

STATE OF WISCONSIN
SUPREME COURT

In re:

WISCONSIN STATUTES §§ 809.15, 809.19, 809.30, 809.32, and 885.42

**PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING WIS. STATS.
§§809.15, 809.19, 809.30, 809.32, and 885.42**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

May 26, 2017

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ 809.15, 809.19, 809.30, 809.32, and 885.42.

This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

PETITION

The Judicial Council respectfully requests that the Supreme Court adopt the following:

SECTION 1. 809.15 (1) (a) (title) of the statutes is created to read:

809.15 (1) (a) (title) *Record items.*

SECTION 2. 809.15 (1) (am) of the statutes is created to read:

809.15 (1) (am) *Presentence investigation report.* The clerk of circuit court shall include in the record any sealed court-ordered presentence investigation report. Except as provided by s. 809.30 (2) (g), the clerk shall serve a copy of the report on the parties when requested under s. 809.30 (2) (e) or (f).

SECTION 3. 809.15 (1) (b) (title) of the statutes is created to read:

809.15 (1) (b) (title) *Substitution of photocopies.*

SECTION 4. 809.15 (1) (c) (title) of the statutes is created to read:

809.15 (1) (c) (title) *Destruction of original court record.*

SECTION 5. 809.15 (1) (d) of the statutes is created to read:

809.15 (1) (d) *Sealed records.* Except as governed by sub. (6), any document or other part of the record which has been sealed by order of the circuit court shall remain sealed unless the court, for good cause shown, shall authorize the unsealing of such document or record.

SECTION 6. 809.15 (2) (title) of the statutes is created to read:

809.15 (2) (title) **COMPILATION AND APPROVAL OF THE RECORD.**

SECTION 7. 809.15 (3) (title) of the statutes is amended to read:

809.15 (3) (title) ~~DEFECTIVE~~ SUPPLEMENTS OR CORRECTIONS TO RECORD ON APPEAL.

SECTION 8. 809.15 (3) is renumbered 809.15 (3) (a) and amended to read:

809.15 (3) (a) A party may move the court to supplement or correct the record if any of the following apply:

1. ~~A~~ The party who believes that the circuit court record, including the transcript of the reporter's notes, is defective, ~~or that the~~
3. The record does not accurately reflect what occurred in the circuit court ~~may move the court in which the record is located to supplement or correct the record.~~

(b) A motion to supplement or correct the record shall be filed with the clerk of the circuit court until the record has been transmitted to the court of appeals; thereafter, with the clerk of the court of appeals. The movant shall send a copy of any motion that is filed in the circuit court to the clerk of the court of appeals, or, if filed in the court of appeals, to the clerk of the circuit court under s. 809.14(3)(c). Motions under this subsection may be heard under s. 807.13.

SECTION 9. 809.15 (3) (a) 2. of the statutes is created to read:

2. The record needs to be supplemented with any item specified in sub. (1) (a).

SECTION 10. 809.15 (4) (c) of the statutes is amended to read:

809.15 (4) (c) *Supplementation or correction of record.* Notwithstanding pars. (a) and (b), if a motion to supplement or correct the record is filed in circuit court, the clerk of circuit court may not transmit the record until the motion is determined. ~~A copy of any motion to supplement or correct the record that is filed in circuit court shall be sent to the clerk of the court of appeals.~~ The circuit court shall determine, by order, the motion to supplement or correct the record within 14 days after the filing or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion and shall transmit the record to the court of appeals within 20 days after entry of the order. If the circuit court grants the motion, the clerk of circuit court shall transmit the supplemented or corrected record to the court of appeals within 20 days after entry of the order or filing of the supplemental or corrected record in the circuit court, whichever is later.

SECTION 11. 809.15 (6) of the statutes is created to read:

809.15 (6) CONFIDENTIALITY OF PRESENTENCE INVESTIGATION MATERIALS IN THE RECORD ON APPEAL. Copies of presentence investigation reports that are included in the record under sub. (1) (am) are confidential and may not be made available to any person except the court, the attorney representing the state, and either the defendant's attorney or, if the defendant is not represented by an attorney, the defendant. If a defendant is not represented by an attorney, the defendant may request and the court shall specify the manner in which the defendant shall have access to the presentence investigation report so as to allow meaningful and timely review of the report, consistent with s. 972.15 (4m).

JUDICIAL COUNCIL NOTE

Sub. (6) applies only to the copy of the presentence investigation report in the record on appeal and is not intended to contravene the provisions of s. 972.15 or prohibit the defendant or the department of corrections from using the presentence investigation report as permitted by law. This provision gives authority to the appellate court to provide access to the presentence investigation report.

SECTION 12. 809.19 (2) (a) of the statutes is amended to read:

809.19 (2) (a) *Contents.* ~~The~~ Except as provided in sub. (14), the 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. If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

SECTION 13. 809.19 (3) (b) of the statutes is amended to read:

809.19 (3) (b) Except as provided in sub. (14), ~~T~~the respondent may file with his or her brief a supplemental appendix. If the record is required by law to be confidential, the supplemental appendix must comply with the confidentiality requirements under sub. (2) (a). Any supplemental appendix shall include a table of contents, a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b), and a signed certification that the appendix complies with the confidentiality requirements under sub. (2) (a) in a form substantially similar to the confidentiality provision under sub. (2) (b).

SECTION 14. 809.19 (14) of the statutes is created to read:

809.19 (14) USE OF PRESENTENCE INVESTIGATION REPORT. No part of the presentence investigation report that is included in the record under s. 809.15 (1) (am) may be reproduced in an appendix to a brief. A party may discuss and cite to the presentence investigation report in a brief. A party may include in an appendix the portions of a transcript where the presentence investigation report was discussed or read into the record. Any use of the presentence investigation report shall identify any person named in the presentence investigation report by one or more initials or other appropriate pseudonym or designation.

JUDICIAL COUNCIL NOTE

Sub. (14) is intended to be consistent with the supreme court's guidance on the use of a presentence investigation report set forth in *State v. Buchanan*, 2013 WI 31.

SECTION 15. 809.30 (2) (g) 1. of the statutes is amended to read:

809.30 (2) (g) 1. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 60 days after receipt of the request for the circuit court case record. The copy of the circuit court case record shall include any court-ordered presentence investigation report. If the person requesting the copy of the circuit court case record under par. (f) is not represented by counsel, the clerk shall not include the presentence investigation report in the copy of the circuit court case records. If the person is not represented by counsel, the person may request and the circuit court shall specify the manner in which the person will have access to the presentence investigation report to allow meaningful and timely review before the filing of a postconviction motion or notice of appeal.

SECTION 16. 809.32 (1) (h) of the statutes is created to read:

809.32 (1) (h) *Use of presentence investigative report.* No part of the presentence investigation report that is included in the record under s. 809.15 (1) (am) may be reproduced in an appendix. A person or an attorney may discuss and cite to the presentence investigation report in a no-merit report, response, or supplemental no-merit report. A person or an attorney may include in an appendix the portions of a transcript where the presentence investigation report was discussed or read into the record. Any use of the presentence investigation report shall identify any person named in the presentence investigation report by one or more initials or other appropriate pseudonym or designation.

JUDICIAL COUNCIL NOTE

Par. (1) (h) is intended to be consistent with the supreme court's guidance on the use of a presentence investigation report set forth in *State v. Buchanan*, 2013 WI 31.

SECTION 17. 885.42 (1) of the statutes is amended to read:

885.42 (1) DEPOSITIONS. Any deposition may be recorded by audiovisual videotape without a stenographic transcript. Any party to the action may arrange at the party's expense to have a simultaneous stenographic record made. Except as provided by ss. 885.40 to 885.47, ch. 804 governing the practice and procedure in depositions and discovery shall apply. Before a party may present or offer into evidence an audio or audiovisual recording of deposition or other prior testimony, the party shall file a transcript of the deposition or prior testimony with the court at least 10 days in advance of the proceeding unless otherwise ordered by the court. At the time the recording is played, the party shall identify on the record the page and line numbers where the testimony presented or offered appears in the transcript unless otherwise ordered by the court.

Dated May 26, 2017.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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APPENDIX 1

Upon adoption, the amended provisions would read as follows:

809.15. Record on appeal

(1) COMPOSITION OF RECORD. (a) Record items. The record on appeal consists of the following unless the parties stipulate to the contrary:

1. The initiating document by which the action or proceeding was commenced;
2. Proof of service of summons or other process;
3. Answer or other responsive pleading;
4. Instructions to the jury;
5. Verdict, or findings of the court, and order based thereon;
6. Opinion of the court;
7. Final judgment;
8. Order made after judgment relevant to the appeal and documents upon which the order is based;
9. Exhibits whether or not received in evidence, including photographs, video recordings, audio recordings and computer media such as discs or flash drives, except that physical evidence, models, charts, diagrams, and photographs exceeding 8.5 x 11 inches in size shall not be included unless requested by a party to be included in the record;
10. Any other document filed in the court requested by a party to be included in the record;
11. Notice of appeal;
12. Bond or undertaking;
13. Transcript of reporter's notes;
14. Certificate of the clerk.

(am) Presentence investigation report. The clerk of circuit court shall include in the record any sealed court-ordered presentence investigation report. Except as provided by s. 809.30 (2) (g), the clerk shall serve a copy of the report on the parties when requested under s. 809.30 (2) (e) or (f).

(b) Substitution of photocopies. The clerk of the circuit court may request by letter permission of the court to substitute a photocopy for the actual paper or exhibit filed in the circuit court. A photocopy does not include a document that the clerk of the circuit court has electronically scanned into the court record as permitted under SCR 72.05.

(c) Destruction of original court record. For purposes of preparing the record on appeal, if the original record has been discarded as permitted under SCR 72.03 (3), the electronically scanned document constitutes the official court record.

(d) Sealed records. Except as governed by sub. (6), any document or other part of the

record which has been sealed by order of the circuit court shall remain sealed unless the court, for good cause shown, shall authorize the unsealing of such document or record.

(2) COMPILATION AND APPROVAL OF THE RECORD. The clerk of circuit court shall assemble the record in the order set forth in sub. (1) (a), identify by number, date of filing, and title each document, and prepare a list of the numbered documents. If the record is in an electronic format, the clerk shall also include in the list of numbered documents a list of exhibits not electronically maintained that are part of the record on appeal. At least 10 days before the due date for filing the record in the court, the clerk of the circuit court shall notify in writing each party appearing in the circuit court that the record has been assembled and is available for inspection. The clerk of the circuit court shall include with the notice the list of the documents constituting the record.

(3) DEFECTIVE SUPPLEMENTS OR CORRECTIONS TO RECORD ON APPEAL. (a) A party may move the court to supplement or correct the record if any of the following apply:

1. A party who believes that the circuit court record, including the transcript of the reporter's notes, is defective, or that the

2. The record needs to be supplemented with any item specified in sub. (1) (a).

3. The record does not accurately reflect what occurred in the circuit court may move the court in which the record is located to supplement or correct the record.

(b) A motion to supplement or correct the record shall be filed with the clerk of the circuit court until the record has been transmitted to the court of appeals; thereafter, with the clerk of the court of appeals. The movant shall send a copy of any motion that is filed in the circuit court to the clerk of the court of appeals, or, if filed in the court of appeals, to the clerk of the circuit court under s. 809.14(3)(c). Motions under this subsection may be heard under s. 807.13.

(4) (a) *Transmittal of the record.* The clerk of the circuit court shall transmit the record to the court of appeals within 20 days after the date of the filing of the transcript designated in the statement on transcript or within 20 days after the date of the filing of a statement on transcript indicating that no transcript is necessary for prosecution of the appeal, unless the court extends the time for transmittal of the record or unless the tolling provisions of s. 809.14(3) extend the time for transmittal of the record. If additional portions of the transcript are requested under s. 809.11(5), the clerk of the circuit court shall transmit the record to the court of appeals within 20 days after the date of the filing of the additional portions of the transcript. If the record is transmitted electronically, the clerk of the circuit court shall transmit by traditional methods any original documents or exhibits not electronically maintained.

(b) *Late transcript.* If the reporter fails to file the transcript within the time limit specified in the statement on transcript, the clerk of circuit court shall transmit the record not more

than 90 days after the filing of the notice of appeal, unless the court of appeals extends the time for filing the transcript of the reporter's notes. If the court extends the time for filing the transcript of the reporter's notes, the clerk of circuit court shall transmit the record within 20 days after the date that the transcript is filed.

(c) *Supplementation or correction of record.* Notwithstanding pars. (a) and (b), if a motion to supplement or correct the record is filed in circuit court, the clerk of circuit court may not transmit the record until the motion is determined. ~~A copy of any motion to supplement or correct the record that is filed in circuit court shall be sent to the clerk of the court of appeals.~~ The circuit court shall determine, by order, the motion to supplement or correct the record within 14 days after the filing or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion and shall transmit the record to the court of appeals within 20 days after entry of the order. If the circuit court grants the motion, the clerk of circuit court shall transmit the supplemented or corrected record to the court of appeals within 20 days after entry of the order or filing of the supplemental or corrected record in the circuit court, whichever is later.

(4m) NOTICE OF FILING OF RECORD. The clerk of the court of appeals shall notify the clerk of circuit court and all parties appearing in the circuit court of the date on which the record was filed. When the record is transmitted electronically and the clerk of the circuit court must transmit original documents or exhibits not electronically maintained by traditional methods, the date on which the record was filed is the date the electronic transmission and index was received by the clerk of the court of appeals.

(5) AGREED STATEMENT IN LIEU OF RECORD. The parties may file in the court within the time prescribed by sub. (4) an agreed statement of the case in lieu of the record on appeal. The statement must:

(a) Show how the issues presented by the appeal arose and were decided by the trial court; and

(b) Recite sufficient facts proved or sought to be proved as are essential to a resolution of the issues presented.

(6) CONFIDENTIALITY OF PRESENTENCE INVESTIGATION MATERIALS IN THE RECORD ON APPEAL. Copies of presentence investigation reports that are included in the record under sub. (1) (am) are confidential and may not be made available to any person except the court, the attorney representing the state, and either the defendant's attorney or, if the defendant is not represented by an attorney, the defendant. If a defendant is not represented by an attorney, the defendant may request and the court shall specify the manner in which the defendant shall have access to the presentence investigation report so as to allow meaningful and timely review of the report, consistent with s. 972.15 (4m).

809.19. Briefs and appendix.

(2) APPENDIX. (a) *Contents.* ~~The~~ Except as provided in sub. (14), the appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court, 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, and a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b). If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using 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.

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

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 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.

Signed: ...

Signature

(3) RESPONDENT'S BRIEF. (a)1. The respondent shall file a brief within the later of any of the following:

a. Thirty days after the date of service of the appellant's brief, and 3 additional days under s. 801.15(5)(a) if service is accomplished by mail.

b. Thirty days after the date on which the court accepts the appellant's brief for filing.

c. Thirty days after the date on which the record is filed in the office of the clerk.

2. The brief must conform with sub. (1), except that the statement of issues and the statement of the case may be excluded.

3. Within the time limits for filing a respondent's brief, a party who has been designated as a respondent may file a statement with the court that it will not be filing a brief because its interests are not affected by the issues raised in the appellant's brief or because its interests are adequately represented in another respondent's brief.

(b) Except as provided in sub. (14), ~~T~~the respondent may file with his or her brief a supplemental appendix. If the record is required by law to be confidential, the supplemental appendix must comply with the confidentiality requirements under sub. (2)(a). Any supplemental appendix shall include a table of contents, a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b), and a signed certification that the appendix complies with the confidentiality requirements under sub. (2)(a) in a form substantially similar to the confidentiality provision under sub. (2)(b).

(14) USE OF PRESENTENCE INVESTIGATION REPORT. No part of the presentence investigation report that is included in the record under s. 809.15 (1) (am) may be reproduced in an appendix to a brief. A party may discuss and cite to the presentence investigation report in a brief. A party may include in an appendix the portions of a transcript where the presentence investigation report was discussed or read into the record. Any use of the presentence investigation report shall identify any person named in the presentence investigation report by one or more initials or other appropriate pseudonym or designation.

809.30. Rule (Appeals in s. 971.17 proceedings and in criminal, ch. 48, 51, 55, 938, and 980 cases)

(2) (g) *Filing and service of transcript and circuit court case record.* 1. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 60 days after receipt of the request for the circuit court case record. The copy of the circuit court case record shall include any court-ordered presentence investigation report. If the person requesting the copy of the circuit court case record under par. (f) is not represented by counsel, the clerk shall not include the presentence investigation report in the copy of the circuit court case records. If the person is not represented by counsel, the person may request and the circuit court shall specify the manner in which the person will have access to the presentence investigation report to allow meaningful and timely review before the filing of a postconviction motion or notice of appeal.

809.32. No merit reports

(1) (h) *Use of presentence investigative report.* No part of the presentence investigation report that is included in the record under s. 809.15 (1) (am) may be reproduced in an appendix. A person or an attorney may discuss and cite to the presentence investigation report in a no-merit report, response, or supplemental no-merit report. A person or an attorney may include in an appendix the portions of a transcript where the presentence investigation report was discussed or read into the record. Any use of the presentence investigation report shall identify any person named in the presentence investigation report by one or more initials or other appropriate pseudonym or designation.

885.42. When available

(1) DEPOSITIONS. Any deposition may be recorded by audiovisual videotape without a stenographic transcript. Any party to the action may arrange at the party's expense to have a simultaneous stenographic record made. Except as provided by ss. 885.40 to 885.47, ch. 804 governing the practice and procedure in depositions and discovery shall apply. Before a party may present or offer into evidence an audio or audiovisual recording of deposition or other prior testimony, the party shall file a transcript of the deposition or prior testimony with the court at least 10 days in advance of the proceeding unless otherwise ordered by the court. At the time the recording is played, the party shall identify on the record the page and line numbers where the testimony presented or offered appears in the transcript unless otherwise ordered by the court.

(2) OTHER EVIDENCE. Such other evidence as is appropriate may be recorded by videotape and be presented at a trial. The court may direct a party or the court reporter to prepare a transcript of an audio or audiovisual recording presented under this subsection in accordance with SCR 71.01(2)(e).

(3) ENTIRE TRIAL TESTIMONY AND EVIDENCE. All trial proceedings, including evidence in its entirety, may be presented at a trial by videotape upon the approval of all parties and the trial judge. In determining whether to approve a videotape trial, the trial judge, after consultation with counsel, shall consider the cost involved, the nature of the action, and the nature and amount of testimony. The trial judge shall fix a date prior to the date of trial when all recorded testimony must be filed with the clerk of court.

(4) TRIAL RECORD. At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2)(d).