

**PRISONERS' GUIDE TO  
CHALLENGING REVOCATION  
BY CERTIORARI**

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# **PRISONERS' GUIDE TO CHALLENGING REVOCATION BY CERTIORARI**

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# PRISONERS' GUIDE TO CHALLENGING REVOCATION BY CERTIORARI

## I. INTRODUCTION

This manual has purposes. First, this manual explains the procedures involved in the revocation of probation, parole, or Extended Supervision (ES).

Second, this manual explains how you can get into court to have a court review a revocation decision by the Division of Hearings and Appeals (DHA). To get judicial review of a revocation decision, you must file a common-law **petition for writ of certiorari**.

As this manual will explain, **a certiorari challenge to revocation must be filed within 45 days of when you receive notice of the final decision from DHA.**

Please note that **LAIP does not generally assist inmates in challenging revocation.**

Furthermore, the Wisconsin Supreme Court has ruled that a defendant does not have the right to appointed counsel to file a certiorari challenge to a revocation. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 31, 270 Wis. 2d 235, 677 N.W.2d 259.

Accordingly, this manual is designed to help you obtain court review of a revocation decision *pro se* (on your own). It also includes forms that you can use if you decide to proceed to court. We suggest you read this entire manual before filing a petition for writ of certiorari.

If you do proceed to court, remember that in doing any legal work, it is very important to do careful and thorough work in preparing papers for a court. Unfortunately, courts generally do not view prisoners who represent themselves as having the same credibility as lawyers. If you make a careful and thorough presentation, you will have a better chance of getting an unbiased review of your case by the court.

**A warning:** The forms provided here, especially the form for the certiorari petition, must be tailored to your individual case. **You will probably need to modify the forms to include the specific facts and legal issues in your case.**

In addition, Wisconsin law requires that motions must “state *with particularity* the grounds therefor and . . . set forth the relief or order sought.” Wis. Stat. § 802.01(2)(a) (emphasis added). This means that **you will have to be specific about exactly why you think you are entitled to relief, and tell the court exactly what kind of relief you want.**

Furthermore, the court forms provided in this manual do not include all the possible motions or other forms you could use in asking a court to review a revocation decision. Even the careful use of these forms will not guarantee that a particular court will decide in your favor on the merits.

**These forms are intended only to be a guide to you in pursuing your own case.** It is impossible to anticipate all of the variations in all cases. Therefore, you must do your own reading of the law to be sure you are correctly following procedure.

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## **II. REVOCATION HEARINGS AND ADMINISTRATIVE APPEAL**

### **A. Introduction**

Many inmates get into prison through revocation of probation, parole, or Extended Supervision (ES). Every defendant has a right to a revocation hearing, and a right to appeal the outcome of that hearing. This section of the manual describes how these procedures work.

If you want to challenge a revocation, you must follow the procedures outlined in Chapter 2 of the “Hearings and Appeals” (HA) section of the Wisconsin Administrative Code. If your administrative appeal is not successful, you may then challenge the disciplinary decision in circuit court by filing a petition for writ of certiorari.

This manual cites to the Hearings and Appeals chapter or sections of the Administrative Code as “Ch. HA\_\_\_\_\_” or “§ HA \_\_\_\_\_.” You should have access to the Administrative Code in your prison law library.

### **B. Revocation Hearing**

#### **1) Revocation Hearings Generally**

Courts do not conduct revocation hearings in Wisconsin. Instead, revocation hearings are held by state administrative law judges (also called hearing examiners). In this manual, we will refer to this person as the “ALJ” (administrative law judge).

The ALJ is a lawyer who works for the Division of Hearings and Appeals of the Wisconsin Department of Administration. In this manual, we will refer to the Division of Hearings and Appeals as the “DHA.”

At the revocation hearing, the state is represented by the probation/parole

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agent, who asks for revocation and presents evidence at the hearing to support the revocation.

If the offender waives the revocation hearing, then he or she will probably not be able to challenge the revocation in court later on. See *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶¶ 8-9, 242 Wis. 2d 94, 624 N.W.2d 150.

Thus, if you plan to challenge a revocation decision in court, you should first request a revocation hearing, and then appeal the ALJ's decision through the administrative procedures of DHA.

## 2) Right to Counsel

**An offender does not have a constitutional right to counsel for all revocation hearings.** This is because revocation proceedings are not part of a new criminal case, so the Sixth Amendment right to counsel does *not* apply.

However, sometimes counsel is constitutionally required under the Fifth and Fourteenth Amendment due process clause. But under these amendments, counsel is constitutionally required only in cases where the circumstances of the particular case make the assistance of counsel necessary to ensure a fair hearing. See *State ex rel. Hawkins v. Gagnon*, 64 Wis. 2d 394, 219 N.W.2d 252, 256 (1974).

Nevertheless, the Wisconsin statutes and Wisconsin Administrative Code do provide a statutory right to counsel at a revocation hearing. See Wis. Stat. §§ 977.05(h) and (l); § HA 2.05(3)(f).

However, it is not clear whether an offender has a statutory right to the assistance of counsel on the administrative appeal of a revocation. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 46, 270 Wis. 2d 235, 677 N.W.2d 259 (C.J. Abrahamson, concurring).

Finally, an offender does not have a right to counsel on certiorari review of a revocation. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 31, 270 Wis. 2d 235, 677 N.W.2d 259.

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### **3) Procedural Requirements**

The United States Supreme Court has established minimum due process standards that must be met at revocation hearings. The leading cases are *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Generally, due process in revocation proceedings requires the following:

- written notice of the claimed violations;
- disclosure of the evidence to be used against the offender;
- a timely hearing;
- the opportunity to be heard in person and to present witnesses and other evidence;
- a limited right to confront and cross-examine adverse witnesses;
- a “neutral and detached” decision maker; and
- a written statement by the decisionmaker as to the evidence relied on and the reasons for revoking.

The Wisconsin Administrative Code lists the procedural requirements of a revocation hearing under § HA 2.05.

The Wisconsin Supreme Court has added an additional requirement for revocation hearings. Just as at trial, an offender facing revocation has a due process right to a competency determination, if the ALJ has reason to doubt his or her competency to proceed. See *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 503, 563 N.W.2d 883 (1997).

At a revocation hearing, the agent has the burden of establishing grounds for revocation. The ALJ must decide three things:

- (1) whether the offender committed the conduct alleged;
- (2) whether the conduct constituted a violation of the rules or conditions of supervision; and

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(3) whether revocation should result from any rules violations or whether there are appropriate alternatives to revocation.

§ HA 2.05(7)(b).

An offender's supervision can be revoked only if the ALJ makes one of the following findings:

- confinement is necessary to protect the public from further criminal activity;
- the offender is in need of correctional treatment that can most effectively be provided if confined; or
- it would unduly depreciate the seriousness of the violation if supervision were not revoked.

§ HA 2.05(7)(b).

There are many procedural rights that do not apply at revocation hearings:

1. The rules of evidence used in court trials generally do not apply. Wis. Stat. § 911.01(4)(c); § HA 2.05(6)(d).
2. Hearsay testimony is admissible, if it is reliable and ALJ finds good cause. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶¶ 12-13, 250 Wis. 2d 214, 640 N.W.2d 527.
3. The exclusionary rule does not apply to revocation hearings. In other words, illegally obtained evidence is admissible at revocation hearings.
4. A confession does not need to be corroborated by other evidence at a revocation hearing. See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶ 24, 239 Wis. 2d 443, 620 N.W.2d 414.
5. To revoke supervision, the ALJ only has to find a violation by a "preponderance of the evidence." See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶ 17, 239 Wis. 2d 443, 620 N.W.2d 414.

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6. In particular, the ALJ can find that the offender committed a violation and that supervision should be revoked even if the offender was acquitted of a criminal charge based on that violation. See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 387, 260 N.W.2d 727 (1978).
7. Revocation hearings are tape recorded. Transcripts are prepared only if a party requests a written transcript and agrees to pay for transcription, or if a court orders that a transcript be prepared. Wis. Stat. §§ 304.06(3e) and 973.10(4); Wis. Admin. Code § HA 2.07.

### **3) Outcome of Revocation Hearing**

#### *a) Revocation of Probation*

If the ALJ orders revocation of probation, the offender may or may not go back to court for sentencing.

Probation can involve two possible scenarios. In the first scenario, the court “imposed and stayed” a sentence, and then placed the offender on probation. In that situation, if probation is revoked, the previously imposed and stayed sentence begins automatically. Thus the offender does not return to court for sentencing.

In the second scenario, the court “withheld” sentence when the offender was placed on probation. In that situation, no jail or prison sentence was ever imposed. So, if probation is later revoked, the offender will return to the court for sentencing.

If the offender does return to court for sentencing after revocation, then two important rights kick in. First, the offender has a right to appointment of counsel by the State Public Defender for the sentencing hearing. Second, the offender has a right to appeal the sentence that is imposed after revocation.

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*b) Revocation of Parole or Extended Supervision (ES)*

When a New Law (parolable) offender's parole is revoked, the offender does not go back in front of the Judge. Instead, the ALJ will decide how much "good time" (i.e. street time) to forfeit (take away). In other words, the ALJ must decide how much of the remaining sentence to require the offender to serve. §§ HA 2.05(7)(e).

After revocation, the New Law inmate will be eligible for reparole on this revocation time. However, the inmate has no mandatory release date on the revocation time. That is, the inmate can be required to serve the entire revocation period that was ordered.

For Truth-in-Sentencing (TIS) offenders, the law governing revocation procedures has changed several times over the past decade. Since 2009, when the ALJ orders revocation of ES, the offender does not go back in front of the judge for a reconfinement hearing. Instead, the ALJ will decide how much reconfinement time the offender must serve. Wis. Stat. § 302.113(9)(ag).

*c) Sentence Credit*

In most cases, the ALJ in a revocation hearing must also determine jail credit for time spent in custody while on supervision.

*d) Waiver of Revocation Hearing*

If the offender waives a revocation hearing, then the Department of Corrections (DOC), rather than an ALJ, will determine the length of reincarceration and jail credit. Wis. Stat. § 304.06(3); Wis. Stat. § 302.113(9)(ag).

**C. Administrative Appeal of a Revocation Decision**

The ALJ must issue a written decision within **10 calendar days** after the hearing. § HA 2.05(7)(f).

Either party (the offender or the DOC) has **10 calendar days from the date of**

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**the ALJ's decision** to appeal the decision to the Administrator of the DHA. § HA 2.05(8)(a).

Appeals often simply take the form of a letter explaining why the party believes the decision was error, but the appeal can include supporting documents.

The appeal must be served upon the other party, who then has **7 calendar days to respond** to the appeal. § HA 2.05(8)(b).

Review in this administrative appeal process is *de novo*, meaning that the Administrator is not required to give deference to the ALJ's decision. See *State ex rel. Foshey v. H&SS Dept.*, 102 Wis. 2d 505 (Ct. App. 1981).

You should know, however, that the Administrator rarely reverses the decision of an ALJ.

In deciding on the appeal, the Administrator has four choices. The Administrator can:

- sustain (affirm) the ALJ's decision;
- modify the ALJ's decision;
- reverse the ALJ's decision;
- or remand (return) the case back to the ALJ for more proceedings.

§ HA 2.05(9)(a).

The Administrator must forward a written decision within **21 days after receiving the appeal**, unless the time is extended by the Administrator. § 2.05(9)(b).

The Administrator's decision is the final step in the administrative appeal process. In very rare circumstances, an offender can ask the Administrator for a new revocation hearing outside of the administrative appeal deadline, but only on the basis of newly discovered evidence. See *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361.

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Once the administrative appeal process is over, an offender can ask a court to review a revocation decision, usually by filing a certiorari petition in the circuit court in which the offender was convicted. See *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540 (1971); *State ex rel. Drow v. Schwarz*, 225 Wis. 2d 362, 592 N.W.2d 623 (1999).

However, if an offender has a valid constitutional challenge to a revocation proceeding, and if the limited review afforded by certiorari is not adequate or available, it may be possible to seek review by filing a petition for a writ of habeas corpus in circuit court under Wis. Stat. Ch. 782. See, e.g., *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 521, 563 N.W.2d 883, 890-91 (1997).

However, state habeas cannot be used to get around the time limit for certiorari. See *State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 572 N.W.2d 505, 507 (Ct. App. 1997).

The rest of this manual will explain how to file a certiorari challenge to revocation. State habeas challenges to revocation decisions are beyond the scope of this manual.

#### **D. Harmless Error**

If you raise a challenge to procedures used in your revocation proceedings, you can expect the DHA Administrator to respond by stating that any such procedural error was “harmless.”

Section HA 2.08 states that “if any requirement of this chapter or DOC 328 or 331 is not met,” the ALJ can deem it to be “harmless error” and disregard it, unless it affects the offender’s substantive rights. The term “substantive rights” is defined to mean that the error “tends to prejudice a fair proceeding or disposition.”

In addition, the Wisconsin Court of Appeals has held that if the ALJ makes an error, that error can also be considered harmless. See *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 16, 250 Wis. 2d 214, 640 N.W.2d 527.

So if you do proceed with a certiorari petition, you should be prepared to state clearly how your “substantive rights” were harmed.

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### **III. JUDICIAL REVIEW OF A REVOCATION DECISION**

If the DHA Administrator has denied your administrative appeal, then you can seek judicial (court) review of the denial by filing a **petition for writ of certiorari**. In this manual, we call this document a certiorari petition.

Certiorari review by a court is available to people who want to challenge a decision that affects them, made by an administrative agency. The DHA is an administrative agency, so certiorari is available to ask a court to review the revocation decision.

Certiorari review is also used by prisoners who wish to challenge the DOC's decisions on inmate complaints or prison discipline. The *LAIIP Desk Book* includes two other manuals like this one, the *Prisoner's Guide to the Inmate Complaint Review System* and the *Prisoners' Guide to Prison Discipline*, which explain how to request certiorari review of these other issues.

#### **A. An Overview of Certiorari Review**

##### **1) Certiorari Process**

In a certiorari proceeding, the petitioner (you) files a certiorari petition against the respondent. When you are challenging a revocation decision, **the respondent is the DHA Administrator**, who upheld the ALJ's decision in the administrative appeal.

For a revocation challenge, **the certiorari petition must be filed in the county where you were convicted**. See *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540 (1971); *State ex rel. Drow v. Schwarz*, 225 Wis. 2d 362, 592 N.W.2d 623 (1999).

Do not list the warden as the respondent instead of the DHA Administrator; if you do, your petition will be dismissed. See *Sate ex rel. Myers v. Smith*, 2009 WI App 49, 316 Wis. 2d 722, 766 N.W.2d 764.

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In the certiorari petition, you state why you believe the decision to revoke your supervision was wrong.

After receiving the petition, the judge can then issue a writ of certiorari to the respondent.

The fact that the judge issues the writ does not mean that you have won the case. Rather, **by issuing the writ, the judge is simply ordering the respondent to prepare a return in the case and present it to the court.** The “return” is a set of documents that includes the official, written, administrative record (paperwork) regarding your revocation.

Once the court receives the return, the court will review this written record to see whether the respondent’s decision in the case should stand.

Sometimes the parties are given an opportunity to file briefs explaining why the written record supports their argument that they should win.

Usually there is **no court hearing** in a certiorari proceeding. Rather, judge makes a decision based on the petition and return (the written record) and on the parties’ briefs.

The judge can affirm, reverse, or modify the DHA Administrator’s decision.

## **2) Evidence in a Certiorari Proceeding**

It is extremely important to understand that the **court’s review in a certiorari proceeding is limited to review of the written record of the revocation proceeding and appeal.** The court will not consider any evidence or facts outside of the record that was developed during the revocation process.

In other words, the court will not allow you to present new or additional facts, either orally or in writing, during certiorari review. There will not be any

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evidentiary hearing that would allow you to present new evidence in your favor.<sup>1</sup>

The written record in the certiorari proceeding will usually consist of at least the following documents:

1. the agent's revocation summary;
2. documents included in the record of the revocation proceedings;
3. a transcript of the revocation hearing(s) (if ordered by the judge);
4. the ALJ's written decision;
5. your written appeal to the Administrator of DHA; and
6. the Administrator's written decision on your appeal.

There may be additional documents in the record, other than those listed above. **If you want to be sure that a document is included in the record, you should make sure that it is entered into the record at the time of your revocation hearing.**

### ***3) Limits on Judge's Review in a Certiorari Proceeding***

A reviewing court has a very limited scope of review in a certiorari case. See *State ex rel. Griffin v. Smith*, 2004 WI 36, n. 4, 270 Wis. 2d 235, 239, n. 4, 677 N.W.2d 259.

The court's authority is limited to determining:

1. Whether the administrative agency kept within its jurisdiction.
2. Whether the DHA Administrator acted according to law in making the decision. This includes whether state or federal constitution, state statutes, or the Wisconsin Administrative Code rules were violated.

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<sup>1</sup>For a very rare exception to this rule, see *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361.

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3. Whether the Administrator's decision was arbitrary, oppressive or unreasonable and represented the agency's will rather than its judgment. The Administrator is supposed to reach a reasonable decision based on the evidence presented. This is similar to the next point.
4. Whether, based on the evidence, the Administrator could reasonably have decided as he or she did. This is definitely an uphill battle for the petitioner (you). **Courts will not substitute their judgment of the evidence for the judgment made by the Administrator.** This is because courts do not like to second-guess decisions made by people whom they perceive as experts in a given area.

In general, courts are reluctant to review the substance of the decision of an administrative agency. They generally will not reverse findings of fact, including those involving witness credibility. The courts also will not re-weigh the sufficiency of the evidence to support the decision.

On the other hand, courts have sometimes vacated or reversed decisions for which no credible evidence appeared in the record. Courts may also grant certiorari relief when there has been some procedural error that has deprived the inmate of a fair shot in the ICRS.

Nevertheless, it is important to understand that **the remedy in certiorari is extremely limited.** Generally, the remedy should only give you what you would have had if the problems with your revocation had never happened.

Often, even if you win the certiorari proceeding, the remedy will simply be a new revocation hearing, rather than vacating the revocation itself. For example, if you convince the court that the ALJ erroneously failed to allow you to present witnesses at your revocation hearing, and that the lack of witnesses may have affected the outcome of the proceeding, then the court would order a new hearing at which you could present your witnesses.

A court will not completely vacate a revocation only unless it finds that the evidence was "legally insufficient." To do this the court would have to find that, **even assuming that the evidence provided by the state was true, no**

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**reasonable factfinder could revoke you.** That is a very, very difficult standard to meet.

Finally, **a court cannot award money damages in a certiorari proceeding.** See *Coleman v. Percy*, 86 Wis. 2d 336, 341, 272 N.W.2d 118 (Ct. App. 1978), *aff'd*, 96 Wis. 2d 548, 292 N.W.2d 615 (1980).

If you believe that you have valid grounds for a successful court challenge to your revocation, the remainder of this manual will help you secure judicial review by certiorari if you are proceeding *pro se* (on your own).

The information and suggested forms in this manual should help you get your action properly filed in the proper court. However, you should remember that you may have to do additional legal research to write a convincing certiorari petition, as well as any brief you might submit on the merits of your claim.

## **B. The Prisoner Litigation Reform Act (PLRA)**

### **1) Overview of the PLRA**

Beginning in 1998, the Prisoner Litigation Reform Act (PLRA) created a procedure that applies only to Wisconsin prisoners who start civil cases. See Wis. Stat. §§ 801.02(7), 802.05(3), 807.15, 814.29, and 893.735.

The Wisconsin Supreme Court has ruled that the PLRA filing requirements do apply to inmates who file certiorari challenges to revocation decisions of the DHA. See *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 3, 236 Wis. 2d 473, 613 N.W.2d 591.

The PLRA includes some procedural requirements that you must meet if you want a court to consider your certiorari challenge to your revocation.

- a) **The PLRA imposes a strict 45-day deadline.** Wis. Stat. § 893.735. This means that your certiorari petition must be filed within 45 calendar days of the final decision by DHA Administrator on your revocation.

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- b) **Exhaustion Requirement.** You will also have to provide documents showing that you have exhausted your administrative remedies—that is, that you have taken all possible steps in the administrative appeal process before going to court.<sup>2</sup>
- c) **The PLRA’s fee requirements** mean that you can get waiver of prepayment of filing fees and costs, but the fees and costs will be taken back out of your prison accounts, and the accounts must be frozen until the fees and costs are paid in full.
- d) **“Three Strikes Rule”:** This rule states that you cannot use the fee-waiver provisions of the PLRA if you have had three or more civil cases dismissed for being frivolous or malicious. Wis. Stat. § 801.02(7)(d).
- e) **Penalty for filing a malicious action:** If a court finds that your case was filed maliciously or to harass the opposing party, your release date can be extended. Wis. Stat. § 807.15.

Each of these rules is discussed in greater detail below.

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<sup>2</sup> The Wisconsin Supreme Court has ruled that inmates who file certiorari challenges to revocation decisions of the DHA Administrator do not have to meet the exhaustion requirements of the PLRA, which are found in Wis. Stat. § 801.02(7)(b). See *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶ 6, 242 Wis. 2d 94, 624 N.W.2d 150.

However, the *Mentek* court also ruled that, even without the PLRA, a circuit court may require a party to exhaust all available administrative remedies before the circuit court will consider a certiorari petition. *Id.* at ¶¶ 8-9. Thus, this manual instructs you to provide the circuit court with proof that you exhausted your administrative remedies.

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## **2) Specific Requirements of the PLRA**

### *a) 45-Day Statute of Limitations, Wis. Stat. § 893.735*

Your certiorari petition must be filed within **45 calendar days** of the DHA Administrator's final decision on your issue. If it is not filed in time, your petition will be dismissed. Details about the 45-day filing deadline will be discussed in greater detail in Section III(c), "Procedural Requirements for Certiorari Petitions."

### *b) Exhaustion Requirement*

Along with your affidavit of indigency, **you must include documentation to prove that you have exhausted all your administrative remedies**, as discussed in Section II of this manual. As explained in Section II, this means that you will need to prove that you appealed your revocation up to the level of the DHA Administrator.

### *c) Fee Requirements*

Under the PLRA, **prepayment of filing fees and costs can get waived** if you file an affidavit of indigency. However, the **fees and costs will be paid back to the court out of your prison accounts**. Wis. Stat. § 814.29(1m)(b). As of 2011, the filing fee for a certiorari petition is **\$129.50**.

The PLRA still allows prisoners to start civil cases without paying the filing fees up front. In other words, the PLRA allows courts to waive prepayment of fees and costs. However, under the PLRA, the costs of filing and serving the civil action must then be deducted from the inmate's prison accounts, and the accounts must be frozen until the fees and costs are paid in full.

Both your regular institution account and your release account are subject to being frozen until the fees and costs are paid in full. See *Spence v. Cooke*, 222 Wis. 2d 530, 587 N.W.2d 904 (Ct. App. 1998); *State ex rel. Akbar v. Kronzer*, 2004 WI App 108, 680 N.W.2d 280.

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You can expect that fees and costs will first be deducted out of your regular institution account. When that account is depleted, the remainder of the fees/costs will be deducted from your release account.

In addition to requiring you to pay back circuit court filing fees from your inmate accounts, the PLRA also requires you to **pay back service fees and any other costs.** *Id.*

If the circuit court denies your petition and you appeal to the court of appeals, **then you will also have to pay back appellate filing fees and costs.** Wis. Stat. § 814.29(1m)(b).

*d) "Three Strikes" Rule*

The PLRA's "three strikes" rule may apply to you if you have had previous civil actions (cases) dismissed. Under this rule, **if you ask for waiver of prepayment, a court will dismiss your petition** if you have already had three or more actions dismissed in the past, for any of the following reasons:

- the action was legally frivolous or failed to state a legal claim;
- you sought damages against a party who was immune from suit; or
- the action was filed for an improper purpose, such as to harass, delay, or increase the costs of litigation.

See Wis. Stat. § 801.02(7)(d).

In order to qualify as a "strike" under § 801.02(7)(d), the prior case must have been entirely dismissed for the reasons outlined in the statute. See *State ex rel. Henderson v. Raemisch*, 2010 WI App 114; 329 Wis. 2d 109, 790 N.W.2d 242.

**There are a few limited exceptions to the "three strikes" rule.** First, if your certification from the Department of Justice says that you have had three or more such dismissals in the past, and you think this information is wrong, then you should write to the DOJ's Civil Litigation Unit, at P.O. Box 7857, Madison, WI 63707-7857, and explain why you believe that the information in their database is incorrect.

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Second, even if you have had three prior actions dismissed under Wis. Stat. § 801.02(7)(d), you can avoid dismissal of your petition if you pay the full filing fee to the clerk of court when you file the petition. The money to pay the fees up front can be taken out of your prison accounts (both your institution account and your release account), if there is enough in them to pay the filing fee in full. See Wis. Stat. § 801.02(7)(d); *Coleman v. Sullivan*, 229 Wis. 2d 804, 601 N.W.2d 335 (Ct. App. 1999).

account and your release account), if there is enough in them to pay the filing fee in full. See Wis. Stat. § 801.02(7)(d); *Coleman v. Sullivan*, 229 Wis. 2d 804, 601 N.W.2d 335 (Ct. App. 1999).

However, in order get the money in your release account to pay the filing fee in full, a court order will be necessary. *Id.* Although such a procedure is beyond the scope of this manual, you should realize that you would have to request the court order.

Third, the PLRA provides an exception to both the fee and “three strikes” provisions, *if* you can establish that you are in imminent danger of serious physical harm. See Wis. Stat. §§ 814.29(f) and 801.02(7)(d). If you believe that you are in such danger, you may petition the court without providing an institution trust fund statement, and even if you have had three or more actions dismissed in the past.

It is not known at this time what this “imminent danger” provision means. However, it is difficult to imagine many revocation challenges that would fit the “imminent danger” requirement, so that procedure is not included in this manual.

*e) Penalty for Filing a False or Malicious Civil Action*

If the court finds that you have filed a suit for a malicious purpose or to harass the opposing party, or that you knowingly offered false evidence to the court, then the **court can order the DOC to extend your mandatory release date**. See Wis. Stat. § 807.15.

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In Section III(D), you will find the specific filing instructions and forms to comply with the PLRA.

### **3) Avoiding the Requirements of the PLRA**

It is important to remember that you can avoid many of the requirements of the PLRA by paying the filing fees and costs up front.

If you are able to pay the filing fees and costs, you should enclose with your pleadings a money order, made out to the Clerk of Court, in the amount of the filing fee. Alternatively, you could have someone on the outside send the fees directly to the Clerk of Court on your behalf. Finally, as noted above, you can ask the court to order the DOC to provide funds for the filing fee out of your release account.

If you can pay the filing fees and costs, you can avoid most of the PLRA requirements listed in Section III(B)(2) above. **However, you must still provide the court with documents proving that you have exhausted your administrative remedies.**

Remember also that if you decide not to file the PLRA documents, you will be responsible for all costs and fees of the proceeding, not just the filing fee. For example, if the sheriff personally serves pleadings on the respondent, the sheriff may make you pay the service fee up front, or may send you a bill after service.

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### **C. Procedural Requirements for Certiorari Petitions**

This section outlines the procedural requirements for filing a certiorari petition. Since most inmates are indigent, this section assumes that you will need to comply with the procedures of the PLRA.

#### **1) Where to File (Venue)**

**You should file your certiorari petition in the circuit court for the county in which you were “last convicted.”** See *State ex rel. Drow v. Schwarz*, 225 Wis. 2d 362, 592 N.W.2d 623 (1999); Wis. Stat. § 801.50(5). This apparently means that if you were revoked in more than one case, you should go to the court where you were most recently convicted.

A list of court addresses can be found in the Appendix to the *LAIP Desk Book*.

#### **2) When to File**

Under the PLRA, there is a **strict 45-day time limit (calendar days) for filing a certiorari petition.** See Wis. Stat. § 893.735. The PLRA’s 45-day deadline runs from the date of that you receive “actual notice” of the final decision by the DHA Administrator. See *State ex rel. Locklear v. Schwarz*, 2001 WI App 74 ¶ 15, 242 Wis. 2d 327, 332, 629 N.W.2d 30.

You should make every possible effort to file the certiorari petition within 45 days of the final decision.

A petition is considered filed as of the date that you place it in the prison mailbox. See *State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, 239 Wis. 2d 327, 338, 620 N.W.2d 409.

However, this “mailbox rule” applies only to a petition that is complete, in proper form, and accompanied by the required filing fee or the fee-waiver documents required by the PLRA. See *State ex rel. Tyler v. Bett*, 2002 WI App 234, 257 Wis. 2d 606, 652 N.W.2d.

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To get the benefit of the mailbox rule, you must also submit, along with your certiorari petition, a sworn affidavit (statement) that says when you placed the petition and accompanying documents in the prison mailbox. See *State ex rel. Shimkus v. Sondalle*, 2000 WI App 262, 240 Wis. 2d 310, 312, 622 N.W.2d 763; *State ex rel. L'Minngio v. Gamble*, 2003 WI 82, ¶ 29, 263 Wis. 2d 55, 72, 667 N.W.2d 1. Such an affidavit is included as **Form 6** in this manual.

There may be certain situations in which a court will “toll” (stop) the PLRA’s 45-day deadline. For example, as will be discussed later, the PLRA requires you to get a certification from the Wisconsin Department of Justice (DOJ) about whether you have had any prior lawsuits dismissed in the past for failure to state a claim. You are not allowed to request this DOJ certification any earlier than 30 days before you file the certiorari petition.

Sometimes, there is a delay in getting the certification form back from the DOJ, so that the petition itself can get delayed. The Court of Appeals has ruled that the PLRA’s 45-day time limit is tolled during the period that you are waiting for a response from the DOJ about your request for certification. See *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, 242 Wis. 2d 327, 629 N.W.2d 30. The affidavit (**Form 6**) includes a statement about when you requested the DOJ certification and whether/when you received it.

Similarly, the PLRA requires an inmate to send a certified statement of the funds in his or her prison trust account along with the certiorari petition. Some prison business offices will give the account statement to the inmate to file, while other prison business offices will send the account statement directly to the court.

If the prison business office sends the prison trust account statement directly to the court, the Court of Appeals has ruled that the 45-day time limit is tolled between the time an inmate requests the statement and the time the court receives the statement. See *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, 244 Wis.2d 177, 629 N.W.2d 17.

You should make every effort to get the business office to give the trust account statement directly to you. However, if the business office is going to send the

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statement to the court, you should make sure that you have a written record of the date when you asked the business office to send it.

**Form 6** also includes a statement of when you requested your trust account statement from your prison business office and whether/when you received it.

Despite these tolling provisions, **you should assume that the filing deadline is 45 days from the date you receive notice of the Administrator's decision.**

If you have not received your DOJ certification and/or your trust account statement within the 45-day deadline, **you can go ahead and file anyway, and include the affidavit (Form 6) stating that you have requested these items.**

#### **D. Forms and Instructions for Pleadings**

##### **1) General Instructions**

All pleadings and documents filed with the court, except for exhibits, should be on regular-size (8-1/2" x 11") paper.

Try to type all of your court papers. If you don't have access to a typewriter, print your papers so the court can read them easily. Be as neat as possible. You want to make your papers easy to read.

Be sure that there are **page numbers** on all your documents.

You are free to use the forms in this manual. Some lines give you a choice of two or more things to write. In these cases, you should fill out only the lines that applies to you.

There are a few blank lines that you should not fill in when you do your initial filing. For example, you will not be able to fill in the case number until after the court has assigned a number to your case. Similarly, you should not fill in the judge's signature on proposed orders.

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If you make your own papers using these forms as a guideline, you can eliminate the form number at the top of the sheet, the parentheses, and as many of the blank lines as you can.

In addition, whenever the manual supplies a standard court form (e.g. Court Form CV-438, the PLRA's "Affidavit of Indigency" form), you must use this standard court form. Otherwise, the court will consider your petition improperly filed.

All formal legal papers have **captions**. A caption is simply a formal heading which tells the name of the court, the names of the parties, the number of the case, and the title of the document.

Note that in the caption of the certiorari forms, you should fill in the following:

1. **Your name and address** after "State ex rel.," since you are the petitioner in the action. § 802.04.
2. **The name and address of the DHA Administrator** as the respondent. § 802.04. As of 2011, the Administrator's address is:

Wisconsin Department of Administration  
Division of Hearings and Appeals  
5005 University Avenue, Suite 201  
Madison, WI 53705-5400

We have pre-filled in the Administrator's address on the forms in this manual. **But you will still need to write in the current Administrator's name.** And, obviously, if the Administrator's address changes in the future, you will need to change it on the forms.

3. **A case number.** The case number is assigned by the court only after the case is filed. Thus, in your first set of papers you will leave the case number blank.

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4. **A case classification code.** The case classification code for a certiorari petition is **30607**. You must put the case classification code in the caption of all your pleadings, under the case number.

None of the forms asks the court to provide you with court-appointed counsel to represent you in your case. This is because, unlike in a criminal case, a prisoner has no right to have an attorney appointed at public expense to challenge a revocation decision in a certiorari proceeding. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 31, 270 Wis. 2d 235, 258, 677 N.W.2d 259.

Finally, it is unlikely that you will find a private attorney who is willing to handle your case on a contingency basis. This is because money damages cannot be awarded on a writ of certiorari, and therefore, representation on a contingency fee basis is not possible.

For these reasons, **this manual is designed to help you pursue your certiorari petition on your own.**

## **2) PLRA Forms and Instructions**

Under the PLRA, the procedure for filing a civil case is complicated. PLRA forms are included in this manual. Be careful to use these forms, and to follow the instructions below. Remember, it is extremely important that you follow the PLRA procedures exactly.

### **Step 1: Get a Certification from the Wisconsin Department of Justice**

The first thing you need to do is to write a letter to the Civil Litigation Unit of the Wisconsin Department of Justice (DOJ) and request a certification of whether or not you have had three prior civil actions dismissed. You can use **Form 1** to write to the DOJ. You need to get the form from the DOJ no more than 30 days before you file your case.

The DOJ will send you a certification form (officially called Form DJLS22), which will list the number of your prior civil filings that have been dismissed. Under the PLRA, you are required to file the **original** DJLS22 form along with the pleadings in your civil case. Wis. Stat. § 801.02(7)(d).

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According to the DOJ's Civil Litigation Unit, the DJLS22 form is usually sent out within 48 hours of receiving a request from an inmate, so you should receive it in a week or so after you send in your request. However, remember that the DJLS22 form cannot be dated more than 30 days before you file your civil case.

If you have not received the DJLS22 form by the time your 45-day deadline is running out, you can go ahead and file your certiorari petition without the form, but also include **Form 6**. **Form 6** is an affidavit in which you state when you requested the DJLS22 form.

*Step 2: Get a Six-Month Certified Account Statement of your Trust Account*

While you are waiting for the DJLS22 form, you should ask your prison business office to give you a certified six-month account statement of your prison trust fund account for the most recent six months prior to the date you are filing the pleadings in your civil case. Wis. Stat. § 814.29(1m)(b)2.

If the business office is not willing to give the statement directly to you, you should give them the address of the court, and ask them to mail it directly to the court. Be sure to make a written record of when you asked for the statement to be mailed to the court, so that you can include that information on **Form 6**.

*Step 3: File the Required PLRA Forms Along With Your Pleadings in the Civil Case*

Once you receive the DJLS22 form back from the DOJ, and your certified six-month account statement is either given to you or has been sent to the court, you can file your certiorari petition.

In addition to your certiorari petition and the proposed writ of certiorari form (discussed later), you should complete and file all the PLRA documents listed below:

1. Court Form CV-438, "Prisoner's Petition for Waiver of Prepayment of Fees/Costs--Affidavit of Indigency" (Form 2). Be sure to answer each

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and every question on the affidavit form, even if it seems irrelevant (for example, if it asks about stocks and bonds). If you do not answer all the questions, the court may send it back to you. **Note that your signature on Form CV-438 must be notarized.** You should check at your institution to see who is a notary public who can witness you signing this form.

2. The certified six-month account statement for your prison trust account, for the six months prior to the date that you file your certiorari petition. If you have not received the trust account statement within your 45-day deadline, you can leave it out and state that you have not yet received it on **Form 6** (“Affidavit of Petitioner”).
3. An “Authorization to Department of Corrections to Forward Payments to the Clerk of Courts” (Form 3). This authorization allows the DOC to forward payments from your prison accounts (regular and release) to the clerk of courts, until the fees/costs of the action are paid in full.
4. The **original** DOJ certification (Form DJLS22) stating that you have not had three or more previous filings dismissed under Wis. Stat. § 801.02(7)(d). If you have not received the DOJ certification within your 45-day deadline, you can leave it out and state on **Form 6** (“Affidavit of Petitioner”) that you have not yet received it.
5. Documentation proving that you have exhausted your administrative remedies. This documentation will be discussed in the following section.

### **3) The Certiorari Petition**

The certiorari petition is provided as **Form 4** in this manual. This is the document that states the basic facts and the reasons you believe the circuit court should reverse the DHA Administrator’s decision.

**Form 4** gives you blank lines in which to describe what happened in the revocation process. You may need more room to fully explain what happened. If so, you should attach more pages.

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The petition is where you want to explain fully what happened to you during the revocation procedure and appeal, and what you want the judge to do about it. This is where you explain the facts and where you tell how you were wronged in the process. The petition is the heart of your court papers, and you want to make sure you have covered everything here.

Even though you want to be thorough, you should also do your best to be brief and to the point. You do not want to irritate the judge by going on too long.

a) Caption

Note that the caption to the petition includes space for addresses for you and the DHA Administrator, as respondent. The addresses are required on the certiorari petition and on the writ form. **These addresses are required by statute and the Dane County court's local rules. If you do not include them, your petition and other documents will be returned to you.**

Just to be safe, this manual suggests that you include the addresses on all pleadings that you file. On the forms in this manual, we have pre-filled in the Administrator's address as of 2011, but **you will need to make sure you include the Administrator's name, along with your own name and address.**

b) Petition Form

**Paragraphs 1 and 2** of the petition provide information about you, as the petitioner, and about the DHA Administrator, as the respondent.

**Paragraphs 3 and 4** list the administrative rules you have been operating under.

**Paragraph 5** asks the judge to review the DHA Administrator's decision regarding your revocation. Note that this paragraph talks about revocation of "probation/ parole/ Extended Supervision." You should cross out the words that don't apply here. For example, if you were revoked off probation, cross out "parole/ Extended Supervision."

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At the end of **Paragraph 5**, there are a couple of blank lines. If you were revoked off of more than one case, you can list the extra counties and case numbers on these lines.

In **Paragraph 6**, you say when you got notice that the DOC was trying to revoke you. You also summarize the reasons given for trying to revoke you.

In **Paragraph 7**, you say when and where your revocation hearing was held.

In **Paragraph 8**, you tell what happened before and during the hearing. In this paragraph, you should focus only on the facts that are important to your claim that the process and/or outcome was unfair. You will have an opportunity to explain why you thought it was unfair later on, in Paragraph 13.

In **Paragraph 9**, you tell what the ALJ decided. You can also summarize the ALJ's reasons for the decision [note: this is not the place to argue with the ALJ's reasoning. Instead, in this paragraph, you just summarize what the ALJ said].

In **Paragraph 10**, you say when you filed your administrative appeal.

In **Paragraph 11**, you tell what the Administrator decided on your appeal. Remember that the Administrator has four choices: to sustain (affirm) the ALJ's decision; to modify the decision; to reverse the decision; or to remand (return) the case to the ALJ for further proceedings. Tell which of these things happened in your case.

In **Paragraph 12**, you tell the court that you have made use of all of the administrative mechanisms and appeals within the DHA rules available to you, and so your case is ready for court review.

**Paragraph 12** also states that you are including, along with your certiorari petition, **documentation proving that you have exhausted your administrative remedies**. In general, this documentation will include copies of all of the following written materials:

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1. the agent's revocation summary;
2. documents included in the record of the revocation proceedings;
3. the ALJ's written decision;
4. your written appeal to the Administrator of DHA; and
5. the Administrator's written decision on your appeal.

NOTE: if the Administrator remanded the case back to the ALJ and you had a second hearing and another appeal, then you should include those documents as well.

In **Paragraph 13**, you tell the court exactly how your rights have been denied. **This is a very important part of your petition.** This is where you explain why you believe the respondent's actions with regard to your revocation were in error, arbitrary and capricious, or contrary to law.

In completing Paragraph 13, it will be helpful to review the standards a court uses in ruling on a certiorari petition, which are outlined above in Section III(A)(3), "Limits on Judge's Review in a Certiorari Proceeding."

Use as many brief, lettered subparagraphs under Paragraph 13 as are necessary to state all of your reasons for asking the court to take action on your petition. The form petition includes four lettered subparagraphs, but you can add a page that includes more subparagraphs if you need them.

You do not need to cite a lot of case law under Paragraph 13. Instead, focus on the facts that show the decision on your revocation was wrong. As always, be as specific and as clear as you can, but also be brief and to the point.

*c) Date and Signature*

At the end of the petition is a place for you to write in your signature and the date. It is important that you sign and date the petition.

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#### **4) The Proposed Writ of Certiorari**

**Form 5** is the proposed writ of certiorari that you want the court to sign. You should fill in the entire caption (leave the case number blank, since it has not yet been assigned). Remember to include your name and addresses and the name of the DHA Administrator as the respondent.

The judge can then use this writ form to order the respondent to produce the return (or record) in the case. Alternatively, the judge may decide to use his or her own writ form. So you should leave the signature line for the judge blank.

This writ of certiorari forms commands the respondent to prepare the written record of your revocation proceedings and file it with the court. This written record is also called the “return.” This proposed writ also has the judge ordering the DHA to prepare a transcript of your revocation hearing.

The return is the record that the judge will consider in deciding your claim. Generally, with this procedure, all the judge will have to base his or her decision on is the return and the parties’ briefs.

The court can give the respondent up to 60 days to produce the return, but the practice generally has been to require a return within 30 days of receipt of service of the writ. The proposed writ form supplied in this manual allows for 30 days.

#### **5) Other Documents to Include With Your Certiorari Forms**

**Form 6** is an affidavit (statement) you can use to tell the court that you have made every effort to comply with the requirements of the PLRA. On the affidavit, you can state the following:

- when you requested a copy of your prison trust fund statement from your institution’s business office, and whether/when you received the statement;
- when you requested the DOJ certification form (Form DJLS22), and whether/when you received the certification; and

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- the date that you are placing your documents in the prison mailbox.

**You will need to have a notary public witness your signature on the affidavit form.** You should check with the records office at your institution to find out which prison staff members are notaries. Then you should sign the affidavit in front of the notary.

It is helpful to have a cover letter to send to the court with all of your materials. **Form 7** is a cover letter that you use.

is helpful to have a cover letter to send to the court with all of your materials. **Form 7** is a cover letter that you use.

Once you have completed your affidavit, you should put all your certiorari materials, including the PLRA materials and cover letter, in the prison mailbox the same day.

#### **6) Checklist of Documents to Send to Court**

1. Court Form CV-438, "Prisoner's Petition for Waiver of Prepayment of Fees/ Costs--Affidavit of Indigency" (Form 2).
2. The certified six-month account statement for your prison trust account, for the six months prior to the date that you file your certiorari petition.\*\*
3. The "Authorization to Department of Corrections to Forward Payments to the Clerk of Courts" (Form 3).
4. The original DOJ certification (Form DJLS22) that you have not had three or more previous filings dismissed under Wis. Stat. § 801.02(7)(d).\*\*
5. The petition for writ of certiorari (Form 4).
6. The proposed writ of certiorari (Form 5).
7. Documentation proving that you have exhausted your administrative remedies.
8. A notarized affidavit, in which you state when you requested and whether/when you received your prison trust fund statement and DOJ certification, as well as the date that you placed all of the documents in the prison mailbox **(Form 6)**.
9. A cover letter to the court (Form 7).

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**\*\*If you have requested, but have not yet received, the trust account statement and/or Form DJLS22, then you can leave them out, but you should be sure to include Form 6.**

You should **file 2 copies of each of the documents listed above**. The first copy of the documents is for the court file. The second copy of the documents will eventually be served upon (given to) the DHA Administrator.

Finally, be sure to **keep a copy of every paper that you send to the court**.

You file the documents by mailing them to the **Dane County Clerk of Circuit Court, 215 South Hamilton Street, Madison, WI 53709**.

### **E. The Judge's Initial Rulings**

In this section, we will assume that you have properly filed all of the documents required by the PLRA, along with the certiorari petition and proposed writ.

Next, the judge will determine whether you are indigent. If the judge finds that you are indigent, he or she will issue an "Order on Prisoner's Petition for Waiver of Prepayment Fees/Costs."

If the judge does not find you indigent, you will be notified that you will have to pay the filing fee before the judge will review the petition.

Assuming that the judge has found you indigent, then he or she will do an initial review of your certiorari petition itself. Under Wis. Stat. § 802.05(3)(b), the judge can deny the petition without requiring a response from the respondent, if the petition:

- is legally frivolous, as defined in Wis. Stat. § 814.025(3); or
- is used for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; or
- seeks monetary damages from an offender who is immune from such relief; or

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- fails to state a claim upon which relief may be granted.

If the judge denies the petition under § 802.05(3)(b), you will be notified in writing.

Remember, if the judge denies the petition under § 802.05(3)(b), **this will count as a “strike” against you** under § 801.02(7)(d), if you try to file future civil cases under the PLRA. See the discussion of the “three strikes” rule in Section III(B)(2)(d).

If the judge does not deny the petition, then the judge will sign the writ of certiorari. Remember, **the writ simply commands the respondent to file a “return” (a copy of the record)**. The fact that the judge signed the writ does not mean that you have won the case.

Assuming that the judge has ruled that you are indigent and that prepayment of fees and costs should be waived, the court clerk will “authenticate” (date-stamp) one copy of each of the filed documents, including the certiorari petition and the signed writ. The clerk will then return the authenticated documents to you. The clerk will also send you a copy of the order waiving prepayment of fees/costs, signed by the judge.

#### **F. What to Do With the Papers the Court Sends You**

As soon as you get the authenticated documents and the signed order waiving fees/costs back from the court, **you should make another copy of each authenticated and/or signed document for your own records.**

Then, mail the following documents to the Dane County Sheriff’s Department at 115 W. Doty Street, Madison, WI 53703:

1. The authenticated petition.
2. The signed writ.
3. The signed order waiving prepayment of fees and costs.
4. The authenticated documentation that you have exhausted your administrative remedies.

This *pro se* manual is designed to assist you in representing yourself. It is not intended to provide legal advice to any individual. Your case may involve circumstances that are not taken into account by this manual. Remember also that this manual was drafted in 2011, so you should check to see if the law or procedures have changed.

You should also include the signed order waiving prepayment of fees and costs.

Finally, you should include a cover letter stating that you are asking that the Sheriff's Department serve the authenticated/signed documents on the DHA Administrator, without requiring prepayment of the service fee (**Form 8**).

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2. The signed writ.
3. The signed order waiving prepayment of fees and costs.
4. The authenticated documentation that you have exhausted your administrative remedies.

You should also include the signed order waiving prepayment of fees and costs.

Finally, you should include a cover letter stating that you are asking that the Sheriff's Department serve the authenticated/signed documents on the DHA Administrator, without requiring prepayment of the service fee (**Form 8**).

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The Dane County Sheriff's Department will serve the documents on the Administrator at the DHA's office address in Madison. As of 2011, the cost of service is **\$40** per person served, plus the cost of mileage.

The Sheriff's Department will then mail you an "affidavit of service," which you should keep. The affidavit proves that the DHA Administrator's office was served with the certiorari petition, writ, and other filed documents.

Along with the affidavit of service, the Sheriff's Department will send you a bill for the amount of service. You should give this bill to the prison business office, along with a copy of **Form 4** (your authorization to the DOC to have filing fees and costs taken out of your prison accounts), and a copy of the court's signed order waiving prepayment of fees and costs. The service fee will then be paid back to the Sheriff's Department out of your prison accounts.

### **G. What Happens Next?**

Once the Administrator is served with your documents, he or she will have 30 days to file a "return." However, if the judge used his or her own writ form rather than the one provided in this manual, the judge may give the Administrator up to 60 days to file a return.

The return should consist of copies of all documents involved or considered in the revocation proceeding and administrative appeal. This would typically include:

1. the agent's revocation summary;
2. documents included in the record of the revocation proceedings;
3. a transcript of the revocation hearing(s);
4. the ALJ's written decision;
5. your written appeal to the Administrator of DHA; and
6. the Administrator's written decision on your appeal.

The return could also include any additional documents that were included at any point in the process (for example, documents that may have been attached to your administrative appeal).

This *pro se* manual is designed to assist you in representing yourself. It is not intended to provide legal advice to any individual. Your case may involve circumstances that are not taken into account by this manual. Remember also that this manual was drafted in 2011, so you should check to see if the law or procedures have changed.

Once the initial documents are filed and served, you are responsible for sending the respondent or the respondent's attorney a copy of any later document that you file in the case (including any letters to the court).

However, although your initial documents must be served by personal (sheriff's) service, these later documents can be served by first-class mail.

At some point in this process (probably when the return is filed) the attorney for the respondent will file a "Notice of Appearance." The attorney may be an assistant attorney general in the Department of Justice or another government attorney.

Either way, you should receive a copy of this Notice of Appearance. Once you know which attorney is representing the respondent, you should send copies of all future documents that you file with the court to that attorney, rather than to the respondent.

Once a proper and complete return is filed, the judge may set up a briefing schedule to address the merits of the case. The schedule will typically provide for a brief by the petitioner (you); a response brief from the respondent's attorney; and your reply brief.

If the court does not order a briefing schedule, you can write to the court, with a copy to the respondent's attorney, and ask for a briefing schedule. However, the court is not required to order briefing.

If you do file a brief, it should outline the relevant facts from the record, and the arguments in favor of your motion, including citations to any cases which support those arguments.

After briefs are filed, the judge will issue an order granting or denying the relief you requested. If the judge rules against you, you may wish to consider taking an appeal to the Court of Appeals.

This *pro se* manual is designed to assist you in representing yourself. It is not intended to provide legal advice to any individual. Your case may involve circumstances that are not taken into account by this manual. Remember also that this manual was drafted in 2011, so you should check to see if the law or procedures have changed.

Appealing a decision on a certiorari case is beyond the scope of this manual. However, the *LAIP Desk Book* does include a manual for people who are representing themselves on appeal, which was prepared by the Clerk of the Court of Appeals. You may find that manual helpful.

Remember, however, that the PLRA's fee provisions do apply to the fees and costs involved in appeals. This means that, if you are indigent, you can get a waiver of prepayment of appellate fees and costs, but you will have to pay these fees/costs back out of your institution trust funds.

Finally, **Form 9** is a general cover letter. This is a sample letter to the court which should accompany any additional documents (e.g. motions or briefs) that you submit for filing in your case, after the initial filing.

In your cover letter, you should state the title of every paper that you submit with the letter. Your cover letter should list the respondent's attorney in the "cc" ("copy to") line, to show that you have sent copies of the cover letter and any enclosed documents to the attorney. **And remember that you should always keep a copy of any document you send out.**

#### IV. CONCLUSION

Remember, this manual can only get you started on the process of filing a certiorari petition. Legal cases take on a life of their own, once they've been filed. It is not possible in a *pro se* manual to anticipate and discuss all the possible ways that a case could proceed. Instead, we have attempted to provide information that will help you file legally correct documents, so that the court can consider your case on its merits.

Remember also that statutes can change, and that cases interpreting the statutes can also change. So it is important to double-check current statutes and case law, in order to make sure that the law hasn't changed by the time you want to file your own certiorari petition.

## V. SAMPLE FORMS FOR FILING A CERTIORARI PETITION

Note: except for Form 2, the forms included in this manual are only samples. You can use them if they are appropriate to your case, but you may need to modify them to suit the circumstances of your case.

- Form 1:** Sample letter to Department of Justice requesting DJLS22 Certification
- Form 2:** Court Form CV-438, "Prisoner's Petition for Waiver of Prepayment of Fees/ Costs-Affidavit of Indigency"
- Form 3:** Sample authorization to Department of Corrections to Forward Payments to the Clerk of Courts
- Form 4:** Sample Petition for Writ of Certiorari
- Form 5:** Sample Proposed Writ of Certiorari
- Form 6:** Sample Affidavit of Petitioner
- Form 7:** Sample cover letter to accompany your initial filing
- Form 8:** Sample letter to Dane County Sheriff requesting service
- Form 9:** Sample general cover letter



FORM 1

(Date)

Civil Litigation Unit  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, Wisconsin 53707-7857

Re: PLRA certification for \_\_\_\_\_  
(*your name and DOC number*)

Dear Sir or Madam:

I am incarcerated in a Wisconsin prison, and I am planning to file a certiorari petition within 30 days. Please mail me a Form DJLS22, certifying that I have not had three or more civil actions dismissed pursuant to Wis. Stat. § 801.02(7)(d). My name and address are:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Since there is a 45-day deadline for me to file my certiorari petition, I would appreciate your prompt action on this request. Thank you for your attention to this matter.

Very truly yours,

\_\_\_\_\_  
(*your signature*)



# FORM 2

For Official Use

STATE OF WISCONSIN, CIRCUIT COURT, \_\_\_\_\_ COUNTY

Please Print or Type

## Prisoner's Petition for Waiver of Prepayment of Fees/Costs - Affidavit of Indigency

-vs-

Case No. \_\_\_\_\_

**(The prisoner must provide the following to the Clerk of Court at the time of filing:**

- **The original and one copy of this affidavit and attachments.**
- **Sufficient copies of the pleadings for potential service on all named defendants.)**

Under oath I state that:

- I am unable to pay the costs of this action, special proceeding or appeal or to give security for those costs, and request waiver of prepayment of those costs because of poverty.
- I have not had three or more appeals, writs of error, actions or special proceedings dismissed by a state or federal court for any of the reasons listed in §802.05(3)(b)1-4, Wisconsin Statutes.
  - Attached is the original Wisconsin Department of Justice certification (form DJ-LS-22 containing the raised seal) dated within 30 days of the date of this petition concerning the number of appeals, writs of error, actions or special proceedings dismissed by a state or federal court.
- I have attached and incorporated into this affidavit:
  - The original pleading in this matter.
  - [If this proceeding is related to prison or jail conditions]: Written documentation of exhaustion of all available administrative remedies, including copies of all written materials:
    - I provided to the administrative agency as part of the administrative proceeding;
    - the administrative agency provided to me related to the administrative proceeding; and,
    - included as part of any administrative appeal.
  - A certified copy of my prison trust fund account for the six months preceding the date of this petition.
  - My authorization to the agency having custody of my prison trust fund account (on DOC form 1930 provided by the Wisconsin Department of Corrections), to forward payments from my account to the clerk of court each time the amount in the account exceeds \$10, until the costs and fees are paid in full.
- I  have  have not committed an offense on or after September 1, 1998.  
(An offense is defined in §165.83(1)(c), Wisconsin Statutes, as an act which is a felony, misdemeanor, or violation of a city, county, village, or town ordinance.
- I  am  am not employed. Name of employer: \_\_\_\_\_
- I earn \$ \_\_\_\_\_ gross  weekly.  every two weeks.  twice monthly.  monthly.
- I have received or been entitled to receive money from the following sources within the past 12 months (list total amount):
  - pension, annuities or life insurance payments: .....\$ \_\_\_\_\_
  - disability or worker's compensation payments: .....\$ \_\_\_\_\_
  - gifts, loans or inheritances: .....\$ \_\_\_\_\_
  - rent payments, interest or dividends: .....\$ \_\_\_\_\_
  - business, profession or self employment: .....\$ \_\_\_\_\_
  - other: .....\$ \_\_\_\_\_
- I have the following cash assets:
  - savings accounts: .....\$ \_\_\_\_\_
  - checking accounts: .....\$ \_\_\_\_\_
  - cash: .....\$ \_\_\_\_\_
  - money owed me: .....\$ \_\_\_\_\_
  - any other cash assets: .....\$ \_\_\_\_\_

9. I have the following other assets (list value):

- real estate: ..... \$ \_\_\_\_\_
- stocks, bonds, securities and financial instruments: ..... \$ \_\_\_\_\_
- automobiles: ..... \$ \_\_\_\_\_
- computers, audio-visual equipment, other personal property: ... \$ \_\_\_\_\_
- jewelry, antiques, objects of art or other valuable property : .... \$ \_\_\_\_\_

10. I have not transferred any funds or other assets in the past 12 months except as follows (describe any transfers):

\_\_\_\_\_

\_\_\_\_\_

11. I have not assigned my rights to any funds or other assets since first incarcerated except as follows (describe any assignments):

\_\_\_\_\_

\_\_\_\_\_

12. I have the following legal obligations:

Obligation	Amount Actually Paid Per Month	Amount Actually Paid in Last Six Months
<input type="checkbox"/> Child Support	\$ _____	\$ _____
<input type="checkbox"/> Restitution	\$ _____	\$ _____
<input type="checkbox"/> Fines/Costs	\$ _____	\$ _____
<input type="checkbox"/> Other:	\$ _____	\$ _____

13. My spouse  is  is not employed. Name of employer: \_\_\_\_\_

14. My spouse earns \$ \_\_\_\_\_ gross  weekly.  every two weeks  twice monthly  monthly.

15. My spouse receives monthly income totaling the amount of \$ \_\_\_\_\_ from:

- Pension  Social Security  Unemployment compensation
- Disability  Student loans/grants  Other: \_\_\_\_\_

16. I have the following miscellaneous expenses: \_\_\_\_\_

\_\_\_\_\_

Subscribed and sworn to before me  
on \_\_\_\_\_

I understand that if my financial situation changes,  
I must notify the court immediately.

\_\_\_\_\_  
Notary Public, State of Wisconsin

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

FORM 3

AUTHORIZATION TO WITHHOLD MONEY FROM ACCOUNTS

I, \_\_\_\_\_,  
(your name and DOC identification number)

wish to commence a lawsuit described as follows:

\_\_\_\_\_  
Name of DHA Administrator as Respondent

\_\_\_\_\_  
Name of court (e.g. Circuit Court for \_\_\_\_\_ County)

**Revocation**  
\_\_\_\_\_  
Subject of the lawsuit

If the court permits me to commence this lawsuit, by my signature below I authorize the agency having custody of my prison trust fund account to forward payments from my account to the clerk of court each time the amount in the account exceeds \$10 until the costs and fees are paid in full.

\_\_\_\_\_  
(Signature of Petitioner)

\_\_\_\_\_  
(Date)

**CUSTODIAN:**

Give inmate a copy after he or she signs it.

When suit is filed and served, enter court case number here: \_\_\_\_\_

**A COPY OF THIS FORM MUST ACCOMPANY CIRCUIT COURT FORM CV-438 OR CV-440, PRISONER'S AFFIDAVIT OF INDIGENCY**



FORM 4

---

STATE OF WISCONSIN    CIRCUIT COURT    \_\_\_\_\_ COUNTY

---

STATE EX REL.    \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ ,

*(your name and address)*

**Petitioner,**

v.

Case No. \_\_\_\_\_  
Case Classification Code 30707

\_\_\_\_\_  
**Wisconsin Department of Administration**  
**Division of Hearings and Appeals**  
**5005 University Avenue, Suite 201**  
**Madison, WI 53705-5400** ,

*(DHA Administrator's name and address)*

**Respondent.**

---

**PETITION FOR WRIT OF CERTIORARI**

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TO:    Judge of the Circuit Court  
\_\_\_\_\_ County Circuit Court  
*(your county of conviction)*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
*(address of court)*

I, \_\_\_\_\_, the petitioner in this action,  
(fill in your name)

respectfully state as follows:

1. I am now confined at \_\_\_\_\_ Correctional  
(name of institution)  
Institution.

2. The respondent, \_\_\_\_\_ is the Administrator of the  
(Administrator's name)  
Division of Hearings and Appeals (DHA) of the Wisconsin Department of Administration.

3. Pursuant to Wis. Admin. Code Ch. HA 2, DHA is responsible for  
hearings and decisions on revocation of probation, parole, or Extended Supervision.

4. Pursuant to Wis. Admin. Code § HA 2.05(8), the respondent is  
the final decision-maker regarding revocation decisions after a hearing.

5. I hereby ask the court to review the \_\_\_\_\_ decision of the respondent  
(date)  
regarding revocation of my [probation/ parole/ Extended Supervision] in \_\_\_\_\_  
(cross out the words that don't apply)

County Case No. \_\_\_\_\_

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6. On or about \_\_\_\_\_, 20\_\_\_\_, I received notice that revocation  
proceedings were being brought against me. The notice alleged the following grounds as bases  
for revocation:

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WHEREFORE, I respectfully request that a writ of certiorari be granted to bring up for review and determination the proceedings in the matter set forth in this petition; and that, upon the return of the writ, the decisions and actions of the respondent and the Administrative Law Judge be reversed and adjudged to be null and void.

IN ADDITION, pursuant to Wis. Admin. Code § HA 2.07, I respectfully request that the court order the DHA to transcribe the electronic record of the hearing(s) in this case, at no cost to me.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Respectfully submitted,

---

*(your signature)*

PRO SE PETITIONER



FORM 5

---

STATE OF WISCONSIN

CIRCUIT COURT

\_\_\_\_\_ COUNTY

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STATE EX REL. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ ,

*(your name and address)*

Petitioner,

v.

Case No. \_\_\_\_\_

Case Classification Code 30707

---

Wisconsin Department of Administration

Division of Hearings and Appeals

5005 University Avenue, Suite 201

Madison, WI 53705-5400 ,

*(DHA Administrator's name and address)*

Respondent.

---

WRIT OF CERTIORARI

---

THE STATE OF WISCONSIN:

TO: *(Administrator's name and address)*

Wisconsin Department of Administration

Division of Hearings and Appeals

5005 University Avenue, Suite 201

Madison, WI 53705-5400

WHEREAS, it has been represented to this court by the petition of \_\_\_\_\_  
\_\_\_\_\_, (your name)  
\_\_\_\_\_, that this respondent has upheld revocation of the prisoner's (probation/  
parole/Extended Supervision) in \_\_\_\_\_ County Case No. \_\_\_\_\_, contrary to  
law and justice; and being willing that the record of the proceedings upon which that denial of  
petitioner's appeal of the revocation is based be certified and returned by you to our court;

**WE HEREBY COMMAND YOU** to certify and return to this court within thirty days  
after service of this writ upon you a correct transcript of the record and proceedings in  
in the revocation, including a transcript of the revocation hearing, together with all the papers,  
documents, and docket entries involved or considered by you in the proceedings.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

BY THE COURT:

\_\_\_\_\_  
Circuit Judge

FORM 6

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE EX REL.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(your name and address)

Petitioner,

v.

Case No. \_\_\_\_\_  
Case Classification Code 30707

\_\_\_\_\_  
**Wisconsin Department of Administration**  
\_\_\_\_\_  
**Division of Hearings and Appeals**  
\_\_\_\_\_  
**5005 University Avenue, Suite 201**  
\_\_\_\_\_  
**Madison, WI 53705-5400**  
\_\_\_\_\_

(DHA Administrator's name and address)

Respondent.

AFFIDAVIT OF PETITIONER

STATE OF WISCONSIN )  
COUNTY OF \_\_\_\_\_ )  
(county where you are now housed)

I, \_\_\_\_\_, being first duly sworn on oath, depose and state the  
your name)  
following:

(1) On \_\_\_\_\_, 20\_\_\_\_, I requested a copy of my prison  
(date)  
trust fund statement from the business office at \_\_\_\_\_  
(name of your institution)

(2) (Cross out either Paragraph (2)(a) or (2)(b) below):

(a) I have not yet received a copy of my trust fund statement.

**OR**

(b) On \_\_\_\_\_, 20\_\_\_\_\_, I received a copy of my  
(date)  
trust fund statement from the business office at \_\_\_\_\_.  
(name of your institution)

(3) On \_\_\_\_\_, 20\_\_\_\_\_, I requested a copy of Form DJLS22  
(date)

(Certification of Prior Civil Cases Dismissed) from the Wisconsin Department of Justice.

(4) (Cross out either Paragraph (4)(a) or (4)(b) below):

(a) I have not yet received a copy of Form DJLS22.

**OR**

(b) On \_\_\_\_\_, 20\_\_\_\_\_, I received Form DJLS22  
from the Department of Justice.

(5) On \_\_\_\_\_, 20\_\_\_\_\_, I placed the following documents  
(date)

in the prison mailbox at \_\_\_\_\_.  
(name of your institution)

[below, list all the documents you placed in the prison mailbox].

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**FORM 7**

Your name, DOC number & address:

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Date: \_\_\_\_\_

Clerk of Circuit Court  
Dane County Courthouse  
215 S. Hamilton Street  
Madison, WI 53709

Re: *State ex rel.* \_\_\_\_\_ v. \_\_\_\_\_ (*case name*)

Dear Clerk:

Enclosed please find for filing the original and one copy of each of the following documents:

- Court Form CV-438, "Prisoner's Petition for Waiver of Prepayment of Fees/Costs--Affidavit of Indigency."
1. A certified six-month account statement for my prison trust account.\*\*
  2. An "Authorization to Department of Corrections to Forward Payments to the Clerk of Courts."
  3. A DOJ certification (Form DJLS22) stating that I have not had three or more previous filings dismissed under Wis. Stat. § 801.02(7)(d).\*\*
  4. My petition for writ of certiorari.
  5. A proposed writ of certiorari.
  6. Documentation proving that I have exhausted my administrative remedies.
  7. A notarized "Affidavit of Petitioner."
  - 8.

\*\*(*Cross out items 1 and 3 if you have not yet received them*)

If the court decides to sign the proposed writ and an order waiving prepayment of fees and costs, please return one copy of the authenticated certiorari petition, the signed writ, and the signed order waiving prepayment of fees and costs to me at the address above.

I will then forward the appropriate documents to the Sheriff's Department for service upon the respondent. Thank you for your attention to this matter.

Very truly yours,

\_\_\_\_\_  
(*your signature*)

Enclosures



**FORM 8**

*Your name, DOC number & address:*

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Date: \_\_\_\_\_

Dane County Sheriff's Department  
15 W. Doty Street  
Madison, WI 53703

Re: *State ex rel.* \_\_\_\_\_ v. \_\_\_\_\_ (*case name*)

Dane County Case No. \_\_\_\_\_

Dear Sheriff:

I am the petitioner in the above-captioned case. Enclosed please find an authenticated copy of my petition for writ of certiorari, the writ of certiorari signed by the court, and documentation that I have exhausted my administrative remedies.

Please serve the documents listed above on the respondent at the address listed on the writ, without requiring prepayment of service fees. I have enclosed a signed order waiving prepayment of fees and costs.

Please send an affidavit of service to me at the address above.

Thank you for your attention to this matter.

Very truly yours,

\_\_\_\_\_  
(*your signature*)

Enclosures



**FORM 9**

Your name, DOC number & address:

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---

---

Date: \_\_\_\_\_

Clerk of Circuit Court  
Dane County Courthouse  
215 S. Hamilton Street  
Madison, WI 53709

Re: *State ex rel.* \_\_\_\_\_ v. \_\_\_\_\_ (*case name*)  
Case No. \_\_\_\_\_

Dear Clerk:

Enclosed please find for filing in the above captioned case:  
*[list your papers below].*

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---

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Thank you for your attention to this matter.

Very truly yours,

\_\_\_\_\_  
(*your signature*)

Enclosures

cc: Respondent's attorney (with address)  
w/enclosures [*you must send the respondent's attorney copies of all documents that you send to the court*]

