

## THE WISCONSIN STATE PUBLIC DEFENDER APPELLATE DIVISION

### The Right to Counsel on Appeal

The Wisconsin Constitution and statutes guarantee the right to a direct appeal from a criminal conviction and other final judgments. The United States Constitution guarantees the right to the assistance of an appointed attorney where a corresponding right to appeal exists. *Douglas v. California*, 372 U.S. 353, 357-58 (1963); *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 648, 579 N.W.2d 698 (1998). The State Public Defender (SPD) Appellate Division (AD) provides this post-judgment (after the final judgment) legal representation (to persons who meet the SPD's financial eligibility restrictions) in the trial and appellate courts in criminal, civil commitment, sexually violent person commitment, protective placement, children in need of protection or services, juvenile delinquency and termination of parental rights cases. Appellate cases comprise 2.3% of the SPD's total case openings for FY 2013-14 (3,111 of 136,226 cases).

### Appeal Procedures

The Rules of Appellate Procedure are set forth in chapters 808 and 809 of the Wisconsin Statutes. These Rules contain the time limits within which each step of an appeal must occur. An attorney is appointed if a financially eligible person files a Notice of Intent to Pursue Post-Conviction or Post-Disposition Relief and requests a public defender-appointed attorney. The attorney confers with the client regarding potential issues for appeal and reviews the transcripts of the trial court proceedings and the rest of the trial court record for legal error. The attorney conducts further fact development and/or investigation if necessary, and researches any potential legal issues. Then the attorney discusses his or her legal conclusions with the client.

If arguably meritorious grounds for appeal exist, and the client wishes to pursue them, the attorney will either file a post-judgment or post-conviction motion in the trial court or proceed directly to the court of appeals on briefs, depending upon the issues presented in the case. The court of appeals may decide the appeal on the briefs or may schedule the appeal for oral argument. Appointed attorneys are obligated to file a Petition for Review (or, if appropriate, a No-Merit Petition for Review) in the Wisconsin Supreme Court if the court of appeals decision is adverse to the client and the client so requests. Review by the Supreme Court is discretionary, but the right to an appointed attorney continues if the Supreme Court grants review.

If the appointed attorney concludes that no arguably meritorious grounds for appeal exist and the client disagrees with that conclusion, the client can require the appointed attorney to file a no merit report in the court of appeals. If the court of appeals agrees with the attorney's no merit conclusion, the court will affirm the judgment and discharge the attorney. If the court disagrees, it will reject the no merit report and order further proceedings in the appeal.

If the client agrees with the appointed attorney's conclusion that there are no arguably meritorious grounds for appeal, or if the client decides not to pursue an appeal for other reasons, the attorney may close the file without any court action.

Regardless of the attorney's conclusions, the client always has the authority to discharge the appointed attorney and 1) hire a private attorney for the appeal or 2) proceed on appeal *pro se* (on his or her own). When a client decides to retain an attorney or proceed *pro se*, the appointed attorney generally files a motion to withdraw from the case. Except in extraordinary circumstances, if the client later changes his or her mind, the SPD will not appoint a successor attorney.

### SPD Staff & Private Attorney Appeal Case Dispositions (FY 2005 – 2014)

Case closed without court action	46.5%
No merit report	14.1%
Relief granted	11.7%
Relief denied	27.7%

## **Staffing**

The division's two local offices, at 17 S. Fairchild, P. O. Box 7862, Madison 53707-7862 and 735 N. Water Street, #912, Milwaukee 53202-4116, provide representation in all 72 counties of the state.

All financial eligibility determinations and attorney appointments are handled in the Appellate Intake Unit, located in the Madison Appellate office. Appellate support staff generates the requests for transcripts and the court record for both staff and private attorneys in every case.

The AD employs 30.85 FTE staff attorneys. Staff attorneys handled 45% of the appeal cases appointed in FY 2013-14. Cases are appointed to private attorneys when staff attorneys have a conflict of interest (for example, where another staff attorney represented a co-defendant) or when appointment of additional cases to staff will exceed their capacity to provide ethical and competent representation.

In addition to supervising AD staff, the division's managers typically handle more than 1,000 non-case matters each year. Specifically, they 1) receive and respond to requests for post-judgment information from the public, requests for constituent assistance from the legislature or executive branch agencies, and requests for counsel from or on behalf of prison inmates; 2) act upon complaints about appointed appellate attorneys from clients, their families, prosecutors and the courts; and 3) receive and respond to circuit court and court of appeals' orders requesting case information or the appointment of successor appellate counsel for SPD clients. The attorney managers also answer questions from staff and private attorneys about substantive law, the rules of appellate procedure, and agency policy and procedure. They review all staff briefs and participate in all staff oral argument preparation panels. They also do so for private attorneys appointed in SPD cases, if asked. They are members of the State Bar Appellate Practice Section Board, Office of Lawyer Regulation committees, and justice system and local bar committees. The division director is a member of the agency leadership team.

The AD also summarizes and analyzes case law, and tracks issues pending before the United States and Wisconsin Supreme Courts, in *On Point, the Wisconsin Public Defender Appeals Blog* at <http://www.wisconsinappeals.net/>. The On Point blog also provides easy access to archived appellate case summaries. The AD provides other appeal resources on the SPD public web site, [www.wispsd.org](http://www.wispsd.org): the *Appellate Practice and Procedure for SPD-Appointed Counsel Handbook*, that includes time limit charts, issue-spotting checklists, how-to-appeal checklists, attorney performance standards, and forms in its Appendices. The AD coordinates with our Training Division to present continuing education programs focusing on substantive law, appellate procedure and appellate skills throughout the year.

## **Private Bar Attorney Certification**

The Appellate Division certifies private attorneys for appointment in appellate cases. In FY 2014, there were 237 certified private attorneys actively accepting appellate cases. Attorneys are certified in two experience levels in criminal appeal cases, and in four specialty appeal areas (ch. 980 commitments, termination of parental rights cases, children's and juvenile code cases, and civil commitments and protective placements). Appellate certification criteria are set forth in Wis. Admin. Code §§ PD 1.035 (1) and 1.04 (13). Certification applications are available from the Assigned Counsel Division, the Intake Unit in the Madison Appellate office and on the SPD website.

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