STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP387-CR

In the Matter of Sanctions Imposed by the Court of Appeals in *State v. Gregory K. Nielsen*, 2010AP387-CR:

STATE EX REL. OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

v.

WISCONSIN COURT OF APPEALS,

Respondent.

PETITION FOR REVIEW
OR, IN THE ALTERNATIVE, PETITION FOR SUPERVISORY WRIT

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The Office of the State Public Defender, by First Assistant State Public Defender Joseph N. Ehmann, respectfully petitions the Wisconsin Supreme Court, pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.62, to review the sanctions aspect of the decision of the Court of Appeals, District II, dated December 22, 2010, or, pursuant to Wis. Stat. §§ 809.51 and (Rule) 809.71, to grant a supervisory writ on the grounds set forth below.

ISSUES PRESENTED

1. Does the court of appeals' practice of imposing monetary sanctions, summarily in its written decisions, for what the court deems to be violation of court rules regarding appendices in appellants' briefs, violate due process?

2. Does the court of appeals' practice of imposing monetary sanctions for what it characterizes as ethics violations for filing a "false certification" when the court's subjective view of what should have been included in an appendix does not match an appellant's attorney's subjective view, violate due process and impermissibly circumvent or supplant the procedure for resolving ethics issues established by this court by its creation of the Office of Lawyer Regulation?

3. Is Wis. Stat. Rule 809.19(2) Appendix, unconstitutionally vague on its face or as applied for purposes of imposing monetary sanctions?

CRITERIA FOR REVIEW

The court of appeals in this case imposed a monetary sanction on the Office of the State Public Defender based upon the court's conclusion that the Appendix to the brief filed in this matter did not comply with the requirements of Wis. Stat. (Rule) § 809.19(a) and that counsel therefore filed a "false certification." The court announced the violations and sanction in its written opinion.

The court of appeals has been imposing summary sanctions in this manner with increasing frequency. A LEXIS search shows at least 23 cases where appendix and false certification sanctions have been imposed in this manner since the court declared it could do so in ***State v. Bons***, 2007 WI App 132, 301 Wis. 2d 227. At least 17 such cases occurred in the last calendar year and this number under-reports the actual total because LEXIS does not include cases like the one at bar that were resolved by summary order. (See App. 155-165).

The court of appeals' practice of imposing summary sanctions in this manner violates due process of law because it deprives persons of property without first providing notice and an opportunity to be heard. *See* ***Groppi v. Leslie***, 404 U.S. 496 (1972).

This court, in ***Howell v. Denomie***, 2005 WI 81, 282 Wis. 2d 130, ¶ 19, ruled that the court of appeals may on its own motion raise a court rules violation issue, "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 court of appeals' summary action here and in other such cases violates an attorney's, or

in this case the Office of the State Public Defender's, right to due process and therefore the sanctions aspect of the opinion and order in this case must be vacated.

Also at issue is the court of appeals' practice of finding an ethics violation based upon SCR 20:3.3 Candor to the tribunal, for what the court labels a "false certification" when the court's subjective view of what should have been included in the appendix of an appellant's brief differs from that of the appellant's attorney. The practice impermissibly circumvents or supplants the procedure for resolution of ethics issues this court established through the creation of the Office of Lawyer Regulation. Declaring a violation and imposing a sanction in a written opinion is tantamount to imposing a public reprimand without due process and arguably creates a conflict between the client and counsel.

As a final matter, this case presents the issue of whether Wis. Stat. 809.19(2), as written and interpreted, is for purposes of imposing a monetary sanction, unconstitutionally vague on its face or as applied.

Because this case presents significant issues of constitutional law; demonstrates a need for establishing, implementing and changing court policy; will develop and clarify the law on an issue that is likely to recur; and involves a court of appeals' practice that is in conflict with controlling opinions of this court, the criteria of Wis. Stat. §§ 809.62(a), (b), (c)3 & (d) are satisfied.

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. The attorney, on Mr. Nielsen's behalf, filed a postconviction motion alleging that the circuit court erred when it failed to explain the rationale for the sentence it imposed, when it failed to explain why it rejected the sentence recommended in the PSI report and by imposing a sentence that was excessive. The court denied the motion.

Mr. Nielsen took an appeal from the judgment of conviction and from the order denying the postconviction motion. Mr. Nielsen 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, to explain the rationale for the particular sentence the court imposed. The appellant's brief, with citation to the record, sets forth in the "statement of facts" the points from the arguments and the PSI the court mentioned before imposing sentence (Appellant's brief, pp. 2-3; App. 109-110). The statement of facts then, with record cites, sets forth direct quotes of the particular points the court made (Appellant's brief, pp. 3-4; App. 110-111). The argument portion of the brief quotes or paraphrases, with proper citation to the record, what Mr. Nielsen's attorney believed to be the material points the sentencing court made. (Appellant's brief, pp. 7-10; App. 112-117). In the appendix to the brief, Mr. Nielson'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. (Appellant's Appendix, 103-05; App. 123-125).

On December 22, 2010, the court of appeals, District II, issued an opinion summarily affirming the judgment. The opinion 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.

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.

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).

ARGUMENT

I. The Court of Appeals' Practice of Imposing Monetary Sanctions Summarily in its Written Decisions, for what the Court Deems to be Violation of Court Rules Regarding Appendices in Appellant's Briefs, Violates Due Process.

The court of appeals in its written decision in the underlying appeal in this case imposed a $150 sanction against the "Office of the State Public Defender" because, in the court's view, the attorney appointed by the state public defender did not include "the entirety" of the sentencing court's comments in the appendix to her brief. The court averred that the omission violated Wis. Stat. Rule 809.19(2). The court imposed the sanction without notice or an opportunity to be heard as is required to comport with basic principles of due process. Because the court's sanction order was imposed in violation of the attorney's or agency's right to due process of law, it must be vacated.

Wisconsin Stat. (Rule) § 809.83(2) grants courts authority to impose sanctions for noncompliance with court rules. Specifically, § 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 court's authority to impose a monetary sanction or

penalty, however, is not unfettered. The rule does not authorize imposition of a monetary sanction by fiat.

It is well established that the government cannot deprive a person of liberty or property without due process of law. U.S. Const. amend. XIV, Wis. Const., Art. 1, § 1. Basic due process, at minimum, requires notice and an opportunity to be heard. ***Groppi v. Leslie***, 404 U.S. 496 (1972). This court, in ***Howell v. Denomie***, 2005 WI 81, 282 Wis. 2d 130, ¶ 19, 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 right to be heard is fundamental and must be given before any sanction is imposed thereby permitting the judge to find no error or to give a more lenient sanction after considering any mitigating factors presented. ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418 (1995).

The court of appeals' practice of announcing a rules violation and imposing a sanction in the final written opinion in a case violates due process because it does not afford the sanctioned person or entity notice or an opportunity to be heard. The court of appeals here, and in most other appendix sanction cases, cites ***State v. Bons***, 2007 WI App 132, 301 Wis. 2d 227, and Wis. Stat. (Rule) 809.83(2) as the basis for its authority to summarily impose a monetary sanction. Rule 809.83 should not be read to authorize imposition of summary sanctions because doing so would render it unconstitutional. To the extend ***Bons*** is interpreted to authorize imposition of summary sanctions, that aspect of the case was wrongly decided and should be reversed.

The present case vividly illustrates why notice and opportunity to be heard are necessary. Notice and opportunity to be heard would have allowed the agency or appointed attorney to explain exactly why the court was wrong in its allegation that the appendix content and certification rules were violated, and would have allowed the agency or appointed attorney to explain how and why those rules were actually scrupulously followed here.

In any event, because the court of appeals' sanction order was imposed in violation of the Office of the State Public Defender's right to due process of law, the sanction order must be vacated.

II. The Court of Appeals' Practice of Imposing Monetary Sanctions for what It Characterizes as an Ethics Violation for Filing a "False Certification" When the Court's Subjective View of what Should Have Been Included in an Appendix does not Match the Appellant's Attorney's Subjective View, Violates Due Process and Impermissibly Circumvents or Supplants the Procedure for Resolving Lawyer Conduct Issues Established by this Court by the Creation of the Office of Lawyer Regulation.

The court of appeals routinely couples its appendix content sanction with, directly or by implication, a declaration or finding of a violation of SCR 20:3.3(a) Candor toward the tribunal. This is based upon the court's assertions or conclusion that the attorney has filed a "false certification." Declaring a certification "false" when the court's subjective view of what is "essential" in regard to the subjective appendix content rule does not match the attorney's subjective view, is a false equivalency and is based on an erroneous reading of the certification rule. 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 allegation requires fact-finding which the court of appeals cannot do.

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…." (emphasis added). 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.

The certification rule is problematic for several reasons. The certification rule states that its purpose is to ensure that the appendix "meets the content requirements of par. (a)" but the specific provisions of the certification are not aligned with the provisions of "par. (a)" as they are stated or have been interpreted.

The first requirement of "par. (a)" is that the appendix be "short" and courts have found fault when attorneys do not comply. *See e.g.* ***Cottonwood Financial, LTD v. Darcie Estes***, 2010 WI App 75, 325 Wis. 2d 749, ¶ 25. Further,

although "par. (a)" and the certification language seem to require inclusion of the court's written findings, the court of appeals has declared that "formal written findings" are "meaningless" or "worthless" and therefore would seem to be implying that they are not essential. ***State v. Bons***, 2007 WI App 132, 301 Wis. 2d 227, ¶ 27 (Brown, J., concurring). Finally, "par. (a)" states that "limited portions" of the record are to be included and the certification omits the word "limited."

It is this last point, the requirement of inclusion of "limited portions of the record essential to an understanding" that is at issue here. The court imposed the sanction in this case based upon its assertion that "[b]y omission of the *entirety* of the sentencing court's remarks, the certification was false." ***State v. Nielsen***, 2010AP387-CR, n.2 (emphasis added).

The court of appeals' view that the rule requires an attorney to provide the "entirety" of a sentencing judge's remarks when at least arguably, only a limited portion of the remarks is essential to an understanding of the particular issue raised, is wrong. But more importantly, the certification signed by Mr. Nielsen's attorney did not state she was providing the "entirety of the sentencing court's remarks."

What Mr. Nielson's attorney certified was that her appendix contained portions of the record she deemed essential to an understanding of the issue she raised. And that is exactly what the appendix contained.

Mr. Nielsen raised a single appellate issue alleging that the circuit court failed to fulfill the mandate articulated in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, to explain the rationale for the particular sentence the court imposed. ***Gallion*** made clear that the mere "uttering of facts" by a

sentencing court is not critical or essential but what is essential is the court's on-the-record explanation for the sentence. ***Id.*** at ¶¶ 2, 28, 76.

In the present case, Mr. Nielson's appendix contained copies of the three transcript pages where the court explained, or attempted to explain, the rationale for the sentence it imposed. Wisconsin Stat. (Rule) 809.19(2)(a) required nothing more and Mr. Nielsen's attorney's certification accurately stated what the appendix contained.

That the court or individual judges on the panel deciding this case may have wanted to review more of the record before deciding the issue against Mr. Nielsen does not establish that Mr. Nielsen's attorney's view of what was "essential" to an understanding of the issue raised was wrong, or that her certification was "false." Indeed, what the court here appears to be claiming was "essential" at least arguably contradicts what this Court in ***Gallion*** declared was essential.

It is worth noting that the appendix rule states that it must contain only the material essential to an "understanding" of the issue raised, not everything that might possibly be relevant to a final resolution of or decision on the issue. If there are non-essential but relevant points to be made against the argument or issue raised, it is both logically and more appropriate for those points to be made by the state or opposing party.

The appendix content rule, with directives that the appendix be "short" and contain "limited" portions of the record that are "essential" to an "understanding" of the issue raised, is highly subjective. The certification rule adds another layer of subjectivity. All this makes any unilateral or summary claim of a certification being "false" dubious.

The court of appeals, by declaring appendix certifications "false" when the content of an appendix does not match what the court, in its subjective view, apparently deems "essential," means that the court is requiring an attorney to speculate on what the court would deem essential, and then in effect labeling the attorney a liar when the attorney guesses wrong.

The court of appeals in ***Bons*** 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.

Although the court of appeals here did not specifically reference SCR 20:3.3(a), it does so routinely[1] and it is implied by the citation to ***Bons*** and the declaration of the finding of a "false" certification. This aspect of court of appeals' appendix sanctions practice is troubling because it results in what is effectively the imposition of a public reprimand and penalty without due process or the process and protections set forth in Chapter SCR 22.

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 contained in Chapter SCR 20. If the court of appeals believes that "a serious infraction"

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[1] *See e.g.* ***State v. Zurkowski***, 2009AP929-CR, ***State v. Cardiel***, 2009AP1039-CR, and many others. (App. 157, 158).

of an SCR regarding professional conduct has occurred in a case, the matter is properly referred to the Office of Lawyer Regulation rather than being resolved by summary court order.

Because the court of appeals' declaration of a "false" certification here was based upon an erroneous interpretation of the certification rule, was factually incorrect and improperly circumvented or supplanted the process for resolution of alleged violations of the rules of professional conduct for attorneys, the State Public Defender asks that this court vacate the sanctions aspect of the court of appeals' opinion and order entered in this case.

III. The Provisions of Wis. Stat. (Rule) §§ 809.10(2)(a) & (b) are Insufficiently Definite to Provide Fair Notice of the Conduct Required Leading to Their *Ad Hoc* or Arbitrary Application and 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) on their face and as they have been applied, are 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 (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 (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 (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 (1987).

Section 809.19(2)(a) seems to have been drafted to be vague. 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 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 terms "short," "limited," "essential to" and "understanding of the issue raised" are unambiguously vague. The rule seems to require that an attorney to provide only what in his or her own subjective view is essential to an understanding of the issue he or she is raising.

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." *See e.g.* ***State v. Holder***, 2009AP315-CR, ¶ 20 (App. 158) (appendix sanction imposed for failure to provide what the court deemed "essential to this court's review" of the issue raised).

Reading through the sanctions cases as a whole, it seems as though the court wants to interpret the appendix rule as a mechanism to un-tether an appellate case from the record. To the extent the court believes the rule 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 is wrong.

An appellate defendant has a constitutional right to a zealous and partisan attorney advocate. While an attorney has an ethical obligation to not misrepresent the record, the attorney is under no obligation to highlight aspects of the record that may only arguably be relevant to refuting the issues raised. That is the government's job. For this reason the appendix rule cannot be read to require defense counsel to include in the appendix to the appellant's brief anything more than what, as the rule states, is essential to an understanding of the issue being raised. If the court wants more, it must look to the state or its own review of the record.

How the court has interpreted the aspects of the rule that arguably seem more concrete, compounds 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 the seminal case interpreting rule, ***State v Bons***, 2007 WI App 124, 301 Wis. 2d 227, ¶ 27 (Brown, J. concurring), the court suggested that a copy of the "judgment" and the "formal written findings of fact and conclusions of law" are "meaningless." And, while in a suppression case one might reasonably conclude that the motion to suppress is one of the limited portions of the record that would be essential to an understanding of the issue, the ***Bons*** court, too, deemed inclusion of the motion to be "meaningless." ***Id.*** at ¶ 22.

The arbitrariness with which the appendix rule has been interpreted and applied is brought into sharp focus by comparison of the present case to another District II case, ***State v. Knaus***, 2008AP2599-CR, (App. 149-154)[2]. As noted in Issue II of this petition, Mr. Nielsen raised a single ***Gallion*** issue in the court of appeals. The whole point of ***Gallion*** was that the old approach of a court simply uttering facts and invoking sentencing factors would no longer suffice, and sentencing courts would now be required to provide a specific on-the-record explanation for the sentence imposed. To this end, Mr. Nielsen's appointed attorney argued the facts and law, with proper citation, in the body of her brief, and included in the brief's appendix the three pages of transcript where the court came closest to providing the required, but in this case arguably deficient, explanation.

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[2] Citation to an unpublished opinion to show a conflict in the court of appeals for purposes of Wis. Stat. § 809.62 is permitted. ***State v. Higginbotham***, 162 Wis. 2d 978 (1991).

This would seem to comply with what Mr. Nielsen's attorney reasonably believed to be required by § 809.19(2)(a) in that she provided the "limited portion" of the record she deemed essential to an understanding of the issue she raised. The court disagreed, declaring that by including "only a select portion" [as different from a "limited portion"(?)] of the record that did not include the part where the judge uttered facts (that were for the most part referenced with cites in the body of the brief), Mr. Nielsen's attorney violated the appendix content rule and was further guilty of filing a "false" certification for stating that she complied with the rule.

In ***State v. Knaus***, 2008AP2599, the appellant's attorney had previously been sanctioned for an appendix violation, which the court sometimes cites as a basis to impose a more severe sanction. *See* ***State v. Hiebing***, 2006AP2166, (App. 164); ***Kennedy Houseboats, Inc. v. City of St. Croix Falls***, 2007AP2339, (App. 162). In ***Knaus***, like the present case, the appellant raised a single ***State v. Gallion*** issue. As it did here, the court rejected the argument and affirmed the judgment. In the last paragraph, the court states:

> As a final matter, we address the appendix Attorney Bridget Boyle provides. She certifies that it satisfies Wis. Stat. Rule 809.19(2)(a) which requires including the "portions of the record essential to an understanding of the issue raised." The sentencing transcript was essential to understand the issue Boyle raised, yet she provided but a single page of it, bringing her dangerously close to filing a false certification. Filing a false certification is a serious infraction of the rule and violates SCR 20:3.3(a)….Nonetheless, we admonish Boyle in the future to furnish an appendix that not only eases the burden of the court but which fully honors the representations made in her certification.

The ***Knaus*** court thus found that an attorney who provided only one page of the sentencing transcript came "dangerously close," but was not in violation of the rule, whereas here where Mr. Nielsen's attorney who provided the three pages of transcript which set forth what in her view was essential to understanding the ***Gallion*** issue raised, was in violation of both the appendix content rule and the certification rule. Even with application of an "extraordinary" rather than "ordinary" intelligence standard the two cases cannot be reconciled. Neither violated any rule, yet one attorney was sanctioned.

Aside from the court here simply being wrong on the merits of its sanctions order and the unconstitutional vagueness of the rule in the present case, the manner in which the rule is being interpreted, enforced and penalized causes other problems. The rule creates an inherent and a practical conflict between public defender attorneys and their clients. It causes attorneys to have to make decisions regarding an appendix based upon their own interest in avoiding a fine versus making decisions based purely on the interest of the client. Further, the courts' announcing in its written opinion what it views as an appendix and certification error and then characterizing it as one of candor or veracity, destroys what in public defender cases is often a fragile relationship between appointed counsel and the defendant.

With due respect to the court of appeals, 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. The indignity and damage to professional reputation, along with what amounts to a very steep fine for a person who takes cases at the public defender rate or who makes a public defender salary is a disproportionately harsh sanction, particularly when viewed

in light of what must occur in an OLR context for that type of punishment.

Consequently, for all of the above reasons the Office of the State Public Defender asks that this court at minimum grant review to reverse the sanction order imposed in this case. But the public defender also asks this court to exercise its supervisory power to stop the court of appeals from imposing sanctions without due process and to either re-write the appendix rules so that they are more concrete or capable of objective understanding, or provide guidance or clarity as to their meaning.

Dated this 21st day of January, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 4,918 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 21st day of January, 2011.

Signed:

JOSEPH N. EHMANN
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