

THE REVOCATION HEARING'S OVER. NOW WHAT?

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I. Truth in Sentencing

- A. Set period of actual incarceration followed by a period of extended supervision, analogous to parole under pre-TIS law. *See* Wis. Stat. §973.01.
 - 1. The Department of Corrections can recommend revocation of extended supervision based on a violation of the terms of supervision.
 - 2. The defendant is entitled to a final revocation hearing before an Administrative Law Judge to determine whether supervision should be revoked.
 - 3. Once a decision to revoke has been made, the defendant is returned to the circuit court for a determination about how long the defendant will be returned to prison.

II. Challenging the Revocation Decision

- A. Appeal to the Administrator (*See* Wis. Admin. Code §HA 2.05(8))
 - 1. Must be in writing “with arguments and supporting materials” and filed within 10 days of the date of the ALJ’s written decision.
 - a. Materials filed with the division may be served personally or by first class, certified, or registered mail, inter-departmental mail, or fax. Wis. Admin. Code §HA 2.03(2). No affidavit of mailing, certification or admission of service need be filed with the Division of Hearings and Appeals. *Id.*
 - b. Materials filed by mail are considered filed the date of the postmark. Wis. Admin. Code §HA 2.03(3). Materials submitted personally or by inter-department mail are considered filed the date they are received by

the Division of Hearings and Appeals. *Id.* Materials submitted by fax are considered filed the date they are received “as recorded on the division facsimile machine.” *Id.*

- c. In calculating the due date, remember that “‘day’ means any working day, Monday through Friday, excluding legal holidays, except as specifically provided otherwise in s. HA 2.05 (4) (a).” Wis. Admin. Code §HA 2.02(5).
 - d. In drafting an appeal, be sure to preserve any legal and constitutional arguments for a possible petition for writ of certiorari. However, also consider raising any equitable issues, including those relying on facts outside the record.
2. A copy must be sent to the agent, who has seven days to respond. Wis. Admin. Code §HA 2.05(8)(b).
 3. The Administrator can modify, sustain, reverse or remand the ALJ’s decision based on the record at the hearing and the materials submitted by counsel. Wis. Admin. Code §HA 2.05(9)(a).
 - a. The decision must be in writing and provided to the client, client’s counsel, and the Department within 21 days after receipt of the appeal. Wis. Admin. Code §HA 2.05(9)(b).
 4. Contact info:

David H. Schwarz, Administrator
Division of Hearings & Appeals
5005 University Avenue, Suite 201
Madison, WI 53705-5400
(608) 266-7709
Fax (608) 264-9885

- B. Appeal of the Administrator’s decision is done by a **Petition for Writ of Certiorari** in the county in which the defendant was convicted of an offense for which he was on supervision. Wis. Stat. §801.02(5); *see* Wis. Stat. §801.50(5).
 1. The petition for writ must include documentation showing exhaustion of remedies, i.e. the appeal to the Administrator. Wis. Stat. §801.02(7)(c).
 - a. “Exhaustion” means raising the same issues before the Administrator that may later be raised in a petition for writ of certiorari.

2. The Division Administrator (currently David Schwarz) should be listed as the respondent and served at the address above.
3. A petition for writ of certiorari must be commenced within 45 days of the decision to be reviewed. Wis. Stat. §893.735.
 - a. Along with filing a petition, you must also file an Affidavit and Verification in support of the Petition, a Writ of Cert, and your Order Appointing Counsel.¹ (Samples are attached).
 1. The assigned judge should sign the writ and return it to you.
 2. Once it's returned, forward it to the Division with a copy of your petition. The division then has 60 days to compile and file the record.

Division of Hearings and Appeals
Attn: Probation and Parole Appeals
5005 University Avenue, Suite 201
P.O. Box 7875
Madison, WI 53705-5400

4. Venue “shall be in the county in which the relator was last convicted of an offense for which the relator was on probation, extended supervision or parole or for which the relator is currently incarcerated.” Wis. Stat. §801.50(5).
5. A copy of everything filed should also be sent to

Department of Corrections
Office of Legal Counsel
3099 East Washington Avenue
PO Box 7925
Madison, WI 53707-7925

6. The petition for writ of certiorari is limited to the record before the Administrator. *State ex rel. Irby v. Israel*, 95 Wis.2d 697, 701, 291 N.W.2d 643 (Ct. App. 1979) (a reviewing court on certiorari may not consider matters outside the record).

¹ If you do not file your Order (or it's a private case), be aware of the \$120 filing fee.

C. A challenge to the revocation that includes information outside of the record can only be done by **Petition for Writ of Habeas Corpus**.

1. Venue is in the county

a. “[w]here the plaintiff was convicted or sentenced if the action seeks relief from a judgment of conviction or sentence under which the plaintiff’s liberty is restrained.” Wis. Stat. §801.50(4)(a).

b. “[w]here the liberty of the plaintiff is restrained if the action seeks relief concerning any other matter relating to a restraint on the liberty of the plaintiff.” Wis. Stat. §801.50(4)(b)

1. A petition for writ of habeas corpus should almost always be filed in the county in which the client is incarcerated. Wis. Stat. §801.52; *State ex rel West v. Bartow*, 2002 WI App 42, 250 Wis.2d 740, 642 N.W.2d 233

a.. Once filed, seek removal of the case to the county in which the client was convicted, on the basis that the record and necessary documents are in that county. Sample attached.

2. Habeas corpus provides extraordinary relief and is available only where specific factual circumstances are present.

a. The petitioner must be restrained in his liberty. *State ex rel. Hake v. Burke*, 21 Wis.2d 405, 124 N.W.2d 457 (1963); *State ex rel. Wohlfahrt v. Bodette*, 95 Wis.2d 130, 132-33, 289 N.W.2d 366 (Ct. App. 1980).

b. The petitioner’s restraint must have been imposed by a tribunal without jurisdiction over the person or subject matter, or the restraint of liberty was made in violation of the constitution. *State ex rel. Zdanczewicz v. Snyder*, 131 Wis.2d 147, 151, 388 N.W.2d 612 (1986); *State ex rel Warrender v. Kenosha County Court*, 67 Wis.2d 333, 339, 231 N.W.2d 193 (1975).

c. The petitioner must have no other adequate remedy available in law. *State ex rel. Dowe v. Waukesha County Circuit Court*, 184 Wis.2d 724, 729, 516 N.W.2d 714 (1994).

3. The habeas court’s review is limited to determining whether the order

resulting in the restraint of liberty was made in violation of the constitution or whether the court that issued the order lacked the jurisdiction or legal authority to do so. *State ex rel. Zdanczewicz v. Snyder*, 131 Wis.2d 147, 151, 388 N.W.2d 612 (1986).

4. The Warden or Superintendent of the institution where the client is being held should be listed as the respondent.
 - a. However, if the client is in the prison system, but being held at a county jail at the time of filing, name the Secretary of the Department of Corrections, as the respondent.
5. In addition to the petition, also file an affidavit and verification in support of the petition, a writ of habeas corpus, and an order granting the writ. (Samples are attached).
6. Create the record by providing the court with everything it will need to decide the petition. Compile each these documents and file them as Separate Attachments, with an index. (Sample attached).
7. If the client is in the prison system, serve a copy of the Petition on the Warden and the Department's Office of Legal Counsel. *See* §I(B)(4), *supra*, Provide a courtesy copy to the county DA.
 - a. If the client is in a local facility or jail, serve a copy of the Petition on the respondent and corporation counsel. Provide a courtesy copy to the county DA.
8. Habeas *must* be used where facts outside the revocation proceedings are necessary to establish your claim, such as:
 - a. Later challenges to the waiver. *State ex rel. Zdanczewicz v. Snyder*, 131 Wis.2d 147, 151, 388 N.W.2d 612 (1986).
 - b. Making a claim of ineffective assistance of revocation counsel. *State v. Ramey*, 121 Wis.2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984)
 - c. Newly discovered evidence. *Zdanczewicz, supra*; *State ex rel Warrender v. Kenosha County Court*, 67 Wis.2d 333, 339, 231 N.W.2d 193 (1975) (restraint of liberty was made in violation of the constitution).
 - d. Issues relating to mental illness and/or competency. *See State ex rel.*

Vanderbeke v. Endicott, 210 Wis.2d 502, 563 N.W.2d 883, 890-91 (1997) (although certiorari generally is required procedure for challenging revocation of probation, habeas is an appropriate procedure for raising a due process challenge based on the petitioner's mental incompetence)

- D. Appeal of the circuit court's decision on petition for writ of cert or habeas corpus is done by filing a notice of appeal, docketing statement, and statement on transcript with the Court of Appeals. *See* Wis. Stat. ch. 809.
 - 1. This is a civil appeal.
 - 2. The deadline for filing a Notice of Appeal is either 90 days or 45 days (if a notice of entry of judgment is timely filed). *See* Wis. Stat. 808.04(1). **This deadline cannot be extended.** Wis. Stat. (Rule) 809.82(2).
 - 3. File the Order Appointing Counsel or pay the filing fee.

III. Reconfinement Hearings

A. Wis. Stat. §302.113

- 1. Period of reconfinement determined by the circuit court, not the ALJ.

“If the extended supervision of the person is revoked, the person shall be returned to the circuit court for the county in which the person was convicted of the offense for which he or she was on extended supervision, and the court shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence.”

- 2. At a reconfinement hearing, there can be no doubt that the defendant is being returned to prison. The only question is for how long.

B. A Reconfinement Hearing is *akin* to a Sentencing

- 1. *State v. Swaims*, 2004 WI App 217, 277 Wis.2d 400, 690 N.W.2d 452
 - a. For appellate purposes, a reconfinement hearing is a sentencing. Thus, Wis. Stat. (Rule) 809.30 applies, and a defendant can appeal from the decision ordering him reconfined.
 - b. But also see Judge Fine's concurrence in *State v. Presley*, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713: “We did not hold, and I do not

read the Majority opinion to saw that we did, that a post-revocation confinement order is a ‘sentencing’ for all purposes.” ¶17.

2. *State v. Brown*, 2006 WI 131, 298 Wis.2d 37, 725 N.W.2d 262
 - a. “A reconfinement hearing occurs after there has been an original sentencing and a revocation of extended supervision and is, therefore, closely akin to a sentencing hearing.” ¶6.
 - b. Circuit courts are required to put forth on the record a reasoned explanation for a defendant’s length of reconfinement. ¶37.
 1. *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971), and *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 (2004), apply to reconfinement hearings. *Brown* at ¶37. *See also* Wis. Stat. §973.017(10m)(a) (“the court shall state the reasons for its sentencing decision and ...shall do so in open court and on the record.”)
 - a. Discretion “must be exercised on a rational and explainable basis.” *McCleary*, 49 Wis.2d at 276.
 - c. The reconfinement court must “impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the defendant’s rehabilitative needs.” *Brown* at ¶7; *see also Brown* at ¶37 (“The reconfinement period imposed should be the minimum amount that is necessary to protect the public, to prevent depreciation of the seriousness of the offense, and to meet the defendant's rehabilitative needs.”) (citations omitted).
 - d. “[A] main focus of a reconfinement hearing is the defendant/s behavior since the imposition of the original sentence.” *Brown* at ¶27.
- C. The *Brown* Factors (The Court was careful to note that this is not an exhaustive list, and the factors considered by the reconfinement court depend on the specifics of each case).
 1. Nature and severity of the original offense. *Brown* at ¶34.
 2. Client’s institutional conduct record. *Brown* at ¶34.
 3. Amount of incarceration necessary to protect the public from the risk of further criminal activity, taking into account

- a. the defendant's conduct. *Brown at ¶34.*
 - b. the nature of the violation of terms. *Brown at ¶34.*
 - c. conditions during extended supervision. *Brown at ¶34.*
4. Defendant's record. *Brown at ¶36.*
 5. Defendant's attitude. *Brown at ¶36.*
 6. Capacity for rehabilitation. *Brown at ¶36.*
 7. Rehabilitative goals to be accomplished by imprisonment for the time period in question in relation to the time left on the violator's original sentence. *Brown at ¶36.*

D. Continuum from the Sentencing Hearing

1. Reconfinement hearing is only considered a continuum of the original sentencing hearing when the same judge presides over both. *Brown at ¶21.*
2. Different judge = no continuum. *Brown at ¶21.*
3. Sentencing transcript is "readily available." *Brown at ¶38:*

The original sentencing transcript is an important source of information on the defendant that discusses many of the factors that circuit courts should consider when making a reconfinement decisions. The original sentencing transcript is readily available for a circuit court to examine, and those portions that are considered by the court to be relevant should be mentioned.

4. *State v. Gee*, 2007 WI App 32, 299 Wis.2d 518, 729 N.W.2d 424
 - a. Based on *Brown's* explanation of the importance of sentencing transcripts, the *Gee* court held that

the directive that the trial court should determine which portions of the original sentencing transcript are relevant clearly assumes that the transcript will be read and considered by the sentencing court. Thus, we conclude that the trial court was obligated to review, at the very least, the original sentencing transcript.

- b. Circuit courts (at least in Milwaukee Co.) are interrupting *Gee* to mean that they are required to read the sentencing transcripts prior to each reconfinement hearing and to mention relevant portions on the record.
 - 1. Be prepared for the Court to point out the portion of the original sentencing transcript where your client apologized and promised he would never ever ever ever do anything illegal ever again.
 - c. Extension of *Gee* to include PSI.
- E. *State v. Walker*, 2007 WI App 142, ___ Wis.2d ___, 735 N.W.2d 582 (petition for review granted September 11, 2007).
- 1. *Gee* court held “that Brown did create a per se rule, even though Brown itself did not so treat its suggestion that reconfinement courts ‘should consider’ the original sentencing transcript. We are bound by *Gee*.” *Walker* at ¶30 (citations omitted).
 - 2. “We respectfully seek clarification from the supreme court as to whether it intended to create a per se rule, as *Gee* held, or whether, as we now conclude, it did not.” *Walker* at ¶31.
 - a. Only difference between *Gee* and *Walker* is one member of the pane. In *Gee*, it was Curley (author), Kessler and Wedemeyer. In *Walker*, it was Fine (author), Kessler and Wedemeyer.
 - b. But see Kessler’s concurrence: “I disagree with the majority argument, Majority, ¶¶ 27 and 30, that our prior decision in *State v. Gee*, 2007 WI App 32, --- Wis.2d ----, 729 N.W.2d 424, was inconsistent with the supreme court's holdings in *State v. Brown*, 2006 WI 131, 298 Wis.2d 37, 725 N.W.2d 262.” *Walker* at ¶32.
 - c. State filed a petition for review, which Walker objected to. The petition was granted on September 11, 2007.
- F. Sentence Credit
- 1. Entitled to credit from the day of arrest to the day of reconfinement (not the day of revocation). *State v. Presley*, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713.

IV. Preparing for a Reconfinement Hearing

A. PSI

1. Obtain a copy by making a request to the judge who presided over the original case; provide a proposed order. (Samples attached).
2. “Private” PSI
 - a. For example, Benedict Center’s Sentencing Advocacy Program

135 W. Wells Street, Suite 700
Milwaukee, WI 53203
(414) 347-1774 | (414) 347-0148 (FAX)
<http://www.benedictcenter.org/sam/index.cfm>

B. Sentencing Transcript

1. Where there is no continuum, the reconfinement court is required to read it and explain relevant portions on the record.
2. Be prepared to counter statements your client made at the time of his original sentencing that may contradict his behavior on supervision.

C. Court Record

D. Agent and DOC File

1. DOC authorizations (attached) will allow access to the client’s file.
2. Ineffective not to review this prior to the reconfinement hearing.
3. Will contain information about how supervision went (a main focus at the reconfinement hearing; *see Brown* at ¶27).
4. Helpful to determine whether issues raising at sentencing (mental health, drug/alcohol, batter’s intervention, etc.) were made available to client upon his release to supervision.

V. Strategic Considerations

- A. If appropriate, direct court’s focus to conduct while on supervision, as opposed to a re-hashing of the horribleness that lead to the original conviction.

B. Recommendations

1. Agent
2. ALJ
3. State
4. Defense counsel
 - a. Reconfinement for less than the maximum is appropriate to provide client and community with some sort of oversight and help transitioning back into the community, rather than release with not supervision.

C. Court Memo

1. Attack inaccurate information
2. Counter with memo of your own
 - a. Consider “private” PSI

VI. After the Reconfinement Hearing

A. Notice of Intent to Pursue Post-Conviction Relief

1. Rule 809.30 applies. *State v. Swaims*, 2004 WI App 217, 277 Wis.2d 400, 690 N.W.2d 452