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MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT I**

November 30, 2021

To:

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Circuit Court Judge  
Electronic Notice

Thomas C. Bellavia  
Assistant Attorney General  
Electronic Notice

John Barrett  
Clerk of Circuit Court  
Milwaukee County  
Electronic Notice

Priest Johnson  
Electronic Notice

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

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2020AP2027

Priest Johnson v. Carly Patskowski, Sr. (L.C. # 2020CV4389)

Before Donald, P.J., Dugan and White, 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).**

Priest Johnson appeals an order of the circuit court denying his petition for habeas corpus. Johnson contends that the circuit court erred in determining that his parole revocation could not be challenged in a habeas petition and that his ineffective assistance of revocation counsel arguments failed as a matter of law. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).<sup>1</sup> We summarily affirm the order.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On April 8, 1998, Johnson was convicted of three counts of -second-degree sexual assault of a child. The circuit court sentenced Johnson to three consecutive ten-year prison sentences. Sentence was imposed on two of the counts, and Johnson was incarcerated until September 22, 2015, at which time he was released on parole. Sentence was stayed on the third count, and Johnson was given ten years of probation, consecutive to completion of the first two sentences. Those sentences have not yet been discharged and the probation on the third count, thus, has not yet begun.

At some point between March 12, 2019, and May 9, 2019, the Department of Corrections (DOC) issued a Notice of Violation against Johnson, alleging eight violations of his parole supervision rules. As relevant to this appeal, the notice alleged that on March 12, 2019, Johnson placed an acquaintance in a chokehold and prevented her from breathing. The notice also alleged that Johnson violated a term of his supervision by maintaining a social media account and by failing to report that account to the Sex Offender Registry Program.

The matter proceeded to a revocation hearing before the Department of Hearings and Appeals (DHA), where an Administrative Law Judge (ALJ) found that the DOC met its burden of proof in establishing the parole violations relevant to this appeal. The ALJ further found that Johnson's conduct posed a significant risk to the community. The ALJ revoked Johnson's parole and ordered Johnson's reincarceration for a period of six months.

Johnson appealed the ALJ's determination to the DHA Administrator. On July 30, 2019, the Administrator entered a final decision affirming the revocation of Johnson's parole and ordering that he be reincarcerated for one year, rather than for the six months proposed by the ALJ. The decision included a notice of appeal rights expressly stating that judicial review of the

decision was to be obtained by a writ of certiorari within forty-five days of the Administrator's decision.

Johnson did not file a petition for a writ of certiorari. Instead, approximately one year later, Johnson filed a petition for a writ of habeas corpus in the circuit court, arguing that both the ALJ and the Administrator made multiple errors when revoking his parole and as a result violated his due process rights. The petition also alleged multiple instances of ineffective assistance of revocation counsel with regard to counsel's alleged failure to investigate and defend the social media claim.

On July 29, 2020, the circuit court issued the requested habeas writ, set a hearing date, and instructed Carly Patskowski, Johnson's parole agent and the respondent in this matter, to produce Johnson before the court for the hearing. On August 21, 2020, before a return to the habeas writ had been filed, Patskowski moved to supersede the writ and to dismiss Johnson's habeas action. On September 18, 2020, Johnson filed a reply in opposition to Patskowski's motion. On September 23, 2020, the circuit court conducted a motion hearing and heard oral argument from the parties.

On October 28, 2020, the circuit court issued a decision and order dismissing Johnson's petition. The circuit court found that Johnson's challenges to the revocation decision were reviewable by certiorari, not by a habeas petition. The circuit court also found that Johnson's ineffective assistance of counsel claims failed as a matter of law because Johnson could not prove prejudice. Specifically, the circuit court found that even if Johnson could prove that his attorney's performance was deficient with respect to the social media violation, Johnson could

not establish prejudice because the revocation was also based on the choking violation. This appeal follows.

On appeal, Johnson argues (1) that the circuit court had jurisdiction over his habeas petition and that he was not required to proceed via certiorari; (2) that habeas corpus is a proper procedure for raising claims of ineffective assistance of revocation counsel; (3) that his revocation counsel was ineffective; and (4) that habeas, rather than certiorari, is the proper mechanism for raising constitutional issues.

Probation revocation decisions are reviewable by writ of certiorari. *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591. When an issue could be reviewed by writ of certiorari, relief under habeas corpus will not be granted. *See State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 186-87, 572 N.W.2d 505 (Ct. App. 1997). That is because habeas corpus will not be granted where other adequate remedies at law exist. *State ex rel. Dowe v. Circuit Ct. for Waukesha Cnty.*, 184 Wis. 2d 724, 729, 516 N.W.2d 714 (1994).

Many of the issues raised in Johnson's petition fault either the ALJ or the Administrator. These are matters specifically reviewable by certiorari. *Cramer*, 236 Wis. 2d 473, ¶28 n.8. Because certiorari review was available for these issues, the circuit court properly denied habeas corpus relief.

As to Johnson's ineffective assistance of revocation counsel claims, Johnson is correct that ineffective assistance of counsel at a revocation hearing is reviewable by habeas corpus. *See State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). That is because a claim of ineffective assistance of counsel ordinarily depends on facts that would not be found in the record. Patskowski notes, however, that contrary to Johnson's implication, the circuit court

did not dismiss Johnson's ineffective assistance of counsel claims on the basis of jurisdiction; rather, the circuit court found that Johnson could not establish prejudice. Patskowski goes on to argue that Johnson, indeed, cannot establish prejudice.

We note first that Johnson did not respond to Patskowski's prejudice argument because Johnson did not file a reply brief. Accordingly, Johnson has effectively conceded that point. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that appellant's failure to dispute respondent's arguments in a reply brief may be taken as a concession). Nonetheless, we agree that Johnson cannot establish that he was prejudiced by revocation counsel's alleged failures.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *State v. Sanchez*, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). "To demonstrate deficient performance, the defendant must show that his counsel's representation 'fell below an objective standard of reasonableness' considering all the circumstances." *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Here, Johnson's ineffective assistance of counsel arguments centered on counsel's alleged failure to litigate the social media violation; however, the social media violation was not the only basis for the revocation. Johnson also choked an acquaintance. The ALJ's decision

stated that Johnson’s conduct posed a risk to the community, a sentiment that was echoed by the Administrator’s condemnation of the “violence” Johnson demonstrated. We agree with the circuit court that “[g]iven the severity of the choking violation relative to the social media violation, it is not reasonably probable that absent the social media violation, the result of [Johnson’s] revocation proceeding would have been different.”

As to Johnson’s remaining ineffective assistance of counsel arguments, we agree with Patskowksi that those arguments are outside the scope of the present appeal and are not before this court. The circuit court dismissed Johnson’s claim based on the face of his petition before the administrative record of the revocation proceeding had been transmitted to the court. The factual record underlying Johnson’s claim thus was not before the circuit court and is not before this court. Accordingly, we cannot review the question of whether Johnson’s revocation counsel was ineffective.<sup>2</sup>

Johnson’s final argument is that habeas, rather than certiorari, is the proper mechanism for raising constitutional issues, and that the circuit court, therefore, erred in holding that he could not bring a constitutional challenge to his parole revocation through a habeas action. Johnson is mistaken.

One of the standard elements of certiorari review asks whether the administrative entity in question acted according to law. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17

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<sup>2</sup> We again note that Johnson did not file a reply brief and has therefore effectively conceded that this issue is not properly before this court. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that appellant’s failure to dispute respondent’s arguments in a reply brief may be taken as a concession). We address the merits of Johnson’s arguments for the sake of completeness.

(1978). When conducting such review, courts regularly examine constitutional claims, as well as other claims of legal error. *See, e.g., State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶¶24-25, 234 Wis. 2d 626, 610 N.W.2d 821 (finding a due process violation in a certiorari review of prison disciplinary decisions); *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶¶4-11, 246 Wis. 2d 814, 632 N.W.2d 878 (addressing the merits of a due process claim in a certiorari review of a denial of parole). Accordingly, the circuit court did not err in stating that Johnson’s challenges to his revocation were appropriate for certiorari review, rather than habeas review.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*