does not provide standards so that those who enforce it can avoid "arbitrary and erratic" application. ***Id.***; ***Bachowski v. Salamone***, 139 Wis. 2d 397, 406, 407 N.W.2d 533 (1987).

The case at bar demonstrates these points. Section 809.19(2) requires an appellant's brief to contain "limited

portions of the record essential to an understanding of the issues raised." Mr. Nielsen's appeal case presented a single issue, a sentencing claim based on ***State v. Gallion***. At one extreme, since an appellate court "must review the entire record" to ascertain whether a circuit court has complied with mandates relating to sentencing [*See* ***State v. Grady***, 2007 WI 81, ¶ 25, 302 Wis. 2d 80, 734 N.W.2d 364], a different attorney representing Mr. Nielson might reasonably have concluded that he or she was required to reproduce the entire record in the appendix to his or her brief.

Yet another attorney representing Mr. Nielsen might reasonably have concluded that only the transcripts from the date Mr. Nielsen was sentenced were essential. Another attorney might have drawn the line at portions of the transcripts containing counsel's arguments and anything the court said during sentencing. Another attorney, still, might have concluded that only the court's comments were essential. Or an attorney might conclude, as Mr. Nielsen's did, that ***Gallion*** holds that what is essential is only the portion of the transcript where the court gave or, should have given, reasons for the specific sentence it was about to impose.

Finally, and at the other extreme, since a ***Gallion*** issue is predicated on an allegation that something that was supposed to occur did not occur, an attorney might conclude that no transcript pages are "essential" to "understand[ ]" the issue and thus provide none in his or her appendix. That is, this attorney could reasonably conclude that since the only way to prove the negative or to decide, as opposed to merely understand, the issue would require review of the entire record, and neither the rule nor the case interpreting the rule [***State v. Bons***, ***Id.***] contemplate or require appending the

whole record, no transcript pages need be included in the appendix.

All of these options, and no doubt others, are legally defensible in the context of the plain language of Rule 809.19(2). The rule, therefore, does not inform an attorney which option or what material is required or prohibited or provide a court with standards so that it can avoid arbitrary or erratic enforcement.

The appendix rule's lack of clarity and discernable standards has led to arbitrary and erratic enforcement demonstrated by a side-by-side comparison of the case at bar and ***State v. Knaus***, 2008AP2599-CR (App. 149-154).[6] Both ***Nielsen*** and ***Knaus*** involved single issue briefs. Briefs in both cases raised the same ***Gallion*** issue. Both cases were briefed in and decided by the District II Court of Appeals. ***Knaus*** was decided by "Brown, C.J., Anderson, P.J., and Neubauer, J." ***Nielsen*** was decided by "Brown, C.J., Neubauer, P.J., and Anderson, J."

Nielsen and ***Knaus*** diverge in that the attorney representing Mr. Knaus had previously been sanctioned for an appendix rules violation[7] and included in the appendix to her brief only a single page from the sentencing transcript. Mr. Nielsen's attorney, who had never before been sanctioned, provided the court three pages from the sentencing transcript. Yet, despite these key similarities and differences, the ***Knaus*** **court** concluded it was "dangerously close" but found no rules violation and therefore imposed no sanction, whereas the court in ***Nielsen*** found a violation and imposed a sanction.

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[6] *See* n. 3, supra.

[7] *See* ***State v. Hiebing***, 2006AP2166, (App. 164); and n. 3, supra.

There is no definitive or rational place to draw the line in the hypothetical examples given above and there is no rational way to account for the disparate or seemingly "arbitrary and erratic" treatment the respective attorneys received in ***Nielsen*** and ***Knaus***.

It appears that the court of appeals wants to interpret the appendix rule to be a mechanism to un-tether an appellate case from the record. In ***Bons*** the court of appeals indicates that what is at the core of its appendix sanctions rulings is its desire to "take our work home or on the road" without having to take the file or make copies from the file, which by choice "remains in the office." ***State v. Bons***, 2007 WI App 132, 301 Wis. 2d 227, at ¶ 28.

To the extent the court of appeals believes that § 809.19(2) requires the appellant's appendix to include all parts of the record that the court might deem relevant or even necessary to resolve the issue raised, the court of appeals is wrong. Often, as here, those portions of the record essential to an *understanding* of the issue raised are far more limited than the parts of the record the court may desire or be required to review to *decide* the issue.

To interpret the appendix rule to require the appellant's attorney to provide in the appendix to his or her brief all portions of the record a court may wish to review to decide the issue or issues presented can only be accomplished by reading something into the rule that is not there. And, it would often mean that an appendix would have to include the entire record and transcript—something, as noted earlier, the rule does not contemplate and the court in ***Bons*** indicated it does not want. ***Id.*** at ¶ 29.

However, the vagueness problem with the rule lies primarily within the rule itself and not the courts. It is the

rule's vagueness and subjectivity that has led to its inconsistent application. Consequently, for all of the above reasons, the Office of the State Public Defender asks this court to declare Rule 809.19(2) to be unconstitutionally vague such that it cannot be used as a basis for imposing a monetary sanction.

III. Finding a Court Rules Violation and Imposing a Sanction by Declaring a Certification "False," When the Court's Subjective View of What Should Have Been Included in an Appendix Does Not Match the Attorney's Subjective View, is Error, Violates Due Process, and Impermissibly Circumvents or Supplants the Procedure for Resolving Lawyer Misconduct Issues Established by this Court Through its Creation of the Office of Lawyer Regulation.

The court of appeals routinely couples the finding of an appendix rules content violation with a ruling that the certification the attorney is required to file with his or her appendix is "false." The court then directly or by implication declares that the attorney has violated SCR 20:3.3(a) Candor toward the tribunal. However, declaring a certification "false" because a court's subjective view of what is "essential" in regard to appendix content does not match the attorney's subjective view, is a false equivalency and is error. Further, the court of appeals is uniquely *not* the proper entity to resolve an alleged SCR 20:3.3 violation because resolution of this type of claim invariably involves fact-finding, which the court of appeals cannot do. The practice also impermissibly invades the province of the Office of Lawyer Regulation and is inconsistent with the procedure set forth in SCR 60.04(3)(b).

Wisconsin Stat. (Rule) 809.19(2)(a) states that "The appellant's brief shall include a short appendix containing…limited portions of the record essential to an understanding of the issues raised…." Rule 809.19(2)(b), in relevant part, requires an appellant's attorney to append to his or her 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 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.

As was established or argued in Issue II, supra, the appellate brief appendix rule is ambiguous and highly subjective. The appendix content rule's directive that the appendix be "short" and contain "limited" portions of the record that are "essential" to an "understanding" of the issue raised make any objective determination of what the rule requires or whether compliance has occurred, at a minimum, problematic. The certification aspect of the rule adds another layer of ambiguity or subjectivity. When combined, these factors cast doubt upon any unilateral or summary claim that a brief's appendix certification is "false."

The court of appeals, by declaring an appendix certification to be "false" when the content of the appendix in a brief does not match what the court, in its subjective view, deems to be "essential," means that the court is requiring an

attorney to speculate about what he or she thinks the court might deem essential, and then is labeling the attorney a liar when the attorney guesses wrong. The court of appeals' misreads or misapplies the rule by focusing on its own subjective point of view. An attorney can only declare or certify what limited parts of a record he or she believes are essential to an understanding of the issues he or she is raising. Consequently, the court of appeals declaration that, when its view or subjective opinion regarding what is essential to an understanding of the issues differs from that of the attorney, the attorney's point of view is "false," is simply wrong.

The court's practice of summarily finding or declaring an appendix certification to be a rule violation in its decisions or opinions has the same due process problem as that argued in Issue I. The practice of finding a certification violation and imposing a sanction summarily without the court first providing notice and an opportunity to be heard violates due process. ***Groppi v. Leslie***, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).

Although the court of appeals here did not specifically reference SCR 20:3.3(a), it does so routinely. Furthermore, it is implied in this case by the court's reference to ***State v. Bons***, ***Id.*** The court of appeals in ***Bons,*** 219 Wis. 2d 227 at ¶ 24 stated that:

> Filing a false certification with this court is a serious infraction not only of the rule, but it also violates SCR 20:3:3(a)(2006) (sic). This rule provides, "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal." By attesting that he complied with the appendix rules when he did not, [the attorney] made a false statement.

This aspect of the court of appeals' appendix sanctions practice is troubling because it results in what is, effectively, the imposition of a public reprimand and penalty for an SCR violation without any process or the protections set forth in Chapter SCR 22 Procedures for Lawyer Regulation.

The Wisconsin Supreme Court has authority over all attorneys licensed to practice law in Wisconsin and has established rules governing attorney conduct. This Court created the Office of Lawyer Regulation and made it responsible for investigating attorneys who may have violated the rules of professional conduct in Chapter SCR 20.

This court has also created Chapter SCR 60 Code of Judicial Conduct. Rule 60.04(3)(b) sets forth what a court is supposed to do when it believes a violation of SCR 20 regarding a lawyer's honesty has occurred. In relevant part, SCR 60.04(3)(b) states:

> A judge having personal knowledge that a lawyer has committed a violation of the rules of professional conduct for attorneys that raises a substantial question as to a lawyer's honesty…shall inform the appropriate authority.

SCR 60:01(1) states: "'Appropriate authority' means the chief judge of an offending judge's district, the director of state courts, the judicial commission, and [as is relevant here] the office of lawyer regulation."

A court, of course, is not powerless to act itself when it believes that an attorney has run afoul of court rules regarding candor or honesty. The court can, if it is in a position to do so, make findings against a party or it can rule on an issue against the offending party if the candor problem is relevant to the issue, etc. But if a court believes that "a serious infraction" of a SCR regarding professional conduct has

occurred, warranting possible disciplinary purposes or action the matter is properly referred to the Office of Lawyer Regulation. *See*, *e.g*. ***Welytok v. Ziolkowski***, 2008 WI App 67, 312 Wis. 2d 435, at ¶ 41, n. 5, 312 N.W.2d 435.

Separate jurisdiction by OLR and a court over disciplinary proceedings involving alleged lawyer misconduct would mean that a single act or incident could be doubly prosecuted and punished both by a court and by a body created and overseen by a court. Logic, fairness and, seemingly, Rule 60.04(3)(b), suggest that OLR is the proper place to refer and resolve this type of issue.

If, however, this court concludes some sort of concurrent or shared jurisdiction exists, the process that is due must be more than that which occurred here. Notice of the charge is still required, as is the opportunity to be heard before a fact-finding entity, before the embarrassment of a public reprimand is meted out or a monetary sanction is imposed.

But, the Office of the State Public Defender believes that lawyer disciplinary matters are best left to the Office of Lawyer Regulation and this court to resolve.

IV. The Brief Filed by Mr. Nielsen's Attorney in the Court of Appeals Fully Complied with the Requirements of Rule 809.19(2) and Did Not Contain a "False" Certification Therefore There Was No Error.

Mr. Nielsen raised a single issue on appeal regarding the circuit court's failure to articulate the specific reasons for the sentence it imposed. Mr. Nielsen's attorney appended to her brief the limited portions of the record that she deemed essential to an understanding of the issue. She signed an affidavit which stated she had done just that. The court of

appeals ruled that by providing only "select" portions and not "the entirety" of the court's remarks at sentencing, Mr. Nielsen's attorney violated the appendix rule and filed a "false" certification. However, as the rule expressly states that the appendix is to be "short" and include only the "limited portions" of the record counsel deems essential to an understanding of the issue, there was no appendix content error. Further, since Mr. Nielsen never claimed that she provided the "entirety" of the court's remarks, her certification was not false.

Wisconsin Stat. (Rule) § 809.19(2)(a) states, in relevant part, "The appellant's brief shall include a short appendix containing…limited portions of the record essential to an understanding of the issues raised,…including oral…rulings or decisions showing the circuit court's reasoning regarding those issues. Wisconsin Stat. (Rule) § 809.19(2)(b) states that "An appellant's counsel shall append to the appendix a signed certification that the appendix meets the requirements of par. (a)…."

The appendix rule does not require the appellant to provide in an appendix all parts of the record relevant to the issue or all aspects of the record a court may theoretically want to consider to decide an issue. It does not require the appellant to provide complete or entire portions of the record. It expressly calls for *limited* portions of the record essential to an *understanding* of the issue raised including oral rulings or decisions showing the circuit court's reasoning.

The whole point of the issue Mr. Nielsen raised on appeal was that the circuit court's oral ruling or decision did not show the court's reasoning. This court, in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, ruled that circuit courts are required to articulate on the record

the specific reasons for the sentence they are about to impose. ***Gallion*** made clear that the mere "uttering of facts" by a sentencing court is not meaningful or essential but what is essential is the court's on-the-record explanation for the particular sentence.

The appendix to Mr. Nielsen's brief contained the three pages of the sentencing transcript where the court explained, or should have explained but did not, the sentence it was imposing. The first of the three pages included the tail end of the "uttering of facts" that ***Gallion*** held to be insufficient to explain a sentence and as this court previously stated in ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), was required. The second page shows Mr. Nielsen correcting the circuit court's overstatement of what the PSI writer was recommending. The third page is where the court imposed sentence.

Arguably, all that what was essential to understand the issue presented was the last of the three pages where the court said: "Based on all of the factors that I am required to consider, Mr. Nielsen, I am sentencing you to 15 years in prison and that will be bifurcated nine years of initial confinement and six years of extended supervision." (App. 208). The point of ***Gallion*** and point of the issue Mr. Nielsen raised in this appeal was that this type of pronouncement without specific articulated reasoning explaining why the court believed 15 years was the appropriate number was error.

Just as there was no appendix content error here, there also was no certification error. The court of appeals, here, ruled that "[b]y omission of the entirety of sentencing court's remarks, the certification is false" (sic) and "is grounds for imposition of a penalty." ***State v. Gregory K. Nielsen***,

2010AP387-CR, n. 2 (App. 103). But, as established above, the appendix rule did not require Mr. Nielsen's attorney to provide the "entirety" of the sentencing court's remarks. And, more to the point here, Mr. Nielsen's attorney never claimed or certified that she was providing the entirety of the remarks.

Mr. Nielsen's attorney provided the court with what in her subjective view were the portions of the transcript she deemed essential to understand the issue she raised. She signed the required certification indicating she had done that. There was no error or basis for imposing a monetary sanction.

As has been argued throughout this brief, to justify court of appeals' action here would require reading into the appendix rule things that are not there. The appendix rule does not require an appellant's attorney to provide every thing that a court may desire or even need to consider to decide a particular issue. And interpreting the rule to do so would be problematic. In many cases it would result in the appellant having to append the entire transcript and court record to his or her brief which would be both wasteful and costly, not just in terms of production, but also storage.

Reading the rule to require an appellant's attorney to excise all arguably relevant portions of the record and append them to his or her brief would also be problematic and similarly wasteful. An appellant's partisan advocate has an ethical obligation to not misrepresent the record, but he or she should have no obligation to highlight aspects of the record that may only be arguably relevant to refuting the issues raised. That should be opposing counsel's job.

Aside from the constitutional problems or particular merit of the sanctions issue in this case, the manner in which the rule is being interpreted, enforced and penalized by the

court of appeals causes other problems. The rule creates an inherent and a practical conflict between public defender appellate attorneys and their clients. It creates tension for an attorney in deciding what needs to be included for strategic advocacy purposes and the attorney deciding to include more than he or she otherwise would to, for their own purposes, minimize the possibility of a public reprimand and monetary sanction.

The court's practice of announcing an appendix content and certification error in its written opinions, and characterizing it as an issue of candor or veracity, destroys what in public defender cases is often a fragile relationship between appointed counsel and his or her client. It makes it difficult or impossible for appointed counsel to work with his or her client as the case moves forward.

The court of appeals' statement to the contrary notwithstanding, disagreement over what limited portions of a record are essential to an understanding of the issue presented in an appellant's brief is not a "serious infraction" of the rules of practice. The indignity and damage to professional reputation, along with what amounts to a very steep fine for a person who takes public defender case appointments or who makes a public defender salary, is a harsh sanction, and is disproportionately so when compared with what must occur in an OLR context for that type or punishment.

CONCLUSION

The Office of the State Public Defender asks that this court rule that the summary manner in which the court of appeals decided and sanctioned the alleged rules violation, violated the public defender's right to due process of law. The public defender asks this court to find that the provisions

of Wis. Stat. (Rule) § 809.19(2) are insufficiently definite to provide fair notice of the conduct required, which results in their *ad hoc* or arbitrary application, and causes Rule § 809.19(2) to be unconstitutionally vague. The public defender to clarify that the appendix certification rule references the attorney's and not the court's subjective view of what is necessary to understand a briefed issue, and that disagreement does not create a falsity or implicate SCR 20:3.3 regarding candor to a tribunal. The state public defender asks the court to further clarify that resolution of an issue regarding an alleged violation of SCR 20:3.3 is properly referred to and resolved by the Office of Lawyer Regulation. Finally, the public defender asks this court to rule that Mr. Nielsen's brief complied with the requirements of the appendix rule and, therefore, there was no error.

Dated this 12th day of May, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 8,693 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of May, 2011.

Signed:

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