



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 4, 2018

To:

Hon. Marshall B. Murray
Circuit Court Judge
Branch 43
901 N. 9th St. - Room 208
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Jody J. Schmelzer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Special Litigation & Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Nicole Stewart 380820
Robert Ellsworth Corr. Cntr
21425-A Spring Street
Union Grove, WI 53182-9408

Taycheedah Corr. Inst.
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

You are hereby notified that the Court has entered the following opinion and order:

2017AP783

State of Wisconsin ex rel. Nicole Stewart v. Robert Humphreys
(L.C. # 2017CV2225)

Before Brennan, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nicole Stewart, *pro se*, appeals from an order of the circuit court that “denied and dismissed” her petition for a writ of *habeas corpus* because it was not properly verified. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate

for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ The order is summarily affirmed.

In 2005, Stewart was convicted and sentenced in a criminal case. She was sentenced to five years' initial confinement and nine years' extended supervision, with a consecutive term of probation on a withheld sentence. She was released to extended supervision in 2012; that supervision was revoked in October 2015.

On March 21, 2017, Stewart filed a "request for assignment of writ of habeas corpus," which the circuit court liberally construed as a petition for a writ. Because Stewart's petition was not signed within the presence of a notary public, the circuit court concluded the petition "fails to meet the verification requirements and thus is facially deficient." It denied and dismissed the petition on the same day it was filed. In April 2017, Stewart refiled a writ petition that was adjudicated on the merits under a new case number. Also in April 2017, Stewart appealed from the circuit court's order denying and dismissing her March petition in this case.

The matter is moot in light of Stewart's subsequent filing of a properly verified petition that was adjudicated on its merits. *See Strong v. Brushafer*, 185 Wis. 2d 812, 818, 519 N.W.2d 668 (Ct. App. 1994) (issue moot in light of "new action arising from the same facts and circumstances"). "An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

To the extent the matter is somehow not moot, *see id.*, Stewart’s appellate argument can be distilled to two points: the *habeas corpus* statutes do not require “verification by affidavit,” and federal law, including 28 U.S.C. §§ 1746, 2242, and 2254, allows her to present an unsworn statement in support of any verification or affidavit requirements. These claims are unavailing.

In Wisconsin, a petition for a writ of *habeas corpus* “must be verified[.]” *See* WIS. STAT. § 782.04. Although WIS. STAT. ch. 782 does not expressly define what it means for a petition to be “verified,” “[v]erification entails signing the document in the presence of a notary public.” *See State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶11, 288 Wis. 2d 707, 709 N.W.2d 515; *see also Nielsen v. Waukesha Cty. Bd. of Supervisors*, 178 Wis. 2d 498, 512-13, 504 N.W.2d 621 (Ct. App. 1993) (“[T]he ordinary meaning of ‘verify’ ... is ‘to confirm or substantiate in law by oath.’”) (citation omitted). “The verification requirement assures ‘that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith,’ and petitions not properly verified do not meet the requirements for a valid application.” *Santana*, 288 Wis. 2d 707, ¶11 (citation omitted). It is undisputed that Stewart did not verify her petition in accordance with Wisconsin requirements because she was relying on federal filing requirements.

But Stewart’s reliance on federal law is not persuasive, as the sections of code she cites, 28 U.S.C. § 1746 in particular, are rules of *federal* procedure. *See Carter v. Clark*, 616 F.2d 228, 230 (5th Cir. 1980) (Section 1746 “provides that in all federal governmental proceedings, written declarations made under ‘penalty of perjury’ were permissible in lieu of sworn affidavits

subscribed to before notary publics.”). Wisconsin has a different procedure applicable to *habeas corpus* petitions,² *see generally* WIS. STAT. ch. 782, which Stewart did not follow.

Stewart also asks us to award her \$1,000 because she believes her petition was wrongly denied.³ “Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of \$1,000.” WIS. STAT. § 782.09. However, a petition that is not properly verified is not legally applied for. *Maier v. Byrnes*, 121 Wis. 2d 258, 262-63, 358 N.W.2d 833 (Ct. App. 1984). Thus, the circuit court correctly denied Stewart’s “request for assignment of writ of habeas corpus,” and Stewart is not entitled to the monetary penalty.

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

² Indeed, the penalty for false “swearing” under 28 U.S.C. § 1746 is a perjury charge under 18 U.S.C. § 1651, but the State would not be able to issue the federal charge.

³ The State contends that we should decline to address this matter because it is raised for the first time on appeal. *See State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 634, 579 N.W.2d 698 (1998). In our exercise of discretion, however, we choose to address the issue.