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

Respondent-Respondent.

PETITIONER'S REPLY BRIEF

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,

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 labeled in heading.**

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STATEMENT OF CASE

1. Nature of the case.

Redmond is a prisoner incarcerated a Kettle Moraine Correctional Institution (KMCI). Hen 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 brief Br. 4) The Respondent-Respondent, Brian Foster (Respondent-Respondent or Warden Foster), is the former KMCI warden (R: 10:1.)

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, 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)

2. Administrative Law Judge Robert G. Pultz, (hereinafter ALJ) presided over Redmond's final revocation hearing on April 17, 2012.

3. 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.

4. The Agent advised the parties that Ms. Thomas was subpoenaed

5. (R:.10- EX 4,pg11-line4,) but neither she nor K.E.B appeared.

6. Ms. Thomas never signed for or was properly served a subpoena. Subsequently, the ALJ relied on the police reports. (R: 10- EX9, EX23).

7. The ALJ found that "The child's version has indicia of reliability as it is supported by physical evidence." (APP: 4- EX5, pg-3).

8. There was no physical evidence brought to bear at the final revocation hearing.

9. Redmond, by his attorney, stipulated to allegations five, six, and eight

10. (R: 10- EX3-pg-3 line12-13).

11. DOC withdrew Allegation number seven (R: 10- EX3, pg-8 line 8-11).

12. The ALJ found Redmond guilty of allegations one, two, three, and four.

13. Redmond asked Counsel to file a petition for writ of certiorari, but Counsel declined. (R: 10- EX6).

14. 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).

15. 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).

16. 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).

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

18. 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.

19. 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).

20. 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.

21. 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).

1. 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.

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

3. 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).
4. Redmond appealed his revocation decision and DHA's decision the Sheboygan Circuit court for a State ***Habeas corpus*** on the ineffective assistance claim.
5. The Honorable Judge L. Edward Stengel originally granted this petition and set for a briefing Schedule for the month of august and September.
6. Warden Foster was represented by the AAG Richard Briles Moriarty, who filed a motion to dismiss on (R: 18; 19; 21; 16; 33).
7. Redmond Responded to the Motion to Dismiss and a Motion hearing was scheduled on September 10, 2014.
8. The Motion to dismiss was granted for the reasons set fourth in the motion to dismiss (R: 27).
9. Now Redmond appeals to the Honorable Court of Appeals in the second district. Redmond raises the claim if ineffective assistance of probation revocation counsel.

ARGUMENT

1) THIS COURT SHOULD REVERSE THE CIRCUIT COURTS DISMISSAL OF REDMOND'S PETITION FOR WRIT OF HABEAS CORPUS INSTEAD OF AFFIRMING IT CONSISTENT WITH THE ATTY. GENERALS REQUEST BASED ON THE ASSUMPTION THE LOWER COURTS AND ATTY. GENERAL'S ASSUMPTION THAT REDMOND HAD ADEQUATE REMEDIES AVAILABLE TO HIM WHICH IS INCORRECT.

LEGAL STANDARD

If there is an adequate remedy available at 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.

A. Redmond did not have an available remedy to him before filing his habeas corpus.

Atty General Keckhaver argues that this court should affirm the circuit courts decision because she believes Redmond had adequate remedies available to him at law via Booker motion, and that habeas relief is barred because Redmond could not show he did not have adequate remedies. (Resp'nt Brf.).

As a reference to the Appendix, See (App. 3&5) which shows Redmond did in fact exhaust all of his remedies before he filed his Habeas petition. After Redmonds revocation hearing, he appealed the ALJ's decision (APP: 4) to the division of hearings

and Appeals (App:). Redmond did in fact try to pursue a certiorari petition but because of his then counsel, Randall Skiles, belief it would be pointless because he see no novel issue(R:10-EX6).

Further Redmond tried to pursue Certiorari Pro se, but was unable because he Redmond was writ back I fourth form Dodge correctional institution and Dane county jail by the state. This could be proven through the online court access ascending and deceding order on case # 12cm745&12CF601. This was the delay in filing the Certiorari petition which has a jurisdictional 45 day time limit which could not have been extended. Redmond sleeked to have this 45 day time limit extended by letter to the public defenders office see (Reply brief APP:1)unfortunately it could not coming from the public defenders office from a third party which was Redmond's counsel Randall Skiles.

Redmond Filed a Newly Discovered evidence motion pursuant to ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, after receiving additional evidence at his sentencing after revocation hearing on case # 09CF990&09CF963 in July of 2012 victim statements and phone recordings. The ***Booker*** Motion was Presented to DHA Administrator (APP: 1) this was denied because the administrator believed the evidence presented was already known to the court that MS. Thomas Recanted her statement Redmond agrees. So Redmond filing a certiorari was not necessary. Even if Redmond could have sill petitioned just to see what the court would do with that motion, at the time Redmond filed his Habeas his 45 day time limit was up and was not extendable. Therefore, Redmond was now eligible for a Habeas petition for ineffective assistance of counsel.

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Lastly, In State ex Rel. Redding V. Gallster 1997 Wisc. App. Lexis, 9. The court held that the Petitioner Redding raised no claim of effective assistance of his counsels representation during the probation Revocation Proceedings and that he, Redding, challenges the Administrative decision to revoke his probation and procedural and substantive grounds. The Court held that Circuit court Review of those issues is available through Certiorari, an adequate remedy which thus precludes the issuance of a writ of Habeas Corpus. Id.

Redmond is not challenging DHA's or AL's decision. But effectiveness of his counsel which Redmond contends is the Reason to the adverse decision by DHA and AL. Therefore certiorari was not a remedy because those are for Administrative decisions in which the circuit court hears. Redmond's entitled to Habeas Corpus.

B. THE ADEQUATE REMEDIES THE STATE ARGUES WERE AVAILABLE, WERE EXHAUSTED.

For clarity, Redmond presented in his Initial Brief now his Reply brief, that he has exhausted all adequate and available remedies to him for instance:

1) Appeal to DHA form ALJ's decision, (APP: 4)

2) Booker motion to DHA under newly discovered evidence, (APP: 1)

C. CERTIORARI WAS NOT EXHAUTABLE BECAUSE REDMOND'S ATTORNEY GELTTOLD HE, REDMOND HAD NOT NOVEL ISSUES.

Redmond did not challenge DHA's decision through certioair because for counsels Skiles deficiencies, he told Redmond there were no novel issues. Why? Redmond cannot speak for his former attorney on his insight and decision making, that's what machner and evidentiary hearings are for. Make no mistake, Redmond knows he's not entitled to a attorney on certiorari review, Rather Redmond argues that taking the position on whether Redmond has a novel issue and decision if he should file for certiorari would or should be considered a "self appointed" attorney if you will.

Nevertheless, Redmond still tried to pursue certiorari by trying to see if his time would be extended.

D. INEFFECTIVE ASSISTANCE CLAIM IS NOT A REMEDY PURSUANT TO BOOKER.

Atty General Keckhaver has the straight-forward assumption that Booker allows ineffective assistance claims. Well from the exact autority and case law the state relies upon, is the exact law Redmond relies as well. And from Redmond's understanding the Booker court [o]nly allows newly discovered evidence. ***Booker***. ¶¶9-14. to re-open hearings. Atty Keckhaver, Further states denials by the administrator may be challenged through certiorari petition, well why this is true, Redmond contends that this would not be necessary because the administrator reviewed Redmond's evidence and made a decision. Whereas in ***Booker***, the administrator denied the review because at the time there was no such thing as a remedy which booker made. The Booker court was clear on what type of motion can be brought to DHA, and ineffective assistance of counsel was not one. The respondent repeatedly brings up the assumption that ineffective assistance claims to DHA are remedies pursuant to the Booker court. This is untrue and deserves no further comment. Atty Keckhaver argues her way out of court when she states:

> "A Booker motion is an adequate remedy whenever a probationer obtains [Newly Discovered Evidence]" (Resp'ndt Brf: PG13)

Further, in the respondents Statement of issues, She, Atty Keckhaver, states Redmond could have raised an ineffective assistance claim to DHA,. This is erroneous information and should be disregarded, moreover, in atty Keckhaver's statement of publication, she goes to state:

> [Respondent-Respondent request publication because no published Wisconsin decision addresses a ***Booker*** motion provides an adequate remedy... for a challenge to ineffective assistance of counsel at a revocation proceeding]

So why shall this court affirm a decision which the atty general request when she herself is unfamiliar with the Booker remedy on ineffective assistance specifically, when there are no published decisions to rely upon? A decision based on ones belief is not how our courts were built. Redmond did not and still does not have an adequate remedy.

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 (APP.

2- Ex6). Redmond does not know of any issue that could have been pursued by certiorari.

2) BOOKER MOTION BEING ANALOGOUS TO CRIMINAL DEFENDANT'S RIGHTS AND ITS PROCEEDINGS IS NOT CONSISTENT WITH WHAT ATTY. GENERAL KECKHAVER ARGUES BUT TO ENSURE DUE PROCESS BEING GIVEN.

A) BOOKER MOTIONS ARE ANALOGOUS TO CRIMINAL PROCEEDINGS ONLY UPON NEWLY DISCOVERED EVIDENCE AND DUE PROCESS REASONING.

This case is unique, and as both parties put their arguments fourth, it makes the Booker case more complex. Redmond direct this court and respondent to ***Booker, Supra*** at P11-14.The court was clear on what it meant by being analogous and goes in to detail:

> "The court held, **the determination of whether a claim of newly discovered evidence** entitles a probation revoke to evidentiary hearing, to determine whether a new probation revocation hearing should be conducted shall be governed by procedures analogous to those in criminal proceedings". ***Booker, Supra at P11.***

Booker relied upon ***State v. Bembenek***, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1987). In ***Bembenek***, this court held that "**Due Process may require granting a new trial on the basis on newly discovered evidence**". This court in bembenek further stated that Due Process is the quintessential foundation upon which fairness and justice rest at all stages of proceedings".

In finalizing the Booker court held that, "It has not yet been presented with any legitimate reason as to why a similar procedure to "ensure due process of law should not also apply to an individual in Booker's situation considering personal liberty interest at stake and that the concepts of due process and fair play apply to parole revocations, quoting ***State ex rel. Leroy v. DHSS***, 110 Wis.2d 291, 295, 329 N.W.229 (Ct. 1982), Booker, Supra at P14. Also see, ***Morrissey v. Brewer***, 408 U.S. 471- (minimum requirements of due process for revocation (a) written notice of claimed allegations (b) disclosure of evidence against him (c) opportunity to be heard, present witnesses and documentary evidence (d) etc. ; also see ***Scarpelli v. Gagnon***, 411 U.S. 778, 786. But see (That probationers do not have a full panoply of rights as a person in a criminal process).

If Redmond's minimum requirements of due process is what's laid in ***Morrissey*** and ***Gagnon***, ***Supra***. for probationer's, and knowing that a full panoply of rights due to a person in a criminal process, that doesn't apply to probationers, how can he, Redmond be entitled to all post-conviction motions as those is criminal proceedings? The United

States Supreme Court has set grounds to what is applicable to probation probations that are consistent to those in criminal proceedings. See ***Morrissey*** and ***Gagnon, Supra***.

Redmond states his point. The reason the ***Booker*** court held that theses proceedings are analogous to criminal proceedings is for due process reasons. That all probationers be given the same due process rights that criminal defendants are given. And that, is should be a way, a specific way the courts made, to petition DHA for a new hearing. In doing so, the court made a newly discovered evidence motion under Booker. And upon reviewing this Booker motion, the court made it that the petitioner shall be given a fair review consistent with due process in criminal proceedings. This court did not say that probationers shall be able to petition DHA for all post conviction/revocation motions (example: ineffective assistance, constitutional violation etc).

3) REDMOND'S COUNSEL WAS INEFFECTIVE, AND HIS DEFICIENCY WAS THE MAIN REASON AS TO WHY REDMOND WAS REVOKED.

A. COUNSEL WAS INEFFECTIVE BY HAVING REDMOND STIPULATE TO THE ALLEGED VIOLATION AT THE REV. HEARING.

Attorney General argues that even if Redmond counsel was ineffective it wouldn't matter because Redmond stipulated to 3 allegations. Redmond states that due to his

counsel he stipulated to the three alleged violations. Prior to the beginning of the revocation hearing, Redmond counsel told him to stipulate to the less serious violations. And that the ALJ that was holding the hearing is fair, once an individual show some responsibility. So Redmond did. Redmond would have proven this at a machner or evidentiary hearing on cross-examination of Redmond's former counsel on if this were true and consistent to what Redmond contends.

To the extent that the respondent argues that the Administrator correctly pointed out that Redmond would have been revoked even if he was cleared of the assault allegations made by Thomas and K.E.B, thus, Redmond's claims of ineffective assistance of counsel are unlikely anyway is incorrect. Respondent's Brief, page 15. 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.

Atty. General Keckhaver argues Redmond supervision would likely be revoked based on the violations he admitted alone, as did the administrator. 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. (Starting with the agent, if not it would be putting the cart before the horse)

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-Exhibit 19). 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 was dismissed. (R: 10-Exhibit 4, page 10, lines 13-15 and 20, page 3). Therefore, Redmond's claims of ineffective assistance have made a difference had the battery allegations were reversed and by the agent, stating she would not be revoking Redmond for the other allegations, it would have been a different outcome had counsel been effective. With this Redmond completes his arguments and put faith in the deciding courts hands.

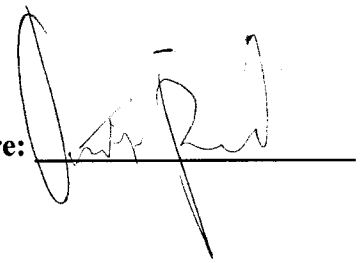
Wherefore, Redmond Respectfully asked that this court decides in his favor, *reversing* the Circuit courts decisions denying his habeas corpus.

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 19 pages including the appendix and table of contents.

Dated this 26th day of May, 2015.

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 5.26.15. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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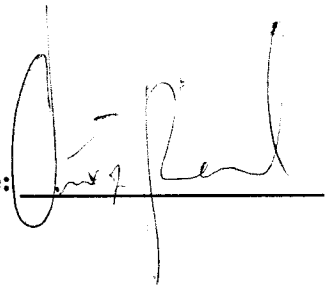
Signature: 

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.

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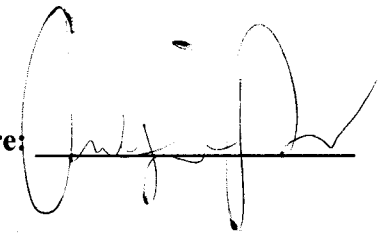
Signature: 

APPENDIX