



WISCONSIN COURT OF APPEALS

TEN EAST DOTY STREET, SUITE 700
MADISON, WISCONSIN 53703-3397

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JOAN F. KESSLER, JUDGE
WILLIAM W. BRASH III, JUDGE
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DISTRICT III: WAUSAU

LISA K. STARK, PRESIDING JUDGE
THOMAS M. HRUZ, JUDGE
MARK A. SEIDL, JUDGE

DISTRICT II: WAUKESHA

LISA S. NEUBAUER, CHIEF JUDGE
PAUL F. REILLY, PRESIDING JUDGE
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BRIAN K. HAGEDORN, JUDGE

DISTRICT IV: MADISON

PAUL LUNDSTEN, PRESIDING JUDGE
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BRIAN W. BLANCHARD, JUDGE
JOANNE F. KLOPPENBURG, JUDGE
MICHAEL R. FITZPATRICK, JUDGE

November 27, 2017

Clerk of Supreme Court
Attn: Deputy Clerk—Rules
Delivered by Inter-departmental mail

Re: Rule Petition 17-07, In re proposed amendments to Wis. STATS. § § 809.15, 809.30, 809.32, and 885.42

Justices of the Supreme Court of Wisconsin:

I submit the following comments regarding Rule Petition 17-07, In re proposed amendments to Wis. STATS. § § 809.15, 809.30, 809.32, and 885.42. My focus is on Section 11 of the petition creating Wis. STAT. RULE 809.15(6). I am an ad hoc member of the Judicial Council's Appellate Procedure Committee which presented the proposed amendments to the Judicial Council. Although I raised in the committee my dislike of a part of Section 11 as it affects the appellate courts, I did not suggest the change requested in this letter at the committee level because the committee's focus was to incorporate changes from a presentence investigation report (PSI) bill that was proposed by the Judicial Council in 2013. See *In re State v. Buchanan*, 2013 WI 31, ¶67 n.6, 346 Wis. 2d 735, 828 N.W.2d 847 (Bradley, J. dissenting). In other words, the wisdom of the incorporated provisions was not to be revisited by the committee. The comments I present here are in my capacity as Chief Staff Attorney of the Wisconsin Court of Appeals, and not as a committee member.

Rule Petition 17-07 addresses access and use of PSIs before the appellate courts. It requires the PSI to be included in the appellate record, permits a party to discuss and cite to the PSI in a brief or no-merit report, and prohibits reproduction of the PSI in an appendix filed with the appellate court. See Rule Petition 17-07, §§ 2, 14, 16. These provisions are in keeping with confidentiality afforded PSIs as required by Wis. STAT. § 972.15(4). The proposed amendments also recognize that there are times when a criminal defendant may not be represented by counsel

on appeal and yet the defendant should be afforded meaningful access to review the PSI. See Rule Petition 17-07, §§ 11, 15.

Specifically, Section 11 of Rule Petition 17-07 creates RULE 809.15(6) and includes a provision which allows a defendant to move the appellate court for access to review the PSI included in the appellate record: “If a defendant is not represented by an attorney, the defendant may request and the court shall specify the manner in which the defendant shall have access to the presentence investigation report so as to allow meaningful and timely review of the report, consistent with 972.15(4m).” The “court” referred to in this provision is either the Court of Appeals or Supreme Court. See WIS. STAT. RULE 809.01(4). The accompanying Judicial Council note to the provision points out that the provision gives authority to the appellate court to provide access to the PSI.

I want to emphasize that authority to give access to the PSI to a defendant is new to the appellate courts. In *State v. Parent*, 2006 WI 132, ¶49, 298 Wis. 2d 63, 725 N.W.2d 915, the court recognized that WIS. STAT. § 972.15 “does not specify that requests to obtain access to the PSI report be made to any tribunal other than the circuit court.” See also *Buchanan*, 346 Wis. 2d 735, ¶25 (“we agree ... that the circuit court is a ‘gatekeeper’ of the PSI”). Under the new WIS. STAT. RULE 809.15(6), once the record is transmitted to the appellate court, the appellate court will have authority previously recognized to only be held by circuit courts.

Giving authority to the appellate court to grant access to the PSI may undermine the circuit court’s role as a gatekeeper of the PSI. Circuit courts have been encouraged to “exercise great caution ... to ensure that the PSI is properly redacted before it goes up on appeal.” *Buchanan*, 346 Wis. 2d 735, ¶28 n.7. WISCONSIN STAT. § 972.15(3) provides that “[t]he judge may conceal the identity of any person who provided information in the presentence investigation report.” Although that authority appears to extend to an appellate judge because WIS. STAT. § 967.02(2m) defines “judge” in the criminal procedure code to mean a judge of a court of record, the appellate court, unlike the circuit court, has no familiarity with the case or the contents of the PSI when presented with a request for access. Whether or not sensitive victim information should be redacted is unknown to the appellate court and not likely to be called to the attention of the appellate court by a pro se defendant’s request for access to the PSI included in the appellate record. Additionally, *Parent*, 298 Wis. 2d 63, ¶45, and *Buchanan*, 346 Wis. 2d 735, ¶39, recognize that there may be other information in a PSI which must be kept confidential for other reasons. Nothing requires that the information be redacted from the PSI before the defendant is given access. Of course, in most cases a pro se defendant has already read or seen the entire PSI before or at sentencing. See *id.*, ¶20 (recognizing a defendant has a right to disclosure of all information in the PSI); *State v. Skaff*, 152 Wis. 2d 48, 56-57, 447 N.W.2d 84 (Ct. App. 1989). It may be that the circuit court, in its gatekeeping role, may require such information be redacted but it is unlikely the appellate court would be alerted to do so.

My principle concern with the provision requiring the appellate court to specify the manner of a pro se defendant’s access to the PSI is the seemingly mandatory nature of the provision. The provision states the “court shall” specify the manner by which the “defendant shall” have access. The requirement that the PSI be included in the record is not limited to appeals under WIS. STAT. RULE 809.30, the first appeal as of right of a criminal conviction. See Rule Petition 17-07, § 2 (creating WIS. STAT. RULE 809.15(1)(am) requiring the clerk of circuit court to include the PSI in the record). There may be some pro se criminal appeals in which the PSI is not relevant to the

issues on appeal and yet the PSI will be part of the record. Many of the appeals filed by pro se criminal defendants come years after the conviction and after the denial of a WIS. STAT. § 974.06 motion. Once the PSI is part of the record in the appellate court, a pro se defendant may request access to the PSI from the appellate court. Under the provision, the appellate court may not deny the request to see the PSI if the language in the provision is construed to be mandatory.

I suggest that Section 11 of Petition 17-07 not be adopted. The declaration of confidentiality that Section 11 creates in a new WIS. STAT. RULE 809.15(6) is not necessary since WIS. STAT. § 972.15(4) already declares the PSI to be confidential after sentencing and new WIS. STAT. RULES 809.19(14) and 809.31(1)(h) set parameters for use of the PSI in appellate briefs, no-merit reports, no-merit responses, and supplemental no-merit reports. *See* Rule Petition 17-07, §§ 14, 16. Without the provision giving the appellate court authority to grant access to the PSI, it will remain that only the circuit court can grant access to the PSI under § 972.15(4). It will remain that a pro se criminal defendant must move the circuit court for access. It will remain that the appellate court will remand the record for the circuit court to decide the manner in which the pro se defendant has access to the PSI and whether the PSI requires redaction.

An alternative is to amend the proposed language in Section 11 of the petition to require a pro se criminal defendant to show a need for access to the PSI and to give the appellate court discretion to deny such access. I suggest an amendment as follows:

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

Thank you for consideration of my comments to Petition 17-07. I will appear at the public hearing scheduled for January 16, 2018 to answer any questions related to this letter.

Sincerely yours,



Jennifer Andrews
Chief Staff Attorney

cc: Judicial Council, Petitioner (c/o Bill Gleisner)
Honorable Robert Van DeHey, Chair, JC Appellate Procedure Committee
Chief Judge Lisa Neubauer