STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2637

STATE OF WISCONSIN ex rel.
ANTJUAN REDMOND,

Petitioner-Appellant,

v.

BRIAN FOSTER, Warden, Kettle
Moraine Correctional Institution,

Respondent-Respondent.

APPEAL FROM THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE L. EDWARD STENGEL, PRESIDING, CASE NO. 14-CV-0310

# BRIEF OF RESPONDENT-RESPONDENT

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## STATEMENT OF THE ISSUES

1. Under Wisconsin law, to obtain habeas relief a petitioner must show that there is no other adequate remedy available in the law. Petitioner-Appellant Antjuan Redmond (Redmond) could raise his claims of ineffective assistance of revocation counsel in a motion to the Division of Hearings and Appeals (DHA) Administrator to reopen the case pursuant to *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. Did the circuit court properly dismiss Redmond's habeas petition because he had an adequate and available remedy?

   The circuit court answered: Yes.

2. To establish ineffective assistance of counsel, a defendant must show that his counsel's deficient performance resulted in prejudice—but for counsel's unprofessional errors, the result of the proceeding would have been different. Redmond admitted to three probation violations separate from the battery violation for which his counsel allegedly performed deficiently. The DHA Administrator concluded that the violations that Redmond admitted warranted revocation. Did the circuit court properly dismiss Redmond's habeas petition for failure to show that he was prejudiced by his counsel's performance?

   The circuit court answered: Yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent-Respondent does not request oral argument because all arguments and relevant law are set out in the parties' briefs.

The Respondent-Respondent requests publication because no published Wisconsin decision addresses whether a *Booker* motion provides an adequate and available remedy precluding habeas relief for a challenge to ineffective assistance of counsel at a revocation proceeding.

## STATEMENT OF THE CASE

### I. Nature of the case.

Redmond is a prisoner incarcerated at the Kettle Moraine Correctional Institution (KMCI). He appeals from a circuit court decision dismissing his petition for writ of habeas corpus. (R. 10; 26:1; 27; 33:10, line 14 – 33:11, line 20; Pet'r-Appellant's Br. 4.) The Respondent-Respondent, Brian Foster (Respondent-Respondent or Warden Foster), is the former KMCI warden. (R. 10:1.)

### II. Statement of facts.

In March 2012, the Department of Corrections (Department) recommended that Redmond's probation be revoked based on eight alleged violations of his rules of probation on various dates in February and March 2012. (R. 10:108-112.) The Department alleged that: (1) Redmond hit Astoria Thomas, (2) he pushed Astoria

Thomas, (3) he put his hands around Astoria Thomas's neck in a choking manner, (4) he struck K.E.B., DOB 09/18/03, (5) he failed to report to his agent as scheduled, (6) he drove a motor vehicle without a valid driver's license, (7) he was in possession of marijuana, and (8) he gave false information to Madison Police; specifically, he lied about his name. (R. 10:108.)

On April 24, 2012, after an April 17, 2012, evidentiary hearing at which Redmond was represented by Attorney Randall Skiles, an Administrative Law Judge (ALJ) issued a decision revoking Redmond's probation. (R. 10:49-67.)[1] The ALJ determined that Redmond had admitted allegations five, six, and eight (R. 10:65.), namely that Redmond failed to report to his agent as scheduled, drove a motor vehicle without a valid driver's license, and gave false information to Madison Police. (R. 10:108.) Allegation seven, regarding marijuana, was withdrawn. (R. 10:65, 108.) The ALJ determined that the Department of Corrections had proven the remaining allegations and ordered Redmond's probation revoked. (R. 10:65-67.)

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[1] The exhibits Redmond attached to his petition for writ of habeas corpus are unauthenticated. Exhibit 4, the purported transcript of the April 17, 2012, revocation hearing, appears to have been prepared by Redmond. (R. 10:49-63.) In the circuit court proceeding below, Respondent-Respondent reserved authentication objections regarding these exhibits and cited them solely for the purposes of the motion to dismiss. (R. 19:7.)

Redmond, through Attorney Skiles, appealed to the DHA Administrator, who sustained the ALJ's decision on May 15, 2012. (R. 10:125-126.) Apparently, Redmond and Attorney Skiles discussed the potential of commencing a certiorari proceeding to challenge the revocation decision, and after those discussions, Redmond decided not to pursue that option. (R. 10:68.)[2]

Redmond filed a petition for writ of habeas corpus in the Dane County Circuit Court on January 28, 2014. (R. 10.) The petition was not filed in the county where he was sentenced, so the case was transferred to the proper venue, the Sheboygan County Circuit Court, which received the petition on April 29, 2014. (R. 8; 9; 10.) The circuit court filed the petition on May 20, 2014. (R. 10.) Warden Foster was first informed about this case on June 23, 2014—more than two years after the May 15, 2012, revocation decision—through service of an unauthenticated copy of the petition. (R. 12.) No other documents were served on Warden Foster.

In his petition, Redmond alleged that Attorney Skiles' performance resulted in ineffective assistance of counsel.

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[2] A search of Wisconsin Circuit Court Access for the last name "Redmond" and the first name "Antjuan" discloses that Redmond did not commence a certiorari action challenging his revocation decision. (R. 18:5-6.) This Court may take judicial notice of that fact. *See* Wis. Stat. § 902.01; *State v. Bullock*, 2014 WI App 29, ¶ 20, 353 Wis. 2d 202, 844 N.W.2d 429, (taking judicial notice of facts from Wisconsin Circuit Court Access); *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 5 n.3, 318 Wis. 2d 216, 768 N.W.2d 53 (same).

(R. 10.) Warden Foster moved to dismiss the petition, and after briefing and a hearing on the matter, the circuit court dismissed the case with prejudice. (R. 18; 19; 21; 26; 33.) The court found that the allegations and evidence in Redmond's petition did not "provide a basis for the Court to conclude that his [attorney's] performance was deficient." (R. 33:10, lines 20-23.) The court further concluded that "any alleged deficiencies that may have been raised by Mr. Redmond do not give rise to prejudice to Mr. Redmond." (R. 33:11, lines 13-15.) And the court was "also satisfied that . . . [be]cause of the availability of the writ of certiorari, that there were other adequate remedies at law, and the Writ of Habeas Corpus does not lie in this matter at this time." (R. 33:11, lines 15-19.)

The circuit court entered a final order dismissing Redmond's petition for writ of habeas corpus on September 23, 2014. (R. 26:1-2.) This appeal followed. (R. 27.)

## STANDARD OF REVIEW

Whether a writ of habeas corpus is available to the party seeking relief is a question of the law that this Court reviews de novo. *State v. Pozo,* 2002 WI App 279, ¶ 6, 258 Wis. 2d 796, 654 N.W.2d 12.

## ARGUMENT

### I. This Court should affirm the circuit court's dismissal of Redmond's petition for writ of habeas corpus because Redmond had adequate remedies available at law.

#### A. Habeas relief is barred unless the party seeking habeas relief shows the lack of adequate remedies available at law.

A "[w]rit of habeas corpus is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement." *State ex rel. Washington v. State,* 2012 WI App 74, ¶ 18, 343 Wis. 2d 434, 819 N.W.2d 305. But habeas corpus is an extraordinary writ that is only available to a petitioner under limited circumstances. *State ex rel. L'Minggio v. Gamble,* 2003 WI 82, ¶ 18, 263 Wis. 2d 55, 667 N.W.2d 1. A petitioner who seeks habeas corpus relief must show that: (1) he or she is restrained of his or her liberty; (2) the restraint was imposed by a tribunal without jurisdiction or that the restraint was imposed contrary to constitutional protections; and (3) there was no other adequate remedy available in the law. *Id.*

If there is an adequate remedy available in the law, "habeas corpus is not available to the petitioner." *State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶ 5, 276 Wis. 2d 96, 687 N.W.2d 79. In *Kreiger*, this Court determined that habeas relief was properly denied "because [the petitioner]

cannot show that he pursued other remedies available to him in the law." *Id.* ¶ 13.

### B. Generally, habeas is barred when detention is grounded on probation or parole revocation.

Redmond seeks to challenge, through a habeas petition, the DHA Administrator's final determination to revoke his probation. (R. 10.) But the Administrator is not a party, nor would he be a proper party to a habeas action. Habeas is usually precluded in those situations because certiorari review is "the common route for reviewing probation revocations, not a habeas writ." *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 48, 236 Wis. 2d 473, 613 N.W.2d 591.

Generally, "[h]abeas corpus proceedings are . . . not available to challenge an administrative order revoking probation, since a writ of certiorari is available, and is the proper remedy under such circumstances." *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 14, 252 Wis. 2d 133, 643 N.W.2d 771. Applying that rule, habeas petitions challenging detention resulting from revocations ordinarily fail because of the availability of certiorari review. *Id.* (probation revocation); *State ex rel. Purifoy v. Malone*, 2002 WI App 151, ¶¶ 6-8, 256 Wis. 2d 98, 648 N.W.2d 1 (parole revocation).

Redmond contends that he can proceed by habeas based on his allegation that his revocation attorney was ineffective.

But Redmond had other adequate and available remedies which preclude habeas relief.

### C. Redmond had adequate and available remedies at law.

#### 1. Ineffective assistance in revocation proceedings.

Redmond contends that he is wrongfully detained because of ineffective assistance of counsel during his revocation hearing. (Pet'r-Appellant's Br. 18-46.) Three reported decisions have addressed whether probationers may assert, through habeas petitions, ineffective assistance during revocation hearings. In chronological order, they are: *State v. Ramey*, 121 Wis. 2d 177, 359 N.W.2d 402 (Ct. App. 1984), *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), and *State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 572 N.W.2d 505 (Ct. App. 1997). *Vanderbeke* issued in June 1997 (210 Wis. 2d at 502), and *Reddin* in November 1997 (215 Wis. 2d at 179), so *Reddin* is the latest reported decision addressing that issue. A fourth decision, *State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 592 N.W.2d 307 (Ct. App. 1999), addressed whether a habeas petition claiming ineffective assistance during a revocation proceeding was governed by the Prisoner Litigation Reform Act (PLRA), 1997 Wis. Act 133, and determined that it was, without directly considering the

availability of habeas in those situations. 224 Wis. 2d at 580-85.

In *Reddin*, this Court viewed *Ramey* as having "intimated that a writ of habeas corpus may be available to raise a claim of ineffective assistance of counsel during probation revocation proceedings" and having held that "a claim of ineffective assistance of counsel during probation revocation proceedings could *not* be addressed on certiorari review, because the scope of that review focuses solely on the actions and determinations of the administrative decision maker." *Reddin*, 215 Wis. 2d at 186.

In *Vanderbeke*, the supreme court viewed *Ramey* as having held that "habeas rather than certiorari is the appropriate procedure for an allegation of ineffective assistance of counsel at a probation revocation proceeding when additional evidence is needed." 210 Wis. 2d at 522-23. Based on *Ramey*, the supreme court concluded that "habeas corpus was a proper method for Vanderbeke to use in challenging his probation revocation on the grounds of violation of due process because of incompetency and lack of counsel." 210 Wis. 2d at 522-23.

### 2. The *Booker* motion remedy created after *Reddin*.

In 2004, seven years after *Reddin* issued (and five years after *Marth* issued), a remedy was created by the court of appeals in *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. A *Booker* motion provides Redmond with an adequate and available remedy at law, which precludes habeas relief.

Under *Booker,* an offender whose probation or parole was revoked has a right to move the DHA Administrator to reopen the revocation case. *Booker*, 270 Wis. 2d 745, ¶¶ 1-20. In *Booker*, probation was revoked through an ALJ decision and later affirmed by the DHA Administrator. *Id.* ¶ 4.

*Six years later*, with Booker still incarcerated based on the revocation, "Booker filed a motion with the Division seeking to vacate the revocation or, in the alternative, an evidentiary hearing to determine whether newly discovered evidence entitled him to a new revocation hearing." *Booker*, 270 Wis. 2d 745, ¶ 5. The DHA Administrator denied the motion. *Id.* ¶ 7. This Court held that, even without authority expressly allowing the DHA Administrator to re-open revocation proceedings, justice and due process required the Administrator to consider newly discovered evidence in civil revocation proceedings. *Id.* ¶¶ 9-14.

The five-prong test applicable in criminal proceedings now applies to motions to reopen filed with the DHA Administrator in civil revocation settings:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

*Booker*, 270 Wis. 2d 745, ¶ 12. Since "Booker's post-revocation motion satisfied the requisite factors," *id.* ¶ 16, this Court reversed and remanded so that the DHA Administrator could reopen the revocation case and order an evidentiary hearing on the alleged newly discovered evidence. *Id.* ¶ 20.

Denials by the Administrator of *Booker* motions may be challenged through certiorari review. *Booker*, 270 Wis. 2d 745, ¶ 1. It is well-established that, where there are no statutory provisions for judicial review, the actions of a board or commission may be reviewed by certiorari. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971).

### 3. A *Booker* motion is analogous to a criminal defendant's right to claim ineffective assistance of counsel through a motion for a new trial.

With the creation of the *Booker* motion remedy, probationers who allege ineffective assistance of revocation counsel are analogous to criminal defendants who claim ineffective assistance of trial counsel through motions for a new trial.

A motion for a new trial is an adequate and available remedy for challenges to ineffective assistance of trial counsel in criminal cases. For example, in *State v. Carter*, "Carter filed a post-conviction motion for a new trial on the grounds of ineffective assistance of counsel." 2010 WI 40, ¶ 1, 324 Wis. 2d 640, 782 N.W.2d 695. After a *Machner* hearing, that motion was denied. *Id.* ¶ 16. Carter appealed and, ultimately, the supreme upheld "the judgment of the circuit court denying Carter's post-conviction motion for a new trial." *Id.* ¶¶ 3, 17-18; *see also State v. Jeannie M.P.*, 2005 WI App 183, ¶¶ 1-2, 286 Wis. 2d 721, 703 N.W.2d 694 (reversing an order denying a motion for a new trial based on claim of ineffective assistance of trial counsel); *State v. Cooks*, 2006 WI App 262, ¶¶ 1-2, 297 Wis. 2d 633, 726 N.W.2d 322 (same).

The *Booker* motion remedy eliminates the disparity between probationers and criminal defendants. It provides probationers with an adequate and available remedy to challenge ineffective assistance of revocation counsel, just like criminal defendants may pursue an ineffective assistance of counsel claim with a motion for a new trial. It makes no sense that probationers would be permitted to make such a challenge in habeas when criminal defendants cannot, especially when certiorari, not habeas, is the common method for reviewing probation revocation.

### 4. The *Booker* motion has been, and remains, an adequate and available remedy for Redmond.

To the extent that Redmond is detained based on the revocation decision issued by the DHA Administrator on May 15, 2012, he could have sought—and may still seek—to be released from detention by asking the Administrator, through a *Booker* motion, to reopen those revocation proceedings. Under the logic of *Booker*, ineffective assistance claims in revocation settings may be pursued through post-revocation motions to the DHA Administrator just as ineffective assistance claims may be pursued through post-trial motions to trial courts in criminal cases. 270 Wis. 2d 745, ¶¶ 9-14.

A *Booker* motion is an adequate and available remedy whenever a probationer obtains newly discovered evidence that might qualify for that relief. Redmond has to show that there are *no* adequate remedies at law and, given the *Booker* motion option, he cannot make that showing.

The logic of *Booker* suggests that probationers like Redmond are not limited to situations involving newly discovered evidence and that other post-revocation remedies, addressable to the DHA Administrator, could also exist.

*Booker* was based on the concept that it would be unjust for criminal defendants to pursue post-trial motions based on newly discovered evidence while persons whose probation or parole was revoked could not pursue similar

post-revocation motions. As noted above, in criminal cases, claims that trial counsel was ineffective, whether based on new evidence or not, may be pursued through adequate and separate post-trial means. Under that logic, persons whose probation or parole is revoked should also be able to pursue post-revocation motions based on alleged ineffective assistance of revocation counsel.

No reported Wisconsin decision has addressed this issue. But after *Booker*, a petitioner pursuing habeas relief based on alleged ineffective assistance of revocation counsel cannot demonstrate that he has no adequate remedy at law when he has not filed a *Booker* motion. *Booker* signals that filing a motion with the DHA Administrator is a far better forum for presenting an ineffective assistance of revocation counsel claim than in circuit court since the DHA Administrator has the full record to evaluate the claim and is more familiar with the facts of the revocation proceeding to assess prejudice.

In his circuit court briefing, Redmond claimed that he contacted the DHA Administrator and requested a new revocation hearing based on newly discovered evidence. (R 21:23-24; 22:3-4.) The "newly discovered" evidence—that Astoria Thomas recanted her version of the incident—was previously presented to the ALJ and the DHA Administrator. (R. 22:3-4.) Redmond did not raise ineffective assistance of counsel in his request to the DHA Administrator. (R. 22:3-4.) The DHA Administrator analyzed

Redmond's request using the five-prong test outlined in *Booker* and concluded that Redmond was not entitled to a new hearing. (R. 22:3-4.) Redmond did not seek certiorari review of this decision.

In summary, Redmond filed a *Booker* motion with the DHA Administrator based on allegedly newly discovered evidence, but that motion was appropriately denied and Redmond did not seek certiorari review. (R. 22:3-4.) Redmond does not allege that he filed a *Booker* motion based on ineffective assistance of counsel. (R. 21:23-24; 22:3-4.) Thus, Redmond has failed to demonstrate that he had no adequate and available remedies and, for that reason alone, the circuit court properly dismissed Redmond's habeas petition.

## II. This Court should affirm the circuit court's dismissal of the habeas petition because, even if Redmond's revocation counsel's performance was deficient, it would have made no difference to the revocation decision.

Redmond admitted to several probation violations *other* than the ones involving battery. The DHA Administrator stated that he would have revoked Redmond's probation on those violations alone. Even if Redmond had proven that his revocation counsel performed deficiently, it would have made no difference to the revocation decision and there was no prejudice to Redmond. In other words, there was no ineffective assistance of counsel.

To establish constitutionally deficient representation, a defendant must show: (1) deficient representation; and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on the prejudice aspect of the *Strickland* analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A court does not need to address both aspects of the *Strickland* test if the defendant does not make a sufficient showing on either one. *See id.* at 697.

"Violation of *a* condition" is "both a necessary and a *sufficient* ground for the revocation of probation." *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997) (emphasis added). Revocation is sufficiently grounded if just one violation is proven or admitted regardless of how many violations may be alleged. *Id.*

Redmond admitted to three probation violations *other* than the ones involving battery. (R. 10:65, 125.) The DHA Administrator concluded that these violations alone warranted revocation and reconfinement:

> In addition, Mr. Redmond admitted to the violations of failing to report to a scheduled meeting with his agent, driving without a valid driver's license and lying to the police about his identity when he was arrested. (Exhibit 5) These violations warrant revocation of his supervision.

(R. 10:125.)

This decision was reasonable because these were serious violations, which involved absconding from supervision. (R. 10:126.) And only a year before, Redmond had violated his rules of supervision in failing to report to his agent. (R. 10:110.) He was warned and counseled about the need to report to his agent when scheduled. (R. 10:110.) His continued failure to comply with his rules of supervision further justifies the Administrator's decision to revoke on the admitted violations.

A "[w]rit of *habeas corpus* is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement." *Washington*, 343 Wis. 2d 434, ¶ 18. "As an equitable doctrine, . . . habeas corpus is confined to situations in which there is a pressing need for relief or where the process or judgment upon which a prisoner is held is void." *State ex rel. Dowe v. Circuit Court for Waukesha Cnty.*, 184 Wis. 2d 724, 728-29, 516 N.W.2d 714 (1994) (citiation omitted). That is not the situation here. Even if Redmond had proven that his counsel's performance was deficient, he still could obtain no habeas relief since the result of the proceeding would have been the same.

There was no prejudice and no ineffective assistance of counsel.[3]

## CONCLUSION

This Court should affirm the circuit court's decision.

Dated this 6th day of May, 2015.

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[3] In his appellate brief, Redmond for the first time seeks $1,000 pursuant to Wis. Stat. § 782.09, which provides: "Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000." Redmond's single paragraph argument does not explain the legal standards that would apply to an analysis of such a claim, whether he can seek relief under Wis. Stat. § 782.09 for the first time on appeal, whether he would have to file a separate civil action, or whether he could be entitled to $1,000 if this Court affirms the dismissal of his petition. This Court should decline to address the merits of Redmond's claim because it is inadequately briefed. *See State v. Pettit,* 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,583 words.

Dated this 6th day of May, 2015.

KARLA Z. KECKHAVER
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 6th day of May, 2015.

KARLA Z. KECKHAVER
Assistant Attorney General