STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1720-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JAMES POPE, JR.,

Defendant-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals Reversing a Postconviction Order for a New Trial Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Conen Presiding

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BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Mr. Pope's direct appeal rights were reinstated over two decades after his 1996 trial, but the court reporters were unable to produce any of the trial transcripts, and trial counsel had no file and no memory of the case.

   In such a situation, where appellate counsel is unable to review any portion of the trial, is the constitutional right to meaningful appellate review denied by application of the burden in *State v. Perry*[1] which requires a defendant to allege a "colorable" or "facially valid" claim of error that might be contained in the missing transcript?

The postconviction court granted Mr. Pope's motion for a new trial because it determined that, without a single transcript available from his four-day jury trial, it was impossible to assert a specific claim of error such that Mr. Pope's direct appeal could proceed in any meaningful way.

The Court of Appeals reversed, concluding that *Perry* required that a "facially valid claim of error" from Mr. Pope's trial be asserted in a postconviction motion, despite the lack of any trial transcripts from which appellate counsel could analyze the proceedings. In so doing, the Court of Appeals relied on what it concluded was Mr. Pope's failure to do "everything that reasonably could be expected in order to perfect his appeal," because statements on

[1] *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987).

transcript filed in a prior unsuccessful *pro se* appeal seeking reinstatement of his direct appeal rights stated that the necessary transcripts for that appeal were already on file.

2. Whether a statement on transcript filed under Wis. Stat. (Rule) §809.11(4)(b) in an appeal thereafter binds a party for all subsequent appeals in the case?

The postconviction court did not address this question.

The Court of Appeals concluded that, by filing a statement on transcript in his long-ago unsuccessful *pro se* procedural appeal of a circuit court order that denied his request to reinstate his direct appeal rights, which stated that the necessary transcripts for that appeal were already on file, Mr. Pope therefore represented to the court that no additional transcripts would ever be needed for any future direct appeal in the case.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Court's acceptance of this case for review signifies the importance of the issues presented, and therefore both oral argument and publication of its opinion are appropriate.

STATEMENT OF THE CASE

Following a four-day trial in May 1996, a jury convicted Robert Pope Jr. of two counts of first-degree intentional homicide as a party to a crime and, on July 2, 1996, the Honorable John Franke sentenced him to life in prison without the possibility of parole. (1:4-10; 18; 26; 80:39-41). Judge Franke advised Mr. Pope he had a right to appeal and asked his trial counsel, Michael Backes, to ensure that his client understood his appellate rights and to file the appropriate form, which counsel assured the court he would. (80:40). Attorney Backes then completed the Wis. JI-Criminal SM-33[2] form with Mr. Pope, checking the box that indicated, "The defendant intends to seek postconviction relief. The required notice will be timely filed by trial counsel." (25).

However, Attorney Backes never filed the notice of intent as Mr. Pope directed, and he subsequently failed to respond to Mr. Pope's repeated letters and efforts to contact him following sentencing. (56; 57; 79:30-40, 42-43). As a result, Mr. Pope's direct appeal rights expired with no appeal initiated.

In the months and years that followed, Mr. Pope made repeated, increasingly desperate and unsuccessful *pro se* attempts to reinstate his right to direct appeal, lost through his trial lawyer's inaction. These attempts included three extension motions filed in the Court of Appeals, in 1997, 1999, and 2003, all of which were denied. (27; 40; 41; 42). In denying his requests, the Court of Appeals found that Mr.

[2] The SM-33 was subsequently replaced by the CR-233 Notice of Right to Seek Postconviction Relief form.

Pope's failure to provide a sufficient reason why he waited 15 months after sentencing before he made his initial request, and his failure to identify the specific issues he believed could be raised on direct appeal, doomed his requests for reinstatement of his direct appeal. (27; 40; 42).

In addition to his *pro se* deadline extension requests, in 1997, Mr. Pope filed a *pro se* Wis. Stat. §974.06 motion, in which he alleged ineffective assistance of counsel based on Attorney Backes' failure to timely file the notice of intent, which the circuit court denied on the basis that it had no jurisdiction and that the Court of Appeals had already denied reinstatement. (28; 29). Mr. Pope appealed that circuit court order (Appeal 1997AP3365), and filed a statement on transcript, which the Court of Appeals construed as a motion to waive transcript fees, remanding the matter to the circuit court for a determination of whether he was entitled to a waiver of transcript fees based on indigency. (33; 40). The circuit court found that Mr. Pope was not entitled to a waiver of transcript fees because he had not set forth an arguably meritorious basis for relief in his motion to reinstate his direct appeal rights. (31). Mr. Pope then filed a statement on transcript which indicated that the sentencing

transcript was the only transcript necessary for his appeal. (34)[3].

On March 5, 1999, the Court of Appeals summarily affirmed the circuit court's order denying reinstatement of Mr. Pope's direct appeal rights, finding that he had "waived" his right to appeal by failing to provide a sufficient reason for the 15-month delay following sentencing before filing of his initial *pro se* motion to extend the deadline for filing the notice of intent. This Court denied the petition for review. (36; 37; 38).

Then, in 2014, this Court held, as a matter of first impression, that the appropriate forum and vehicle for obtaining relief based on trial counsel's ineffectiveness in failing to timely file a notice of intent is through a habeas petition filed in the Court of Appeals. *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805. Within a month of the *Kyles* decision, Mr. Pope, following its direction, again sought reinstatement of his direct appeal rights, filing a *pro se* habeas petition that alleged that his trial counsel was ineffective in failing to timely file the notice of intent. (43:8-24). The Court of Appeals remanded the case for fact-finding and, after testimony from trial counsel and Mr. Pope, the Honorable J.D. Watts made findings which included that trial counsel failed to follow through on filing the

[3] Another statement on transcript was subsequently filed in that appeal on January 20, 1998, according to the file-stamp of the Clerk of the Court of Appeals, which stated that all transcripts necessary are already on file. This document is not contained in the record on appeal in this case, but was included by the State in its appendix to its brief in the Court of Appeals (at App. 123), and is referenced by the Court of Appeals in its decision below (at ¶33).

notice of intent as Mr. Pope had directed, and that Mr. Pope had been actively attempting *pro se* since 1996 to reinstate his direct appeal rights. (56; 57).

Based on these findings the State and undersigned counsel, now appointed to represent Mr. Pope in his habeas action, entered a stipulation jointly moving the Court of Appeals to reinstate Mr. Pope's direct appeal rights. On September 29, 2016, the Court of Appeals granted the State's and undersigned counsel's stipulated motion and reinstated Mr. Pope's direct appeal rights. (60; 62).

On October 4, 2016, undersigned counsel filed a notice of intent to pursue postconviction relief on Mr. Pope's behalf (84), and transcripts of the trial court proceedings and the court record were ordered. After learning that only the previously-prepared transcripts of Mr. Pope's preliminary hearing and sentencing were available, and that the court reporters could not provide transcripts of any of the pretrial or jury trial proceedings because their notes had been destroyed pursuant to SCR 72.01(47), undersigned counsel filed a Wis. Stat. §809.30 postconviction motion requesting a new trial on the basis that Mr. Pope was denied his constitutional right to a meaningful appeal due to the unavailability of any transcripts from his trial. (64). The State opposed the motion on the basis that it failed to allege a specific claim of error under *Perry* and also asserted, for the first time, that Mr. Pope's postconviction motion was precluded by laches. (69).

The postconviction court, the Honorable Jeffrey Conen, granted Mr. Pope's motion for a new trial. (74; 81:25; Pet-App. 139). In addressing the State's assertion that under *Perry*, Mr. Pope must assert a

"facially valid claim of error" in order to establish a need for the missing transcripts for his appeal, the court reasoned:

> THE COURT: … We have a motion for a new trial in this case, but we have no transcripts so we have no way of determining whether this matter should be – well, should go to either a new trial as ordered by the circuit court or go up on appeal. We have no basis for any of this.
>
> There are some issues that were raised with regard to ineffective assistance of counsel, but again, that's all supposition and speculation until we have the transcript, but there's no way, obviously, that anyone could come up with that. And we are looking to do justice across the board and make sure that the laws are followed. So not having the transcript and not being able to really proceed today in a meaningful way on a motion for a new trial, the Court has no other option but to order a new trial in this case.
>
> MR. HAYES [the D.A.]: So is the Court finding that the defense has made out the facially valid claim of error as required under the case law?
>
> THE COURT: To the best of their ability. I mean, it's impossible to make that claim with specificity if you don't have a transcript. So there are things that have been brought up. This is not something that we just said, Oh, 20-plus years later we decided that, you know, we want to appeal because we know there's no transcript. That's not the way this came down.

(81:22-23, Pet-App. 136-137)[4].

[4] The circuit court also rejected the State's assertion that laches applied to bar the motion, as the reinstatement of direct appeal rights was proper based on the stipulation. (81:20-23; Pet-App. 134-137).

The State appealed and, following briefing and oral argument, the Court of Appeals reversed and reinstated Mr. Pope's convictions in an unpublished opinion. *State v. Pope*, 2018 WL 5920615 (November 13, 2018)(unpublished)(Pet-App. 101-114). The Court of Appeals held that this Court's decision in *Perry* imposed a burden upon Mr. Pope to show that the missing transcripts from his trial, if available, would establish a "facially valid claim of error," and that his motion failed to do so. *Id.* at ¶¶31-32,38 (Pet-App. 112, 114). The Court of Appeals also found that Mr. Pope had "not done everything that reasonably could be expected in order to perfect his appeal" because in his prior *pro se* attempts to reinstate his direct appeal rights, he did not tell the court what arguable issues he believed could be raised in a direct appeal under Wis. Stat. §809.30. *Id.* at ¶¶34-37 (Pet. 113-114).

In addition, the Court of Appeals also concluded that since the statements on transcript filed in Mr. Pope's prior *pro se* appeal of the circuit court's denial of his §974.06 motion seeking reinstatement of his direct appeal deadline stated that all transcripts necessary for that procedural appeal were already on file, he thus "represented to this court and the State that the only transcript that was necessary for his appeal was the sentencing transcript" but that he had "failed to even assert that any facially valid error occurred during sentencing." *Id.* at ¶¶33-34. (Pet-App. 113)[5]

Mr. Pope, by undersigned counsel, filed a motion for reconsideration under Wis. Stat. §809.24,

[5] Given its determination, the Court of Appeals did not address the State's laches argument. *Id.* at ¶5, n9 (Pet-App. 103).

arguing that the Court of Appeals had improperly relied on the statements on transcript that he had filed in his prior procedural appeal, which merely represented that all transcripts for that appeal were on file. The reconsideration motion also argued that the Court of Appeals had failed to consider and address the alternative remedy of a remand, as suggested by both the State and Mr. Pope, in the event it held that, contrary to the postconviction court's determination, his §809.30 motion was required to assert specific claims of error despite the unavailability of any trial transcripts. The Court of Appeals denied reconsideration on December 4, 2018.

Mr. Pope filed a petition for review on December 21, 2018, which this Court accepted on April 9, 2019.

SUMMARY OF ARGUMENT

In *Perry*, this Court addressed the circumstance in which a portion of a trial transcript is missing, determining that in such a situation, a defendant was not automatically entitled to a new trial due to a transcript deficiency, but must carry an initial burden to allege a "reviewable error" or "facially valid claim of error" that the missing portion of the transcript would, if available, demonstrate. *Perry*, 136 Wis. 2d at 101. This standard, while feasible in a situation where only a *portion* of the trial transcript is missing, becomes insurmountable in the unusual case where the *entire* transcript of the trial is missing. In this rare circumstance, where the deficiency in the record on direct appeal is so extreme that the defendant's right to appellate review of his conviction is entirely frustrated, the *Perry* standard

imposes an impossible requirement and deprives a defendant of his right to a meaningful appeal.

This Court should conclude that in the unique circumstances that exist in this direct appeal, where transcripts of trial proceedings held long ago are unavailable for appellate counsel's review, prejudice occurs because the defendant is denied meaningful appellate review, and a new trial is required.

Further, this Court should hold that the Court of Appeals erred in its determination that the filing of a statement on transcript in an appeal is binding upon an appellant in any subsequent appeals in the case, as such a conclusion is contradicted by Wis. Stat. §809.11(4)(b) and appellate procedure generally.

ARGUMENT

I. This Court should hold that a transcript deficiency that deprives a defendant of the ability to determine whether any potentially meritorious issues exist for appeal constitutes prejudice because it denies the right to meaningful appellate review.

A. Legal principles and standard of review.

An appeal of a final judgment or order to the Court of Appeals is a matter of right and constitutionally guaranteed in Wisconsin. Wisconsin

Constitution, Article I, §21(1)[6]; Wis. Stat. §§808.02[7], 808.03(1)[8]. The right to meaningful judicial review is also protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *State v. Raflik*, 2001 WI 129, ¶14, 248 Wis. 2d 593, 636 N.W.2d 690.

The United States Supreme Court has emphasized that, where a state appeal of a criminal conviction is a matter of right, the due process and equal protection provisions of the Fourteenth Amendment require that sufficient procedures must assure adequate appellate review, including production of transcripts. See *Griffin v. Illinois*, 351 U.S. 12 (1956) (Fourteenth Amendment requires that indigent defendants be afforded the same appellate review as defendants who can pay for transcripts); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958) (state court's denial of indigent defendant's motion for free transcript was a denial of due process under the Fourteenth Amendment); *Draper v. Washington*, 372 U.S. 387 (1963) (trial judge's conclusion that an indigent's appeal would be frivolous was an inadequate substitute for full appellate review available to nonindigents, where the effect of that finding

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[6] Article I, Sec. 21(1): Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

[7] §808.02 Writ of error. A writ of error may be sought in the court of appeals.

[8] §808.03(1) Appeals as of right. A final judgment or final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law.

prevented appellate review based on a complete trial record, violating the Fourteenth Amendment).

Moreover, this Court has recognized that there is not only a right to appeal, "but that the appeal be a meaningful one." *Perry*, 136 Wis. 2d at 99; *Raflik*, 2001 WI 129, ¶30. Recognizing the importance of a transcript of the trial court proceedings to a meaningful appeal, this Court in *Perry* held:

> In order that the right be meaningful, our law requires that a defendant be furnished a full transcript – or a functionally equivalent substitute that, in a criminal case, beyond a reasonable doubt, portrays in a way that is meaningful to the particular appeal exactly what happened in the course of trial.

Perry, 136 Wis. 2d at 99.

In *Perry*, this Court recognized that a statement of errors alleged to have been committed during trial and a showing that such errors were prejudicial is "[b]asic to a criminal appeal," such that "[a]ny failure of the appellate process which prevents a putative appellant from demonstrating possible error constitutes a constitutional deprivation of the right to appeal." *Perry,* 136 Wis. 2d at 99. It emphasized "the absolute and constitutional necessity for providing a criminal defendant a transcript that will make possible a meaningful appeal," *Id.* at 105, recognizing that, where appellate counsel is new to the case, "it is the transcript which must be his principal guide":

> [T]he most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam

> in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

Perry, 136 Wis. 2d at 106 (quoting *Hardy v. United States*, 375 U.S. 227, 288 (1964)).

This Court also noted the crucial importance of the transcript to the role of reviewing courts:

> …An appellate court cannot function if it has no way to determine whether error has been committed. In most instances, a transcript is required for appellant's counsel to locate error and for an appellate court to verify or disprove it. Frequently, plain error – error usually not pinpointed in the course of trial – can only be discovered and proved by a transcript. Moreover, whether error is prejudicial or harmless is usually determinable only in the context of the entire record.

Perry, 136 Wis. 2d at 105.

Where a transcript deficiency is such that there cannot be a meaningful appeal, the usual remedy is reversal for a new trial. *Id.* at 99-100.

When determining whether the trial transcript is adequate for meaningful appellate review, courts have a duty to ensure that the defendant's right to a fair and meaningful review of his conviction is not frustrated by transcript errors or omissions. *Perry*, 136 Wis. 2d at 108-109. Where "a portion of the record is lost through no fault of the aggrieved party, that party should not be made to bear the burden of this loss." *State v. DeLeon*, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (Ct. App. 1985)(citing *United States v. Ullrich*, 580 F.2d 765, 773 n.13 (5th Cir. 1978)).

Whether a transcript is sufficient under appropriate standards to serve its necessary purpose on appeal is ultimately a matter of law for the appellate courts. *Perry*, 136 Wis. 2d at 97. A circuit court's discretionary decision whether to grant a new trial due to the lack of a transcript will be upheld on appeal if "due consideration is given to the facts then apparent, including the nature of the claimed error and the colorable need for the missing portion – and to the underlying right under our constitution to an appeal." *Perry*, 136 Wis. 2d at 109.

B. The unavailability of any transcripts from Mr. Pope's trial prevents counsel from determining whether any arguable issues exist for appeal, denying meaningful appellate review and the constitutional right to a direct appeal.

1. The *Perry/DeLeon* standard.

Wisconsin appellate courts first addressed the issue of a transcript deficiency in *DeLeon,* a case in which the court reporter lost her notes from about 15 minutes of testimony from a court trial. The trial court attempted to reconstruct the record by recalling the witnesses, and found that the record was adequately reconstructed to address the ineffective assistance of counsel claims raised in postconviction proceedings. *DeLeon*, 127 Wis. 2d at 76. The Court of Appeals approved the trial court's actions in reconstructing the record, finding that they sufficiently tracked federal procedure for missing record issues. *DeLeon*, 127 Wis. 2d at 77-84.

This Court subsequently expanded upon and endorsed the methodology set forth in *DeLeon* in

Perry, another case involving a missing portion of a trial transcript. *State v. Perry*, 136 Wis. 2d 92, 100-106, 401 N.W.2d 748 (1987). In *Perry*, substantial portions of court reporter notes of two days of an eight-day jury trial were lost – approximately one – eighth of the trial, including the entire testimony of two witnesses and closing arguments. *Perry*, 136 Wis. 2d at 95-96, 107. Perry filed a postconviction motion for a new trial which alleged several errors, including a claim of prosecutorial misconduct, and that the deficiency in the trial transcript effectively denied his right to appeal his conviction. *Id.* at 96, 103. The trial court denied the motion, finding that the existing transcript was sufficient for appeal. *Id.* at 96-97.

The Court of Appeals reversed, determining that the transcript was inadequate for the defendant to effectively prosecute his appeal, and granted a new trial. *State v. Perry*, 128 Wis. 2d 297, 307, 381 N.W.2d 609 (Ct. App. 1985). The Court of Appeals rejected the State's argument (similar to that advanced by the State below in this case), that the defendant had failed to show a "colorable need" for the complete transcript because he failed to point to any specific prejudice that might exist in the missing transcript. The Court of Appeals found that such an assertion "begs the question," as if the alleged prejudicial portions of the closing argument could be specifically quoted or described, "there would be no need for the missing transcript to insure meaningful appellate review." *Perry*, 128 Wis. 2d at 305, (internal quotation omitted).

The Court of Appeals in *Perry* also noted that "several jurisdictions have held that an incomplete transcript warrants a new trial where the party

seeking relief is without fault and where a new trial is essential to the protection of his or her rights, regardless of whether any specific error has been alleged." *Id.* at 305-306 (citing *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977); *State v. Ford*, 338 So.2d 107 (La.1976); *Colwell v. State*, 477 P.2d 398 (Okla.Crim.App. 1969); *Commonwealth v. Shields*, 383 A.2d 844 (Pa.1978); *Gamble v. State*, 590 S.W.2d 507 (Tex.Crim. App. 1979); *State ex rel. Kisner v. Fox*, 267 W.Va. 123, 267 S.E.2d 451 (1980)).

This Court affirmed, and in so doing, adopted the standard from *DeLeon* requiring that, after procuring whatever transcript is available and demonstrating that a portion is missing, an appellant has an initial burden to show a "reviewable error" in the missing transcript. *Perry*, 136 Wis. 2d at 101-108. This burden has alternatively been called an assertion of "colorable need" or a "facially valid claim of error," and requires a showing that there is "some likelihood that the missing portion would have shown an error that was arguably prejudicial." *Perry*, 136 Wis. 2d at 101, 103. The Court found that Perry had established a "colorable need" and that the existing transcript was insufficient to permit meaningful appellate review. *Id.* at 108.

Under *Perry*, once a defendant makes an allegation of arguably prejudicial error contained within the missing portion of the record, the circuit court then has a duty to determine whether the missing portion can be "reconstructed," considering such factors as the length of the missing portion of the record, the time lapse from trial to the reconstruction of the record, and the availability of witnesses and counsel to reconstruct the record. *Perry,* 136 Wis. 2d at 101; *Raflik*, 248 Wis. 2d 593,

¶35. The court must ensure that the defendant's right to a fair and meaningful review of his conviction is not frustrated by record errors or omissions. *Perry*, 136 Wis. 2d at 108-109. If it concludes that the record cannot be reconstructed beyond a reasonable doubt, the court may find as a matter of law that reconstruction is insurmountable and, if so, it must then order a new trial. *Perry*, 136 Wis. 2d at 99,101; *DeLeon*, 127 Wis. 2d at 81-82.

2. The *Perry*/*DeLeon* standard requiring identification of a specific claim of error is unworkable where a transcript is so deficient that it deprives a defendant of the ability to determine whether any potentially meritorious issues exist for appeal.

The framework set forth in *DeLeon* and *Perry* for evaluating missing transcript situations involved cases in which transcripts of the majority of the trial proceedings were available, and only a "portion" of the transcripts were missing. Here, however, there are *no* transcripts of any part of Mr. Pope's trial. Without any trial transcripts, appellate counsel is unable to analyze the proceedings of the trial court in order to challenge any errors. As a result, Mr. Pope is prejudiced because he is denied his right to meaningful appellate review.

In granting Mr. Pope's §809.30 motion for a new trial, the postconviction court properly recognized the impossibility of applying the provision in *Perry* that requires appellant to allege a specific claim of error to Mr. Pope's circumstances, where no transcripts are available from any portion of a jury

trial held more than two decades ago, a trial lawyer with no memory of the case, a retired judge and prosecutor, and appellate counsel who did not try the case. The postconviction court recognized that, without a single transcript from Mr. Pope's jury trial, meaningful appellate review in this particular case was "impossible." (81:23-24; Pet-App. 137-138). As other courts have recognized in similar circumstances:

> …unlike the typical case in which only a portion of the trial transcript is unavailable, neither appellant or this court has had access to a verbatim transcript of any of the trial proceedings. As a general matter, the problems associated with a less-than-complete verbatim transcript – especially the inability to notice plain error – will be greater when a substantial portion of the transcript is altogether unavailable. Although the loss of an entire trial transcript will not necessitate a new trial in every instance, it does magnify the need for a complete and accurate substitute statement of the evidence and increases the likelihood that meaningful appellate review will be impossible.

Cole v. U.S., 478 A.2d 277, 286 (D.C. Cir. 1984)

In *Cole*, the court reporter's notes of defendant's two-day trial were lost. Cole challenged the reconstructed statement of the trial proceedings (consisting of a two-and-a-half page summary), as insufficient to permit meaningful appellate review. The D.C. Circuit Court of Appeals agreed, noting that the reconstructed statement, which contained no reference to opening statements, cross-examination of two trial witnesses, or jury instructions, was "at best a fragmentary account of appellant's trial." *Cole*, 478 A.2d at 286. The court also recognized that these

insufficiencies were "greatly exacerbated" because appellate counsel did not participate in the trial and would have a "distinct disadvantage" in uncovering trial court errors without a transcript, which would increase the likelihood that prejudice to the defendant would result. *Id.* at 287. It concluded that a new trial was necessary, as the reconstructed record "lacks the completeness and the reliability necessary to protect appellant's right to pursue an appeal and this court's obligation to engage in meaningful review." *Id.*

Other courts are in accord: *State v. Yates*, 821 S.E.2d 650 (N.C. Ct. App. 2018)(finding prejudice in appellant's inability to identify potential errors that may have occurred in a missing transcript that included victim's testimony); *Johnson v. State*, 524 S.W.3d 338 (Ct. App. Texas 2017) (finding meaningful appellate review not afforded, where significant portions of the transcript was unavailable due to court reporter noncooperation and no method of record reconstruction was available); *Johnson v. State*, 805 S.E.2d 890 (Ga. 2017)(meaningful appellate review denied where all trial transcripts destroyed by fire and 14-page summarized reconstruction was insufficiently detailed); *In re Shackleford*, 789 S.E.2d 15 (N.C. Ct. App. 2016)(finding prejudice in appellant's inability to determine whether issues exist for appeal where commitment hearing transcript unavailable); *State v. Hobbs*, 190 N.C.App. 183 (N.C. Ct.App. 2008)(finding meaningful appellate review prevented where transcripts of three days of evidentiary phase of trial were unavailable and no adequate alternative to reconstruct record); *People v. Jones*, 178 Cal.Rptr 44

(Cal. Ct. App. 1981)(meaningful appellate review precluded where court reporter destroyed trial notes).

As in those cases, meaningful appellate review is also impossible here, given the passage of time, the participation of a different judge, prosecutor, and appellate counsel, a trial attorney with no memory of the case (79:8-19), and no possibility that the record could be reconstructed beyond a reasonable doubt to accurately reflect what actually happened at the 1996 jury trial. *See Perry,* 136 Wis. 2d at 101; *DeLeon*, 127 Wis. 2d at 81. Nor has the State even so much as suggested that a reliable reconstruction of the trial record could be made to the required level of proof. The postconviction court implicitly found as much.

In reversing the postconviction court's order for a new trial on the basis that Mr. Pope's motion failed to state a facially valid claim of error under *Perry*, the Court of Appeals has imposed an impossible burden on an appellant in the unusual case where no trial transcripts exist, as it requires counsel unfamiliar with the trial proceedings to assert claims of error without any review of the record. As recognized by the United States Supreme Court, where new counsel represents a defendant on appeal, "how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?" *Hardy*, 375 U.S. at 279-80.

Moreover, requiring assertion of a specific error in cases in which the transcript is so deficient that no review of the case can be made to determine whether arguable issues exist for appeal defies common sense. *See Shackleford*, 789 S.E.2d at 21. In *Shackleford*, the respondent was involuntarily committed following a hearing, and he appealed. Appellate

counsel was unable to obtain a copy of the hearing transcript due to a recording equipment malfunction, and there was no adequate alternative to a verbatim transcript. The North Carolina Court of Appeals rejected the government's claim that Shackleford was required to identify specific errors in the proceeding in order to establish prejudice due to the lack of a transcript, concluding that such a requirement rested on "circular logic," as "an appellant would never be able to show prejudice in cases where – as here – the absence of a transcript renders the appellant unable to determine whether any errors occurred at trial that would necessitate an appeal in the first instance." *Id*. at 21.

Imposing the insurmountable requirement of alleging a specific claim of error, where the lack of transcripts itself deprives the appellant of the ability to determine in the first instance whether any issues exist for appeal, results in a denial of meaningful appellate review. In such a situation, "the prejudice is the inability of the litigant to determine whether an appeal is even appropriate and, if so, what arguments should be raised." *Yates*, 821 S.E.2d at 656 (quoting *Shackleford*, 789 S.E.2d at 21). As a result of the transcript deficiency, it is impossible to identify errors at trial that may have affected its outcome. Here, it is the inability to identify potential meritorious issues that constitutes prejudice, and denies Mr. Pope the right to a meaningful appeal.

The impossibility of applying the *Perry/DeLeon* standard to cases in which a transcript deficiency is so great that meaningful appellate review cannot occur is illustrated by the issue of sufficiency of the evidence. In a criminal case, whether the evidence was sufficient to sustain a guilty verdict is a question

of law, subject to de novo review on appeal. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410; *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In conducting a sufficiency of the evidence inquiry, an appellate court must consider the totality of the evidence. *Smith,* 2012 WI 91, ¶36. An appellate court may only reverse a conviction where it finds that the evidence, viewed most favorably to the State, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 501.

But, with a transcript deficiency such as that in this case, where no transcripts of any portion of the trial are available for review, neither counsel nor the court can know whether or not sufficient evidence exists to support the guilty verdicts. How can appellate counsel make a determination of whether or not sufficient evidence was presented at trial to satisfy all elements of the charged crimes, in order to decide whether sufficiency is an arguable issue for appeal? And, how would the appellate court conduct its de novo review to determine, as required, whether the totality of the evidence presented at trial was sufficient to sustain the guilty verdicts?

The standard set forth in *DeLeon* and adopted by this Court in *Perry* for cases in which a portion of a transcript is missing, requiring assertion of a specific claim of error that might be shown in the missing transcript, is unworkable in cases in which the transcript is so deficient that counsel is unable to determine whether any potential issues exist for appeal in the first instance. This Court should find that, where a transcript deficiency prevents an

appellant from determining whether potential issues exist for appeal, prejudice has occurred, denying the right to meaningful appeal and requiring a new trial.

C. Where the transcript is so deficient that no meaningful review of the trial proceedings can be conducted, requiring counsel to assert specific claims of error conflicts with counsel's ethical, statutory, and legal obligations.

Moreover, requiring appellate counsel to assert specific claims of error where the record is severely deficient such that counsel cannot determine whether any arguably meritorious issues exist for appeal contravenes a lawyer's ethical duty under the Supreme Court Rules of Professional Conduct to not knowingly advance a claim unwarranted under existing law or advance a factual position that is not frivolous. *See* SCR 20:3.1(a)(1) and (2)[9]. With an utterly deficient record of the trial proceedings as in this case, counsel is foreclosed from conducting the conscientious examination of the record that is required in order to even advance an arguably meritorious legal or factual claim consistent with counsel's professional obligation and duty to the court. Thus, the burden placed on appellate counsel by the Court of Appeals' decision in this circumstance conflicts with Supreme Court Rules.

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[9] As relevant, SCR 20:3.1 provides:

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law…

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous;

Furthermore, where a transcript deficiency is such that appellate counsel cannot make a determination whether or not any arguable issues exist for appeal, the statutory and constitutional obligations of the no-merit procedure of Wis. Stat. §809.32 and *Anders v. California*, 386 U.S. 738 (1967) cannot be discharged. Pursuant to *Anders*, appointed appellate counsel must file a brief with the court and request to withdraw if counsel determines "after conscientious examination" of the case that an appeal would be "wholly frivolous." *Anders,* 386 U.S. at 744.

Anders is codified in the no-merit procedure of Wis. Stat. §809.32, which requires that appointed counsel "must examine the record and prepare a report that 'shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit.'" *State v. Fortier*, 2006 WI App 11, ¶21, 289 Wis. 2d 179, 709 N.W.2d 893 (quoting Wis. Stat. §809.23(1)(a)). In addition, the defendant is given the opportunity to respond, and is entitled to a copy of the transcripts in order to file his response. Wis. Stat. §809.32(1)(d) and (e). *Fortier*, 2006 WI App 11, ¶21. Moreover, under the no-merit procedure, the Court of Appeals "not only examines the no-merit report but also conducts its own scrutiny of the record to find out whether there are any potential appellate issues of arguable merit." *Fortier* at ¶21. Finally, "the appellate court's no-merit decision sets forth the potential appellate issues and explains in turn why each has no arguable merit." *Id.*; Wis. Stat. §809.32(3).

In these circumstances, without a single transcript of the four-day trial in this case, appellate counsel is unable to conduct the required "conscientious examination" of the trial record in

order to make the determination of whether or not arguably meritorious issues exist for appeal, nor can the Court of Appeals conduct its independent review, as required under §809.32 and *Anders*. The inability of counsel and the court to comply with required procedures and constitutional requirements further establishes the denial of meaningful appellate review by rigid application of the *Perry/DeLeon* standard.

The decision of the Court of Appeals creates an ethical dilemma for counsel, as it appears to require counsel to make assertions of error that are not based on a conscientious examination of the record. Further, it provides no mechanism for counsel and the court to comply with their duties under Wis. Stat. §809.32 and *Anders*.

II. This Court should hold that a statement on transcript filed in an appeal as required by §809.11(4)(b) does not bind an appellant in subsequent appeals in the same case.

This Court should also address the Court of Appeals' utilization of statements on transcript filed in Mr. Pope's prior procedural appeal of the circuit court's order denying his §974.06 motion to reinstate his direct appeal deadlines as a basis to reverse the circuit court and deny relief, as its conclusions are contrary to Wis. Stat. §809.11(4)(b).

In reaching its determination that Mr. Pope's postconviction motion in his direct appeal was required to but failed to assert a specific claim of error, the Court of Appeals noted that in the more than two decades since his conviction, Mr. Pope had "engaged in a prolonged postconviction and appellate

process" to attempt to reinstate his direct appeal deadlines, which included the filing of two statements on transcript, on January 2, 1998, and January 20, 1998, [Appeal 1997AP3365] that represented, respectively, that the sentencing transcript was the only transcript necessary to prosecute that appeal, and that all transcripts necessary for that appeal were already on file. (*Pope*, ¶33, Pet.-App. 113).

The Court of Appeals took Mr. Pope to task on the statements on transcript from his prior procedural appeal, positing that:

> By filing the statements of transcript with this court, Pope represented to this court and the State that the only transcript that was necessary for his appeal was the sentencing transcript. The statements also reflect that as of January 2, 1998, Pope believed that his sentence involved a facially valid claim of error. The sentencing transcript is in the record. However, in his postconviction motion, Pope does not tell us what that claim might be. He failed to even assert that any facially valid error occurred during sentencing.
>
> Moreover, the *Perry* court stated that it agreed with the court of appeals that "Appellant has done everything that reasonably could be expected in order to perfect his appeal." *Id.*, 136 Wis. 2d at 108. By contrast to *Perry*, Pope has not done everything that reasonably could be expected in order to perfect his appeal.

(*Pope*, ¶¶34-35; Pet.-App. 113).

This conclusion, however, rests on a patently fallible premise, as it ignores the fact that Mr. Pope's *pro se* appeal in Appeal 1997AP3365 did not address the merits of his conviction and sentence in the case,

but rather was simply an appeal of the circuit court's denial of his §974.06 postconviction motion seeking reinstatement of his direct appeal rights due to trial counsel's failure to file a notice of intent to pursue postconviction relief. (*Id*., ¶11; App. 106). Because that appeal did not address – and could not have addressed – the merits of substantive issues from the trial proceedings*, no transcripts were necessary for prosecution of that appeal,* as the only issue before the appellate court was whether the circuit court order denying reinstatement of his direct appeal deadline should be affirmed or reversed.

Under Wis. Stat. §809.11(4)(b)[10], Mr. Pope was only required to designate in his statement on transcript which transcripts were necessary, or indicate that a transcript was not necessary, for prosecution of that limited procedural appeal of the circuit court's order denying reinstatement of his direct appeal rights. *See also*, Heffernan, Michael S.: *Appellate Practice and Procedure in Wisconsin*, §7.2 (7th ed. 2018).

Had the Court of Appeals granted relief to Mr. Pope in Appeal 1997AP3365, his direct appeal rights would have been reinstated and his case would then

[10] §809.11(4)(b): The appellant shall file a statement on transcript with the clerk of the court of appeals, shall file a copy of the statement on transcript with the clerk of the circuit court, and shall serve a copy of the statement on transcript on the other parties to the appeal within 14 days after the filing of the notice of appeal in the circuit court. *The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. …*

have proceeded under Wis. Stat. §809.30, including filing of the notice of intent, appointment of counsel, ordering of transcripts and court record, filing of a postconviction motion, a notice of appeal, and transmittal of the record. *See* Wis. Stat. §809.30(2)(b)–(k). And, that appeal would have required filing of a new statement on transcript under Wis. Stat. §809.11(4)(b), which would then have specified all transcripts necessary for the direct appeal of his convictions.

In sum, the Court of Appeals' decision ignores that the statements on transcript filed in Mr. Pope's prior *pro se* appeal seeking reinstatement of his direct appeal rights properly addressed only what was required for that limited appeal of the circuit court's order, and thus are simply irrelevant to this direct appeal. Those prior statements on transcript fail to support the Court of Appeals' conclusion that Mr. Pope "represented to this court and the State that the only transcript necessary for his appeal was the sentencing transcript" and that he "has not done everything that reasonably could be expected in order to perfect his appeal." (*Pope*, ¶¶34-35, 37; Pet.-App. 113-114).

CONCLUSION

The burden imposed by *Perry/DeLeon* requiring an appellant to assert a specific claim of error creates an insurmountable challenge in cases in which the transcript is so deficient that a determination of whether potentially meritorious issues exist cannot occur. Accordingly, this Court should hold that in such cases, prejudice occurs because meaningful appellate review is denied, and a new trial should be ordered without the need to identify a specific error that might be contained in the missing transcript. Mr. Pope requests that on this basis, the Court reverse the Court of Appeals and affirm the circuit court's grant of a new trial.

Further, this Court should hold that a statement on transcript filed in an appeal under Wis. Stat. §809.11(4)(b) does not bind an appellant in subsequent appeals in the case.

Dated this 9th day of May, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,977 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 9th day of May, 2019.

ANDREA TAYLOR CORNWALL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 9th day of May, 2019.

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APPENDIX

INDEX
TO
APPENDIX

Page