

Scope of Appointment Issues

The following are some common subjects of questions from private bar regarding scope of SPD appointment and representation.

Motion and hearing on return of a client's property

This motion may be filed as part of the underlying criminal case and is generally within the appointed attorney's discretion to litigate as part of the SPD appointment. However, the SPD will not ordinarily reimburse an attorney for bringing this motion after final adjudication or judgment.

The best practice is for the attorney to identify before disposition whether there is any property belonging to the client that is being held by law enforcement. If there is such property, the attorney and the client may wish to make an informal request for return initially. If the agency declines to release the property and fails to respond promptly, the attorney and client should consider whether a motion is appropriate. Consideration should be given to the nature and value of the property, as well as any risk that additional examination or testing of the property could result in additional prosecution of the client.

Restitution Hearing

If the court orders restitution as part of sentencing, but does not determine the amount at the time, the attorney is ordinarily required to represent the client at the restitution hearing as part of the original case. However, if no restitution hearing is held or scheduled within one year after sentencing, the attorney may close the file. The attorney can interim bill after sentencing, but before restitution is determined. Attorneys should request prior approval from the program manager or ACD Director to submit an interim bill.

Writ of certiorari in a revocation proceeding

This writ is a means of challenging the revocation decision made by an administrative law judge. There is no constitutional right to counsel in seeking certiorari or for an appeal from the order of the circuit court denying certiorari and upholding the revocation.

There are limited grounds for challenging a revocation decision to the circuit court:

Certiorari review of a revocation decision consists of four inquiries: (1) whether the division kept within its jurisdiction; (2) whether it acted according to law; (3) whether its actions were arbitrary, oppressive, or unreasonable; and (4) whether the evidence permitted the division to reasonably make the order or determination in question. *State v. Horn*, 226 Wis.2d 637, 652, 594 N.W.2d 772 (1999) (citing *State ex rel. Warren v. Schwarz*, 211 Wis.2d 710, 717, 566 N.W.2d 173 (1997)).

State ex rel. Griffin v. Smith, 2004 WI 36, 270 Wis. 2d 235, 240, 677 N.W.2d 259, 262

If the appointed attorney is not convinced there is reasonable chance of success, the attorney should decline to file the writ, but should advise the client on the applicable process and time limit. The UW Law School Remington Center has compiled a pro se inmate guide for challenging revocation by certiorari: http://law.wisc.edu/fjr/laip/prose_packets.html

Attorneys should contact ACD if they have questions.

Ancillary (related) matters: When an appointed attorney may represent

Ancillary representation in a separate proceeding is permitted solely for the purpose of representing the client in the primary case (a pending case in which the SPD has appointed an attorney). The following are examples of ancillary representation:

Civil property forfeitures

The appointed attorney may represent a client in a civil property forfeiture action only if it arises from another case in which the attorney has been appointed to represent the client. The attorney may not represent third parties (such as a relative or friend of the client), and the attorney may not litigate civil forfeitures after a final adjudication of the primary case, unless representation is necessary to safeguard the client's Fifth Amendment rights.

Administrative hearings about revocation of driving privileges

The appointed attorney may represent clients in such hearings only if the attorney is already representing the client on an underlying criminal charge.

"Fine-only" misdemeanors and forfeiture offenses

If the only penalty for a misdemeanor charge is a fine, SPD representation is not affirmatively authorized. *See* sec. 977.05(4)(i)(3), Stats. Similarly, the SPD lacks authority to represent on offenses punishable only by a monetary forfeiture. Ancillary representation may be appropriate, however, when a criminal case (with potential imprisonment) is joined with a "fine-only" misdemeanor or a forfeiture offense.

For example, it is appropriate to negotiate a resolution of a criminal case that includes disposition of related non-criminal citations.

Extraordinary writs:

Prior approval of the ACD Director is required for an attorney to file the following writs.

- i. *Habeas corpus* to obtain the presence of a client or witness at a court proceeding or to obtain a client's release from custody.
- ii. *Prohibition* to obtain an order enjoining a court or party from taking specified action.

iii. *Mandamus* to compel production of records or to compel other specified action.

iv. *Coram nobis* to correct factual errors or omissions in the transcripts or other records of a proceeding.