STATE OF WISCONSIN **COURT OF APPEALS** **DISTIRCT II**

STATE EX REL. Antjuan Redmond
Kettle Moraine Correctional Institution
P.O. BOX 282
Plymouth, WI 53073,

Petitioner-Appellant,

CASE NO. 14-CV-310
APPEAL NO. 2014AP0002637
Three-Judge Panel Appeal

Brian Foster (Warden)[1]
Kettle Moraine Correctional Institution
W9071 Forest Dr.
Plymouth, WI 53073,

Respondent-Respondent.

BRIEF OF APPEALLANT

NOWCOMES ANTJUAN REDMOND *PROS SE*, ON APPEAL TO THE COURT OF APPEALS, OF THE SECOND DISTRICT, FROM THE WHOLE AND FINAL JUDGEMENT, ENTERED ON SEPTEMBER 10, 2014 IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE JUDGE L. EDWARD STENGEL, PRESIDING, IN FAVOR OF BRIAN FOSTER, WARDEN FOR KETTLE MORAINE CORRECTIONAL INSTITUTION, AND AGAINST ANTJUAN REDMOND, WHEREIN THE COURT GRANTED WARDEN BRIAN FOSTER'S MOTION TO DIMISS REDMONDS HABEAS CORPUS.

Respectfully Submitted by:

Antjuan Redmond, *Pro Se*, litigant
Kettle Moraine Correctional Institution
P.O. BOX 282
Plymouth, WI 53073

[1] **Brian Foster was the warden at kettle moraine (CI) in the state court habeas proceeding. He is no longer the warden at Kettle Moraine correctional Institution. New Warden is now Robert Humphreys.**

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ORAL ARGUMENT

Oral argument and publication is warranted because there are legal values whether ***State ex rel. Booker v. Schwarz*** which holds precedence for probation revocation for an evidentiary hearing based on newly discovered evidence allows a probationer to raise an ineffective assistance claim as a remedy. And, if a petitioner's due process is violated when a court allows the respondent to argue the merits in a motion to dismiss, which is permitted only in a briefing. Which ultimately eviscerate the meaning of a briefing, and response brief.

STATEMENT ON PUBLICATION

Redmond believes that publication is appropriate in this case because this court's decision will address issues concerning this brief. Specifically, whether the petitioner's due process was violated if the circuit court allows a motion to dismiss to argue merits which should be presented in a briefing, whether ineffective assistance of counsel claims for probation revocation counsel are to be forwarded to the Division of Hearings and Appeals (DHA) as there are no cases or laws allowing it, and whether a Probationer or parolee are to exhaust a certiorari petition if their claiming ineffective assistance of counsel during their probation revocation hearing which are raised in a habeas corpus Redmond is seeking to set precedent.

STATEMENT OF THE ISSUES

1. Was Honorable Judge L. Edward Stengel decision erroneous when he denied Redmond his habeas corpus without holding an evidentiary hearing on Redmond's claim of ineffective assistance of counsel when material facts were presented?

CIRCUIT COURT ANSWERED NO.

2. Did Honorable Judge L. Edward Stengel abused his discretion and erroneously decided that a Habeas is not the proper remedy challenging revocation counsel effectiveness but a motion to Division of Hearings and Appeals is?

Circuit Court Answered no.

3. Did Redmond's habeas petition show anything that would cause for an evidentiary hearing in his initial brief on an ineffective assistance claim?

Circuit Court Answered no.

4. Did Redmond have to exhaust a certiorari petition if he alleges that he did not have a fair revocation hearing because of ineffective assistance of counsel, which is to be litigated in a habeas petition?

Circuit Court Answered no.

5. Was Redmond sentence a continuous sentence that gives him the right to file a habeas on a past sentence having already been sat consistent with *Garlotte v. Fordice*?

Circuit court answered no.

6. Was Atty. Moriarty's motion to dismiss the proper mechanism to challenge the merits of Redmond's claims?
Circuit Court Answered yes.

STATEMENT OF THE CASE

1. The appeal arose from Redmond's Revocation hearing held on April 17, 2012 risen from a battery charge toward his child mother and her nephew in Dane County-Madison, WI in which he, Redmond, raises the issue of ineffective assistance of counsel as to why he was revoked and his rights being violated. Redmond appealed to the Sheboygan Circuit Court stating he is being held based on the following pursuant to an a Habeas Corpus Chapter 782:

    a) Redmond is being restrained of personal liberty by the Respondent, in Kettle Moraine Correctional Institution in Sheboygan, WI;

    b) Redmond is not imprisoned by virtue of any judgment, order or execution specified in 782.02

    c) The cause of pretense of such imprisonment according to the best of petitioner's knowledge and belief.

    d) The restraint of Redmond's liberty is contrary to constitutional Protections

    e) No other adequate remedy for the relief Redmond seeks is available at law.(R: 10- Redmond's habeas brief)

2. Although Redmond did not specify the above a-e, the court upon agreements cured them with the Atty. Moriarty. (R: 19- pg-2 Headnote).

3. Redmond Stated in his Habeas corpus petition that the reasons of him being revoked were because of his Counsel, Randall Skiles, effectiveness and newly discovered evidence.

4. Redmond Presented evidence that his attorney was ineffective with corroborating affidavits, letters, documents, recordings etc. but the court did not hold an evidentiary hearing.

5. The evidence shows with specifics that Redmond did not assault or batter his Childs mother, Ms. Thomas, or her nephew K.E.B.

6. The law is clear when there is evidence, which is reliable, that states facts, an evidentiary hearing shall be held. The judge in his case did not feel Redmond deserves any relief or hearing because it was a unique situation that he has never come across (App.3) so by the documents put fourth, he decided nothing should be given (hearing) to Redmond. And that Redmond may have another remedy to address before filing a Habeas Corpus.

7. The Judge decided that Counsel was effective, argued in Atty. Moriarty's decision, which was his final ruling.

8. The Judge stated that Redmond could have raised an ineffective assistance claim to the Decision of Hearings and Appeals, which is contrary to what the actual law states.

9. The Judge Stated that Atty. Moriarty did not violate Redmond due process and fundamental fairness when he argued the merits in the motion to dismiss when there was a briefing scheduled already set. Although there are no laws that support this or contrary to the action to the best of Redmond's knowledge, Redmond maintains that his rights were violated when he has the opening brief, then reply to the response, which was positioned to the Atty. Moriarty having the opening spot, and having the last reply because of the motion to dismiss.

10. More of the case will be presented through the arguments in this appeal.

STATEMENT OF FACTS

1. Redmond was sentenced to two years initial confinement and three years extended supervision ("ES") by the Dane County Circuit Court. Redmond was also placed on five years' probation, sentence withheld, following a Burglary conviction. He was released to ES on June 7, 2011.
2. Revocation was being held because of allegations against Redmond, reported by Ms. Thomas and K.E.B[2], in which Redmond allegedly battered them both, which brought subsequent felony charges.
3. By Revocation Warrant dated March 15, 2012, the Agent alleged that Redmond:

    1. Hit Ms. Thomas ("Ms. Thomas");
    2. Pushed Ms. Thomas;
    3. Put his hands around Ms. Thomas neck in a choking manner;
    4. Struck K.E.B, DOB 09/18/03;
    5. Failed to report to his Agent as scheduled;
    6. Drove a motor vehicle without a valid driver's license;
    7. Was in possession of marijuana; and (Scratched from record)
    8. Gave false information to police. (R: 10- EX 3)

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[2] **Names and References:** ***Astoria Thomas*** (Hereinafter as Ms. Thomas), ***Nephew*** (Hereinafter as K.E.B.), ***Antjuan Redmond*** (Hereinafter as Redmond), ***Brian Foster- now-Robert Humphreys, represented by Assistant Attorney General Richard B. Moriarty*** (Hereinafter as Atty. Moriarty), ***Assistant Attorney General Richard B. Moriarty*** (Hereinafter as Atty. Moriarty), ***Probation Agent Colleen McCoshen*** (Hereinafter as Agent McCoshen and DOC), ***Attorney or Counsel Randall Skiles*** (Hereinafter as Counsel or Attorney Skiles).

1. Administrative Law Judge Robert G. Pultz, (hereinafter ALJ) presided over Redmond's final revocation hearing on April 17, 2012.
2. Redmond appeared in person and was represented by Attorney Randall Skiles ("Counsel"). Agent Colleen McCoshen (hereinafter "Agent") appeared on behalf of the Department of Corrections, Division of Community Corrections.
3. The Agent advised the parties that Ms. Thomas was subpoenaed
4. (R:.10- EX 4,pg11-line4,) but neither she nor K.E.B appeared.
5. Ms. Thomas never signed for or was properly served a subpoena. Subsequently, the ALJ relied on the police reports. (R: 10- EX9, EX23).
6. The ALJ found that "The child's version has indicia of reliability as it is supported by physical evidence." (APP: 4- EX5, pg-3).
7. There was no physical evidence brought to bear at the final revocation hearing.
8. Redmond, by his attorney, stipulated to allegations five, six, and eight
9. (R: 10- EX3-pg-3 line12-13).
10. DOC withdrew Allegation number seven (R: 10- EX3, pg-8 line 8-11).
11. The ALJ found Redmond guilty of allegations one, two, three, and four.
12. Redmond asked Counsel to file a petition for writ of certiorari, but Counsel declined. (R: 10- EX6).
13. Ms. Thomas: stated via a phone call with Redmond (R: 10- EX7 pg-B line4-8), that she paid her nephew K.E.B to lie about what happen during the alleged incident, in which the police relayed in their reports (R: 10- EX8).
14. K.E.B made a statement "I think he's stupid", about Redmond wanting to be with Ms. Thomas (His aunt) after the alleged incident, see (R: 10- EX1).

15. Ms. Thomas stated she paid K.E.B to lie (R: 10- EX9 pg-5-#5, EX7 pg-B line4-8), and admitted to being scared to serve jail time (R: 10- EX1, EX7, EX9-pg-2 #9).

16. Most importantly, the nephew admitted that Redmond never assaulted him. (R: 10 EX2).

17. Ms. Thomas signed a sworn affidavit, (R: 10- EX9 pg-2 #11) which she would have testified to, and which is now being used in this petition, stating that she lied in her previous statements to police and further stating that Redmond did not assault her.

18. Redmond told counsel to postpone the hearing so that he could attend his preliminary hearing first to see if his charges will be dropped or amended down to an ATR. See letter counsel mailed to Redmond regarding postponing (R: 10- EX11).

19. In a letter mailed to counsel from Redmond dated February 14, 2013. (R: 10- EX10). Redmond asked counsel if he would sign an affidavit admitting being told to postpone the revocation hearing.

20. Counsel did not sign the affidavit admitting to what was stated in Redmond's letter. Counsel replied to the fact that Redmond asked to postpone his hearing. See (R: 10- EX11).

21. Since resolution of Redmond's petition relies largely upon what happened at the revocation hearing, as well as what *didn't happen*, he offers the following verbatim testimony and phone recordings in his statement of facts:

22. The following excerpt is verbatim from the revocation hearing:

23. DIVISION OF HEARINGS AND APPEALS (R: 10- EX4 pg-10 line1-20)

[RECORDING IS ON THE SECOND PART OF THE DISC, FAST FORWARD FIRST HALF TO THE END OF THE RECORDING, IT WILL THEN AUTOMATICALLY GO TO THE SECOND PART] (Report recording to **2:28** and play until **2:40**)

1. **Skiles**: why not?
2. **Agent**: because he was an absconder
3. **Skiles**: ok, you had some contact with him didn't you?
4. **Agent**: actually I put this together right before we came in, about the nine
5. months he was out
6. he was an absconder for at least four of it and incarcerated for two
7. **Skiles**: ok
8. **Agent**: so really we probably met five or six times
9. **Skiles**: the only ATR that you had prior to this event was 30 days sanction correct?
10. **Agent**: uh... extended supervision sanction is not an ATR, it's a umm... a
11. Sanction apparently
12. **Skiles**: you would agree that the Department would not be considering revocation if it **(2:28)**
13. Weren't For the battery allegation and the pending felony charge?**(2:36)**
14. **Agent**: probably not **(2:40) [time on recording]**
15. **Skiles**: ok, you would also agree that the state of the law is that if a judge found under the
16. record before him that the battery charge was unfounded, revocation was not due, but if
17. later on there was a conviction in the pending criminal case you could then revoke based
18. On the conviction?
19. **Agent**: I've done that many times
20. **Skiles**: no other questions

There was a phone called between Redmond and Ms. Thomas, on March 29, 2013, where she, Ms. Thomas, stated that she paid her nephew to lie. (R: 10- EX7)

Short excerpt of Recording:

2. **Astoria**: o.k. But the thing is though is if umm…
3. **Redmond**: Don't talk through the phone
4. **Astoria**: I know because then I'll be going to jail
5. **Redmond**: you'll be going to jail for what?
6. **Redmond**: why would you go to jail…? (Laugh) and why you smacking in my ear?
7. **Astoria**: You really want me to tell you the truth?
1. **Redmond**: Yea… no… why would you go to jail? Yea tell me the truth
2. (Inaudible)
3. **Redmond**: Huh?
4. **Astoria**: umm… no well…umm o.k. Because I told him if we go to court tell the
5. Truth and when that day I had umm… maybe gave him a little bit of money… to
6. Tell them stuff…that happened
7. **Redmond**: you gave who a little bit of money?
8. **Astoria**: umm…no o.k. But…no… I don't want to go to jail though.
15. **Redmond**: About who?
16. **Astoria**: You
17. **Redmond**: like what you talking about?
18. **Astoria**: umm…well I don't have money on the phone
19. **Redmond**: o.k. Well I guess umm…
20. **Astoria**: umm… but don't tell anyone ok.
21. **Astoria**: Because
22. **Redmond**: o.k.
23. **Astoria**: I don't want to go to jail

24. **Redmond**: o.k. We aint gone talk thought the phone whatever

(Emphasis added)

11. **Redmond**: o.k. But I'm still wondering who the fuck did you (inaudible) in what

12. About me… who did you pay?

13. **Astoria**: (heavy breath)…Kaevon

14. **Redmond**: man all right I'm gone talked to you later

15. **Astoria**: o.k. Bye.

16.

Excerpt from recording: (R: 10- EX7)

21. Call Identification #: **22862822_438692_03-29-2012_105418_1-608-658-2779**

DANE COUNTY JAIL

RECORDED PHONE CALL BETWEEN

ANTJUANREDMOND AND ASTORIA THOMAS

MARCH 29, 2012 *INMATE BOOKING* #438692 *INMATE NAME* # 189287

Redmond: you told her I hit you?

Astoria: No, I told her that I didn't tell—because it was the guy. I didn't tell that the guy was there too, and I told you, she didn't even want to fucking talk to me.

Redmond: You aint tell her that guy was there?

Astoria: Excuse me. Yes I did. I told her that I didn't tell the police that there was another person there. Or I told her also that I didn't know—like I was calling, asking him if I was gonna get in trouble for lying, you know. But she didn't get that, though, I don't know.

See (R: 10-EX7 Pg-7).

21. Eleven days before Redmond's revocation hearing dated April 6, 2012, see (R: 10-EX1&2), the alleged victims, Ms. Thomas and K.E.B gave statements to the Victim Witness Impact Division (V.W.I.D) of the D.A.'s office.

22. The Statements in part revealed that: K.E.B stated that Redmond never hit him, (R: 10- EX2).

23. Ms. Thomas explained she has many times tried to explain the wrong doings that she has put upon Redmond and Herself. Ms. Thomas admitted to being "abusive" when she gets mad, also she admits since she has known the defendant that "he's not 'abusive' to women" and most of all that she knows she's in great trouble for her actions and is very "scared to serve jail time", see (R: 10- EX1).

24. Redmond appealed his revocation decision and DHA's decision the Sheboygan Circuit court for a State ***Habeas corpus*** on the ineffective assistance claim.

25. The Honorable Judge L. Edward Stengel originally granted this petition and set for a briefing Schedule for the month of august and September.

26. The AAG Richard Briles Moriarty, who filed a motion to dismiss on August 11, 2014, represented Warden Foster.

27. Redmond Responded to the Motion to Dismiss and a Motion hearing was scheduled on September 10, 2014.

28. The Motion to dismiss was granted for the reasons set fourth in the motion to dismiss.

29. Now Redmond appeals to the Honorable Court of Appeals in the second district.

ARGUMENT

1) HONORABLE JUDGE L. EDWARD STENGEL DECISION WAS ERRONEOUS WHEN HE DENIED REDMOND HIS HABEAS CORPUS WITHOUT HOLDING AN EVIDENTIARY HEARING ON REDMOND'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHEN MATERIAL FACTS WERE PRESENTED.

STANDARD OF REVIEW

> A circuit court denying a petition for writ of habeas corpus presents a mixed question of law and fact. Factual determinations will not be reversed unless clearly erroneous. Whether writ of habeas corpus is available is a question of the law that is reviewed de novo. **State v. Pozo,** 2002 WI App 279, ¶6,

The fore-most concern within this appeal is when the judge makes an erroneous decision. Redmond argued that his counsel was ineffective, his performance was deficient and that it prejudiced him. (R: 10-Pg1-130). Redmond argued his attorney failed to effectively investigate which if he had, would have caused a different result. For example, some of the evidence that was presented shows the following:

1. Redmond did not cause any injury or harm to the alleged victims.
2. Counsel had the opportunity to interview and subpoena witnesses.
3. There were Newly Discovered evidence, etc.

Redmond did not make conclusory allegations to be denied an evidentiary hearing. The things he argued were material facts, as to what happen and what didn't happen supported by corroborating evidence of facts, which would cause for an evidentiary hearing. See ***State v. Washington***, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331, 335-36

(Ct. App. 1993) (Before a trial court must grant an evidentiary hearing on ineffective assistance of counsel claim, defendant must allege sufficient facts in their motion to raise a question of fact for the court).

The Judge's decision in denying Redmond an evidentiary hearing was erroneous because he, Redmond, specifically stated facts. See ***State v. Nelson***, 54 Wis. 2d at 497(If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no *discretion* and must hold an evidentiary hearing); also see ***State v. Pozo***, 2002 WI App 279, P6 (Factual determinations will not be reversed unless clearly erroneous).

Hon. Judge L. Edward Stengel's decision was erroneous because he failed to look at the facts Redmond submitted in his *habeas* petition. For example, Counsels failure to subpoena a witness whom is the crux to the case was damaging to the defense. Redmond argued through his Habeas brief, that his counsel failed to subpoena Ms. Thomas when he personally met with her to get her to release her medical records knowing the state had a hard time locating her, and after discovering her recanted statements. This brings the questions why not subpoena this important witness to give testimony which would reflect her affidavits, police reports, recants etc, and to determine motive of her, Ms. Thomas, getting Redmond arrested. Because she clearly stated that she was upset that Redmond was cheating on her with other women, so by getting him put away she had the power to stop him from seeing other women (R: 10-EX9 pg-2 #10).

For instance, in ***State v. Hicks***, 2007 Wisc. App. Lexis 1152, Hicks the defendant contends that the trial court should have conducted an evidentiary hearing on his claim that his counsel provided ineffective assistance for failing to pursue and present a defense

and witnesses. There were three witnesses in Hicks cases whom would have testified that he was at a different place during the specific times when the crime he was convicted of has taken place. Hicks stated that the witness whom should have been subpoenaed would testify that he did not commit the crime charged and in fact he was nowhere near the scene. Hicks argues that based on these specific facts he ask for relief by the court of appeals, because his counsel knew of these witness but failed to subpoena them The court of appeals agreed and vacated and remanded back to the lower courts.

Similarly, Redmond's Counsel knew that Ms. Thomas recanted her statement, and that she admitted to paying her nephew to lie because of her jealousy. Had he, counsel, subpoenaed Ms. Thomas, the finder of fact would have been different because she admitted to paying her nephew to lie and co-opt a plan to get Redmond arrested because of his cheatings that's the motive here.

Most importantly, the State couldn't subpoena Ms. Thomas Ms. Thomas, one of the allege victims personally, so they allegedly left a subpoena at Ms. Thomas's home. Redmond's revocation counsel stated that he managed to find her; and personally met with her to get a disclosure of health information from her (R: 10-EX4 pg-14 line10-14 EX9 pg-2 #11). This is one of those instances when you as an attorney, subpoena, obtain affidavit, INVESTIGATE. Common sense dictates when fighting to get a witness to attend the hearing, and when you finally meet with the witness you subpoena. The point is that Redmond argues that an affidavit or testimony would show that Redmond did not assault anyone.

Redmond stated material facts instead of conclusory allegations because, the witness, Ms. Thomas, gave a sworn affidavit which would reflect her testimony had she been subpoenaed. *See* ***U.S. v. Yancey,*** 825 F. 2d 83 (7th Cir. 1987); ***Anderson v. Benik,*** 2006 Wis. Dist. Lexis 3002, pg. 18; and ***State v. Love***, 2005 WI 116, ¶ 50-56 (Emphasizing the importance of having affidavit in order to present sufficient material facts for a reviewing court to meaningfully assess ineffective assistance and newly discovered evidence).

Therefore, on just this claim alone Redmond received the needed corroborating evidence regarding the hoax battery from Ms. Thomas in an affidavit dated August 2nd 2013. (R: 10-EX9).

This Honorable court shall see that the circuit courts decision was wrong by denying an evidentiary hearing. Supported by Atty. Moriarty's Motion to Dismiss (R: 18), without any foundation behind it. See, ***Getschow v. Getschow***, 2011 WI APP 136, P19 (An appellate court will affirm the courts discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion).

2) HONORABLE JUDGE L. EDWARD STENGEL ABUSED HIS DISCRETION AND ERRONEOUSLY DECIDED THAT A HABEAS IS NOT THE PROPER REMEDY CHALLENGING REVOCATION COUNSEL EFFECTIVENESS.

Legal Analysis

State habeas corpus is the appropriate remedy to challenge revocation counsels effectiveness. ***State ex rel. Vanderbeke v. Edicott***, 210 Wis. 2d 502; also see ***Ramey***, 121 Wis. 2d 177; and ***Reddin***, 215 Wis. 2d 179.

A. A HABEAS IS THE PROPER REMEDY CHALLENGING INEFFECTIVE ASSISTANCE OF REVOCATION COUNSEL.

Whether the circuit court feels that Redmond's Habeas petition is not appropriate at this time, he is still entitled to such remedy if he has an ineffective assistance claim. ***Id.*** The circuit court erroneously denied Redmond a Habeas review when the judge held that Redmond could have raised the effectiveness of counsel claim in another remedy (i.e.) Certiorari, Post-revocation motion to the Division of Hearings and Appeals consistent with booker (R: 19-pg17).

There are no legal authorities citing Redmond can forward his ineffective assistance claim to DHA (Division of Hearings and Appeals hereinafter as DHA). Like Redmond Explained in his Response brief to the motion to dismiss in the lower courts (R: 21- pg-24), Atty. Moriarty argues this in his motion to dismiss but there are no case law or legal authorities, which support such remedy for raising an ineffective claim to DHA. And as this court well knows, if there is an erroneous decision then this court shall overturn the trial courts findings of fact. See, ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). , And unsupported arguments should be disregarded by this Court. ***McMorris,*** and ***Olson,*** supras.

Redmond argued to the court that his habeas is the only remedy he has left during exhaustion phase, and that there are no other remedies left (R: 21- pg21-23), and as repeated Redmond could not raise an Ineffective Assistance Claim in a Certiorari, or

post-revocation motions. See, ***Reddin***, 215 Wis. 2d at 186, 572 N.W.2d at 508 (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 his actions and determination of the administrative maker) also see ***State v. Ramey***, 121 Wis. 2d 177, 182, 359 N.W.2d 402, 405 (Ct. App. 1984), and that a Certiorari is limited to reviews of the record brought up by the writ, 47 Wis.2d 603, 614-15. Further, Redmond need more evidence to support his ineffective assistance of counsel claim, so the Habeas would be the proper remedy because it allows more evidence to be brought, see ***State ex rel. Hippler v. City of Baraboo*** (the record to prove ineffective assistance which could only be brought fourth in a Habeas corpus).

B. A CERTIORARI PETITION IS NOT AN ADEQUATE REMEDY FOR REDMOND.

Redmond Has had his probation revocation. He appealed to DHA the decision was denied (App: 4 & 5). Redmond diligently tried to appeal through certiorari but was unsuccessful because he had open court cases and constantly was writ back in fourth to court from dodge correctional institution. The certiorari is a 45-day jurisdictional time limit and was told that he could not extend that time limit. Before Redmond's jurisdictional time was up, he asked his attorney Randall Skiles could he appeal the decision through certiorari. Redmond's counsel declined stating Redmond had no novel issue. Redmond asked if his attorney would ask SPD but declined (R: 10-EX11).

Make no mistake; Redmond knows that on a certiorari review he is not entitled to an appointed counsel, ***State ex rel. Griffin v. Smith***, 2004 Wi 36 (Parolees have no right

under either federal const. or state law to have lawyer file timely petition for certiorari review if revocation decision).

Nevertheless, Certiorari petitions are only to challenge administrative rulings and whether the decision was arbitrary and or capricious. ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, not to challenge ineffective assistance claims ***Reddin***, ***Supra.*** Redmond's not challenging the ALJ's decision but counsel's effectiveness; this makes a certiorari petition in adequate for him. There was more evidence not brought fourth and left out by counsel's failure to investigate, which would be examined by the ALJ and finder of fact which came to Redmond's knowledge later. Had additional evidence been brought to the revocation hearing in time, such as witnesses to testify, statement, and phone recordings, the ALJ's decision would have been different because he would also have had the chance to view everything exculpatory to Redmond's defense, Instead of what he had to rule on which was solely hearsay evidence. After the decision of the ALJ's finder of fact, depending on Redmond's demise or success, then certiorari would be adequate.

Makes no mistake Redmond knows that hearsay evidence is admissible in administrative hearings, but what he contends is that had additional evidence came in and testimony, a different outcome would have happened because its shows that the witness are not truthful in person during cross-examination.

C. Redmond did try to Challenge the May 15th 2012 Revocation Decision through Certiorari Review.

Atty. Moriarty avers Redmond did not try to challenge the revocation of his ES and probation by certiorari and that his petition does not state that ineffective assistance of counsel was the only ground he could have potentially pursued to challenge the

decision (R: 19- pg-15-16) As outlined above, habeas is the only adequate remedy at law to pursue his claims of ineffective assistance and newly discovered evidence.

Moreover, Redmond discussed with Skiles pursuit of a certiorari and he indicated that it was not meritorious. So, Redmond did try and pursue a certiorari, but counsel concluded there were no meritorious issues that could be pursued through certiorari. Redmond trusted his attorney's evaluation and still had no reason to question his assessment. (R: 10- Ex 6). Redmond does not know of any issue that could have been pursued by certiorari.[3]

D. No exhaustion of certiorari petition on an ineffective assistance of counsel claim is mandatory.

Moreover, there are no laws in the State of Wisconsin that requires an individual who has had his supervision revoked due to ineffective assistance or newly discovered evidence, to so call exhausted other plausible certiorari issues before filing a habeas corpus. Atty. Moriarty cites no authority to the contrary and this Court should not consider arguments that are not support by cites to authority. ***State v. Pettit,*** 171 Wis. 2d 627, 646 (Ct. App. 1992) (Arguments unsupported by references to legal authority will not be considered). Atty. Moriarty's argument should have failed instead of being granted for this reason also.

E. A *Booker* remedy does not hold ineffective assistance claims

Atty. Moriarty tries to create an understanding ***Booker,*** supra. Does not confer, i.e., that the DHA Administrator can somehow review ineffective assistance. There is no such holding in ***Booker*** or Wisconsin law and it should've been rejected by the circuit

court. As discussed herein, Redmond did move the DHA administrator to entertain his newly discovered evidence claim and he was denied. While Atty. Moriarty attempts to raise Redmond's failure to go to the DHA Administrator as a defense to his to his current newly discovered habeas claims, he did not state any law that requires Redmond to plead exhaustion in his initial petition and arguments that are not support by cites to authority should not been considered and granted by the Circuit Court. ***Pettit,*** supra..

After attempting to file the Certiorari, which failed, Redmond filed a Newly Discovered Evidence petition to DHA under ***Booker*** (App.1). Like previously stated it was denied also.

Lastly as supported by the record and case law Redmond was procedurally correct in filing his habeas petition on ineffective assistance claim. And the Circuit court erroneously denied his habeas review after originally granting a briefing schedule but later pulling back and granting the states motion to dismiss. The state has no right to argue that Redmond was able to argue ineffective assistance in a ***Booker*** motion on newly discovered evidence because the ***Booker*** court never established raising an ineffective assistance in a motion to DHA on a newly discover motion.[4] The court only held that:[5]

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[4] Redmond asks this court to re-establish or interpret ***booker*** if possible, on whether the ***Booker*** case allow probationer's or parolee's to raise an ineffective assistance claim upon a newly discovered evidence motion to the division of hearings and appeals which ***Booker*** never to DHA when it stated that these proceedings are similar to criminal proceedings.

[5] a) Newly discovered motions are similar to criminal cases See **State v. Bembenek,** 148 Wis. 2d 248.

Atty. Moriarty embarked on a fruitless effort to convince the Circuit Court of a Non-existent Avenue made available by ***Booker*** to address claims of ineffective assistance of counsel. (R: 19- pg-21-23). More absurd, Atty. Moriarty has argued to the circuit court that Redmond's habeas petition should be dismissed based upon the novel prospect he has wrongfully and lawlessly instituted during the proceeding. Nevertheless, Atty. Moriarty cited no authority to support his innovative argument and arguments that are not support by cites to authority should not be considered by this Court. ***Pettit,*** supra.. Atty. Moriarty admits, "No reported Wisconsin decision has addressed that issue..." *Id.* at 22. The administrator lacks the authority to consider post-revocation claims of ineffective assistance of counsel.

As explained, Redmond was not required by law to pursue unspecified, potentially non-existent other claims by certiorari, and he did pursue a new hearing with the DHA Administrator on his newly discovered evidence claim. Redmond did everything he was required to prior to filing his habeas corpus. Wisconsin Law regarding reopening revocation hearings through the DHA specifically conflicts with Atty. Moriarty's position that the DHA can review claims of ineffective assistance of counsel. Wis. Adm. Code HA 1.19.

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b) For a post-revocation motion you can raise newly discovered evidence.
c) The petitioner could be entitled to and evidentiary hearing.
d) The petitioner has to meet the five-prong test.

The only reason allowed by law to reopen a hearing is newly discovered evidence. The legislature has spoke and foreclosed any attempt to create a new policy based on novel issue. Atty. Moriarty was wrong.

Based on its erroneous decision that he, Redmond, could have entertained a Ineffective Assistance Claim via ***Booke***r motion. A circuit court denying a petition for writ of habeas corpus presents a mixed question of law and fact. Factual determinations will not be reversed unless clearly erroneous. Whether writ of habeas corpus is available is a question of the law that is reviewed de novo. **State v. Pozo,** 2002 WI App 279, ¶6. Redmond has proven the court has erred in denying him his Habeas corpus without holding a evidentiary hearing for the facts he set fourth..

3) THE COURT ERRED WHEN IT HELD REDMOND'S PETITION DID NOT SHOW ANYTHING THAT WOULD CAUSE FOR RELIEF IN HIS INITIAL BRIEF ON AN INEFFECTIVE ASSISTANCE CLAIM.

LEGAL ANALYSIS

> Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact. "***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). This court shall overturn the trial courts findings of fact if it's clearly erroneous; whether counsel's performance was deficient and whether the deficient performance prejudiced the Redmond are questions of law which this court decides without deference." ***Id.***

A. Redmond's Counsel was Ineffective[6]

To establish an ineffective assistance claim, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 20, 674 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W. 2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that but for counsel's professional errors, the result of the proceeding would have been different. ***Strickland,*** *466 U.S. at 964.* Prejudiced must be affirmatively proven ***State v. Wirts***, 176 Wis.2d 174, 184, 500 N.W.2d 317 (Ct. App.)

B. Exhibits Redmond put in as evidence shows his revocation counsel was ineffective.

Redmond argues that the circuit court erred when it denied his habeas petition on an ineffective assistance claim (App.2). Redmond has put fourth evidence that shows that

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[6] All the ineffective assistance arguments are re-iterated/re-argued from (App. 1), where it shows the *deficiency* and *prejudicial* prong. Now in this petition, Redmond is merely hitting facts of the ineffective assistance claims.

his counsel, Randall Skiles, was ineffective and that his ineffectiveness and deficiency prejudiced him. Redmond raised the following claims.

Counsel was ineffective for failing to:

C. SUBPOENA THEN ALLEGED VICTIM AND OBTAIN A WRITTEN AFFIDAVIT.

a) Attorney Skiles and the Agent's Failure to Subpoena Witnesses or Enforce the Subpoena.

As a preliminary matter, in a footnote at page 8 of Atty. Moriarty's motion to dismiss brief (R: 19 pg-8), Atty. Moriarty contended that Redmond's claim of ineffective assistance of counsel relating to the request for an adjournment and enforcement of a subpoena does not justify any more comment because there is no way his attorney could have requested adjournment or to enforced the subpoena. That is preposterous, as Redmond explained at of his brief (R: 10- pg-22-26); counsel did have an express avenue to request an adjournment and to enforce the subpoena. As clearly stated in Redmond's petition at page 5 (R: 10 pg-5), counsel could have moved the ALJ to adjourn the hearing pending efforts to enforce the subpoena. *Also see,* § 9.35 Subpoena of Witnesses at Exhibit 28 (R: 10-Ex28 pg-3).

Counsel was deficient for failing to motion the ALJ to adjourn the hearing pending enforcement of the subpoena. Moreover, as explained in Redmond's initial *Habeas* petition (R: 10), and below, that deficiency prejudiced Redmond. Atty. Moriarty conceded Redmond's position maintaining deficient performance and prejudice involving the failure to request adjournment and enforcement of the subpoena as he failed to refute petitioner's claims in that regard.

In addition, Atty. Moriarty's position that Redmond was able to argue more effectively on the written statements of alleged victims Astoria Thomas and K.E.B. (the nephew) is ludicrous. As a matter of law and common sense, the ALJ could better judge the credibility of the alleged victims when giving testimony in his presence. The ALJ's ability to evaluate a witness's demeanor via live testimony is the "*foremost concern*" of the confrontation clause. ***Cross v. Hardy,*** 632 F. 3d 355, 362 (7th Cir 2011).

Live testimony is exactly what Redmond wanted so the alleged victims could give truthful personal testimony to the ALJ about how they fabricated the allegations about Redmond's alleged attack toward them. At that point, the ALJ would have been able to conclude based upon his personal observation that Thomas and K.E.B were being truthful about their secondary account of how Redmond did not do the things they reported initially to police.

It was DOC's (Agent McCoshen) duty to act in good faith to obtain an alleged victim's presence, which requires diligent and reasonable measures. Especially, like in this case, where the witnesses are the crux of the state's case, the presence of the witnesses were even more important to the confrontation clause, as is, the government and counsel's responsibility to subpoena them. ***Id.***

In this case, the agent claims she left a subpoena at Thomas's house, nothing else, never called or revisited to ensure she knew she had been subpoenaed. (R: 10-EX4 pg-5 line 8, EX23). That certainly cannot be said to be reasonable or diligent. In fact, Thomas has now confirmed, she never knew anything about a subpoena. (R: 10-EX9 pg-8). These facts magnify how deficient Redmond's revocation counsel was.

Counsel had the obligation and right to subpoena Thomas and Boston, but did not. In fact, counsel admitted, he did not have any problem locating Ms. Thomas, so he could have effectively served the subpoena. Exhibit 4, page 14, lines 9-14. It is no excuse, nor is it reasonable for counsel to assume that the agent was subpoenaing her. Counsel had a duty to subpoena them as well and he did nothing reasonable or diligent to make certain Thomas and Boston had received the subpoena or that they would be coming. It is deficient performance as a matter of law for an attorney, like Skiles, to presume that the agent would secure the victim's presence. *See,* ***Goodman v. Bertrand,*** 467 F. 3d 1022 (7th Cir 2006).

In ***Goodman,*** the court held it was error for defense counsel to believe that a subpoena was unnecessary because the government would call a crucial defense witness and that it was prejudicial to the defendant. In conclusion, the court found, "There is little **tactical wisdom** in counsel resting on his hands and assuming the government would help make the defense case for him." ***Id.*** at 1029. Attorney Skiles failure to subpoena Redmond's critical witnesses undermines any claim of **diligence,** his deficient performance prejudice Redmond. ***U.S. v. Oliver,*** 683 F. 2d 224, 223 (7th Cir. 1982).

While courts will give deference to sound tactical decisions, it is clear Redmond's counsel did not make a tactically wise decision resulting in deficient performance. This deficient performance prejudiced Redmond because what he sought to convey to the ALJ would not have been what Atty. Moriarty portrays as wildly implausible, had the ALJ had the opportunity to observe the alleged victims demeanor and judge their credibility in person. Rather, Redmond would have achieved exactly what he sought, the alleged victims would have vindicated him from any wrong doing on the most serious of the

allegations and there is a reasonable probability he would not have been revoked. ***State v. Spanbauer,*** 180 Wis. 2d 548, 552 (Ct. App. 1982) (ALJ concluded allegation of sexual assault did not require revocation based upon weighing the interests of society and parolee's rehabilitation).

To the extent that Atty. Moriarty argues that the Administrator correctly pointed out that Redmond would have been revoked even if he were cleared of the assault allegations made by Thomas and Boston, thus, Redmond's claims of ineffective assistance of counsel are moot anyway is incorrect. Atty. Moriarty's Motion to dismiss Brief, page 23 (R: 19- pg-23) it is clear matter of law that every violation of does not have to result in revocation. ***Snajder v. State,*** 74 Wis. 2d 303, 316 (1976)(Respondent suggested that the finding of department of a lesser proven violation, standing alone, was sufficient to have warranted revocation even though more serious allegation was thrown out. The court disagreed that every violation of supervision was sufficient to result in automatic revocation).

First, if Redmond proved his counsel was ineffective, he could possibly receive a new hearing that may conclude, with effective counsel, that all the allegations are unfounded or insufficient to warrant revocation. Second, if Redmond is somehow cleared of only the battery allegations, based upon grounds of ineffective assistance of counsel, the matter would need to be reversed for the agent to determine whether to pursue revocation, and if so, for the ALJ to consider the revocation of Redmond's ES and probation, absent the allegations of assaultive behavior, and only on the remaining admitted allegations.

Then, Atty. Moriarty pretty much argues his way out of court when he says, "The only tools that attorney Skiles had were seriously unreliable recantation statements as he attempted to battle the overwhelmingly evidence against Redmond as summarized by the ALJ decision. There was nothing unreasonable in attorney Skiles not subpoenaing the recanter—Redmond's girlfriend—and, if anything, that remains, in retrospect a wise professional decision." (R: 19- pg-9). Atty. Moriarty makes Redmond's case on the prejudice prong for him, i.e., Skiles exercised little **tactical wisdom** in resting on his hands and assuming the government would help make the defense case for him by subpoenaing Thomas and Boston, when he knew if the witnesses did not come, he was left with only seriously unreliable recantation statements as he attempted to battle the so called overwhelmingly evidence against Redmond. In Atty. Moriarty's own words, the actions or inactions of counsel's deficient performance prejudiced Redmond.

D. FAILING TO OBJECT TO THE STATES ALLEGED BLOOD EVIDENCE.

A) Skiles Was Ineffective for Failing to Subpoena Blood Evidence.

Atty. Moriarty made a joke out of the evidence and judicial system when addressing Redmond's grievance regarding Skiles failure to subpoena the blood evidence. Atty. Moriarty avers, what would have that possibly shown beyond the fact that it was Astoria's blood all over the sink? (R: 19-pg-9). Mr. Redmond takes exception with the sarcasm and maintains, if the blood evidence were available it could have very well cast doubt on the agent's case when it may have revealed it was not Ms. Thomas's blood at all or that it was not blood.

Next, Atty. Moriarty argued that Skiles appropriately focused on avenues of investigation that were potentially fruitful given the odds of prevailing on the implausible theory Redmond had selected. In support of this position, Atty. Moriarty point to Exhibit 17 (R: 10- EX17). However, exhibit 17 (R: 10- EX17) is an exhibit that shows Skiles hired an investigator for the underlying criminal case, not the revocation hearing to allegedly investigate certain issues. However, as Redmond stated in his petition, the investigator never spoke with anyone and neither did Skiles. The exhibit simply reflects that Skiles requested and received the money from the public defender, not that any investigation was performed. In his petition under oath and the penalty of perjury, Redmond clearly pointed out Skiles, nor anyone else interviewed or attempted to interview Thomas or K.E.B.

In a last ditch effort, Atty. Moriarty argues that Redmond's arguments of ineffective assistance of counsel were conclusory and that the documents attached to the petition demonstrates the assistance provided was effective, not ineffective. Atty. Moriarty was mistaken; Redmond set forth all required allegations of material facts required by law that, if true, would entitle him to relief, including an affidavit and vast documentary evidence affirmatively indicative of ineffective counsel. Redmond specifically related the deficient performance and prejudice prongs for each claim and maintains facts that, if true, would entitle his to relief, which is presumably why the circuit court scheduled the case for briefing on the merits, rather then summarily dismissing the petition.

In reality, it is Atty. Moriarty's argument maintaining Redmond's arguments of ineffective assistance of counsel were conclusory and that the documents attached to the

petition demonstrates the assistance provided was effective, not ineffective, that are broad sweeping, cursory, and unsupported arguments that should be disregarded by the hearing court. ***McMorris,*** and ***Olson,*** supras.. Atty. Moriarty has not pointed to one iota of evidence and did nothing to develop its position that Redmond's position was lacking under ***State v. Allen,*** 2004 WI 106, ¶ 15, and their conclusory statements are not properly before the court. ***Fritz,***. Supra.. Atty. Moriarty did not provide sufficient facts to support his allegation of timing and stress. The excited utterance exception was therefore misplaced. Atty. Moriarty has not demonstrated counsel was effective.

E. THE CLAIMS OF INEFFECTIVE ASSISTANCE RAISED BY REDMOND THAT ATTY. MORIARTY FAILED TO ADDRESS, THUS, FAILED TO REFUTE AND CONCEDED ARE AS FOLLOWS:

> **2)** Counsel was ineffective for failing to obtain a written affidavit from Thomas and Boston **(R: 10- Page 9-10);**
>
> **3)** Counsel was ineffective for failing to protect Redmond's right to cross examination **(R: 10 Page 11-12);**
>
> 4) Counsel was ineffective for failing to attempt to postpone the revocation hearing until after Redmond's preliminary hearing in Dane County Case 12CM745 and 12CF601 **(R: 10- Page 17-22).**

The Court of Appeals shall see that the circuit court should have valued Redmond's claims of ineffective assistance of counsel that went un-refuted, because Atty. Moriarty not acknowledging those arguments accepts them accepted as confessed which they did not undertake to refute. ***Charolias Breeding Ranch,*** supra.. Redmond requests that this Court grant a reversal on the claims the circuit court left un-argued since the circuit allowed Atty. Moriarty to address his merits in the motion to dismiss in his favor with regard to the above conceded claims.

In brief, the respondent's arguments militating against Redmond's claims of ineffective assistance of counsel are broad sweeping, cursory, and unsupported arguments must be disregarded by this Court. ***State v. McMorris,*** 2007 WI App 231, ¶ 30, and ***Olson v. Red Cedar Clinic,*** 2004 WI App 102, ¶ 11. Moreover, if the respondent's current brief was taken at face value to be his final position on the merits of his claims regarding counsel; the respondent will have admitted/conceded the claims raised by Redmond that it failed to remark on. ***Charolias Breeding Ranch, Ltd., v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109 (Ct App. 1979) (Respondents cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute).

F. COUNSEL AIDED AND ABETTED THE STATE BY MAKING A PREJUDICIAL COMMENT "EXCITED UTTERANCE", IN THE OPENING ARGUMENTS AT THEN HEARING WHICH GAVE THE ALJ THE OPPORTUNITY TO ADMIT THE REPORTS AS A HEARSAY EXCEPTION TO DETERMINE INDICIA OF RELIABILITY.

Counsel's representation fell below objective standards of reasonableness. ***State v. McMahon,*** 186 Wis. 2d 68, 80 (Ct. App. 1994). It cannot by any sensible person be said that it is reasonable for one's defense counsel to give the fact finder a reason to continue with the hearing when it was his client's wish for it to be adjourned. Had the ALJ not been presented with the excited utterance exception by Redmond's defense counsel the case would have likely had to be adjourned to allow Redmond his right to cross examination of the alleged victims.

The claims Redmond asserted in his petition demonstrate a reasonable probability that but for counsel's professional errors; the result of the proceeding would have been different. ***Strickland,* supra. at 964**. Had Redmond been able to cross examine the alleged victims, they could have personally testified to the ALJ how they lied to the police and the fact the police reports that were allowed only because of the excited utterance exception were not truthful. Other then the excited utterance exception, the ALJ did not find good cause for not allowing confrontation of the witnesses and allowing the alleged victims hearsay statements in. Since allowing hearsay evidence in without a finding of good cause is reversible error, the result of the proceeding would have been different. ***State ex rel. Simpson v. Schwarz,*** 2002 WI App 7. Moreover, there is a reasonable probability, had the alleged victims personally testified to the ALJ that Redmond had not hit them, he would have been found not guilty of the most serious allegations and his parole would not have been revoked.

Furthermore, Atty. Moriarty's position and ALJ's finding that Thomas and K.E.B (referred to by Atty. Moriarty as the nephew) told police what they did promptly and that they were under stress are broad sweeping, cursory, and unsupported arguments should have been disregarded by the hearing court. ***McMorris,*** and ***Olson,*** supras. Atty. Moriarty has not pointed to one iota of evidence and did nothing to develop its position in regards to timing and stress. Conclusory statements are not properly before the court. ***Fritz v. McGrath,*** 146 Wis. 2d 681, 689 (Ct. App. 1988) (although pertaining to affidavits, the same logic follows). Atty. Moriarty did not provide sufficient facts to support his allegation of timing and stress. Atty. Moriarty has not demonstrated counsel was effective.

Atty. Moriarty concedes all other aspects of Redmond's claim set forth in the Excited Utterance portion of his petition at (R: 19- pg26-31) ***Charolias Breeding Ranch,*** supra.

For all these claims Redmond argues that is counsel was ineffective. Which are facts and its entirety. The circuit court erred in denying Redmond an evidentiary hearing. Redmond respectfully asks this high court to examine whether there were deficiencies by Redmond's counsels, and whether it prejudice Redmond. And if so, would it cause for Redmond to be given an evidentiary hearing.

G. REDMOND'S PETITION CONFIRMS THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL DID MAKE A DIFFERENCE IN THE OUTCOME.

Lastly, the respondent argues Redmond supervision would likely be revoked based on the violations he admitted alone, as did the administrator. Based upon that conclusion the respondent contends Redmond claims of ineffective assistance are academic (R: 19- pg-23. Although Redmond admitted to some of the allegations, not all violations are sufficient to warrant revocation. ***Spanbauer*** and ***Snajder,*** supras.. Revocation may not be sufficiently grounded if the battery allegations, which Redmond did not admit to, are removed. Whether he should be revoked based upon those lesser allegations would be for the ALJ and his agent to determine.

In fact the evidence demonstrates that the agent would not have moved to revoke Redmond if the battery allegation were dismissed. Attorney Skiles indicated in two letters an ATR would be appropriate and he would seek ATR if battery allegations were dismissed. (R: 10- EX19). In addition, Redmond's agent indicated in the revocation

summary and at the revocation hearing she would not be revoking him if the battery allegation were dismissed. (R: 10- EX4, page-10, lines 13-15 and 20, page 3. Therefore, Redmond's claims of ineffective assistance are not moot. Redmond stated material facts that, if true, entitle him to relief and based thereon the Court scheduled the matter for briefing on the merits. Redmond is now ready to prove his claims based on the evidence presented and to be presented at a ***Machner*** evidentiary hearing if necessary.

4. ATTY. MORIARTY'S MOTION TO DISMISS IS NOT THE PROPER MECHANISM TO CHALLENGE THE MERITS OF PETITIONER'S CLAIMS.

A. The court erred when it allowed Atty. Moriarty to argue the merits on Redmond's claim of ineffective assistance in its motion to dismiss.

A very important part that went wrong with Redmond's case is the proper procedure when raising a motion to dismiss and its arguments. After doing the run-of the-mill screening process; presumably, the circuit court found the Redmond's claims stated sufficient facts that, if true, would entitle him to relief. When a court conducts the initial screening order of a habeas corpus petition, the law authorizes the court to dismiss a petition summarily where it plainly appears from the face of the petition that the petitioner is not entitled to relief.

The screening process would include dismissing a petition that does not state material facts that, if true, would entitle the petitioner to relief or a petition that is plainly frivolous. Atty. Moriarty's current argument on the merits is flawed for at least four reasons:

1) The circuit Court did its initial screening of the petition for writ of habeas corpus and scheduled the petitioner's habeas for briefing on the merits. This would make it seem, the Court found that the material facts the petitioner stated, if true, entitled him to relief, otherwise the Court would have summarily dismissed the petition. ***State v. Bentley,*** 201 Wis. 2d 303, 309-10 (1996); ***State v. Nelson,*** 54 Wis. 2d 489, 497 (1972); and ***State v. Allen,*** 2004 WI 106. Thus, Atty. Moriarty's argument that the materials Redmond presented do not raise facts sufficient to entitle him to relief because they demonstrate he received the effective assistance of counsel must fail. Obviously, the circuit Court determined in its initial evaluation that the petitioner stated sufficient facts, which if true, entitle him to relief and did not summarily deny the petition and scheduled briefing on the merits.

2) Atty. Moriarty argued the merits of petitioner claims in a motion to dismiss are legally amiss. As the law states, a motion to dismiss is not the proper place to argue the merits of the claims. Rather, the motion to dismiss is the proper mechanism to argue other procedural defects that can resolve the case without looking into the merits, e.g., failure to exhaust remedies, failure to prosecute, failure to comply with discovery, untimely petition, court's lack of jurisdiction, petitioner has other adequate remedy at law, claims disqualified due to procedural bar, etc. *See, e.g.,* **Wis. Stat. § 345.41, §802.05 (4) (b), § 805.03, § 974.06 (4),** ***State v. Pozo,*** 2002 WI App 279, ¶8.[7]

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[7] During Redmond's research, he extensively search cases particular to the proper mechanism on a motion to dismiss and if it violates the petitioners due process if the circuit court allows a respondent to argue the merits prior to the actual habeas briefing in a motion to dismiss. This case is unique and there are no laws or standards set to Redmond's knowledge, which he can rely. Redmond asks if this procedure **"arguing a merit in a motion to dismiss is proper"** if not does it violates the petitioner's procedural due process and fundamental fairness.

3) Atty. Moriarty argued the merits of petitioner's claims in a motion to dismiss improperly affects fundamental fairness and due process of law. It is a well-known concept, that when a defendant or petitioner is attacking the effectiveness of counsel via motion or writ of habeas corpus; the merits are examined fairly by allowing the petitioner an opening brief and a reply brief. In this case, by trying to argue the merits in the motion to dismiss, Atty. Moriarty is taking the opening brief and the reply brief away from the petitioner in a tactical move to stomp out his fundamental fairness and due process. The adjudication of the petitioner's claims on the merits in what Atty. Moriarty hoped would be in this motion to dismiss is ultimately wrong and Redmond objected but was rejected by the hearing court.

4) Redmond claims does have merits as presented in his petition. To prevail on his ineffective assistance of counsel claims, Redmond must establish that counsel performed deficiently and that that deficient performance prejudiced him. ***Strickland v. Washington,*** 466 U.S. 668, 694(1984), and ***State v. Moats,*** 156 Wis. 2d 74, 100-01(1989). In Redmond's motion he meticulous and steadfastly sets forth how counsel's performance was deficient and prejudicial.

Redmond correctly forwards his claims of ineffective assistance of revocation counsel in his ***Habeas Corpus***. ***Ramey***; ***Vanderbeke;*** and ***Reddin***, supras.. Redmond correctly set forth in his petition how his counsel's representation fell below objective standards of reasonableness. ***State v. McMahon,*** 186 Wis. 2d 68, 80 (Ct. App. 1994). The claims Redmond asserted in his petition demonstrate a reasonable probability that but for counsel's professional errors; the result of the proceeding would have been different. ***Strickland,*** supra. at 964.

Redmond suggested that if the circuit Court deemed appropriate at the motion to dismiss stage to argue the merits of his claims, that the Court afforded him the opportunity to file a supplemental brief addressing the merits. Atty. Moriarty could then fairly respond and Redmond can then file his reply. This would have ensured the due process protections a habeas petitioner is entitled, are provided to Redmond. Ultimately, the court granted Atty. Moriarty's motion to dismiss thus violating Redmond's due process by arguing the merits in the motion to dismiss and not affording him the opportunity to address the issues properly held in Atty. Moriarty's brief.

5. The Facts Relayed Still Suffice to Show Redmond is Detained Based upon the Revocation Decision.

The State maintains that Redmond's probation was revoked, but argues he finished the one year and six months reconfinement probation, which it observed by the petition and its attachments, long ago when his sentence expired on or before November 2013 (R: 10- pg 10-11. Again, the state argues its way out of court by acknowledging Redmond's probation was also revoked, information they gleaned form the petition, which obviously would have resulted in a sentencing after revocation and shows the cause of his detainment.

However, even if one were to accept the fact the petition only demonstrates Redmond was serving one year six months reconfinement that arguably ended in October or November, the petition still demonstrates that revocation is the cause of his detainment. The only logical conclusion for Redmond still being confined is that he received more time on the related criminal case or revocation of probation, which in this case he received both. The Court can judicially note from Wisconsin Circuit Court

Access that Redmond was sentence after revocation of his probation to 4 in and 4 out **consecutive** to reincarceration on

Dane County Case No. 09CF963 and to six months incarceration on Dane County Case No. 12CF601. *See* ***Bullock,*** and ***Mercado,*** supras.

Our United States Supreme Court has acknowledged in ***Garlotte v. Fordice,*** 515 U.S. 39, 40 (1995) that, for purpose of habeas relief, **consecutive** sentences should be treated as a continuous sentence and a prisoner is in custody in violation of the constitution, if any of the sentences the prisoner is scheduled to serve was imposed as the result of the deprivation of a constitutional right. Likewise, Wis. Stats. § 302.113(4) [*holds all* ***consecutive*** *sentences shall be computed as one continuous sentence*].

So, even if the petition only demonstrated Redmond was only being detained for one year six months reconfinement, although it also does raise his probation revocation, logical extension would conclude the reconfinement was only a portion of the continuous sentence he had to serve since he is still confined. Accordingly, habeas relief is available because Redmond is currently detained as a result of a continuous sentence, which in part is comprised of the one year and six months order on reconfinement that the respondent acknowledges the petition pleads. The petition does portray Redmond is in custody for the one year six month reincarceration decision being challenged; a cause of custody the respondent admits the petition clearly establishes. Accordingly, the respondent's argument that the petition does not confirm cause for Redmond's current custody is amiss.

Therefore, the hearing court erred in denying habeas petition because its belief that Redmond's sentence has expired which he, Redmond, could not make appeal to.

Redmond Respectfully asks that this court Reverse and remand back to the hearing court to correct its erroneous decision.

REFUSAL OF WRIT

6. A) Any judge who refuses to grant a writ of habeas corpus, when legally applied for is liable to the prisoner in the sum of $1000. ***State v. Pozo***, 2002 WI App 279; State Stat. 782.09

As this appeal brief is sufficiently argued, Redmond states that he is entitled to the sum of $1000 because the circuit court denied him his Habeas corpus when legally applied for. When Redmond applied for his habeas corpus, the circuit court judge originally granted the motion on its faces because Redmond alleged facts, which entitled him to the review. When the Atty. Moriarty filed for the motion to dismiss, the judge then denied the Habeas corpus without further review when he originally set a briefing date. Redmond argued throughout this brief that he was entitled to the Habeas corpus because the law entitles him to it. ***Ramey***; ***Vanderbeke;*** and ***Reddin***, supras. Moreover, Redmond had no other adequate remedy at law, which Redmond could have exhausted. And by the court making an erroneous decision by granting Atty. Moriarty's motion to dismiss on its arguments, it erroneously stated that Redmond was not entitled to a Habeas relief or review because the court felt Redmond had other remedies he could have pursued. This must fail because there are no legal authorities supporting such finding. Therefore Redmond shall be granted the $1000 pursuant to Chapter 782.09. Even more, if this court

decides with Redmond on his arguments and grounds for *reversal*, Redmond shall be granted the $1000 judgment.

CONCLUSION

Wherefore, Petitioner-Appellant, Antjuan Redmond, respectfully asks this court to reverse the Circuit Courts decision denying his Habeas Corpus and Remand back to the hearing court for an evidentiary hearing on the claim of ineffective assistance of counsels and its merits.

CERTIFICATIONS

I here by Certify that this brief conforms to the rules contained in §809.19(8) (b) And (c) for a brief produced with a monospaced font.

The length of this brief is 48 pages.

Dated this 2nd day of April, 2014.

Signature: _____

I certify that this brief or appendix was deposited in the United States mail for delivery to the clerk of the Court of Appeals by first-class or other class of mail that is at least as expeditious, on 4/2/15. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this 2nd day of April, 2014.

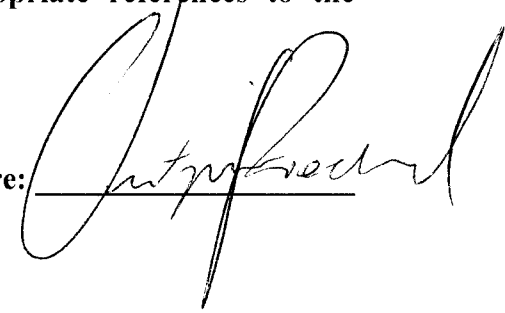
Signature: _____

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit courts reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and the last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd **day of** April **, 2014**

Signature: 

APPENDIX