



**THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER**

APPELLATE DIVISION

Information for Clients

This document contains general information about the appeal process, provides notice of important appeal rights, and answers questions frequently asked by persons who have chosen to pursue an appeal with an attorney appointed by the State Public Defender, Appellate Division. Your attorney will be an Assistant State Public Defender or a private bar attorney certified to receive public defender postconviction appointments. Please review this document carefully. If you have additional questions you should address them directly to your appellate attorney. Your attorney's name, address and phone number are listed on the Order Appointing Counsel.

Procedure for a Direct Appeal

The rules of procedure for direct appeal are found in Wis. Stat. § 809.30. The first step in the process, filing a notice of intent to pursue postconviction relief, has already occurred. The next step is obtaining the court record and transcripts. The court record consists of documents that were filed in the circuit court. The transcripts are a written record of what was said at your court hearings. The public defender requested these documents for your case when it appointed an attorney. Court reporters have 60 days to prepare transcripts. Often, though, reporters ask for and are granted more time. The transcripts will be sent directly to your attorney. While you may contact your attorney earlier in the process, your attorney will not be able to discuss your case in detail until he or she has received and reviewed all of these documents. Your attorney will consult with you in person or by phone after he or she completes this review.

Depending upon what the transcripts and record reveal, the options for your case may include filing a postconviction motion in the circuit court; filing a notice of appeal in the court of appeals; deciding to take no action; or, if your attorney cannot find arguable issues, filing a no-merit report. The nature of the issues revealed in the documents or from information you provide, as well as decisions you and your attorney make, will determine the course your case will follow. Appeal time limits begin to run from the date your attorney receives the last transcript or the court record, whichever is later. A notice of appeal or postconviction motion must be filed within 60 days of that date. This deadline can in some instances be extended.

Postconviction Motion: In some cases, before proceeding in the court of appeals, your attorney may decide to file a postconviction motion in the circuit court. A postconviction motion provides the circuit court an opportunity to reconsider earlier rulings, allows your attorney to present new issues, or gives your attorney an opportunity to make a more complete record for appeal. All claims for sentence relief must be raised in the circuit court by postconviction motion. However, you should know it is very difficult to successfully challenge a sentence unless the term the circuit court imposed is unlawful or the court based its sentencing decision on erroneous information. A sentence modification motion can also be filed when there is a new

factor highly relevant to the sentence or when the record establishes the court misused its discretion. Good behavior after sentencing is not a new factor. Public defender attorneys cannot file or appeal sentence modification motions after direct appeal time limits have passed.

Appeal to the Court of Appeals: An appeal to the Wisconsin Court of Appeals is not a new trial—the appellate court does not hear new testimony or take evidence. Factual issues in your case were resolved in the circuit court and cannot be reargued or reconsidered in the court of appeals. The court of appeals’ role is to resolve questions of law as they appear in the record. If your attorney identifies an arguably meritorious issue, he or she will discuss it with you and then may present or argue the issue to the court of appeals in a written document called a “brief.” If your attorney files a brief, the Attorney General or District Attorney will file a response brief for the prosecution. Your attorney may then file a reply brief. Your attorney will send copies of all briefs to you. If the case is complex or involves a previously unexplored area of law, your attorney may request oral argument or publication of the court’s decision. After the case is fully briefed and argued, the court will issue a written decision. This process can take many months or even a year or more. Your attorney will notify you of the court’s decision when it is issued.

Review in the Wisconsin Supreme Court: If you lose in the court of appeals, your options are to accept the court of appeals’ decision and end your appeal, or, you may petition the Wisconsin Supreme Court to review your case. While you have a right to request review, the supreme court does not have to grant review. The supreme court rejects most defense petitions. A rejected petition for review ends the appeal in Wisconsin state court. If a petition for review is granted, the procedure is similar to that in the court of appeals. The issues will be briefed and argued by the parties and the supreme court will then issue a final written decision.

If your attorney decides not to file a petition for review because he or she has concluded doing so would be frivolous, you may direct your attorney to file a no-merit petition for review under Rule 809.32(4). The no-merit petition will contain a statement of the case and appendix which you must then supplement with your own arguments. Failure to seek review of an issue in the Wisconsin Supreme Court may bar future review in federal court. A petition for review (or no-merit petition and supplement) must be filed within 30 days of the court of appeals’ decision. **The deadline for filing a petition for review or a no-merit petition cannot be extended.**

No-Merit Report: If, after reviewing the record and consulting with you, your appointed attorney concludes that an appeal would be frivolous and without arguable merit you have three options: (1) you may consent to have your attorney close your file and end your case without an appeal; or (2) you may discharge your attorney and proceed on your own without an appointed attorney (*pro se*) or with an attorney you hire; or (3) you may direct your attorney to file a “no-merit report” in the court of appeals pursuant to Wis. Stat. § 809.32. If after discussing these options with your attorney you do not consent to close your file or you do not discharge your attorney, your attorney is required by rule to file a no-merit report.

The no-merit report will identify anything in the record that might support an appeal and will explain why the issue or issues lack legal merit. If a no-merit report is filed, your attorney will send you a copy. You may file a written response to the report in the court of appeals within 30 days. Your attorney may then file a supplemental report and that report may include confidential information. The court will review the report, responses and the record. If the court agrees that no issues of arguable merit exist, the court will enter an order discharging your

attorney and affirming the judgment. If the court disagrees and identifies one or more arguable issues, the court will reject the report and order further proceedings.

If your attorney concludes no issues of arguable merit exist for appeal, he or she will contact you to discuss your options. If your attorney is unable to reach you because you have not kept your attorney informed of your contact information, your direct appeal deadlines may expire and you may lose your right to appeal.

Discharging or “Firing” your Appointed Attorney: Before you decide to discharge or “fire” your appellate public defender you should carefully consider the consequences. If you discharge your appellate public defender you very likely will be waiving your right to have any attorney appointed for your postconviction or appeal case. If you discharge your appointed attorney you will be solely responsible for all aspects of your case. You will receive no further assistance from the State Public Defender and will not be provided public defender funds for experts, investigators, or transcripts. If you fire your public defender because you decided to proceed either without an attorney or with a retained attorney, no other public defender attorney will be appointed for you later. If you decide to represent yourself, you must comply with the rules of appellate procedure and must meet all filing requirements and deadlines. If a postconviction motion is necessary, you will be responsible for filing the motion, presenting evidence and legal arguments, and securing the appearance of witnesses. If you pursue an appeal, any brief you file must comply with the technical and legal requirements of Wis. Stat. Rule 809.19. Failure to follow or comply with relevant statutes, case law and court rules could result in you losing your appeal or having your case dismissed. If you fail to litigate your case properly in state court, review of your issues in federal court may be barred. **If you choose to discharge your appointed appellate attorney, the State Public Defender will not appoint another attorney for you even if you later regret your decision or change your mind.**

Frequently Asked Questions on Appeal

WHEN WILL I SEE OR HEAR FROM MY ATTORNEY? Your attorney will consult with you either in person or by phone before taking any significant action in your case. It is important to provide your attorney with current contact information (preferably an address and phone number) where you can reliably be reached. **If your attorney cannot find you to consult about your case, you may lose your right to an appeal regardless of the merit of your case.**

WHAT ARE MY CHANCES? It is very difficult to win meaningful relief from an appellate court. Even when there are strong issues, it is impossible to predict how courts will rule on a given issue. Your attorney will identify and vigorously argue the issues your case presents but there is no guarantee as to how a court will rule.

HOW MUCH TIME WILL IT TAKE? Nothing happens quickly on appeal. Wisconsin Stat. Rule 809.30 describes the time limits and procedure for an appeal. However, appeal courts have no time limits for deciding cases. If there is an appeal in your case it may take many months or even a year or more for the court to make a final decision.

WHEN WILL I GET BACK TO COURT? You may not get back to court at all. An appeal is not a new trial. Much of the appellate process takes place on paper. An exception occurs when a postconviction motion hearing requires your presence.

WHAT HAPPENS IF I DISAGREE WITH MY ATTORNEY? It is your responsibility to decide whether to appeal and to determine the objective of the appeal. However, if you choose to be represented by an appointed attorney, it is the attorney's responsibility to determine what issues have merit and how any issue will be presented to the court. Your appointed attorney is not required to raise every non-frivolous issue and may decide for strategic reasons to not pursue weaker issues. *See Jones v. Barnes*, 463 U.S. 745 (1983). **The public defender will not appoint another attorney simply because you disagree with the attorney's conclusions about what issues to appeal or how those issues will be litigated.** If you disagree with your attorney's conclusions on the issues or any strategic decision, you should discuss your concerns with your attorney but you must then either allow your attorney to proceed in the manner he or she believes would best represent you, or you must discharge your appointed attorney and proceed on your own without an attorney or with an attorney you hire.

CAN I GET ANOTHER ATTORNEY? Your right to an appointed attorney for appeal does not include a right to an attorney of your choice or to successive appointments. Under no circumstances will the public defender appoint a new attorney to give a second opinion regarding your attorney's legal conclusions or strategic decisions. Except in extraordinary circumstances, once your attorney has begun work on your case the public defender will not appoint a new attorney for your appeal.

CAN I GET A COPY OF MY TRANSCRIPTS AND COURT RECORD? The public defender orders one set of transcripts and one copy of the court record for the defense. While there is no cost to you, the public defender pays the court reporters and clerks to prepare these documents. The legislature has funded the public defender for only one copy. Your attorney needs to keep these documents as long as he or she is representing you. When your attorney is done representing you or has filed a no-merit report, you may receive the transcripts and record upon request. You are not entitled to possess a copy of the pre-sentence investigation report in your case but may gain access to review the report by obtaining a court order.

WHAT HAPPENS IF I CANNOT PAY THE PUBLIC DEFENDER FEE? Your ability to pay the public defender fee will not affect the representation you receive. Your attorney does not have anything to do with billing, does not receive any of the money, and most likely will not even know if you have paid the fee. After an attorney is appointed to represent you, the public defender Collections Unit will mail you a letter explaining the fee payment options and what to do if you are unable to pay. Please notify the Collections Unit of any address change by toll free call at 1-800-445-2230 or by mail at Collections Unit, PO Box 7923, Madison, WI 53707-7923.

CAN MY ATTORNEY ASSIST WITH OTHER LEGAL PROBLEMS? No. The scope of public defender representation is limited by statute. Your appointed attorney **cannot** represent you in non-authorized proceedings such as clemency, pardons, conditions-of-confinement actions, most civil actions (traffic, small claims, etc.), divorce proceedings or sentence modification motions filed outside Rule 809.30 appeal time limits. The Legal Assistance to Institutionalized Persons Project (LAIP) can assist in some of these situations. The address is: LAIP, The Remington Center, UW Law School, 975 Bascom Mall, Madison, WI 53706-1399.

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