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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2637

STATE OF WISCONSIN ex rel. ANTIJUAN REDMOND,
Petitioner-Appellant,

v.

BRIAN FOSTER,
Warden, Kettle Moraine Correctional Institution,
Respondent-Respondent.

On Notice of Appeal from a Decision and Order Denying
Petition for Writ of Habeas Corpus Entered in the Circuit
Court for Sheboygan County, Honorable L. Edward Stengel,
Presiding

SUPPLEMENTAL REPLY BRIEF OF
PETITIONER-APPELLANT

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ARGUMENT

- I. A Writ of Habeas Corpus is the Proper Legal Mechanism for Mr. Redmond's Claim that He was Denied the Effective Assistance of Counsel in His Probation Revocation Proceedings.

As the Wisconsin Supreme Court explained in *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), the holding in *State v. Ramey*, 121 Wis. 2d 177, 359 N.W.2d 402 (Ct. App. 1984), is that a habeas corpus petition, rather than a petition for writ of certiorari is the appropriate legal procedure for an allegation of ineffective assistance of counsel at a revocation proceeding when additional evidence is needed. 210 Wis. 2d at 522 (citing *Ramey*, 121 Wis. 2d at 181-82). This Court's decision in *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361 could not, and did not, *sub silentio* overrule or modify the *Ramey* holding. As outlined in his supplemental brief, both this Court and federal district courts have relied, and continue to rely, on *Ramey* as Wisconsin precedent that claims of ineffective assistance of counsel at revocation proceedings are properly raised in habeas corpus proceedings.

Mr. Redmond agrees that a habeas corpus petition is not appropriate if an adequate and available remedy at law exists. Here, however, there is no established adequate and available remedy for a claim of ineffective assistance of counsel at a revocation hearing.

In its order for supplemental briefing, this Court asked direct questions regarding Foster's claim that an adequate and available administrative remedy exists for Mr. Redmond's ineffective assistance of counsel claim: 1) whether there is

any established mechanism for a post-revocation motion for relief before the Division of Hearings and Appeals?; and 2) if so: a) what is the mechanism; and b) under what standard would the motion for relief be addressed, *i.e.* would any time limits apply, what pleading requirements would need to be satisfied, would an ineffective assistance of counsel claim be governed by the same procedures applicable in criminal proceedings.

The only fair reading of Foster's brief is that the short answer to whether there is an established mechanism is "no" and the answer to what is that mechanism is "nothing actually exists". Foster does not cite to an administrative regulation containing an established mechanism. Nor does Foster cite to any administrative code promulgating such a procedure. He also does not cite to any written formal or informal policy regarding such a mechanism.

Foster cannot even explain what the rules are. Instead, he claims that an adequate and available remedy exists without specifically explaining what that procedure is and exactly how it operates. The essence of Foster's argument is that "there should be a procedure, we don't know what it exactly looks like, so you, court, figure it out."

For example, Foster claims that the same standard for holding a hearing on a postconviction ineffective assistance of counsel claim should apply to an administrative post-revocation ineffective assistance of counsel claim, "except that the Court should account for the obvious differences between criminal and administrative proceedings." Resp.'s Supp. Brief, p. 12. However, Foster does not say what those differences are nor propose how specifically this Court should account for those differences. Further, Foster argues that an evidentiary hearing is necessary and that procedures similar to *Machner* hearings "should apply in the civil revocation

context” without explaining what those “similar” procedures should be in the revocation context. *See* Resp.’s Supp. Brief, p. 12.

Additionally, regarding the procedure for a post-revocation administrative evidentiary hearing, Foster asserts that “it make sense that the administrative rules that apply in revocation proceedings should also apply”. However, Foster does not cite to the specific administrative procedure rules that apply to revocation hearings and proceedings, let alone explain how such rules should be adapted for a post-revocation hearing. *See* Resp.’s Supp. Brief, p. 13. Further, while asserting that defendants are not afforded the same range of constitutional rights in revocation proceedings, Foster fails to explain which constitutional rights a revoked person is entitled to in post-revocation proceedings and how its proposed procedure ensures those constitutional rights. *See* Resp.’s Supp. Brief, p. 13.

With these vague assertions about a non-existent procedure, Foster cannot prove that this phantom procedure actually exists or that it is in fact adequate. In any event, given that there is no other available and adequate remedy at law, Mr. Redmond properly raised his claim of ineffective assistance of counsel via a habeas corpus petition in the circuit court. Mr. Redmond, an incarcerated *pro se* litigant, had no notice of any other way to raise it.

Furthermore, litigation is not an effective method for developing adequate administrative rules, procedures, and standards for resolving the complex constitutional questions raised in ineffective claims. Neither the petitioning litigants (who usually are *pro se*¹ and have limited education) nor

¹ Habeas corpus petitioners are not entitled to the appointment of counsel and the State Public Defender (“SPD”) appoints counsel in

revocation hearing examiners (whom statutes do not require to be attorneys²) are well-suited to ferret out procedural nuances and crucial constitutional requirements in this complex legal area.

limited circumstances. *See* Wis. Stat. § 977.05(4)(j) (providing for appointment of counsel in habeas corpus proceedings only “if the state public defender determines the case should be pursued.”) It is less clear that the SPD’s discretionary appointment authority extends to a post-revocation administrative proceedings. *See* Wis. Stat. § 977.05(6)(h) (providing that the SPD may not appoint counsel in supervision revocation hearings unless the person contests the revocation and the department seeks imprisonment upon revocation).

² According to the Division of Hearings and Appeals administrative code, an administrative law judge is “an administrative hearing examiner employed by the division of hearings and appeals.” Wis. Admin Code HA 2.02 (1). For purposes of this division, a hearing examiner is not statutorily defined. *See* Wis. Stat. § 227.43, et seq.

CONCLUSION

For all of the reasons set forth above, and in his brief-in-chief, reply brief, and supplemental brief, Mr. Redmond respectfully requests that this Court enter an order reversing the circuit court's denial of his petition for writ of habeas corpus and remanding this case to the circuit court for an evidentiary hearing on the petition for writ of habeas corpus.

Dated this 15th day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,077 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of March, 2016.

Respectfully submitted,

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