STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 99-2587-CR
(Winnebago County Case No. 97-CF-109)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY SAMUEL,

Defendant-Appellant.

Appeal From The Judgment Entered In The Circuit Court For Winnebago County, The Honorable Thomas S. Williams, Circuit Judge, Presiding, And From The Order Entered in the Circuit Court For Winnebago County, The Honorable Barbara Hart Key, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to convict Mr. Samuel of "tak[ing] a child away . . . from a legal custodian" in violation of Wis. Stat. §948.31(1)(b), as the jury was instructed on Count 1, when the evidence was undisputed that the 15-year old alleged victim left her mother's home of her own free will.

The post-conviction court held that the evidence was sufficient to uphold the verdict.

2. Whether the evidence was sufficient to convict Mr. Samuel of "tak[ing] a child . . . from home or the custody of . . . her parent" in violation of Wis. Stat. §948.30(1)(a), as the jury was instructed on Count 2, when the evidence was undisputed that the 15-year old alleged victim left her mother's home of her own free will.

The post-conviction court held that the evidence was sufficient to uphold the verdict.

3. Did the admission at trial of the alleged victim's pretrial statements, elicited by threats by state agents that her newborn daughter would be taken from her if she did not "cooperate" in the investigation against Samuel, violate Samuel's right to due process, mandating reversal and a new trial.

The trial court admitted evidence of the statements and the post-conviction court affirmed that decision.

4. Was Samuel denied his due process rights when the sentencing court relied upon sealed evidence from a separate proceeding, to which Samuel had no access and no opportunity to rebut.

The post-conviction court held that Samuel was not denied due

process based upon the sentencing court's consideration of and reliance upon such evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication also is justified under Wis. Stat. (Rule) 809.23. Although the federal courts uniformly have held that a defendant's due process rights are violated by admission of a witness statements resulting from coercion by state agents, and the only Wisconsin decision on that point is in accord, *see State v. Duckart*, 140 Wis.2d 860, 409 N.W.2d 670 (Ct. App. 1987) (available on Westlaw), the Wisconsin decision is unpublished. The sentencing court's consideration of sealed evidence which the defendant was given no opportunity to rebut also suggests the need for appellate guidance on that point.

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STATEMENT OF THE CASE

On June 11, 1996, the state filed a criminal complaint charging Stanley Samuel with interference with child custody in violation of Wis. Stat. §948.31(2) (R1).[1] On March 21, 1997, after Samuel was arrested in Missouri, the state filed an amended criminal complainant charging Samuel with interference with child custody, Wis. Stat. §948.31(2), and abduction, Wis. Stat. §948.30(1)(a), both as a repeater, Wis. Stat. §939.62(1) (R4). The counts concerned an incident on January 29, 1996, in which 15-year old Tisha Leyh left the home of her mother, either because she ran away from home (the

[1] Throughout this brief, references to documents in the record are identified by the docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. When the document is included in the Appendix, it is identified by Appendix page number as "App. __."

state's view) or because she was thrown out (Tisha's view), and then left Wisconsin with Samuel. The state filed a second amended complaint on March 24, 1997, adding a charge of second degree sexual assault of a child, Wis. Stat. §948.02(2). The third count concerned the allegation that Samuel and Tisha had sex at some point between September 10 and 20, 1995, at a time when Tisha was 15 years old. (R5).

On March 8, 1997, Samuel and Tisha were stopped at a roadblock in Phelps County, Missouri. Samuel waived extradition and was returned to Wisconsin for an initial appearance on March 21, 1997. Tisha was returned to Wisconsin where, on March 10, 1997, she gave birth to a daughter.

On March 12, 1997, after Tisha declined to provide any information against Samuel, government agents placed her newborn daughter in a foster home pending Tisha's "cooperation." When Tisha subsequently provided the agents with a statement against Samuel, her daughter was returned to her on March 14, 1997. (R100:16, 48).

At the preliminary examination on April 2, 1997, Tisha testified that, contrary to her statement to the agents, she and Samuel did not have sex prior to leaving Wisconsin (R94:5-7, 10-11). The Court nonetheless bound Samuel over for trial based upon Tisha's prior, unsworn statements to the officers (*id.*:106-08). On April 16, 1997, Samuel was arraigned on an information charging him with the same three offenses (R8; R95).

After various pretrial hearings, the case proceeded to a jury trial on December 1, 1997, Hon. Thomas S. Williams, presiding

(R102). On December 4, 1997, the jury returned verdicts convicting Samuel on all three counts of the information (R60; R105:101).

On January 16, 1998, the circuit court, Hon. Thomas S. Williams, presiding, sentenced Samuel to 38 years imprisonment and a consecutive term of 16 years probation in lieu of a stayed prison term (R107:68-70), and entered judgment (R68; R69). The court entered amended judgments of conviction on February 25, 1998 (R74; R75).

Samuel timely filed his Notice of Intent to Pursue Post-conviction Relief (R70). On August 4, 1999, he filed his post-conviction motion (R84; R85), this Court having extended the time for filing that motion to that date by Order dated July 14, 1999. The parties briefed that motion (RR86; R87). Following arguments on September 30, 1999, the circuit court, Hon. Barbara Hart-Key, presiding, denied the motion and entered an order reflecting that denial (R108; R90; App. 1, 2-11).

Mr. Samuel timely filed his notice of appeal (R91).

TRIAL EVIDENCE

Tisha Leyh testified at trial that she met Stanley Samuel through her mother, Cindy Jones, during the summer of 1995 (R103:118). Jones and Tisha's father, Peter Leyh, were divorced, and Tisha was living with her mother at the time in Oshkosh, Wisconsin (*id.*:117-18). Tisha, who turned 15 in September, 1995, and Samuel developed a friendship over the following months (*id.* at 118-19).

In late November, 1995, Tisha and Samuel reported Jones to

Samuel's parole officer and to Social Services for the unsanitary condition of her home and for additional reasons excluded from evidence at trial.[2] (R103:17, 123, 130; R104:128-29, 187-88; R105:13-14). The relationship between Jones and Tisha then deteriorated, with Jones seeking and obtaining a no-contact order from Samuel's parole officer (*id.*:134-36). After Samuel moved to South Dakota in December, 1995, the relationship continued to deteriorate until Jones gave Tisha two weeks notice in mid-January, 1996, that she would have to leave (R104:187).

On January 29, 1996, Tisha voluntarily left with Samuel because she wanted to leave and because her mother had kicked her out (R103:141; R104:190-91, 221).

Tisha testified that she and Samuel were just friends prior to leaving, and that she left with him because she had nowhere else to stay (R103:143, 154-55; R104:221-22). Their relationship did not develop into anything more than friendship until March or April of 1996 when they were outside of Wisconsin. The two did not have sex in Wisconsin or before they had left Winnebago County on January 29, 1996. (R103:139-40; R104:196).

At trial, the state once again relied primarily upon Tisha's prior, unsworn statements to the police to the effect that she had sex with Samuel in September, 1995, when she had just turned 15 (R103:155, 165-68, 171-73; R104:19, 22, 26-27, 83-84, 87, 89-99; R56:Exh. 7). The state also presented testimony of Tisha's parents

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[2] The primary focus of the reports was not the condition of the home, but the claim that Jones' upstairs neighbor had been molesting Tisha's younger sister, Laura (R107:45; *see* R103:130; R104:187-88). This claim, however, was excluded from evidence at trial (R103:17; R104:128-29, 187-88; R105:13-14).

to the effect that they did not consent to her leaving with Samuel (R102:120-21, 186), and Jones' claim that she did not throw her daughter out of the house (*id.*:121).

The state also called as witnesses two girls who said they were friends of Tisha's and that Tisha had told them that she had sex with Samuel (R103:101-04, 201, 203). The state also called a boy who claimed that Tisha told him the same thing while he was attempting to make out with her after a party (*id.*:88-89).[3] Tisha's 10-year old sister, Laura, also testified that she had seen Samuel at Jones' house when Jones was not there, that she had seen Samuel once kiss Tisha on the cheek, that she had seen Tisha and Samuel on Tisha's bed one time, and that she had seen Tisha and Samuel sitting on a "bed" in the back of Samuel's pickup (R102:156-61).

One neighbor, Judy Paulick, confirmed the unsanitary condition of Jones' house, describing it as a "disgusting pigsty," but also claimed to have once seen Samuel kiss Tisha goodby (R103:12-13). Another neighbor, and friend of Jones, Rachel Davis, claimed that she saw Samuel's car at Jones' home almost every night after Jones left on her paper route (*id.*:19-20).

Samuel's probation officer, Darryl Meenk, testified that Samuel was on DIS electronic monitoring until sometime in October, 1995, requiring him to be at home in the evenings (R103:34).

A jail inmate, Mark O'Kray, also testified. Soon after getting into a fight with Samuel in jail in April, 1997, O'Kray contacted the

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[3] Contrary to the claims of these witnesses, Tisha's best friend at the time, Molly Maxwell, testified that Tisha never talked much about her boyfriends and that Tisha never said she was having sex with Samuel (R103:191-92).

police and claimed that Samuel had admitted to him that he and Tisha had sex in her bedroom the night before they left. (R103:38-41).

Tisha admitted making the statements to Sagmeister and Schraufnagel, but testified that they were false and made only because she was told that she would not get her baby back unless she "cooperated." (R103:154-73; R104:206-11). She also testified that she never told her friends that she was having sex with Samuel (R104:212-16).

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 1

Wis. Stat. §948.31(1)(b) prohibits three separate offenses: causing a child to leave, taking a child away, or withholding a child for more than 12 hours. *See State v. Inglin*, 224 Wis.2d 764, 592 N.W.2d 666, 669-70 (Ct. App. 1999). The evidence here was sufficient for the jury to convict on the first of these possible grounds, as in fact was charged in the information: Mr. Samuel cooperated with Tisha's decision to leave home and thus may be deemed to have "caused" her to leave. *Cf. State v. Deer*, 125 Wis.2d 357, 372 N.W.2d 176 (Ct. App. 1985).

The "causes to leave" theory, however, was not before the jury. Without objection from the state (*see* R105:15), the jury instructions referred only to the "takes away" theory (*id.*:89-90). Because the evidence was insufficient to support a conviction on the only theory before the jury, Samuel's conviction under Count 1 must

be reversed and that count dismissed.

As the Supreme Court recently reaffirmed, the Court can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. *State v. Wulff*, 207 Wis.2d 143, 557 N.W.2d 813, 817 (1997); *see Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury").

Each essential element of the offense must be proved by the state beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

While the evidence may have been sufficient had the Court instructed on the "caused to leave" theory of §948.31(1)(b), it did not do so, and the evidence does not support conviction on the "takes away" theory actually presented to the jury. The evidence established that Samuel did not take Tisha away from her mother, as required for conviction under that theory. Rather, it is undisputed that Tisha left of her own free will to go with Samuel.

Contrary to the state's suggestion below (R87:1-3), "takes away," as used in the statute and instruction, cannot be read so broadly as to encompass the act of causing another to leave or to help someone leave voluntarily on their own. "Causes to leave" must mean something different than "takes away" or that language would be rendered surplusage, a result which this Court must avoid when, as here, it is unnecessary. *Wyss v. Albee*, 193 Wis.2d 101, 532 N.W.2d 444, 448 (1995). Because a reasonable alternative construction which avoids that result is readily available, this Court must not

adopt the state's theory. *See, e.g., id.*

Indeed, the most reasonable analysis focuses on the statutory language which in turn focuses on the "moving force" at work, whether the defendant or the child. The first alternative, "takes away," involves the situation in which the defendant takes a child away from her home or parents. The moving force under that provision, as demonstrated by the verb "takes," is the defendant. This alternative does not, as the state suggested below, require either a forceful taking or a taking against the will of the child (R87:1). The child may be indifferent or too young to comprehend what is going on.

The second alternative is where the defendant "causes the child to leave." Here, the child is not "taken" but leaves on her own accord, although the defendant has contributed to that decision by persuasion or otherwise. The use of the verb "leave" demonstrates a focus on the wilful act of the child.

It is the "causing to leave" alternative which the state initially charged, and which might have been sufficient for conviction had the jury been given the opportunity to address it. The fact is, however, that the jury never was given that opportunity. It was instructed only on the "takes away" theory.

While §948.31(1)(b) does not speak of the rights of the child or of her consent, that does not make her wishes irrelevant under this statute. One cannot ignore that a child, as amply demonstrated by the facts of this case, may have a mind of her own. The statutory distinction between "takes away" and "causes to leave" merely reflects that children are not chattels or mindless automatons.

Reversal is required in this case, not because Tisha "consented" to Samuel's actions, but because his actions did not constitute the act of taking her away from her legal custodian, as required for conviction under the instructions given the jury.

The state's attempt below to distinguish "takes away" from "causes to leave" on the basis of whether the defendant is physically present at the time the child exits the home (R87:2-3) is both unreasonable and ineffective. Nothing in the statutory language suggests that the defendant's presence has any relevance whatsoever. Rather, that language focuses on the moving force: the defendant who *takes* the child away or the child who *leaves*. If the child wilfully leaves, she is not "taken" regardless whether the defendant is present at the time.

The state's attempted distinction, moreover, does not save its conviction in this case. Under the state's theory, it is decisive whether the defendant was physically present when Tisha exited her mother's house. Under the state's construction, Samuel did not "take [Tisha] away" if he did not escort her from the home and instead waited outside or a block or two away (R87:2-3). Because there was no evidence that Samuel physically escorted Tisha from the house, the evidence was insufficient even under the state's theory.

The post-conviction court below asserted yet another theory, that the relevant act of "taking away" consisted not of Tisha's leaving her mother's home, but of Samuel's leaving the area or the state with her:

> Now, to this court when an adult has a child in their physical custody or control and they leave the area with that child without the parents' consent or permis-

sion a taking has occurred.

* * *

. . . Again, to this court that act of taking the child and taking them into physical custody and control outside the area is the taking.

(R108:24-26; App. 3-5).

Under the circuit court's analysis, therefore, it is sufficient for conviction on a "takes away" theory if the defendant assumes custody or control over a child at some point *after* she has already left home or custody of her parents. Overlooked by that analysis, however, is the fact that the required "taking" under §948.31(1)(b) must be "from a legal custodian," not merely "from the area." Likewise the jury instructions in this case required that "the defendant took T.L.L. *from her parents* without their consent" (R105:89 (emphasis added)).

Once the child has left the custody of her parents of her own accord, as here, the defendant's later act of leaving the area or the state accompanied by the child does not constitute taking the child from the parents' custody in violation of §948.31(1)(b). She already is outside their custody by her own actions and thus cannot be "taken from them."

An analogous situation is where a thief takes property from its owner and then abandons it, at which point the defendant finds the property and assumes custody over it. While that hypothetical defendant may be guilty of some offense, he is not guilty of theft from the owner because the property was not in the owner's custody or control at the time the defendant acquired it. *See La Porte Motor Co. v. Fireman's Ins. Co.*, 209 Wis. 397, 245 N.W. 105 (1932) (car left parked on street not taken from the possession of the person with

right to possession).

The state did not object to the instruction and the evidence was insufficient to support conviction under the instruction. The conviction under Count 1 and the sentence under that count thus must be vacated and that count dismissed. *E.g.*, *Wulff*, *supra*.

II.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 2

The evidence was insufficient under Count 2 for the same reasons. Like §948.31(1)(b), Wis. Stat. §948.30(1)(a) criminalizes the act of taking a child from the child's home or custody of her parents and the jury was so instructed (R105:90-92). As with Count 1, however, the evidence was uncontested that Tisha voluntarily left home with Samuel, although there was some dispute whether she left because she was thrown out or because she just ran away from home.

Because Tisha left home voluntarily under either scenario, the evidence failed to establish the "taking" necessary for conviction. The evidence at most shows that Samuel caused Tisha to leave or enticed her away. However, the legislature deleted such an option from the abduction statute in 1987. *See* 1987 Wis. Act 332, §55; Comment--1987 Act 332 (following Wis. Stat. Ann. §948.30):

> [1987 Act 332] [r]evises the current abduction of a child statute to:
>
> * * *
>
> 3. Eliminate the prohibition in the current abduction statute against *enticing* a child from his or her home or the custody of his or her parent or guardian. This provision is unnecessary since current law and this bill contain a specific prohibition relating to

child enticement.

Neither the jury nor this Court can write into the statute that which the Legislature intentionally has removed. *E.g.*, *Debeck v. D.N.R.*, 172 Wis.2d 382, 493 N.W.2d 234, 238 (Ct. App. 1992) (Court may not "rewrite" statute to comport with its policy concerns).

The evidence thus was insufficient to support conviction under the statute and the instruction given. The conviction under Count 2 and the sentence under that count thus must be vacated and that count dismissed. *E.g.*, *Wulff*, *supra*.

III.

ADMISSION OF TISHA'S PRIOR STATEMENTS TO STATE AGENTS VIOLATED SAMUEL'S RIGHTS TO DUE PROCESS

A. Background

Prior to trial, Mr. Samuel moved for suppression of Tisha's statements to Officer Sagmeister and Mr. Schraufnagel on the grounds they were coerced. The Court heard evidence on the claim on September 18 1998. (R100:8-54).

Tisha gave birth to her daughter on March 10, 1997. On March 12, 1997, a secure custody hearing was held to determine placement for Tisha and her baby. Tisha was placed in her father's custody, while the baby was placed in the custody of the Department of Social Services, with placement to be determined at an intake conference. (R100:44-45).

An intake conference was held immediately following the custody hearing. Present were Corporation Counsel Grant Thomas; County intake worker Kim Threw; the social worker on Tisha's

delinquency matters, Chris Stanaszak; David Keck, Tisha's attorney; and a physical and sexual abuse investigator from the Department of Social Services, Rodney Schraufnagel. Tisha's father, Peter Leyh, arrived later, as did Officer Steven Sagmeister and Peter's girlfriend, Catherine Stelzner. (*Id.*:10, 45). The supposed purpose of the intake conference was to determine where the baby would be placed (*id.*:44-45).

Tisha testified that, at the time of the intake conference, she was tired and under the influence of drugs, having only recently given birth. (R100:10, 12). She also testified that, despite the limited purpose of the intake conference, a number of questions were asked at that time regarding her sex life with Stanley Samuel and where they had been during their trip (*id.*:10-11, 19-20). When Tisha declined to answer the questions as irrelevant to placement of her baby, the questioners were not satisfied and told her several times that she must "cooperate" in order to get her baby back. They told her that she would have to give Officer Sagmeister a statement prior to the March 14 hearing on the baby's custody in order to get her back. (*Id.*:10-14, 20-23, 46-47).

Tisha felt quite intimidated and believed that she had to "cooperate" to get her baby back (R100:14-15). Accordingly, she met with Sagmeister and Schraufnagel on March 13, 1997, and gave them the statement (*id.*:15-16). Beforehand, her father told her he had spoken with Schraufnagel and that what they wanted was an account of a sexual relationship with Samuel before they left Wisconsin and a statement that she wanted to come home (*id.*:27-28). After she gave the inculpatory statement, her baby was returned to

her on March 14, 1997 (*id.*:16, 48).

Immediately after the hearing on March 14, Schraufnagel and Sagmeister had Tisha give a second statement because the tape recording of the first one did not come out (R100:21). On March 21, 1997, Schraufnagel and Sagmeister had Tisha provide a written statement. Although her daughter had been returned to her and the officers made no express threats to her at that time, Tisha was still intimidated by the statements and results of the intake conference and felt she still needed to "cooperate" to keep her baby (*id.*:17-18).

Peter Leyh testified that he was surprised by the questions at the intake conference, which he thought would be limited to placement for the baby (R100:34). The questioners became angry for Tisha's "not cooperating" in the investigation and stated that, in the absence of "cooperation," they could not trust her with the baby (*id.*:36-37). Peter admitted that Schraufnagel had relayed to him the areas of "cooperation" they were interested in addressing (*id.*:38).

Cathy Stelsner testified that she asked at the intake conference for the rationale for taking Tisha's baby. She was told that Tisha was not giving them the information that they wanted, but that they would consider giving the baby back if they saw some "cooperation." Stelsner viewed their position as "blackmail" and felt they were using the baby as a pawn. (R100:49-51).

Tisha's attorney was not with her when she gave the inculpatory statements (R100:48), and her father was only with her for a short time during the statements and then left (R100:39, 41, 42).

The State presented no witnesses at the hearing. (R100:54).

At the hearing, the circuit court expressed some concern about

authority for suppressing coerced statements made by a witness rather than by the defendant and requested briefs on that issue, as well as on the issue of coercion (R100:6-8, 55). The parties filed briefs, but neither found authority addressing this issue (R40; R43:2). Defense counsel argued that the statements were coerced and that the same standards for suppression should apply to witness statements to avoid the incentive to coerce statements from "uncooperative" witnesses, statements which would be inherently untrustworthy. (R40).

The state did not respond to the coercion argument (*see* R43:2), and therefore conceded it. *Charolais Breeding Ranches, Ltd. v. FPC Securities*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Instead, it argued solely that suppression is not a proper remedy for state coercion of witnesses. (R43:2).

By written decision dated November 14, 1997, the circuit court denied the motion to suppress Tisha's statements (R46:1-2; App. 12-13). The court did not decide whether Tisha's prior statements in fact were coerced. Instead, it held that the statements could not be suppressed even if they were coerced:

> I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley [sic] on the ground that they were coerced, and deny defendant's motion to suppress them.

(R46:2; App. 13).

By post-conviction motion, Samuel again raised this issue. He there noted both that the United States Supreme Court had held that statements are coerced and involuntary if extracted by threats to take away a person's child and that federal courts consistently have held that a defendant's due process rights are violated by admission at trial

of a coerced witness statement. (R84:7-13).

Following legal arguments on September 30, 1999 (R108:8-24), the circuit court, Hon. Barbara Hart-Key, presiding, again denied the motion. In essence, the court held that (1) the federal cases upholding the defendant's due process right to suppression of coerced witness statements were distinguishable because the witnesses in those cases were potential codefendants rather than victims, (2) Tisha's statements were not involuntary or coerced because she had brought the removal of her baby upon herself by running away from home, (3) that the officers did not expressly tell Tisha what to say, and (4) there was some level of corroboration for the statements (R108:26-7; App. 5-6).

B. Admission of Tisha's Statements Was Reversible Error.

While overlooked by the parties and the court at trial, there is in fact ample authority supporting suppression of coerced witness statements on due process grounds. Contrary to the opinion of the post-conviction court, moreover, there is no doubt but that that authority is fully applicable here and that Tisha's statements were coerced and involuntary. Because the improper admission of Tisha's coerced statements was not harmless, Samuel is entitled to a new trial.

1. The Statements Were Coerced and Involuntary.

The voluntariness of a confession turns on whether the person "made an independent and informed choice of his own free will,

possessing the capability to do so, his will not being over-borne by the pressures and circumstances swirling around him." *United States v. Castaneda-Castaneda*, 729 F.2d 1360, 1362 (7th Cir. 1984) (citation omitted), *cert. denied,* 469 U.S. 1219 (1985). Voluntariness depends on the totality of the circumstances and must be evaluated on a case-by-case basis. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

Although coercive police activity is a necessary predicate to the finding that a statement is involuntary under the Due Process Clause, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), coercive activity alone does not, in and of itself, establish involuntariness. Rather, the "[d]etermination of whether a statement is voluntary requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressures." *State v. Pheil,* 152 Wis.2d 523, 449 N.W.2d 858, 863 (Ct. App. 1989). It is important under this analysis to determine that the individual "was not the victim of a conspicuously unequal confrontation in which the pressures brought to bear on him by representatives of the state exceed[ed] the [individual's] ability to resist." *State v. Clappes*, 136 Wis.2d 222, 401 N.W.2d 759, 765 (1987) (citation omitted).

Because the historical facts are undisputed, the state having chosen to present no evidence at the suppression hearing, this Court must review the issues of coercion and voluntariness *de novo*. *Miller v. Fenton*, 474 U.S. 104 (1985).

There is no doubt that Tisha's statements were coerced. She was told numerous times that she would have to "cooperate" with the police or her newborn baby would be taken from her. When she did

not "cooperate" by providing a statement against Samuel, the officers followed through on their threat and took her baby. Tisha was told that the return of her baby turned on her "cooperation" in the criminal investigation. She also was told that her "cooperation" was necessary to prosecute Samuel. (*E.g.*, R100:38-9, 41, 43).

From the context of these statements to her it was quite obvious to all involved what the supposed "cooperation" entailed. Samuel was under arrest and it was the police, not the social workers, with whom Tisha was to "cooperate" in order to get her baby back. At the intake conference, Grant Thomas and Kim Threw became angry with Tisha, said that "she was failing to cooperate in the investigation" (R100:36), and directed her to speak with the police whom, she was also told, needed her cooperation in order to prosecute Samuel *(e.g., id.*:43). Schraufnagel, through Tisha's father, expressly told her that she had to give an account of a sexual relationship with Samuel before they left Wisconsin (*id.*:27-28).

It does not take a rocket scientist to understand that the "cooperation" at issue under these circumstances did not include statements exculpating Samuel, but rather required just the opposite. It was eminently reasonable to construe the agents' statements about "cooperation," as Tisha did, as requiring statements supporting a prosecution of Samuel. (R100:31, 43).

The statements thus plainly were coerced. *E.g.*, *Lynumn v. Illinois*, 372 U.S. 528 (1963) (oral confession, made by defendant only after police told her that state aid would be cut off and her children taken from her, was coerced in violation of due process). The Ninth Circuit Court of Appeals explained, in language equally

applicable here, the coercive nature of such threats to take a child in the absence of "cooperation:"

> We think it clear that the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. We think it equally clear that such would be the conclusion which Tingle could reasonably be expected to draw from the agent's use of this technique. *The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence" proscribed by Malloy [v. Hogan, 378 U.S. 1 (1964).]*

United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (Emphasis added).

As in *Lynumn* and *Tingle*, the state agents deliberately preyed on Tisha's maternal instinct and inculcated fear in her that her newborn child would not be returned to her until and unless she provided "cooperation" by incriminating Samuel. Indeed, the coercive effect of the agents' actions in this case were, if anything, more forceful than those in the cited authorities, because the officers here in fact did take Tisha's baby from her pending her "cooperation." The officers in *Lynumn* and *Tingle* merely threatened to do so. While the defendants in those cases may have believed the officers had the authority and would follow through on their threats, Tisha knew first hand that the officers here would do so because they already had taken her baby from her for her failure to "cooperate."

Contrary to the court's suggestion below (R100:26; App. 5), it is wholly irrelevant whether Tisha somehow deserved to have her

child taken due to her decision to leave home and travel with Samuel. In both *Lynumn* and *Tingle*, the courts found that statements were coerced and involuntary despite the fact that the individuals at issue were believed to have committed criminal offenses. In each of those cases, moreover, the threatened loss of a child was based upon the individual's supposed commission of that offense. They both were told that, only by making the statement sought by the officers could they avoid losing their children. Of course, that is exactly the situation here.

Even if Tisha's conduct could have justified the taking of her child, the evidence is clear that it was not her actions with Samuel, but her refusal to tell the officers what they wanted to hear, which placed the child in a foster home. The key to releasing the child to her mother was Tisha's statements incriminating Samuel; nothing changed between March 12, when the agents took her child, and March 14, when they returned her, except that Tisha caved in and provided such a statement.

In addition to the overwhelming coercive effect of the taking of her child pending her "cooperation" against Samuel, the Court must consider Tisha's personal characteristics. *Pheil, supra.*

Tisha was only 16-years old at the time of her statements, was left alone to deal with the officers,[4] and had only recently given birth to her first child. It was that child, moreover, whom the state agents used as their lever to pry an inculpatory statement from her. In both

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[4] Contrary to the post-conviction court's finding (R108:26; App. 5), Tisha's attorney was not with her when she gave the inculpatory statements (R100:48), and her father was only with her for a short time during the statements and then left (R100:39, 41, 42). That finding thus was clearly erroneous.

Tingle and *Lynumn* it appears that both the victims of the official coercion and their children were much older.

When viewed together, the state tactics applied here were conducted "so as to 'control and coerce [Tisha's] mind," *Clappes*, 401 N.W.2d at 767, quoting *Phillips v. State*, 29 Wis.2d 521, 530, 139 N.W.2d 41 (1966), and that Tisha's resulting statements were not the product of a "free and unconstrained will, reflecting deliberateness of choice." *Id.* at 765 (citation omitted). Tisha was not at all inclined to make inculpatory statements to the state agents and declined to do so prior to being subjected to the coercive tactics employed here. *Cf. Haynes v. Washington*, 373 U.S. 503, 514 (1963). Instead, those statements were wrenched from her by the state's use of "overbearing inquisitorial techniques." *See Clappes*, 401 N.W.2d at 766 (citation omitted).

"The entire thrust of police interrogation [in this case] was to put [Tisha] in such an emotional state as to impair [her] capacity for rational judgment." *Miranda v. Arizona*, 384 U.S. 436, 465 (1966). In this, the state succeeded. The resulting statements therefore were involuntary.

Finally, it is simply irrelevant whether, as the post-conviction court found, certain peripheral aspects of the statements were corroborated by other witnesses (R108:27; App. 6). Even if the statements had been fully corroborated by independent evidence and demonstrated to be truthful, which they were not, the purported accuracy of a statement is irrelevant to whether it was voluntary or admissible. *State v. Agnello*, 226 Wis.2d 164, 593 N.W.2d 427, 431 ¶13 (1999) ("It is well settled constitutional law that the truthfulness

of a confession can play no role in determining whether the confession was voluntarily given." (citations omitted).

2. Admission of Coerced Witness Statements Violates the Defendant's Due Process Rights

There likewise can be no question that a defendant has the right to challenge admission against him or her of a coerced statement given by another. The federal courts uniformly have held as much. *See, e.g., United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person"); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause"), *cert. denied,* 513 U.S. 1085 (1995); *United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985) ("A defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics" (footnote and citations omitted); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973), *aff'g* 354 F.Supp. 1331 (E.D. Mich. 1972). *See also LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974):

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . .. Yet methods offensive when used against an accused do not magically become any

less so when exerted against a witness.

This right to suppression of coerced witness statements is based in the due process right to a fair trial, and is wholly independent of the defendant's right to be free from compelled self-incrimination or to use of his or her own coerced statements at trial. *E.g.*, *Gonzales*, 164 F.3d at 1289. The defendant is not, as the state and the court suggested below (R43:2; R108:27; App. 6), limited to challenging the reliability of such evidence before the jury. *E.g.*, *Gonzales*, 164 F.3d at 1289.

The state's attempt to distinguish these authorities, although adopted by the court below (R108:26-27; App. 5-6), simply makes no sense. As demonstrated by the language of the authorities cited above, it is the government coercion which renders admission of coerced witness statements violative of a defendant's right to a fair trial; whether that witness also was a potential codefendant is wholly irrelevant.

While this Court has not squarely addressed this point in a published decision, it's discussion of the protections provided by the Due Process Clause fully applies to situations such as this. In *State v. Pheil*, 152 Wis.2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989), for instance, the Court recognized that "[t]he fourteenth amendment prohibits involuntary statements because of their inherent unreliability and the judicial system's unwillingness to tolerate illegal police behavior." A coerced statement is inherently unreliable, and is no less so merely because wrung from a "victim" witness rather than a "codefendant" witness. Nor do such offensive methods of obtaining evidence suddenly become less so when used on a "victim"

rather than on a codefendant. Indeed, one would assume them to be more offensive when applied to the innocent party whom the law supposedly was intended to protect.

This Court also has acknowledged that there is a due process line which the state may not cross in obtaining testimony or evidence against a defendant. *See State v. Nerison*, 130 Wis.2d 313, 387 N.W.2d 128, 131 (Ct. App. 1986), *rev'd on other grounds*, 136 Wis.2d 37, 401 N.W.2d 1 (1987).[5] By coercing the evidence from Tisha, the state clearly crossed that line.

The state's coercion of statements from Tisha violated due process on another ground as well. It is well-established that a defendant's constitutional rights are implicated where the state (or even the judge) employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify. *Webb v. Texas*, 409 U.S. 95 (1972) (due process violated where judge "gratuitously singled out" defense witness for a lengthy and unnecessarily strong admonition on dangers of perjury, resulting in witness' refusal to testify); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) (due process violated where prosecutor substantially interfered with decision of defendant's wife to testify);

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[5] Although the Supreme Court reversed this Court's specific application of the rule in *Nerison*, it did not reject the holding that there is in fact a due process "line" which the state may not cross in obtaining evidence. Rather, it merely held that due process did not require exclusion of evidence by accomplices testifying under an immunity agreement so long as sufficient procedural safeguards were in place. 401 N.W.2d at 5. The due process line remains, although the specific tactics in *Nerison* were found not to cross it. *Id.* at 8.

Unlike the type of immunized testimony at issue in *Nerison*, Samuel was denied at least one very substantial due process protection regarding the admission of Tisha's out-of-court statements: the oath.

see State v. Koller, 87 Wis.2d 253, 274 N.W.2d 651, 664-65 (1979). Just as it violates a defendant's due process rights to use coercion to deny him the testimony of a defense witness, so too must it violate due process to use such coercion to create evidence against him and, in the process, to nullify a defense witness' evidence.

This is not a case in which the state merely coerced a witness to attend the trial or to answer questions put to her. The state, like the defense, is entitled to subpoena witnesses and to require them to testify at trial. What the state cannot legally do, however, is force the witness to provide a specific response to those questions. Yet, that is exactly what the state agents did in this case, depriving Tisha of her child until she "cooperated" by providing inculpatory statements against Samuel.

3. The Error was not Harmless.

The state cannot meet its burden of proving that the admission of Tisha's prior statements was harmless beyond a reasonable doubt. *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (state must demonstrate harmlessness beyond reasonable doubt). Indeed, virtually the state's entire case consisted of the prior statements and its efforts to provide some minimal level of corroboration for peripheral aspects of those statements. Tisha's trial testimony directly contradicted those portions of the prior statements helpful to the state. Without the prior statements, in short, the state had no case.

Admission of the prior statements thus was error requiring reversal and a new trial without such evidence. *E.g.*, *LaFrance*, *supra*; *Bradford*, *supra*.

IV.

THE COURT DENIED SAMUEL DUE PROCESS AT SENTENCING BY CONSIDERING SEALED EVIDENCE FROM A SEPARATE PROCEEDING

At sentencing, the Court expressly relied upon testimony given at a separate proceeding to which Samuel and his attorney had no access:

> As to seriousness, the Court has heard testimony in another proceeding, and incidently [sic], I will make a transcript of the testimony on which this finding is based available in a sealed file for purposes of the appeal. But the effect on Ms. Leyh, whether she recognizes it or not, is substantial. And she will require long-term counseling, perhaps treatment in the future. She's been exposed to a criminal environment over a long period of time. There is testimony that she has considerable disrespect for authority, and certainly that exposure can hardly be expected not to have increased that.

(R107:63-64; *see id.*:71 ("And, as indicated, I will make available the transcript of the psychological evidence heard by this Court in another action for review by the appellate court")).[6]

The "psychological evidence" relied upon by the Court was not disclosed to the defense, Samuel was not a party to that other proceeding, and he had no opportunity to rebut that supposed evidence.[7]

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[6] The sealed transcript was not included in the record initially transmitted to this Court. By Order dated December 30, 1999, however, the circuit court was directed to transmit a supplemental record containing that sealed transcript.

[7] Contrary to the circuit court's statement in denying Samuel's post-conviction motion, defense counsel was not permitted to view the sealed (continued...)

Due process requires reasonable notice of the evidence the Court will rely upon and a reasonable opportunity to rebut evidence offered against a defendant. Accordingly, criminal sentences cannot be based, as here, upon evidence not disclosed to the defendant. *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality decision); *State v. Skaff*, 152 Wis.2d 48, 447 N.W.2d 84, 86-87 (Ct. App. 1989). To deny the defendant access to information relied upon at sentencing "is to prejudicially deny him an essential factor of due process, *i.e.*, a procedure conducive to sentencing based on correct information." *Id.*, 447 N.W.2d at 88 (citation omitted). The procedure used by the sentencing court here was more appropriate to a Kafka novel than to a system dedicated to justice.

Contrary to the post-conviction court's holding below (R108:30), it is wholly irrelevant for purposes of due process that the sentencing Court might have reached the same decision without relying on the improper information. *Cf. United States ex rel. Welch v Lane*, 738 F.2d 863, 867 (7th Cir. 1984) (where sentencing violates due process because based on inaccurate information, "the fact that other information might have justified the sentence, independent of the inaccurate information, is irrelevant when the Court has relied on inaccurate information as part of the basis of the sentence").

Because Samuel was sentenced based upon secret evidence he

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[7](...continued)
document (R108:30). As indicated on the record at the time of the sentencing, the transcript on which the sentencing court relied was to be sealed "for review by the appellate court," not by the defendant or defense counsel (R107:71; *see id.*:63-64). Post-conviction counsel raised this factual error during the motion hearing, and both counsel acknowledged that the transcript was *not* to be available for counsel to review (R108:31-32).

had no reasonable opportunity to rebut, he was denied due process and is entitled to resentencing before a different judge, untainted by the secret evidence. *Skaff, supra.*

CONCLUSION

For these reasons, the evidence was insufficient on Counts 1 and 2 and the convictions on those two counts accordingly must be reversed and the charges dismissed. Because the trial court erred in admitting Tisha's prior coerced statements into evidence, and that error was not harmless, Samuel also is entitled to reversal of his conviction on all three counts and a new trial. Should such relief not be granted, Samuel is entitled to resentencing for the reasons stated in Section IV.

Dated at Milwaukee, Wisconsin, January 7, 2000.

Respectfully submitted,

STANLEY SAMUEL, Defendant-Appellant

SHELLOW, SHELLOW & GLYNN, S.C.

Robert R. Henak
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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,317 words.

Robert R. Henak

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APPENDIX

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal no. 97-3191

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RALPH D. SMYTHE,

Defendant-Appellant.

MOTION FOR EXTENSION OF TIME TO FILE
BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COMES NOW the defendant-appellant, RALPH D. SMYTHE, by his attorneys, KALAL & ASSOCIATES, and, pursuant to Rule 809.82(2), respectfully moves this Court to extend the due date for the filing of the opening brief herein of defendant-appellant from December 29, 1997, to January 6, 1998, upon the following grounds:

1. Primary responsibility within the office of counsel for defendant-appellant for preparation of the appeal brief in this appeal is assigned within counsel's office to attorney Michelle A Tjader. Attorney Tjader is on vacation from December 25, 1997 through January 4, 1998, a vacation previously planned.

2. Due to Attorney Tjader's vacation, she was able to only complete the draft stage of the brief herein prior to her scheduled vacation departure.

3. No other requests for extension of time have been made herein or are contemplated.

Dated at Madison, Wisconsin, December 29, 1997.

Respectfully submitted,

RALPH D. SMYTHE,
Defendant-Appellant

KALAL & ASSOCIATES
Attorneys for the Defendant-Appellant
217 South Hamilton Street, Ste. 500
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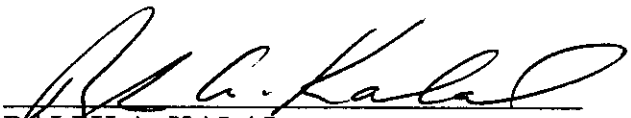
(608) 255-9295

BY: 
RALPH A. KALAL
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal no. 97-3191

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RALPH D. SMYTHE,

Defendant-Appellant.

AFFIDAVIT IN SUPPORT OF
MOTION FOR EXTENSION OF TIME TO FILE
BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

RALPH A. KALAL, being first duly sworn, on oath says:

1. He is a member of the firm of KALAL & ASSOCIATES.

2. The factual statements in the forgoing motion are true to your affiant's own personal knowledge insofar as they relate to the fact of attorney Tjader's vacation and the draft status of the brief on appeal and upon information and belief as they relate to her ability to complete the brief prior to that vacation.

Dated at Madison, Wisconsin, December 29, 1997.

RALPH A. KALAL, Affiant

Subscribed and sworn to before me
this 29th day of December, 1997.

Notary Public, Dane County, WI
My commission expires: 3/26/00.

JAN 5 1997

DISTRICT IV
Office of the Clerk
COURT OF APPEALS
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Marilyn L. Graves
Clerk

January 2, 1998

To:

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Baraboo, WI 53913

Donna Mueller, Clerk
Sauk Co. Courthouse
515 Oak St.
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Hon. Patrick Taggart
Sauk Co. Courthouse
515 Oak St.
Baraboo, WI 53913

Ralph A. Kalal
Michele Anne Tjader
Kalal & Associates
217 S. Hamilton St., Ste 500
Madison, WI 53703

You are hereby notified that the Court has entered the following opinion and order:

97-3191 In re Refusal of Ralph D. Smythe: State v. Ralph D. Smythe (L.C. #97-TR-408)

Before Dykman, P.J.

Appellant Ralph D. Smythe moves to extend the time to file his brief. The record was filed November 17, 1997, making the appellant's brief due December 29, 1997. *See* RULE 809.19(1), STATS. The motion states that primary responsibility for preparation of the brief has been assigned to Attorney Michelle A. Tjader, and that Attorney Tjader is on vacation from December 25, 1997, through January 4, 1998. It further states: "Due to Attorney Tjader's vacation, she was able only to complete the draft stage of the brief herein prior to her scheduled vacation departure." We note that this motion and its

accompanying affidavit, and all previous papers in this appeal, were filed by Attorney Ralph A. Kalal.

Appellant's counsel's firm has a long history of extension motions in this court, and we have in the past issued stern warnings and taken other actions to attempt to reduce their number. We have noted the toll these motions take on this court's time and resources. We have advised counsel that extension motions based on counsel's heavy workload fail to make the showing of good cause required by RULE 809.82(2), STATS., when they become routine. In the past, such motions were routine. For much of this past year, counsel's firm has been reasonable in its requests for extensions. However, we have again noted an increase in such motions. That increase, combined with this motion's complete absence of any showing of why the brief could not be completed during the five weeks before counsel's vacation, leads us to conclude that good cause has not been shown. Therefore, we deny the motion.

This leaves us with the question of what sanction is appropriate under RULE 809.83(2), STATS. When we denied a similar motion by appellant's counsel in a different case, we allowed the respondent to decide whether it wished to file a brief on the merits. *See* ***State v. Mosel***, appeal no. 96-1432-CR, order dated September 18, 1996. The respondent chose not to do so, and we reviewed the decision appealed from on the merits without briefs. We decline to do that in this case. That procedure essentially gives the appellant the benefit of an appeal without the effort of writing briefs. This court, in effect, acts as appellant's counsel. Furthermore, review of the merits is a more difficult and time-consuming process when the court is not assisted by briefing. Our usual sanction for

failure to file an appellant's brief is dismissal. We conclude that dismissal is the appropriate response here.

IT IS ORDERED that the motion to extend the time to file the appellant's brief is denied.

IT IS FURTHER ORDERED that this appeal is dismissed for appellant's failure to file a brief.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal no. 97-3191

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RALPH D. SMYTHE,

Defendant-Appellant.

RENEWED MOTION TO EXTEND TIME FOR FILING OF BRIEF AND APPENDIX OF DEFENDANT-APPELLANT AND OBJECTION TO JANUARY 2, 1998, ORDER

COMES NOW the defendant-appellant, RALPH D. SMYTHE, by his attorneys, KALAL & ASSOCIATES, and, pursuant to Rule 809.82, respectfully renews his motion for extension of time, previously filed with this Court on December 29, 1997, in which to file the brief and appendix of defendant-appellant, which brief and appendix are herewith simultaneously tendered to the Clerk of this Court.

IN SUPPORT OF THIS RENEWED MOTION and in objection to the Order issued in this appeal on January 2, 1997, defendant-appellant respectfully shows to this Court, as follows:

Part I: The Past Practice of Counsel:

1. This Court has faulted counsel for defendant-appellant for what the author of the January 2nd order views as excessive requests for extension of time filed by counsel's firm. Defense counsel believes that the viewpoint of the Court is not justified and is based upon subjective impression rather than actual practice.

2. Counsel has reviewed the filings of briefs by his firm with this Court and the Supreme Court during the entirety of 1997. Counsel and his firm during 1997 filed with this Court or the Supreme Court 53 opening briefs or petitions for review and 27 reply briefs, for a total of 80 briefs filed with the Clerk of this Court or the Supreme Court.

3. Counsel and his firm requested extensions of time in the filing of these briefs a total of 15 times.

4. Opposing counsel in these cases requested extensions of time in the filing of the opposing briefs a total of 15 times.[1]

[1] The numbers of extensions requested by this firm and by opposing counsel include the requests of the Attorney General to the Supreme Court in State v. Konrath, appeal no. 96-1261-CR, which cuumlated to an extension of almost three months duration, and the two motions for extension of time filed by this firm which were necessitated by the extensions allowed to the Staet and which resulted in defendant briefs being due during times when counsel was committed to trial in other matters.

5. Thus, counsel and his firm have requested absolutely no more extensions than have the opposing parties in these appeals. Actually, given that counsel generally represents the appellant before this Court, counsel's track record is *better* than that of the opposing parties, since appellant's counsel, due to the filing of reply briefs, is generally obliged to submit a greater number of briefs to this Court.

Part II: This Court's Operating Procedure:

6. While counsel for defendant-appellant acknowledges that the Internal Operating Procedures of this Court are not binding rules, counsel believes that the operating procedures illustrate a consideration in the exercise of discretion which this Court should consider in light of the draconian sanction which it has imposed through its January 2nd order.

7. Specifically, had counsel not requested, by properly filed motion, an extension of time, it is likely that no sanction whatsoever would have been imposed and that this Court would simply have issued a delinquency notice requiring the filing of the brief within five days after the date of the issuance of the delinquency notice. It is the routine practice of the Clerk of this Court, pursuant to IOP III, that a delinquency notice issue to the counsel for the appellant or respondent whenever an opening or responding brief is not filed within the statutory time requirement. That notice routinely asserts that "unless within five

days of the date of this Order, the Brief of the Appellants/Respondents is served and filed or an extension is requested under Rule 809.14," the appeal will be subject to dismissal or summary reversal.[2]

8. Counsel, therefore, had he simply done nothing, filed no motion, and merely waited for the issuance of the delinquency notice, could have achieved a longer extension than he actually sought, since the issuance of the delinquency notice itself by the Clerk generally does not occur until some period of time has elapsed after the due date of the brief and the calculation of the five day time period specified in such orders does not included holidays or Saturdays or Sundays. Rule 801.15(1)(b).

Part III: The Motion Previously Filed:

9. Counsel filed the motion for extension with this Court on December 29, 1997, because it was not practical to complete and file the brief in this case in the time specified. Counsel perhaps should have provided to this Court a greater factual background to the request, in order to allow the Court more information upon which to evaluate it.

10. Counsel, as indicated in the motion, filed on December 29, 1997, the brief and appendix of defendant-appellant in State v. Patten, appeal no. 97-2927.

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[2] The language quoted is taken directly from the delinquency notice issued by this Court in State v. Steve A. Johnson, appeal no. 97-2708-CR on January 5, 1998, in which the respondent State of Wisconsin has failed to file its brief. Counsel is aware of the notice because counsel represents the defendant-appellant in that case. The delinquency in the filing of the Johnson brief is not included in the calculations of the number of extensions requested by the opposing party set out in Part I of this brief, as counsel views this as a 1998 extension.

Counsel had delegated to another attorney in this firm the task of preparing the brief and appendix in this appeal specifically because counsel knew that the preparation of that brief, in light of the time which counsel had been obliged to put into preparing the reply brief for submission to the Supreme Court on December 23, 1997, in State v. Warren, appeal no. 96-2441, would leave counsel without time sufficient to complete the brief and appendix in the instant appeal. Counsel, therefore, delegated the preparation of the brief, while retaining ultimate responsibility for the content of that brief.

11. Counsel was on vacation from Christmas through New Year's Day. The Court's order of January 2nd notes that counsel must have been in the area and accessible to his office, since the motion for extension was filed on December 29th. The fact, however, is that counsel had a prearranged family vacation with his two children scheduled for the vacation time period, a vacation which counsel regarded and regards with the utmost seriousness. Counsel is in divorce proceedings, and visitation with his children over the holiday time period is not only of the utmost personal value to counsel, but also required certain legal steps to accomplish. Counsel did not believe it to be appropriate to take time from that vacation to complete the brief and appendix in this appeal, given that there had been no prior request for an extension, and that the requested extension was a request for a five working day extension.

12. Counsel, nonetheless, interrupted that family vacation time to prepare the motion previously filed in this case. Counsel prepared that motion in some haste, as his children were awaiting him in the office and counsel has been subjected to criticism in the divorce proceeding by his future ex-wife for having the children at the office during visitation periods. Furthermore, though counsel firmly believes his children to be among the best behaved children on earth, their presence during the drafting of motions does not allow for the most thoughtful preparation of filings with this Court.

Dated at Madison, Wisconsin, January 6, 1998.

Respectfully submitted,

RALPH D. SMYTHE,
Defendant-Appellant

KALAL & ASSOCIATES
Attorneys for the Defendant
217 South Hamilton Street, Ste. 500
Madison, Wisconsin 53703
(608) 255-9295

BY: _____
RALPH A. KALAL
State Bar no. 01015594

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal no. 97-3191

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RALPH D. SMYTHE,

Defendant-Appellant.

AFFIDAVIT IN SUPPORT OF RENEWED MOTION TO EXTEND TIME FOR FILING OF BRIEF AND APPENDIX OF DEFENDANT-APPELLANT AND OBJECTION TO JANUARY 2, 1998, ORDER

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

RALPH A. KALAL, being first duly sworn, on oath says:

1. He is a member of the firm of KALAL & ASSOCIATES.

2. The factual statements in the forgoing motion are true to your affiant's own personal knowledge.

Dated at Madison, Wisconsin, January 6, 1998.

RALPH A. KALAL, Affiant

Subscribed and sworn to before me
this 6th day of January, 1998.

Notary Public, Dane County, WI
My commission expires: 9/9/01

JAN 9 1998

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Marilyn L. Graves
Clerk

January 9, 1998

To:

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Ralph A. Kalal
Kalal & Associates
217 South Hamilton Street, Ste. 500
Madison, WI 53703

You are hereby notified that the Court has entered the following order:

97-3191 In the Matter of the Refusal of Ralph D. Smythe: State of Wisconsin v. Ralph D. Smythe

Before Dykman, P.J.

By order of January 2, 1998, we denied the motion by appellant Ralph D. Smythe to extend the time to file his brief, and we dismissed the appeal as a sanction for failure to file the brief. Smythe has renewed his motion and objects to the January 2 order. As stated in that order, we denied the motion due to appellant's counsel's long history of extension motions in this court and the inadequate showing made in this particular motion.

Smythe's counsel objects to our description of his past practice and asserts that it is not justified and is based upon "subjective impression rather than actual practice." To support this argument, counsel provides us with his analysis of his 1997 extension practice. He states that his firm filed with this court or the Wisconsin Supreme Court 53 opening briefs or petitions for review and 27 reply briefs, for a total of 80 filings. His firm requested extensions for those filings 15 times, while opposing counsel also requested extensions 15 times. Thus, he asserts, his firm has requested no more extensions than opposing parties, and, given the fact that in his customary position as appellant he must file two briefs while his opponent files only one, his percentage record on extensions is actually better than his opponents'.

This analysis is unconvincing for several reasons. First, it includes filings in the supreme court. Counsel's extension record in other courts is of no concern to us in our administration of this court. Second, the analysis includes the filing of petitions for review. This information is irrelevant to counsel's extension record because the time to file a petition for review is jurisdictional and cannot be extended. *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis.2d 246, 253-54, 548 N.W.2d 45 (1996).

Third, our concern about counsel's extension record would be unchanged even if it is true that the number requested by his firm in this court is no greater than those requested by his opponents. That is because his opponents are usually municipal or state agencies which have virtually no control over their case loads or budgets. Counsel, on the other hand, has complete control of both those elements of his practice. Therefore, it is reasonable to expect that counsel's firm should be better able to conduct its business in a

timely fashion which does not burden this court with routine motions and unnecessarily prolong litigation.

Finally, counsel's statistics are for the entirety of 1997. We do not dispute that his firm's extension record for much of 1997 was reasonable, and we stated as much in our January 2 order. However, as we also stated, our decision was based partly on our perception that there has been a recent increase. Counsel's response does not dispute the accuracy of that perception.

Smythe also argues that our normal procedure in responding to untimely briefs is something we should consider in our exercise of discretion to impose the sanction of dismissal in this case. Specifically, Smythe is referring to the form notice which is usually issued by our clerk when a brief has not been timely filed. The notice advises an appellant that the appeal will be dismissed if the brief is not filed within five days. Smythe argues that if his attorney had not filed the original extension motion, but had simply done nothing and waited for the form notice, he would have obtained an extension of the length sought.

The form notice issued by our clerk does not grant an extension. Rather, it is a statement of forbearance from imposing a sanction which the court might otherwise impose. The practical effect may appear to be the same, but the difference is significant. The appellant is correct that our normal procedure would be to allow a party to file a brief within a certain period of time past the date it was due, even without a showing of good cause. However, no party or attorney is *entitled* to forbearance. The fact that we refrain

from immediately imposing sanctions in the normal case does not mean that we must do so in the abnormal case. We have made it clear that we have concluded our normal procedures are inadequate to address appellant's counsel's excessive extension motions. In light of our earlier actions, counsel cannot, and does not, claim to have reasonably relied on our normal procedures as leading him to believe this motion would be granted, or that no sanction would be imposed.

Turning to the specifics of this case, in the original motion Attorney Kalal stated that this brief had been assigned to another attorney at the firm who was unable to complete it before she went on vacation starting December 25. In the renewed motion, Attorney Kalal provides information about his own vacation during that period, but says nothing further about the vacation of the other attorney or about why she was unable to complete the brief before starting her vacation. The discussion of his own vacation might be construed as accepting ultimate responsibility for the brief, and therefore we address it. The motion focuses primarily on the family-oriented nature of the vacation, but ultimately adds little new information. Counsel's motivation for his vacation is understandable, but it does not appear that the children's visitation occurred without advance notice, leaving counsel unable to plan the work load accordingly. The renewed motion does not show good cause for an extension.

Counsel may be without time to adequately process the number of appeals he undertakes. If so, it is counsel's responsibility to add staff sufficient to do the work made necessary by accepting a significant number of appeals.

IT IS ORDERED that the renewed motion to extend the time to file the appellant's brief is denied. The dismissal order of January 2, 1998, is confirmed.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against:

RALPH A. KALAL, Case No. 00-1070-D

Attorney at Law/
Respondent. Code No. 30912

REPORT AND RECOMMENDATION OF REFEREE

This matter came on for hearing on the 5th day of October, 2000, the Board of Attorneys Professional Responsibility appearing by Attorney Robert G. Krohn, and the Respondent Ralph A. Kalal appearing in person and by Attorney Steven M. Glynn. Based upon the testimony, exhibits and files herein I know make the following:

FINDINGS OF FACT

1. The Board of Attorneys Professional Responsibility, hereinafter "the Board", is a body established by the Wisconsin Supreme Court, now operating under Chapters 21 and 22 of the Supreme Court Rules.

2. Ralph A. Kalal, hereinafter "respondent", is an attorney fully licensed to practice law in the State of Wisconsin and all courts of the State after his admission to practice by the Wisconsin Supreme Court in 1973 and practices from an office located at 217 South Hamilton Street, Suite 500, Madison, Wisconsin 53703.

3. Between 1996 and 1998 Attorney Kalal had between one and three associates working for him, including Attorneys Tracy Woods and Stephen Mays. (T12-14)

4. Respondent represented Ralph D. Smythe (Smythe) in the Circuit Court for Sauk County on a charge of Operating a Motor Vehicle While Intoxicated. Smythe's operating privileges were revoked in a refusal proceeding brought under Wis. Stat. 343.05, the Wisconsin Implied Consent Law.

5. Respondent appealed the final order of revocation regarding Smythe's driving privileges to the District IV Court of Appeals.

6. The trial court record was filed with the Court of Appeals on November 17, 1997. By court rule, appellant's brief was due on December 29, 1997.

7. On December 29, 1997, respondent made a motion to the Court of Appeals requesting an extension of five working days from that time within which to file their brief.

8. By Order of January 2, 1998, the Court of Appeals denied the motion of appellant Smythe to extend the time to file his brief and dismissed the appeal as a sanction for failure to file the appellate brief.

9. On January 6, 1998, the date requested within appellant's motion to extend the time to file the brief, respondent filed appellant's brief.

10. On January 6, 1998, respondent filed a renewed motion to extend the time to file the brief which had, in fact, been filed that day.

11. By order of January 9, 1998, the Court of Appeals denied appellant's motion to file the brief and confirmed its earlier January 2, 1998, order of dismissal.

12. Respondent appealed the Smythe Court of Appeals decision to the Wisconsin Supreme Court.

13. The Wisconsin Supreme Court heard oral argument in the Smythe matter on November 11, 1998. Respondent appeared on behalf of Smythe.

14. During oral argument the following colloquy took place:

> **Justice Crooks:** I have a question, however. During the two years preceding the action that was taken in the *Smythe* case, had either you or your firm in any way been sanctioned by the Court of Appeals, by District IV, for the filing of briefs on a rather regular late basis?
>
> **Chief Justice Abrahamson:** Is that the 1996 case?
>
> **Mr. Kalal:** *Mosel*?
>
> **Chief Justice Abrahamson:** Pardon me?
>
> **Mr. Kalal:** That ...
>
> **Chief Justice Abramahson:** It's referenced here, *Mosel*.
>
> **Mr. Kalal:** Yes.
>
> **Chief Justice Abrahamson:** In an order dated the 18th of September.
>
> **Mr. Kalal:** Correct.
>
> **Justice Crooks:** Was there some warning given when that action was taken?
>
> **Mr. Kalal:** No.
>
> **Justice Bablitch:** Just to follow that up if I may, Justice. On page, appendix 6, in Judge Dykman's first order, he states: "We have advised counsel," which I presume is you, "that extension

> motions based on counsel's heavy workload fail to make the showing of good cause when they become routine" and then on page 19 of this, which is Judge Dykman's second order, he states: "We have made it clear that we have concluded our normal procedures are inadequate to address appellate counsel's, "which I presume is you, "excessive extension motions." I was led to believe by those that somehow they have gotten the word to you or your firm that "hey, you've pushed the envelope too far."
>
> **Mr. Kalal:** I think that it would be fair to say that in a couple of their orders they have indicated that good cause is shown, but have indicated essentially that they were reluctant because they viewed that there had been mor requests than they would like. I will not dispute that. I would not say that they have, with the clarity that is suggested by Judge Dykman's orders said "you do this again, you're going to be wasted."

15. During the two years preceding the *Smythe* case the Court of Appeals discussed the Kalal firm's extension requests in *State v. Lesavage* (Attorney Wood, Ex. 4); *State v. Chamberlain* (Attorney Kalal, Ex. 5); *State v. Gaulrapp* (Attorney Kalal, Ex. 6); *Village of Oregon v.Feiler* (Attorney Wood, Ex. 7); *State v. Kulinski* (Attorneys Wood and Mays, Ex. 8) *State v. Mosel* (Attorney Kalal, Ex. 9); *State v. Size ;* (Attorneys Wood and Mays, Ex. 10).

REPORT AND RECOMMENDATIONS OF REFEREE

1. Discussion of Count One- Extension Request in the Court of Appeals

In Count One of its Complaint, The Board of Attorney's Professional Responsibility alleges that respondent's failure to file the Smythe brief when due in the Court of Appeals, instead filing a motion for an extension on the brief's due date, constitutes a violation of SCR 20:1.3. That rule, "Diligence" is placed in a section entitled Client-Lawyer

Relationship. It reads, "A lawyer shall act with reasonable diligence and promptness in representing a client."

It seems clear from reading both the section heading and comments that this rule is client focused. The comments include :

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

I can find no Wisconsin cases in which this rule has been invoked solely on the basis of an attorney seeking an extension. Since lawyers ask the court for extensions with a high degree of frequency, and for a variety of reasons, it is important to clarify when such a request may constitute grounds for discipline under SCR 20:1.3. The comments suggest two circumstances. One would be when the length of delay is so great that the client's case is impaired or the attorney-client relationship damaged. There is no evidence that respondent's request for a 5 working day extension fits these factors. The second circumstance arises when, without regard to the length of the delay, the client is damaged by the attorney's lack of diligence. If counsel files suit after the expiration of the statute of limitations, it makes no difference if he is one day or one decade late. His lack of diligence and promptness has caused injury to his client, and SCR 20:1.3 would be properly invoked.

In In re Smythe, 225 Wis 2d 456, 592 N.W. 2d 628 (1999) the Supreme Court has made it clear that a number of sanctions directed at attorneys are available when attorney's actions cause delay, including double costs, damages, attorneys fees. I suspect an attempt to pass these costs back to a client would likely offend SCR 20:1.3 as well, as the client in such circumstance suffers financial injury due to the lawyer's delay

But the record does not provide any evidence of the circumstances identified above. In *Smythe* respondent requested an extension, the request was denied and an appeal taken. The Supreme Court remanded the matter and on remand the Court of Appeals granted the extension. There is no evidence of injury to the client. On these facts I cannot find a violation of SCR 20:1.3.

The *Smythe* case notes "...the heavy and overwhelming workload of the court of appeals" and the need to "permit the court to manage its workload in an efficient, effective manner." 225 Wis 2d at 466-467. The opinion states that attorneys whose "slipshod practices abuse the system, create unnecessary work, and deny speedy justice for others" are appropriately referred to the Board of Attorneys Professional responsibility. 225 Wis 2d at 472.

The Court is clearly focused on the institutional, rather than client focused duties of lawyers. This focus is best captured in SCR 20:3.2. Expediting Litigation. "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client." The comments refer to the administration of justice, and note that "Delay should not be indulged merely for the convenience of the advocates."

When attorneys abuse the system, seeking repeated delays on behalf of different clients, SCR 20.3.2 is properly invoked. It was not alleged in this case, and I do not consider whether the facts alleged would or would not have supported such a claim. I note the existence of this rule simply to explore the question of when and how requests for extensions, without proof of client injury, may be considered as the basis for discipline.

2. Discussion of Count Two The Supreme Court Argument

Count Two alleges that Atty Kalal violated SCR 20.3.3 in knowingly making a false statement of fact to the Wisconsin Supreme Court during oral arguments in the *Smythe* case.

Justice Crooks asked, "During the two years preceding the action that was taken in the *Smythe* case, had either you or your firm in any way been sanctioned by the Court of Appeals, by District IV, for the filing of briefs on a rather regular late basis?"

The respondent answered, "No. There was one case and I believe it was referred to in Judge Dykman's second order in which they declined to allow us to file a reply brief and decided the case without benefit of that brief." (Ex. 3)

Respondent was referring to the September 1996 order in the *Mosel* case, in which in September of 1996 the Court of Appeals denied a motion to extend the time for filing appellant's opening brief (*State v. Mosel*, 96-1432-CR, Ex. 9). However, in July of 1996 the court sanctioned Attorney Kalal by imposing a fine when Kalal moved for a second extension after a first extension, filed the date a brief was originally due, had been made and denied. *(State v. Gaulrapp*, 96-1094-CR, Ex. 6)

Attorney Kalal represented Gaulrapp. His firm, consisting of himself and not more than three associates during the time in question, was also sanctioned in cases involving his associates. On July 23, 1966, the same day as the *Gaulrapp* order was issued by Judge Vergeront, an identical fine was imposed on Attorney Tracey A. Wood, Kalal's associate. (*Village of Oregon v. Feiler*, 96-1202, Ex. 7) . In *Feiler*, an initial extension motion was made on the date a brief was due, and after a short extension was granted with an admonition that no further extension were contemplated, Wood moved for a second extension on the new due date.

Thus Kalal's answer, "No. There was one case..." (Ex. 3) was false.

Referring to the *Mosel* order of September18, Justice Crooks next asked, "Was there some warning given when that action was taken?" The response by Attorney Kalal was "No." (Ex. 3)

The *Mosel* order contained the following language,

> In February 1996, in an unrelated appeal we advised Mosel's attorney that an extension motion on the ground of counsel's heavy workload makes a less satisfactory showing of good cause when the workload appears so perpetually heavy that extension motions are routine. (Copy of order attached). We stated that counsel should not assume extensions will be granted. In the months following that order, we imposed a monetary penalty against counsel several times for failure to file a brief timely.
>
> In July 1996, in another unrelated appeal, we again advised counsel not to assume that extension motions will be granted, or to assume the additional time to complete briefs will be provided if the motion is denied. (Copy of order attached) We further cautioned counsel not to assume the a

> financial sanction is the only penalty the court is prepared to impose. We noted that dismissal is also a sanction available under Rule 809.83(2) Stats.
>
> We have reviewed the files of appeals by appellant's counsel. We have received briefs in 26 such appeals in 1996. In 19 of those 26 appeals appellant's counsel sought an extension of the time to file his brief.
>
> Counsel's proclivity for extension motions wastes the resources of this court and causes unnecessary delays. We have advised counsel of our dissatisfaction, and warmed him hat an appeal may be dismissed. Counsel has had ample time to adjust his practice so that such motions are not routine. We conclude the present motion does not show good cause, and therefore we deny it. (Ex. 9, pp. 2-3)

The answer "No" is clearly false. The *Mosel* order attached the Court of Appeals' previous orders in *Gaulrupp* and *Chamberlain (County of Dane v. Chamberlain,* 95-2706, Ex. 5) In addition to the quoted language in *Mosel,* the *Chamberlain* order contained the following language:

> While counsel may have comprehended the court's remarks, it is not clear that such comprehension has substantially reduced counsel's proclivity for extension motions. Counsel should not assume extensions will be granted or, if granted, that they will be for the length requested. Counsel should not assume extraordinary means of delivery, such as facsimile, will be used to respond to routine motions.

Ex 5 p. 2

In the *Gaulrapp* order the court said:

> We caution appellant's counsel not to assume that motions filed on the due date will be granted, or that additional time to complete the brief will be provided if the motion is denied. We also caution counsel not to assume that a financial sanction is the only penalty the court is prepared to impose for the failure to file a brief timely.

Ex 6. P 1-2

The third colloquy contained in Exhibit 3 is between Justice Bablitch and the respondent. Justice Bablitch said:

> Just to follow that up if I may, Justice. On page, appendix 6, in Judge Dykman's first order, he states: "We have advised counsel," which I presume is you, "that extension motions based on counsel's heavy workload fail to make the showing of good cause when they become routine" and then on page 19 of this, which is Judge Dykman's second order, he states: "We have made it clear that we have concluded our normal procedures are inadequate to address appellate counsel's" which I presume is you, "excessive extension motions." I was led to believe by those that somehow they have gotten the word to you or your firm that "hey, you've pushed the envelope too far."

Ex. 3

Attorney Kalal began his answer:

> I think it would be fair to say that in a couple of their orders they have indicate that good cause is shown, but that have indicated essentially that they were reluctant because they viewed that there had been more requests than they would like...(Ex. 3, p 2.)

This remark may be an accurate characterization of the order in *Chamberlain*, where Judge Sundby wrote, "As for the present motion, we reluctantly conclude good cause is

shown." It is inconsistent with the fact that sanctions had been imposed, prior to *Smythe* in *Mosel Gaulrapp* and *Feiler*. And there is more.

In February of 1996, Judge Sundby wrote in Attorney Wood's case, *State v. Lesavage*, 95-3364-CR:

> The motion does not show a workload during those forty days sufficient to justify extension. Nor does it show good cause for an extension of the length requested....Counsel should not assume extension motions will be granted, or that short extensions will be granted even when the motion does not show good cause.
>
> Ex. 4. P.2

In *State v. Kulinski*, 96-1266 in an order directed to Attorneys Wood and Stephen E. Mays, another Kalal Associate, Judge Dykman denied a requested two week extension, saying the grounds articulated (maternity leave) would not be considered as good cause for an extension, unless there was a showing that the leave was unexpected. In October 15, 1996 in *State v. Size*, 96-2070-CR (Ex. 10) Judge Vergeront issued an order directed to Attorneys Mays and Wood. Reviewing the history of the firm's requests for extension, Judge Vergeront wrote.

> Counsels' proclivity for extension motions wastes the resources of this court and causes unnecessary delays.. Until now, first requests for short extensions have usually been handled by the clerk of this court without review by the court. As a result of counsels' abuse of extension motions, all such motions will now be reviewed by the court.

The present motion does not show good cause for an extension.

Ex. 10, P. 3 (footnote omitted)

Attorney Kalal's response ignores at least three instances in which the Court of Appeals explicitly found good cause was not shown; it ignored three previous sanctions, two in cases in which he was counsel, and one of his associates. It ignored the order in *Size* in which the court announced that with respect to Attorney Kalal's firm the practice of reviewing short extension requests would no longer be delegated to the clerk, but instead would be considered by the court. His response to Justice Bablitch does not constitute candor to a tribunal.

In his testimony in the present proceeding, respondent justified his statements in two ways. With respect to orders directed at other members of his firm, he claimed to be unaware of them. I find this position to be not credible. This was a very small law office. He and Attorney Wood were sanctioned by the same court, in the same way, for the same reason, on the same day. I cannot believe this fact was not known to respondent. Nor is it reasonable to think that upon receiving an order announcing that the entire firm's extension requests would henceforth be scrutinized by the court, Associates May and Woods would not share this information with their employer.

Even assuming that he was unaware, respondent's answer to Justice Crooks was incorrect. The Justice asked with respect to sanctions, "...had either you or your firm..." If respondent really did not know whether his associates had been sanctioned by District IV, candor required that he confess ignorance–not answer "No."

With respect to the cases in which Attorney Kalal admitted personal knowledge, his explanation was that at the time of the *Smythe* oral argument, he forgot. This, too, is difficult to believe, since he remember being disciplined in *Mosel,* and the court's sanction in *Mosel* was based on its recitation of previous incidents.

Respondent testified that none of these other cases were central to the argument he was making in *Smythe* and so he was not focused on them. Perhaps they momentarily slipped his mind. But the comments to SCR 20:3.3 make it clear that lawyers have an ongoing duty to remediate false evidence. Surely there came a time when Respondent was made aware of all of the exhibits presented in this proceeding. Yet, confronted with all the exhibits of appellate court orders warning and admonishing respondent and his associates concerning the firm's extension practice at his disciplinary hearing on October 3, 2000, respondent concluded his direct testimony as follows:

> Q: Is there anything in the transcript presented in Exhibit 3 that had you to speak again you would change?
>
> A: I would correct the mistaken reference to the Mosel brief as a reply brief. I was wrong about that.
>
> Q. Is there anything else you would change in it.
>
> A: Not a word. (T 86-87)

Based upon the forgoing, I conclude that the respondent did knowingly make false statements of fact to the Wisconsin Supreme Court and thus violated SCR 20: 3.3.

3. **Recommendations as to Sanction**

The Board has indicated that the sanction it seeks is a private reprimand based on the absence of any prior discipline and the fact that counsel's misleading statements were not central to the facts needed to resolve the appeal. Given that the oral argument in *Smythe* occurred more than two years after some of the orders discussed herein had been entered, some diminished recollection may also argue for mitigation. Thus, the referee will accept the Board's position and recommend that the court impose a private reprimand on the respondent. I further recommend that, having prevailed in one of the two counts, respondent be made to pay one half the costs of this proceeding.

Dated this 29 day of November, 2000.

Cheryl Rosen Weston
Referee

*628 592 N.W.2d 628

225 Wis.2d 456

Supreme Court of Wisconsin.

In the Matter of the Refusal of Ralph D. SMYTHE.
State of Wisconsin, Plaintiff-Respondent,
v.
Ralph D. Smythe, Defendant-Appellant-Petitioner.
No. 97-3191.
Argued Nov. 11, 1998.
Decided May 14, 1999.

Motorist appealed from order of the Circuit Court, Sauk County, Patrick Taggart, J., which determined that his refusal to submit to a breath test was unreasonable, and that his operating privileges should be revoked. The Court of Appeals, acting through a single judge, denied motion by motorist's counsel for extension of period for filing opening brief, and dismissed appeal as sanction for failure to file a brief. Motorist appealed, and the Supreme Court, David T. Prosser, J., held that Court of Appeals abused its discretion by dismissing appeal as sanction, as it had impermissibly relied, at least in part, on past practices of motorist's attorney regarding deadlines in unrelated cases.

Reversed and remanded.

Ann Walsh Bradley, J., concurred and filed opinion in which Shirley S. Abrahamson, Chief Justice, joined.

West Headnotes

[1] Criminal Law ⚖1179
110 ----
110XXIV Review
110XXIV(S) Decisions of Intermediate Courts
110k1179 In General.
Supreme Court will ordinarily refrain from reviewing a discretionary decision by the Court of Appeals.

[2] Criminal Law ⚖1179
110 ----
110XXIV Review
110XXIV(S) Decisions of Intermediate Courts
110k1179 In General.
Where Supreme Court opts to review discretionary decision by Court of Appeals, it must review decision as it would any other exercise of discretion.

[3] Criminal Law ⚖1147
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 In General.
Reviewing court will sustain a discretionary decision if it finds that lower court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a demonstrative rational process in reaching a conclusion that a reasonable judge could reach.

[4] Criminal Law ⚖1147
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 In General.
Reviewing court will not sustain a discretionary decision which is based upon an improper standard of law, as such a decision would constitute an erroneous exercise of discretion.

[5] Criminal Law ⚖1004
110 ----
110XXIV Review
110XXIV(A) Nature and Form of Remedy
110k1004 Nature and Scope of Remedy in General.
Criminal defendant's right to appeal is guaranteed by State Constitution, and thus is absolute. W.S.A. Const. Art. 1, § 21.

[6] Constitutional Law ⚖249(9)
92 ----
92XI Equal Protection of Laws
92k249 Civil Remedies and Proceedings
92k249(9) Appeal or Other Proceeding for Review.

[See headnote text below]

[6] Constitutional Law ⚖316
92 ----
92XII Due Process of Law
92k304 Civil Remedies and Proceedings
92k316 Appeal or Other Proceedings for Review.
Protections of due process and equal protection clauses of Federal Constitution which apply once right to appeal has been granted are not limited to criminal defendants. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law ⚖316
92 ----
92XII Due Process of Law
92k304 Civil Remedies and Proceedings
92k316 Appeal or Other Proceedings for Review.
Due process requires that the right to appeal not be rendered meaningless, and for an appeal to be considered meaningful, party seeking review must be afforded the right to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ⚖43(1)
92 ----
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k43 Estoppel or Waiver
92k43(1) In General.
Even a right guaranteed by State or Federal Constitution can be waived or squandered.

[9] Criminal Law ⚖1081(5)
110 ----
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1081 Notice of Appeal
110k1081(4) Time of Giving
110k1081(5) Effect of Delay.
If party fails to file notice of appeal within time specified by statute, appellate court does not have jurisdiction over the case, and has no discretion whether to accept the appeal. W.S.A. 808.04(1), 809.10(1)(b).

[10] Criminal Law ⚖1130(4)
110 ----
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(4) Filing and Service (Failure to File or to File in Time).
Court of Appeals' dismissal of defendant's appeal, which was timely filed, as sanction for defendant's failure to file appellate brief within period required by statute, involved discretionary decision by Court of Appeals, rather than question of jurisdiction. W.S.A. 809.19, 809.83(2).

[11] Criminal Law ⚖1131(.5)
110 ----
110XXIV Review
110XXIV(J) Dismissal
110k1131 In General
110k1131(.5) In General.
Dismissal of appeal with prejudice is a drastic sanction, which should be imposed only when harsh measures are necessary. W.S.A. 809.83(2).

[12] Criminal Law ⚖1131(4)
110 ----
110XXIV Review
110XXIV(J) Dismissal
110k1131 In General
110k1131(4) Grounds of Dismissal in General.
For appellate court to dismiss an appeal as a sanction for delay or noncompliance with rules, there must be a showing that the party, or the party's attorney, has demonstrated bad faith or egregious conduct, or there must be a common sense finding that the appeal has been abandoned; in appropriate circumstances, bad faith or egregious conduct of the party's attorney may be imputed to the party in order to justify the dismissal, but in such unusual situations, the conduct of the attorney should involve the same litigation. W.S.A. 809.83(2).

[13] Attorney and Client ⚖77
45 ----
45II Retainer and Authority
45k77 Scope of Authority in General.
Conduct of attorney may be imputed to client if client failed to act as a reasonable and prudent person in engaging an attorney of good reputation, failed to rely upon attorney to protect his or her rights, and failed to make a reasonable inquiry concerning the proceedings; evidence of complicity or inexcusable neglect strengthens the case against the client.

[14] Criminal Law ⚖1179
110 ----
110XXIV Review
110XXIV(S) Decisions of Intermediate Courts
110k1179 In General.
Decision by Court of Appeals to dismiss appeal as sanction for delay or noncompliance with rules may be reversed as an abuse of discretion where there is compelling evidence that Court of Appeals based its decision, in part, on the past practices of counsel in unrelated matters. W.S.A. 809.83(2).

[15] Criminal Law ⚖1068.5
110 ----

110XXIV Review
110XXIV(F) Proceedings, Generally
110k1068.5 Proceedings in General.
A clear and justifiable excuse is a defense for not complying with rules governing appeals. W.S.A. 809.83(2).

[16] Criminal Law ***628** ⚿1130(4)
110 ----
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(4) Filing and Service (Failure to File or to File in Time).
Court of Appeals abused its discretion by denying motion by motorist to extend time in which to file opening brief in connection with appeal from circuit court's determination that motorist's operating privileges should be revoked, and dismissing appeal based on failure to file brief, where court impermissibly relied, at least in part, on past practices of motorist's attorney regarding deadlines in unrelated cases in which motorist was not involved, and there was no evidence of motorist's complicity in or knowledge of counsel's delays and previous motions. W.S.A. 809.19, 809.83(2).

[17] Courts ⚿70
106 ----
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 Designation or Assignment of Judges.
Presiding Judge of Court of Appeals has a responsibility to exercise continuous leadership in management of the court's case assignment and processing systems, and to initiate development of policy concerning the court's internal operations.

***629** [225 Wis.2d 458] For the defendant-appellant-petitioner there were briefs by Ralph A. Kalal and Kalal & Associates, Madison and oral argument by Ralph A. Kalal.

For the plaintiff-respondent the cause was argued by James H. McDermott, assistant attorney general, with whom on the brief was James E. Doyle, attorney general.

¶ 1 DAVID T. PROSSER, J.

The petitioner, Ralph D. Smythe (Smythe), seeks review of an order dismissing his appeal of the circuit court's determination that his refusal to submit to a breath test was unreasonable and that his operating privileges should be revoked. The court of appeals denied a request by Smythe's counsel, Ralph A. Kalal (Kalal), for an eight-day extension (five working days) to file his brief and then, applying Wis. Stat. § (Rule) 809.83(2) (1995-96), (FN1) it dismissed the appeal as a sanction for failure to file a brief.

¶ 2 Although the request for extension was the first in this case, Judge Charles P. Dykman noted that Kalal's firm had a "long history" of requesting time extensions and that the court of appeals, in the past, had issued "stern warnings" and taken other actions in an attempt to reduce such requests from the firm. Judge Dykman concluded that a scheduled vacation over the winter holidays by an associate in Kalal's office was ***630** not a showing of "good cause" for the requested five-day extension because it did not explain why 40 days was not sufficient time to brief the appeal. [225 Wis.2d 459] Consequently, the court applied what it described as its "usual sanction" for failure to file a brief-dismissal. On January 9, 1998, the court of appeals refused to reconsider that dismissal.

¶ 3 The petitioner seeks review of the following issue: Does Rule 809.83(2), pertaining to the imposition of sanctions, allow the court of appeals to dismiss a party's appeal as a sanction against the party's counsel, based upon the conduct of the counsel in other cases not involving the party and occurring in the past? We conclude that a court of appeals decision to dismiss an appeal may be reversed when there is compelling evidence that that court based its decision, in part, on the past practices of counsel in unrelated matters. Because the court based its decision in this case partly on past, unrelated extension practices by Attorney Kalal, we reverse the order and remand the case for reconsideration.

FACTS AND PROCEDURAL HISTORY

¶ 4 On January 18, 1997, Ralph Smythe was stopped for operating a motor vehicle while under the influence of an intoxicant. He refused to submit to a test of his breath, and as a result, a refusal hearing was held in Sauk County on June 12, 1997, under Wis. Stat. § 343.305. On October 15, 1997, Smythe's operating privileges were revoked by court order. Smythe appealed the order, giving timely notice of the appeal. The record was filed in the

court of appeals on November 17, 1997, and the opening brief for this appeal was due on December 29, 1997. Wis. Stat. § (Rule) 809.19. (FN2)

[225 Wis.2d 460] ¶ 5 On the due date, Smythe's counsel, Ralph Kalal, filed a motion to extend for five working days the time in which to file the opening brief. The motion stated that the attorney assigned responsibility for preparation of the appeal brief, Michelle A. Tjader, was on a previously planned vacation from December 25, 1997, through January 4, 1998. The motion further stated that due to the vacation, the attorney was able to complete only a draft of the brief prior to her scheduled vacation.

¶ 6 In an opinion and order dated January 2, 1998, the court of appeals, acting through a single judge, denied the motion to extend the time to file the brief and dismissed Smythe's appeal for failure to file a brief. The court stated:

> Appellant's counsel's firm has a long history of extension motions in this court, and we have in the past issued stern warnings and taken other actions to attempt to reduce their number. We have noted the toll these motions take on this court's time and resources. We have advised counsel that extension motions based on counsel's heavy workload fail to make the showing of good cause required by Rule 809.82(2), Stats., when they become routine. In the past, such motions were routine. For much of this past year, counsel's firm has been reasonable in its requests for extensions. However, we have again noted an increase in such motions. That increase, combined with this motion's complete absence of any showing of why the brief could not be completed during the five weeks before counsel's vacation, leads us to conclude that good cause has not been shown. Therefore, we deny the motion.

[225 Wis.2d 461] The court then went on to dismiss the appeal, stating, "Our usual sanction for failure to file an appellant's brief is dismissal."

¶ 7 On January 6, 1998, Kalal filed a renewed motion to extend the time for filing the appeal brief. He advanced three arguments. First, Kalal stated that the court was faulting Kalal for his past requests for extension of time. Kalal argued that his past requests for extension had been no greater than those requested by his opponents. He contended that in 1997, of 80 total briefs he filed, only 15 extensions of time were requested. Kalal asserted that given the fact that he often files two briefs while his opponents file one, his percentage record was actually better than the record of his opponents in the same appeals.

*631 ¶ 8 Second, Kalal argued that he would have been better off under the court's internal operating procedures if he would not have filed the motion to extend. (FN3) He stated that if he had not requested an extension, the court would likely have issued a delinquency notice stating that he must file a brief within five days of issuance of the notice. According to Kalal, under this scenario, he would have been granted an extension and the case would not have been dismissed.

¶ 9 Finally, Kalal acknowledged that he did not provide a sufficient factual background in his original motion for an extension. Kalal attributed the insufficiency to the fact that he interrupted his own family vacation to draft the motion and that his children were present in his office while he drafted the motion.

¶ 10 The court of appeals, in an order dated January 9, 1998, denied Kalal's renewed motion to extend and confirmed the order of dismissal. The court of [225 Wis.2d 462] appeals stated that opposing parties filed an equal number of requests for time extensions because they were generally prosecution offices with limited budgets and no control over their dockets. The court also stated that since Kalal had control over his caseload and budget, he should be able to conduct his business in a manner that did not unduly burden the court of appeals.

¶ 11 In addition, the court explained that a delinquency notice is a statement of forbearance from imposing a sanction which the court might otherwise impose; it is not an extension of time. The court stated, "The fact that we refrain from immediately imposing sanctions in the normal case does not mean that we must do so in the abnormal case."

¶ 12 Finally, the court noted that the renewed motion added little information and therefore failed to demonstrate good cause for an extension. The court of appeals thus denied Kalal's renewed motion to extend the time to file the appellant's brief.

¶ 13 This court granted Smythe's petition for review on the issue whether Rule 809.83(2) allows the court of appeals to dismiss a party's appeal as a sanction against counsel based upon the conduct of counsel in other cases not involving the party and occurring in the past.

STANDARD OF REVIEW

[1][2][3][4] ¶ 14 This controversy involves the court of appeals' discretionary act of dismissing an appeal for failure to file a brief. The Supreme Court "will ordinarily refrain from reviewing a discretionary determination of the court of appeals." *State v. McConnohie,* 113 Wis.2d 362, 369, 334 N.W.2d 903 (1983). "If [225 Wis.2d 463] this court does review, we must review the court of appeals' decision as we would any other exercise of discretion." *State v. Johnson,* 149 Wis.2d 418, 429, 439 N.W.2d 122 (1989),*confirmed on reconsideration,* 153 Wis.2d 121, 449 N.W.2d 845 (1990). A reviewing court will sustain a discretionary decision if it finds that that the lower court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a demonstrative rational process in reaching a conclusion that a reasonable judge could reach. *See Loy v. Bunderson,* 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982). A reviewing court will not sustain a discretionary decision if the decision is based upon an improper standard of law, for that would constitute an erroneous exercise of discretion.

ANALYSIS

I.

¶ 15 This case presents a clash between two competing interests: a litigant's right to appeal and an appellate court's right to manage its heavy caseload.

[5] ¶ 16 The right to appeal the final judgment of a circuit court is an important right. For a criminal defendant, the right to appeal has been characterized as "absolute," *State v. Perry,* 136 Wis.2d 92, 98, 401 N.W.2d 748 (1987), because it is guaranteed by the Wisconsin Constitution. Wis. Const. art. I, § 21(1). (FN4) In other situations, the right to ***632** appeal is governed by statute. *See State v. Newman,* 162 Wis.2d 41, 46, 469 N.W.2d 394 (1991); *State v. Rabe,* 96 Wis.2d 48, 59, 291 N.W.2d 809 (1980)

[225 Wis.2d 464] ¶ 17 Before the creation of the court of appeals, appeals from the circuit court were reviewed in the Wisconsin Supreme Court. By the mid-1970s this court was swamped with cases. In April 1977, the people amended the Wisconsin Constitution to create an intermediate appellate court, and the legislature acted quickly to implement the amendment with legislation. The first twelve judges of the court of appeals were elected in April 1978, and the court began business the following August.

¶ 18 Since 1978, Wis. Stat. § 808.03(1) has provided that "[a] final judgment or a 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." (Emphasis added).

[6][7] ¶ 19 In *State v. Borrell,* 167 Wis.2d 749, 778, 482 N.W.2d 883 (1992), this court declared that, "Once the right to appeal is granted, a defendant is protected by the due process and equal protection clauses of the Fourteenth Amendment...." These protections are not limited to criminal defendants. Due process requires that the right to appeal not be rendered meaningless. *Griffin v. Illinois,* 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956). In order for an appeal to be considered meaningful, "the party seeking review must be afforded the right to be heard at a meaningful time and in a meaningful manner." *City of Middleton v. Hennen,* 206 Wis.2d 347, 354, 557 N.W.2d 818 (Ct.App.1996).

[8] ¶ 20 Of course, even a right guaranteed by the constitution can be waived or squandered.

¶ 21 Today the court of appeals is the court swamped with cases. The court has an enormous burden. [225 Wis.2d 465] Its caseload has grown tremendously in the twenty plus years since its inception. In 1979, the court's first full year, 1,983 cases were filed with the court of appeals. (FN5) Combined with 809 cases carried over from the previous year and 13 cases reinstated, the court had 2,805 cases on its docket in 1979. In 1998, the last full year for which statistics are available, 3,577 cases were filed with the court. Combined with the 2,303 cases carried over from 1997, the court had 5,880 cases on its docket in 1998. (FN6)

¶ 22 Four additional judges have been added to the

court since 1978; but, as one writer recently noted, "while judges and staff have increased by only 33ver the past 20 years, the number of appeals filed has increased over 300% of the expected maximum number of appeals." (FN7) Matthew E. Gabrys, Comment, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 Wis. L.Rev. 1547, 1567.

¶ 23 Originally, the special committee which recommended creating the court of appeals suggested that each judge on the court would be responsible for terminating approximately 100 appeals per year. *Id.* at 1552. This benchmark has been substantially exceeded from the beginning. In 1979, with 12 judges, the court [225 Wis.2d 466] of appeals terminated 1760 cases-an average of 147 terminations per judge. In 1998, with 16 judges, the court terminated 3,777 cases-an average of 236 terminations per judge.

¶ 24 Case numbers tell only part of the story. The court of appeals has been overwhelmed by a torrent of motions. In 1997, 4,970 general and substantive motions were filed; 2,358 motions were filed for cases not yet pending before the court; and 2,016 motions were filed for extensions of time on ***633** briefs, records, transcripts, et cetera. In total, 9,344 motions were filed with the court in 1997. In 1998, 4,943 general and substantive motions were filed; 2,365 motions were filed for cases not yet pending before the court; and 2,183 motions were filed for extensions of time on briefs, records, transcripts, et cetera. In total, 9,491 motions were filed with the court during 1998. (FN8) Virtually all these motions required a response.

¶ 25 We are thus presented with a situation in which two important, competing interests have collided. On the one hand, this court must recognize the constitutional or statutory right of a litigant to have the litigant's appeal heard in a timely and meaningful manner in the court of appeals. On the other hand, we must recognize the heavy and overwhelming workload of the court of appeals and permit the court to manage [225 Wis.2d 467] its workload in an efficient, effective manner. With these two competing interests as a backdrop, this court must determine if the court of appeals reasonably exercised its discretion when the court dismissed Smythe's appeal as a sanction for Smythe's counsel's failure to timely file a brief.

[9] ¶ 26 It should be emphasized that this case is different from a situation in which a court does not gain jurisdiction because a party or the party's counsel fails to act in a timely manner. For instance, a party must file a notice of appeal within 45 days of entry of judgment if written notice of the judgment is given within 21 days of the judgment. Wis. Stat. § (Rule) 808.04(1). Wisconsin Stat. § (Rule) 809.10(1)(b) provides that: "The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal." If a party fails to file a notice of appeal within the time specified by § 808.04(1), the court does not have jurisdiction over the case and has no discretion whether to accept the appeal. (FN9) In that situation, the court does not examine who should be faulted for the tardy filing or whether the litigant had good cause.

[10] ¶ 27 This case involves a discretionary decision by the court of appeals. It does not involve the jurisdiction of the court. In fact, the relevant statute specifically provides that jurisdiction is not affected by a party's failure to follow procedural rules. Wisconsin Statute § (Rule) 809.19 requires an appellant to file a brief within 40 days of filing in the court of the record on appeal. The Rules of Appellate Procedure further provide:

> [225 Wis.2d 468] Failure of a person to comply with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

Wisconsin Statute § (Rule) 809.83(2). Because this case does not involve an untimely notice of appeal, dismissal of the appeal for failure to file a brief by the due date involves discretion, not jurisdiction.

¶ 28 Section 809.83(2) sets out a variety of sanctions to address a litigant's failure to follow the appellate rules. These include dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other actions as the court considers appropriate.

[11] ¶ 29 Dismissal with prejudice is a drastic

sanction. (FN10) In *Hudson Diesel, Inc. v. *634 Kenall,* 194 Wis.2d 531, 542, 535 N.W.2d 65 (Ct.App.1995), the court of appeals declared that "Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary." Dismissal of a complaint and dismissal of an appeal are not the same and may not [225 Wis.2d 469] entail identical justifications. Nonetheless, dismissal of an appeal represents an abrupt termination of litigation and in many cases it imposes a finality to both issues and claims. For that reason, it is fitting that we adopt substantially similar criteria for dismissing an appeal.

¶ 30 In *Johnson v. Allis Chalmers Corp.,* 162 Wis.2d 261, 470 N.W.2d 859 (1991), we stated that "dismissal [of litigation] is improper ... unless bad faith or egregious conduct can be shown on the part of the non-complying party." *Johnson,* 162 Wis.2d at 275, 470 N.W.2d 859, citing *Trispel v. Haefer,* 89 Wis.2d 725, 279 N.W.2d 242 (1979). The court also pointed to *Trispel* for the proposition that dismissal is improper if the non-complying party shows a "clear and justifiable" excuse for the conduct. *Johnson,* 162 Wis.2d at 276, 470 N.W.2d 859.

[12][13][14] ¶ 31 For a court to dismiss an appeal under § 809.83(2), there must be a showing that the party or the party's attorney has demonstrated bad faith or egregious conduct, or there must be a common sense finding that the appeal has been abandoned. In appropriate circumstances, the bad faith or egregious conduct of the party's attorney may be imputed to the party in order to justify the dismissal. (FN11) However, in [225 Wis.2d 470] these unusual situations, the conduct of the attorney should involve the same litigation.

[15] ¶ 32 As we noted in *Johnson,* a "clear and justifiable" excuse is a defense for not complying with the rules. While we cannot foresee every possible fact situation, it is difficult to conceive how an appellant can be guilty of bad faith or egregious conduct and still have a "clear and justifiable excuse" for non-compliance.

[16] ¶ 33 In this case, there is compelling evidence in the record that the court relied impermissibly, at least in part, on Attorney Kalal's past practices in unrelated cases in dismissing the Smythe appeal. In the court's January 2, 1998, order, the court said in part:

> We have advised counsel that extension motions based on counsel's heavy workload fail to make the showing of good cause ... when they become routine. In the past, such motions were routine. For much of this past year, counsel's firm has been reasonable in its requests for extensions. However, we have again noted an increase in such motions. That increase, combined with this motion's complete absence of any showing of why the brief could not be completed during the five weeks before counsel's vacation, leads us to conclude that good cause has not been shown.

¶ 34 The increase in Kalal's motions for extension in unrelated cases was cited as the first reason why Kalal's motion in Smythe's case was denied. This was reaffirmed in the court's January 9, 1998, order, in which the court said:

> As stated in [the January 2 order], we denied the motion due to appellant's counsel's long history of [225 Wis.2d 471] extension motions in this court and the inadequate showing made in this particular motion.

¶ 35 There is no evidence in the record of Smythe's complicity in or knowledge of the delay in filing the brief nor his involvement in any of Kalal's previous motions for extension. ***635** As a result, we are unable to discern from the record the kind of egregious conduct by the attorney which may properly be imputed to the client. Hence, the court applied an improper standard of law in its decision and we must reverse.

¶ 36 Although we remand to the court of appeals for reconsideration, we think it unlikely the court will find bad faith or egregious conduct in a request for an extension of five working days overlapping the New Year's weekend. Kalal's original motion made a point that "No other requests for extensions of time have been made herein or are contemplated." This does not suggest the type of protracted delay or abuse that will justify dismissal of an appeal. Absent Kalal's motions in unrelated matters, this case does not appear to be "the abnormal case."

II.

¶ 37 Our reversal of the dismissal order in this case should not be interpreted as an impairment of the court's power to dismiss appeals in appropriate circumstances. Recently, we denied a petition for review in another case, *State v. Baake,* 225 Wis.2d 489, 594 N.W.2d 383 (Wis.1999) in which the court of appeals dismissed an appeal based upon Baake's failure to file a brief and appendix in compliance with Wis. Stat. § (Rule) 809.19. In that dismissal, the court properly utilized its power to sanction under[225 Wis.2d 472] § (Rule) 809.83(2). (FN12) This court can be expected to affirm dismissals based upon bad faith, egregious conduct, or a litigant's effective abandonment of the appeal.

¶ 38 We will also support sanctions directed personally at those attorneys whose slipshod practices abuse the system, create unnecessary work, and delay speedy justice for others. Section (Rule) 809.83(2) invites penalties, costs, and other actions the court considers appropriate. Subsection (1) of the statute authorizes double costs, damages, and reasonable attorneys fees as sanctions available for appeals taken for the purpose of delay, and these tough sanctions may also be applied under subsection (2) "as the court considers appropriate." The court of appeals might consider removing a non-complying attorney from the litigation. It may also wish to refer particular attorneys to the Board of Attorneys Professional Responsibility for discipline.

III.

¶ 39 In remanding this case to the court of appeals, we note that the order denying Kalal's motion and dismissing Kalal's appeal was issued by the Presiding Judge, acting alone.

[17] ¶ 40 The Presiding Judge has a responsibility to exercise continuous leadership in management of the court's case assignment and processing systems and to initiate development of policy concerning the court's internal operations. The Presiding Judge has a duty to oversee and address the court's heavy caseload.

[225 Wis.2d 473] ¶ 41 According to the court's internal operating procedures, "*Following filing of briefs,* the Presiding Judge schedules a screening conference for members of the panel.... One-judge appeals are identified and assigned by the Presiding Judge...." Wis. Ct.App. IOP VI(1) (June 13, 1994) (Emphasis added).

¶ 42 The motions judge is the judge designated by the Presiding Judge to hear motions. In the event the motions judge is not available, any other judge may consider a motion. Wis. Ct.App. IOP VI(3). The motions judge "may act on all motions, except those that reach the merits or preclude the merits from being reached, which can only be acted on by the panel. The motions judge may direct that any motion be acted on by the panel. The panel considers motions ... that preclude the merits from being reached.... The panel considers these motions at regularly scheduled or specially called motions conferences...." Wis. Ct.App. IOP VI(3)(c).

¶ 43 In one-judge appeals specified in Wis. Stat. § 752.31(2), "Motions and petitions ... are decided by one Court of Appeals judge." ***636.** Wis. Ct.App. IOP VI(12)(b)(June 13, 1994). Standing alone, this provision explains how a single judge can deny a motion and dismiss an appeal. But read together with either IOP VI(1) in which assignment of appeals is triggered by the filing of a brief or IOP VI(3)(h) in which extension motions are occasionally presented to the motions judge, the provision does not make clear how this case came before the Presiding Judge. The procedure ought to be clarified for future cases.

¶ 44 Because the court based its order to dismiss Smythe's appeal in part on the past, unrelated practice [225 Wis.2d 474] of Smythe's attorney, we reverse and remand the case to the court of appeals for reconsideration.

The order of the court of appeals is reversed and the cause remanded.

¶ 45 ANN WALSH BRADLEY, J. (*Concurring*).

I agree with the majority that the court of appeals did not articulate a permissible reason to dismiss Smythe's appeal. Requesting a five working day extension to file a brief, absent more, does not justify the imposition of this drastic penalty under Wis. Stat. (Rule) § 809.83(2).

¶ 46 As we said most recently in *Johnson v. Allis Chalmers Corp.,* 162 Wis.2d 261, 275-76, 470 N.W.2d 859 (1991), the sanction of dismissal is only appropriate where the record reflects that a

party's failure to comply with a court order both is without excuse and egregious. While Attorney Kalal's conduct may have been without excuse, nowhere in the court of appeals' dismissal of Smythe's appeal or in its reconsideration of that dismissal is there any suggestion that it was egregious.

¶ 47 Further, there is nothing in the record that would support a finding that Attorney Kalal's conduct in this case was egregious. Even the majority opinion hesitatingly acknowledges this when it states:

> we think it unlikely the court will find bad faith or egregious conduct in a request for an extension of five working days overlapping the New Year's weekend.... This does not suggest the type of protracted delay or abuse that will justify dismissal of an appeal. Majority op. at 635.

¶ 48 I therefore see no point in remanding this case to the court of appeals for the purpose of having it [225 Wis.2d 475] review the same record to reconsider its dismissal. Quite simply, on this record dismissal is not an option. There is no reason to have the already overburdened court of appeals take additional time to reconsider its dismissal when the answer is foreordained. Accordingly, I would remand the case to the court of appeals to have it consider the merits of Smythe's appeal.

¶ 49 I am authorized to state that CHIEF JUSTICE SHIRLEY S. ABRAHAMSON joins this opinion.

(FN1.) All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

(FN2.) Wis. Stat. § (Rule) 809.19(1), states in pertinent part: "The appellant shall file a brief within 40 days of the filing in the court of the record on appeal."

(FN3.) Wis. Ct.App. IOP VI(3)(h).

(FN4.) Article I, § 21(1) of the Wisconsin Constitution provides:

> Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

(FN5.) All statistical references to calendar year 1979, unless otherwise noted, are to a report dated April 1, 1980, by Judge John A. Decker, the Chief Judge of the Wisconsin Court of Appeals.

(FN6.) All case statistics from calendar year 1998, unless otherwise noted, are from a cumulative statistical report dated January 4, 1999, issued by Marilyn L. Graves, Clerk of the Wisconsin Court of Appeals.

(FN7.) The expected maximum number of appeals was 1200 appeals per year.

(FN8.) All motion statistics from calendar years 1997 and 1998 are from internal memoranda dated January 5, 1998, and January 5, 1999, from Marilyn L. Graves, Clerk of the Wisconsin Court of Appeals, to the judges of the Court of Appeals. Each memo summarized and totaled from the preceding year the monthly data on motions contained in the clerk's monthly statistical reports on the court of appeals. These monthly reports are public documents. Current monthly reports can be found on the court's website: www.courts.state.wi.us.

(FN9.) For another situation in which jurisdiction was not acquired because of late filing, see *McDonald Lumber Co. v. Wis. Dept. of Revenue,* 117 Wis.2d 446, 344 N.W.2d 210 (1984).

(FN10.) *See* 20 Jeremy C. Moore et al., *Moore's Federal Practice* § 303.31(3)(d) (3d ed. 1998) ("Dismissal of an appeal is a drastic sanction that should not be imposed for minor infractions of the rules."). *See also Dabney v. Burrell,* 67 F.R.D. 132, 133 (D.Md.1975) ("Dismissal with prejudice is a drastic sanction. It is reserved for extreme situations where there is compelling evidence of willful default."); 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2369, at 340 (2d ed.1995).

***636** (FN11.) The conduct of an attorney may be imputed to a client if the client failed to act as a reasonable and prudent person in engaging an attorney of good reputation, failed to rely upon the attorney to protect his or her rights, and failed to make a reasonable inquiry concerning the proceedings. *Charolais Breeding Ranches, Ltd. v. Wiegel,* 92 Wis.2d 498, 514, 285 N.W.2d 720 (1979); *Wagner v. Springaire Corp.,* 50 Wis.2d

212, 221, 184 N.W.2d 88 (1971); *Paschong v. Hollenbeck,* 13 Wis.2d 415, 423, 108 N.W.2d 668 (1961). Evidence of complicity, *cf. United States v. Ford,* 806 F.2d 769, 770 (7th Cir.1986), or inexcusable neglect, *cf. Charolais Breeding Ranches,* 92 Wis.2d 498, 285 N.W.2d 720, strengthens the case against the client.

(FN12.) See *State ex rel. Blackdeer v. Levis Tp.,* 176 Wis.2d 252, 260, 500 N.W.2d 339 (1993), for discussion of summary reversal as a sanction for failure to file a brief.