When to File a Writ of Certiorari

Attorneys are often uncertain when it is appropriate to file a Writ of Certiorari in a probation/extended supervision revocation matter. Although it is within the scope of a public defender appointment in a revocation case to file a Writ of Certiorari, the attorney must first determine whether grounds exist to bring the Writ. Like any other motion, attorneys should bring a Writ of Certiorari based on their best legal judgment and not simply because the client insists. The following are some cases and language intended to assist the attorney in determining whether a Writ of Certiorari is appropriate in a given case.

Wisconsin courts have held consistently that:

> Review of a probation revocation pursuant to a writ of certiorari is limited to the following questions:
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> (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.

Van Ermen v. D.H.S.S., 84 Wis. 2d 57(1978), Von Arx v. Schwarz, 185 Wis. 2d 645, (Ct. App. 1994), State ex rel Warren v. Schwarz, 211 Wis. 2d 710 (Ct. App. 1997), State ex rel. Thomas v. Schwarz, 285 Wis. 2d 805 (Ct. App. 2005).

The attorney must consider his or her case in light of these four questions and keeping in mind the burden of proof and evidentiary test in a Writ of Cert review.

> "The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the ALJ reached." ***George v. Schwarz****, 2001 WI App 72, P10, 242 Wis. 2d 450, 626 N.W.2d 57.* "The facts found by the ALJ are conclusive if supported by 'any [*6] reasonable view' of the evidence, and we may not substitute our view of the evidence for that of the ALJ." ***Id****.*
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> At the revocation hearing, the State has the burden of proving the alleged violation or violations by a preponderance of the evidence. *See* ***State ex rel. Thompson v. Riveland****, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982).* On the probationer's appeal, the burden switches to the probationer to prove by the same standard that the decision was arbitrary and capricious. ***State ex rel. Solie v. Schmidt****, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).*

State ex rel. Thomas v. Schwarz, 285 Wis. 2d 805 (Ct. App. 2005).

> Although DOC has the burden of proving the alleged probation violation by a preponderance of the evidence at the revocation hearing, on appeal challenging the

division's decision to revoke, the probationer has the burden of proving the decision was arbitrary and capricious, that is, that the division did not properly exercise its discretion. ***Von Arx,*** *185 Wis. 2d at 655, 517 N.W.2d at 544*. A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical explanation founded upon a proper legal standard. ***Id****. at 655, 517 N.W.2d at 544*. We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports its decision. If it does, we must affirm even though there is evidence that may support a contrary determination. ***Id****. at 656, 517 N.W.2d at 544*. Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact-finder could base a conclusion. ***Id.***

State ex rel Warren v. Schwarz, 211 Wis. 2d 710 (Ct. App. 1997)

Attorneys and clients considering a Writ of Certiorari are often concerned that the evidence at the revocation hearing was not sufficient or that the Department did not pursue appropriate alternatives to revocation. The courts have addressed review by Writ of Certiorari based on these two types of challenges.

With respect to sufficiency of the evidence claims the Court has said:

Flowers' final contention is that there was insufficient evidence to support the allegation that he absconded from the state. The circuit court rejected this contention, finding that Flowers had not sustained the substantial burden of proof in such actions:

". . . In *State ex rel. Johnson v. Cady (1971), 50 Wis.2d 540, 550, 185 N.W.2d 306*, this court set forth the standard of judicial review on certiorari in a probation revocation proceeding when the sufficiency of the evidence to support a probation revocation is at issue to be as follows:

"'. . . We further conclude that the scope of the review shall be addressed to whether the department's action was arbitrary and capricious and represented its will and not its judgment.

"'"The board is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. That burden rests squarely on the prisoner, and if he fails to sustain the burden, the courts will not interfere with the board's decision. . . ."'" *State ex rel. Hanson v. H&SS Dept., supra, at 375, 376.*

State ex rel. Flowers v. DHSS, 81 Wis. 2d 376 (1978)

Regarding challenges to the ATR issue we find the following:

Warren's second challenge to the probation revocation is that the division had an obligation to establish, before revoking parole, that there was no reasonable alternative to revocation, which includes a duty to investigate the availability of potential treatment alternatives, and that it did not do so. This challenge implicates the third and fourth areas of a court's certiorari review--whether the division's decision was arbitrary, unreasonable and capricious, representing its will, not its judgment, and whether it is supported by the evidence. We begin by defining more precisely the duty of the division and our scope of review.

An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. ***Von Arx v. Schwarz,*** *185 Wis. 2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994).* In ***Plotkin v. DHSS,*** *63 Wis. 2d 535, 217 N.W.2d 641 (1974),* the court held that these ABA guidelines "properly set forth the duty of ... [an] administrative body in exercising its discretion in regard to the possibility of probation revocation:

> 5.1 **Grounds for and alternatives to probation revocation**. (a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
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> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
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> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
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> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.
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> (b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:
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> (i) a review of the conditions, followed by changes where necessary or desirable;
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> (ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;
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> (iii) a formal or informal warning that further violations could result in revocation." American Bar Association, *Standards Relating to Probation*, pp. 15, 16, 56, 57.

Id. *at 544-45, 217 N.W.2d at 645-46.*

In a later case, ***Van Ermen****, 84 Wis. 2d 57, 267 N.W.2d 17 (1978),* the court considered the argument that the ***Plotkin*** standards required that the Department of Health and Social Services consider alternatives to revocation and stated:

> This does not mean that revocation cannot occur unless alternatives are tried, but it does mean that the Department must exercise its discretion by at least considering whether alternatives are available and feasible.
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> ***Id.*** *at 67, 267 N.W.2d at 21-22*. We consider this to be the proper formulation of the State's duty with respect to alternatives to probation revocation.

State ex rel Warren v. Schwarz, 211 Wis. 2d 710 (Ct. App. 1997)