STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP2188

STATE OF WISCONSIN EX REL.
ARDONIS GREER,

Petitioner-Respondent-Petitioner,

v.

DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARING AND APPEALS

Respondent-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A FINAL ORDER ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE CHARLES H. CONSTANTINE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT-APPELLANT

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BRIEF OF RESPONDENT-APPELLANT

STATEMENT OF THE ISSUES

1. Does the erroneous issuance by the Department of Corrections of a certificate of discharge prior to the expiration of the court-ordered term of probation as a result of an administrative error deprive the department of jurisdiction over a probationer?

The circuit court and the court of appeals both held that the department retained jurisdiction over the probationer, petitioner-respondent-petitioner Ardonis Greer.

2. Was Greer's right to due process violated by revoking his probation after the certificate of discharge was issued?

The circuit court did not expressly rule that Greer's right to due process was violated, but did state that revocation under these circumstances "would violate the basic principles of decency and fairness."

The court of appeals held that Greer's rights to procedural and substantive due process were not violated by revocation of his probation.

3. May a court engaged in certiorari review of an administrative decision apply equitable estoppel when determining whether the agency acted according to law?

The circuit court ruled that the Department of Corrections was equitably estopped from seeking probation revocation because it had issued a certificate discharging Greer from supervision.

The court of appeals held that estoppel is an equitable remedy that may not be employed in a certiorari action to estop the Department of Corrections from seeking revocation of Greer's probation or the Division of Hearing and Appeals from revoking Greer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

This is an appeal by David H. Schwarz, Administrator of the Division of Hearing and Appeals, from an order of the Racine County Circuit Court on certiorari review that reversed the Division's decision to revoke Ardonis Greer's probation (11:1; Pet-Ap. 133).[1] The appeal is before the supreme court on a petition by Greer to review the court of appeals' decision reversing that order.

Greer was convicted of two felonies in Racine County case no. 04CR1184: possession with intent to deliver THC, and possession of a firearm by a felon (3:28; Pet-Ap. 224). On March 14, 2005, the court sentenced Greer to three years of imprisonment on the drug count, consisting of fourteen months of initial confinement and twenty-two months of extended supervision (*id.*). On the felon-in-possession count, the court imposed and stayed a six-year sentence and placed Greer on three years of probation consecutive to his sentence on the first count (3:16, 28; Pet-Ap. 228, 224).

The Department of Corrections Central Records Unit failed to input the consecutive

[1]References to "Pet-Ap." are to the appendix in petitioner-respondent-petitioner Ardonis Greer's brief. References to "Supp-Ap." are to the supplemental appendix in this brief.

probation term into its computerized record system (3:12, 27; Pet-Ap. 138, 223). As a result, when Greer reached the end of extended supervision on the first count, DOC issued him two certificates, both dated October 3, 2007, discharging him from supervision (3:27, 54-55; Pet-Ap. 223, 209-10). One of the discharge certificates stated that Greer was sentenced in case no. 04CF1184 for violating Wis. Stat. § 961.41(1m)(h)2 and that "[t]he department having determined that you have satisfied said judgment, it is ordered that effective September 28, 2007, you are discharged from said judgment only" (3:55; Pet-Ap. 210). The other certificate stated that Greer was "sentenced to Wisconsin State Prisons" and that "[t]he department having determined that you have satisfied said sentence, it is ordered that effective September 28, 2007, you are discharged absolutely" (3:54; Pet-Ap. 209).

On November 9, 2009, Greer was charged with three new criminal counts: felony intimidation of a witness with the use of a dangerous weapon, as a repeater; second-degree reckless endangerment, as a repeater; and disorderly conduct with a dangerous weapon as an act of domestic abuse, as a repeater (3:37-38). He was convicted on June 25, 2010, of the felony intimidation of a witness charge (3:12, 85; Pet-Ap. 138).

On September 1, 2010, a DOC agent who was conducting a presentence investigation in the new case discovered that the consecutive probation term in the 2004 case had not been entered into DOC's record system (3:27; Pet-Ap. 223). After that discovery, probation revocation proceedings were initiated (*id.*). Two of the alleged violations involved the conduct that had led to the

new criminal charges (*id.*). The other alleged violations involved Greer's failure to report for consecutive probation supervision, a speeding ticket, and consumption of alcohol (*id.*).

Following a hearing, an Administrative Law Judge ordered that Greer's probation be revoked (3:11-14; Pet-Ap. 137-40). The ALJ rejected Greer's argument that DOC lacked jurisdiction because he had been issued discharge certificates (3:12; Pet-Ap. 138). The ALJ found that violation two – that on November 5, 2009, Greer had threatened another man (3:27; Pet-Ap. 223) – had been proven because Greer had been convicted of felony intimidation of a witness based on that conduct (3:12; Pet-Ap. 138). The ALJ also found that allegation five – that Greer had consumed alcohol – had been proven based on Greer's admission to that conduct (3:13; Pet-Ap. 139). The ALJ concluded that revocation of Greer's probation was warranted because of the seriousness of Greer's new criminal conduct and the need to protect the public (*id.*)

Greer filed an administrative appeal of the ALJ's decision with the Division of Hearing and Appeals (3:67-78). In an appeal decision dated December 22, 2010, Division Administrator Schwarz sustained the ALJ's decision to revoke Greer's probation (3:104-05; Pet-Ap. 134-35). Administrator Schwarz ruled that the ALJ correctly found that Greer was subject to revocation because "[t]he courts have determined that the department's error does not deprive it of jurisdiction, nor does it relieve the offender of liability for misconduct, particularly criminal offenses" (3:104; Pet-Ap. 134). Administrator Schwarz found that "Greer would have been in court at sentencing and therefore knew, or should

have known, that he was required to serve a consecutive probation term" and that Greer "should also have known that he would not have finished serving both the three year prison sentence and the consecutive three year probation term by the time he engaged in new criminal conduct on November 9, 2009, less than five years after his sentencing" (*id.*).

Administrator Schwarz rejected Greer's argument that DOC lost jurisdiction when it issued the discharge certificates (3:105; Pet-Ap. 135). He found that "nothing in the discharge documents indicates the department's intent to discharge Greer from his probation" (*id.*). He noted that "both discharge documents begin with the phrase, 'You were sentenced to Wisconsin State Prisons'" and that "[t]he courts have long recognized that probation is not a sentence" (*id.*).

The Administrator also rejected Greer's argument that revocation of his probation violated Greer's due process rights and offended notions of decency and fairness (*id.*). He found that "[t]hat argument is not persuasive when it comes to new criminal behavior. 'A petitioner cannot seriously contend that a probationer can violate the criminal laws of this state without affecting his or her probationary status. . . .'" (*id.*) (quoting *State ex rel. Rodriguez v. Dept. of Health and Social Services*, 133 Wis. 2d 47, 393 N.W.2d 105, 107 (Ct. App. 1986)). Administrator Schwarz found that "[a]llowing Greer by windfall to escape possible revocation despite new criminal behavior would unduly jeopardize community safety" (*id.*).

> I am satisfied that revocation is appropriate based on Greer's new criminal offense. He engaged in threatening behavior involving the use of a weapon to intimidate a witness,

> resulting in a new criminal conviction. This conduct shows that Greer is a potential danger to others. This is especially true given the serious nature of his underlying firearm offense. The need to protect the community from further violent crime outweighs the positive factors that Greer cites on appeal. I therefore agree that revocation is appropriate and I sustain the underlying decision.

(*Id*.)

Greer filed a petition for writ of certiorari in the circuit court (1:1-7). In a decision entered on June 23, 2011, the court reversed the Division's decision (7:12; Pet-Ap. 130). The court held that the DOC and the Division had not lost jurisdiction, that the actions of the DOC and the Division were not arbitrary, oppressive or unreasonable, and that the determination to revoke Greer's probation was warranted by the evidence (7:4-8; Pet-Ap. 122-26). However, the court concluded that the Division did not act according to law because the DOC was equitably estopped from seeking probation revocation as a result of Greer's reasonable reliance on the erroneous discharge certificate (7:8-12; Pet-Ap. 126-30).

Administrator Schwarz filed a motion for reconsideration in which he argued that equitable principles, including equitable estoppel, are not applicable in a certiorari review (8:1-2). In a decision entered on August 2, 2011, the court denied the reconsideration motion (10:1-2; Pet-Ap. 131-32). On August 4, 2011, the court entered a written order stating that "the Respondent was estopped from pursuing revocation against Petitioner and the decision to revoke Petitioner's probation is reversed" (11:1; Pet-Ap. 133).

Administrator Schwarz appealed that order (12:1-2). In a published decision, the court of appeals reversed the circuit court's order and remanded for reinstatement of the Division's decision. *State ex rel. Greer v. Schwarz*, 2012 WI App 122, ¶38, 344 Wis. 2d 639, 825 N.W.2d 497 (Pet-Ap. 117).

The court of appeals held that "[t]he discharge certificate could not have had the effect of discharging Greer from that probation term because that three-year period of probation ordered by the court had not expired at the time the certificate was issued, as required by" Wis. Stat. § 973.09(5) (2009-10) and Wis. Admin Code § DOC 328.17(2) (Dec. 2006). *Id.*, ¶10 (Pet-Ap. 106). The court concluded that "because Greer's court-ordered three-year term of probation on Count 3 had not expired at the time the DOC commenced revocation proceedings, the DOC retained jurisdiction over Greer despite its issuance of the discharge certificate." *Id.*, ¶20 (Pet-Ap. 109-110).

The court of appeals next held that the Division acted according to law. *Id.*, ¶21 (Pet-Ap. 110). It rejected Greer's argument (and the circuit court's holding) that the DOC was equitably estopped from seeking to revoke his probation. *Id.*, ¶22 (Pet-Ap. 110). Citing *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis. 2d 109, 675 N.W.2d 470, the court held that "equitable relief is not available in a certiorari action." *Greer*, 344 Wis. 2d 639, ¶22 (Pet-Ap. 110).

The court of appeals noted that "[t]he circuit court, like Greer, was concerned that revocation of Greer's probation after Greer had been issued the discharge certificate violated 'basic principles of

decency and fairness.'" *Id.*, ¶23 (Pet-Ap. 111). The court of appeals said that "this concern is appropriately addressed as a question of due process." *Id.* It concluded that "the DOC did not violate Greer's due process rights because Greer knew or should have known he was on probation at the time he committed the new intimidation of witness offense in November 2009 and we impute to him knowledge that he cannot violate other criminal laws while on probation." *Id.*

The court of appeals also rejected Greer's arguments that his substantive due process rights were violated because he was taken into custody "with no legal basis" and that the DOC's actions in revoking him after issuing him the discharge certificate "shocks the conscience." *Id.*, ¶30 (Pet-Ap. 114). The DOC had a legal basis for Greer's custody and revocation, the court held, because "Greer was present when the sentencing court ordered him to serve a three-year period of probation on Count 3 consecutive to his three-year prison term on Count 1" and the DOC's issuance of the discharge certificate "did not nullify or supersede the court's order imposing that three-year period of probation." *Id.*, ¶31 (Pet-Ap. 114). Greer was still within that three-year period of probation when he committed the new felony offense and when revocation proceedings were initiated, the court noted, and "[k]nowledge that he cannot commit a criminal offense is imputed to Greer." *Id.* The court held that "[t]he DOC's initiation of revocation proceedings based upon Greer's new felony offense does not 'shock the conscience' and did not violate his substantive due process rights." *Id.* (Pet-Ap. 114-15).

Finally, the court of appeals addressed Greer's arguments that "the Division's decision to

revoke his probation was arbitrary and capricious, oppressive and unreasonable, and represented its will rather than its judgment," and that "the Division could not reasonably decide to revoke his probation based upon the evidence." *Id*., ¶32 (Pet-Ap. 115). The court noted that "[t]he Administrator sustained the revocation decision based on Greer's new criminal offense, concluding that Greer's threatening behavior and intimidation of a witness demonstrated he was a potential danger to others and that the need to protect the community outweighed 'the positive factors that Greer cite[d] on appeal.'" *Id*., ¶36 (Pet-Ap. 117). The court of appeals concluded that "[t]he Division's decision to revoke Greer was a reasonable one based upon the evidence and was the result of a proper exercise of discretion." *Id*. at ¶38. It therefore "reverse[d] the circuit court's order and remand[ed] for reinstatement of the Division's decision." *Id*.

ARGUMENT

Greer argues that the Department of Corrections had no jurisdiction over him and that, for a variety of reasons, the Administrator's decision sustaining his probation revocation was contrary to the law. *See* Greer's brief at 1-2, 9-33. His arguments rely primarily on the fact that the Department of Corrections erroneously issued a discharge certificate to him in 2007.

As Administrator Schwarz will discuss below, the mistaken issuance of the discharge certificate did not cause the DOC to lose jurisdiction over Greer, and Greer's various arguments that the Administrator's decision was contrary to the law are without merit. Accordingly,

this court should affirm the court of appeals decision reversing the circuit court's order that reversed the Division's decision to revoke Greer's probation.

I. APPLICABLE LEGAL STANDARDS.

On certiorari review of an administrative decision revoking probation, an appellate court reviews the decision of the Division of Hearings and Appeals, not that of the circuit court. *State ex rel. Warren v. Schwarz,* 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff'd,* 219 Wis. 2d 615, 579 N.W.2d 698 (1998). Appellate review of a revocation decision is limited to determining whether: (1) the Division of Hearings and Appeals stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) the evidence was such that it might reasonably make the decision that it did. *State ex rel. Tate v. Schwarz,* 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438.

The Division, not the reviewing court, weighs the evidence presented at a revocation hearing. *Van Ermen v. DHSS,* 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). "A *certiorari* court may not substitute its view of the evidence for that of the [Division]." *Id.* Rather, the court's inquiry "is limited to whether there is substantial evidence to support the [Division]'s decision." *Id.* The Division's factual findings are conclusive if any reasonable view of the evidence supports them. *State ex rel. Ortega v. McCaughtry,* 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). However, whether the Division acted according to

law is a question of law that an appellate court reviews de novo. *Tate*, 257 Wis. 2d 40, ¶16.

II. THE ERRONEOUS ISSUANCE OF A CERTIFICATE OF DISCHARGE PRIOR TO THE EXPIRATION OF THE COURT-ORDERED TERM OF PROBATION DOES NOT DEPRIVE THE DEPARTMENT OF CORRECTIONS OF JURISDICTION OVER A PROBATIONER.

Greer argues that the Department of Corrections lacked jurisdiction over him because it issued a discharge certificate that terminated his supervision. *See* Greer's brief at 9-16. However, the DOC had no authority to discharge Greer from probation because he had not completed the term of probation ordered by the circuit court. The discharge certificate was invalid, therefore, and did not operate to terminate the DOC's jurisdiction over Greer.

When a court places a person on probation, "[t]he period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously." Wis. Stat. § 973.09(1)(a). Consecutive sentences are treated as one continuous sentence. *See* Wis. Stat. § 302.11(4). When consecutive sentences have been imposed, a defendant is not discharged from the department's legal custody until he or she has served the entire aggregated sentence. *Ashford v. Division of Hearings and Appeals,* 177 Wis. 2d 34, 43-44, 501 N.W.2d 824 (1993). The department retains jurisdiction over the offender

until the date of discharge "from the entire sentence." *Dept. of Corrections v. Schwarz,* 2005 WI 34, ¶31, 279 Wis. 2d 223, 693 N.W.2d 703.

Wisconsin's probation statute provides that a person will be discharged from probation only after the period of probation has expired. The statute reads, in relevant part:

> **(5)** *When the period of probation for a probationer has expired*, the probationer shall be discharged from probation and the department shall do all of the following:
>
> (a) If the probationer was placed on probation for a felony, issue the probationer one of the following:
>
> 1. A certificate of discharge from probation for the felony for which he or she was placed on probation if, at the time of discharge, the probationer is on probation or parole for another felony.
>
> 2. A certificate of final discharge if, at the time of discharge, the probationer is not on probation or parole for another felony. A certificate of final discharge under this subdivision shall list the civil rights which have been restored to the probationer and the civil rights which have not been restored to the probationer.
>
> * * *
>
> (c) In all cases, notify the court that placed the probationer on probation that the period of probation has expired.

Wis. Stat. § 973.09(5) (emphasis added.)

Consistent with that statute, the rules of the Department of Corrections provide that, other than for exceptions not relevant here, *see* Wis. Admin. Code §§ DOC 328.17(2)(a)-(e), a supervisee

"shall be discharged upon the issuance of a discharge certificate issued by the [DOC] secretary *at the expiration of the term noted on the court order* committing the client to the custody and supervision of the department. . . ." Wis. Admin. Code § DOC 328.17(2) (Dec. 2006) (emphasis added).[2] Therefore, under both the applicable statute and the administrative rules, the department may not issue a discharge certificate until the supervisee has completed service of all the consecutive sentences and probationary terms imposed by the sentencing court.

In his 2004 criminal case, the court sentenced Greer to three years of imprisonment on the first count, consisting of fourteen months of initial confinement and twenty-two months of extended supervision, imposed and stayed a six-year sentence on the other count, and placed Greer on three years of probation consecutive to his sentence on the first count (3:16, 28; Pet-Ap. 228, 224). As a result, Greer was to remain under the DOC's supervision until he completed serving the three-year sentence on the first count and three consecutive years of probation on the other count – a total of six years.

Greer completed serving his extended supervision term on September 28, 2007 (3:1; Pet-Ap. 134). Thus, as he acknowledges, three years of consecutive probation would have ended on September 28, 2010. *See* Greer's brief at 10. However, the discharge certificate was issued on October 3, 2007, just five days after Greer

[2]Except where otherwise noted, all references to the Wisconsin Administrative Code are to the December 2006 version, which is the version of the rules that was in effect when the DOC issued the discharge certificate and the revocation proceedings were conducted.

completed the extended supervision term (3:54; Pet-Ap. 209).

When the department issued the discharge certificate on October 3, 2007, Greer had not served to the expiration of his entire term of legal custody because the consecutive term of probation had not been completed. Thus, the discharge certificate was issued in violation of Wis. Stat. § 973.09(5) and Wis. Admin. Code § DOC 328.17(2).

An administrative agency has only those powers that are expressly conferred or necessarily implied from the statutory provisions under which it operates. *Conway v. Board of the Police and Fire Comm'rs*, 2002 WI App 135, ¶7, 256 Wis. 2d 163, 647 N.W.2d 291. An agency act performed in excess of those powers is invalid. *Seider v. O'Connell*, 2000 WI 76, ¶¶26, 28, 236 Wis. 2d 211, 612 N.W.2d 659. Because Wis. Stat. § 973.09(5) directs the DOC to discharge a petitioner only upon expiration of a period of probation, the DOC had no statutory authority to discharge Greer before his probation term expired.

Because the discharge certificate was issued in violation of the statute and the department's rules, it was invalid. *State ex rel. Anderson-El v. Cooke,* 2000 WI 40, ¶20, 234 Wis. 2d 626, 610 N.W.2d 821. Because the discharge certificate was invalid, it could not affect the department's legal custody of Greer.

Greer finds support for his contention that the issuance of the discharge certificate meant that the department lost jurisdiction over him even though it was erroneously issued in the court of appeals' decisions in *State ex rel. Rodriguez v.*

Dep't of Health and Social Services, 133 Wis. 2d 47, 393 N.W.2d 105 (Ct. App. 1986), and *State v. Stefanovic,* 215 Wis. 2d 310, 572 N.W.2d 140 (Ct. App. 1997). *See* Greer's brief at 11-13. However, neither *Rodriguez* nor *Stefanovic* addressed the significance of an invalid discharge certificate.

In *Rodriguez*, the probationer had been sentenced to four yours in prison on one count and a consecutive two-year term of probation on a second count. *Rodriguez*, 133 Wis. 2d at 49. However, Rodriguez's probation and parole agent was unaware of the court-ordered probation term and told Rodriguez that he would be discharged from supervision at the completion of his sentence on the first count on April 6, 1985. *Id*. The agent subsequently discovered the mistake and informed Rodriguez on May 21, 1985, that he was still on probation. *Id*. at 50.

Between those two dates, however, Rodriguez assaulted a woman. *Id*. at 49. The department commenced probation revocation proceedings based in part on that incident. *Id*. at 50. The hearing examiner rejected Rodriguez's argument that he had been discharged at the time of the attack and that it would be unfair to revoke him because he did not know that he was under supervision at the time. *Id*. The hearing examiner found that Rodriguez knew that he was on probation because the sentencing court had informed him that he would be serving a consecutive probationary term after he completed serving his prison sentence. *Id*. The examiner also determined that Rodriguez was aware of his responsibilities on supervision based on his parole supervision and that he was not relieved of those responsibilities because his agent was unaware of the probationary term. *Id*. at 50-51.

The circuit court granted Rodriguez's petition for certiorari and reversed the revocation. *Id.* at 51. The court concluded that, although erroneous, the probation agent's statement to Rodriguez released Rodriguez from probation and deprived the department of jurisdiction over Rodriguez until the agent discovered the error and informed Rodriguez that he was still on probation. *Id.*

The court of appeals reversed, holding that Rodriguez remained under the department's jurisdiction during that time. The court explained:

> The judgment of conviction unambiguously decreed that probation be served consecutive to the prison sentences. Rodriguez was therefore turned over to the custody of the department for purposes of serving *both* the prison sentence and the probationary term.
>
> Once custody is transferred to the department, discharge from probation or parole under the release of the department occurs only "upon the issuance of a discharge certificate by the secretary [of DH&SS] at the expiration of the term noted on the court order." Wis. Admin Code, sec. HSS 328.17(2). Because no discharge certificate was produced for the child abuse and battery conviction, the department still had jurisdiction even given the agent's erroneous statement.
>
> This is especially so in this instance since Rodriguez knew that the sentencing court had ordered his continuation on probation immediately upon the expiration of parole.

Id. at 51-52.

Rodriguez does not stand for the proposition that a discharge certificate operates to terminate

supervision even if the certificate is erroneously issued. That is so for two reasons.

First, the issue was not before the *Rodriguez* court, as no discharge certificate had been issued in that case. *See Rodriguez*, 133 Wis. 2d at 51. Second, the *Rodriguez* court cited the then-applicable administrative rule for the proposition that "discharge from probation . . . under the release of the department occurs only 'upon the issuance of a discharge certificate by the secretary [of DH&SS] *at the expiration of the term noted on the court order*.'" *Id*. at 51 (quoting Wis. Admin Code, § HSS 328.17(2)) (emphasis added). That rule is identical to the rule in effect when the DOC issued the discharge certificate to Greer. *See* Wis. Admin. Code § DOC 328.17(2) (the client "shall be discharged upon the issuance of a discharge certificate issued by the secretary [of DOC] at the expiration of the term noted on the court order committing the client to the custody and supervision of the department").

The *Rodriguez* court recognized that a discharge certificate is issued "at the expiration of the term noted on the court order." The discharge certificate issued to Greer was issued nearly three years before the expiration of the probationary term noted on the court order (3:12, 54, 55: Pet-Ap. 120, 209, 210). *Rodriguez* thus supports the court of appeals' conclusion that the DOC retained jurisdiction over Greer notwithstanding the erroneously issued discharge certificate.

Greer notes that the court of appeals said in *Rodriguez* that "'[b]ecause no discharge certificate was produced for the child abuse and battery conviction, the department still had jurisdiction even given the agent's erroneous statement.'"

Greer's brief at 12 (quoting *Rodriguez*, 133 Wis. 2d at 51-52). He argues that that statement "can be read to indicate that had the DOC issued a discharge certificate on the child abuse case, the court's decision regarding jurisdiction would have been different." Greer's brief at 12. As the court of appeals correctly observed, however, Greer's proposed reading of that statement ignores its context.

> Greer points to the following language from *Rodriguez* as suggesting we would have concluded the Department had lost jurisdiction over Rodriguez if it had issued him a discharge certificate, even though his probation period had not expired: "Because no discharge certificate was produced for the child abuse and battery conviction, the [D]epartment still had jurisdiction even given the agent's erroneous statement." *Id.* at 51. However, that language cannot be read out of context. Immediately preceding the language Greer cites, we quoted the same provision applicable to this case stating that discharge occurs "only 'upon the issuance of a discharge certificate by the secretary . . . *at the expiration of the term noted on the court order*.'" *Id.* (quoting WIS. ADMIN. CODE § HSS 328.17(2), now WIS. ADMIN. CODE § DOC 328.17(2)) (emphasis added). Had we meant the mere issuance of the discharge certificate to control jurisdiction regardless of whether the term noted on the court order had expired, there would have been no reason for us to have included the highlighted language. Nowhere in *Rodriguez* do we suggest a discharge certificate in conflict with a court-ordered term of probation supersedes the court order.

Greer, 344 Wis. 2d 649, ¶17 (Pet-Ap. 108).

Greer also cites *Stefanovic* for the proposition that "'the issuance of a discharge

certificate is of significant legal moment'" Greer's brief at 12 (quoting *Stefanovic*, 215 Wis. 2d at 315-16). Unlike *Rodriguez*, the probationer in *Stefanovic* had been issued a discharge certificate. *See Stefanovic*, 215 Wis. 2d at 316. Unlike Greer's circumstances, however, the discharge certificate in *Stefanovic* was properly issued because the department issued it upon Stefanovic's completion of her probationary term. *See id*. at 316.

In *Stefanovic,* the trial court withheld sentence and placed Stefanovic on probation for a year. *See id*. at 312. As a condition of probation, the court ordered her to serve thirty days in jail. *See id*. The court granted Stefanovic's motion for release pending appeal, so she did not serve any jail time. *See id*. However, the court did not stay Stefanovic's probation, and she completed her probation while her appeal was pending. *See id*. The Department of Corrections issued a certificate of discharge. *See id*.

After the department had issued the discharge certificate, the court of appeals affirmed Stefanovic's conviction and remitted the case to the trial court. *See id*. The trial court determined that Stefanovic should serve the jail term imposed as a condition of probation, noting that it had stayed the jail term at Stefanovic's request and that she not be allowed to use her right to release pending appeal as a means to frustrate the court's sentence. *See id*. at 313.

The court of appeals reversed. *Id*. at 313, 320. The court noted that unlike *Rodriguez, Stefanovic* was not a revocation case, but it found *Rodriguez* instructive "because it signals that the department's issuance of a discharge certificate is of significant legal moment." *Id*. at 315-16. The

court of appeals quoted the relevant language in Wis. Admin. Code § DOC 328.17(2), which provides that "[a] client shall be discharged upon the issuance of a discharge certificate issued by the secretary at the expiration of the term noted on the court order committing the client to the custody and supervision of the department" unless "[t]he court has subsequently modified the term and extended or reduced it." *Stefanovic*, 215 Wis. 2d at 316. The court of appeals held that "the trial court never modified or extended Stefanovic's probationary term" and that "[a]bsent such action, the department properly issued its certificate of discharge to Stefanovic." *Id*. Accordingly, the court of appeals said, "*Rodriguez* supports Stefanovic's argument" that the trial court lost jurisdiction over the case. *Id*. at 316, 319.

Stefanovic thus involved a certificate of discharge that, according to the court of appeals, was "properly issued." *Id*. It is in that context that the court's statement in *Stefanovic* that "*Rodriguez* . . . signals that the department's issuance of a discharge certificate is of significant legal moment," *id*. at 315-16, must be understood.

Neither *Rodriguez* nor *Stefanovic* addressed the legal significance of an improperly issued discharge certificate. Both decisions, however, relied on the administrative code provisions that a supervisee "shall be discharged upon the issuance of a discharge certificate issued by the secretary at the expiration of the term noted on the court order committing the client to the custody and supervision of the department." *See Stefanovic*, 215 Wis. 2d at 316 (quoting Wis. Admin. Code § DOC 328.17(2)); *Rodriguez*, 133 Wis. 2d at 51 (quoting Wis. Admin Code § HSS 328.17(2)).

In this case, the department issued a discharge certificate to Greer almost three years before "the expiration of the term noted on the court order committing the client to the custody and supervision of the department." Wis. Admin. Code § DOC 328.17(2). Because the department had no authority to discharge Greer from probation before the expiration of the probationary term imposed by the circuit court, the department did not lose jurisdiction over Greer.

Greer argues that a different rule, Wis. Admin. Code § DOC 328.17(2)(c), demonstrates that the Department of Corrections has the authority to discharge a probationer before the end of the court-ordered term of probation. *See* Greer's brief at 14-15. That rule allows the DOC to issue a discharge certificate prior to the end of the court-ordered term of supervision if "[t]here is a reasonable probability that it is no longer necessary either for the rehabilitation and treatment of the client or for the protection of the public that the department retain custody, and discharge is merited." Wis. Admin. Code § DOC 328.17(2)(c) (2006).

The court of appeals held that Greer's reliance on that rule was unavailing. The court explained:

> Greer contends the DOC did not act in excess of its authority in issuing the discharge certificate because an administrative rule, WIS. ADMIN. CODE § DOC 328.17(2)(c), permits the DOC to terminate supervision early when "[t]here is a reasonable probability that it is no longer necessary either for the rehabilitation and treatment of the client or for the protection of the public that the [DOC] retain custody, and discharge is merited." Fatal to this

> contention, however, is the fact that Greer does not argue, and the record does not support the inference, that the DOC actually issued the discharge certificate pursuant to that code subsection, or that the certificate was issued for any reason other than an administrative error resulting from the DOC's failure to input Count 3 into its record system. Thus, § DOC 328.17(2)(c) is inapplicable here.

Greer, 344 Wis. 2d 639, ¶11 (Pet-Ap. 106).

Greer acknowledges that he was not discharged pursuant to this rule. *See* Greer's brief at 14-15. He says that he cites the rule because it demonstrates that "there are times when the DOC does take actions that are contrary to the original sentence structure of the circuit court and therefore it does not necessarily invalidate the discharge certificate simply because it was produced prior to the expiration of the term originally imposed by the court." *Id*. at 15.

The flaw in that argument is that there is express statutory authority for Wis. Admin. Code § DOC 328.17(2)(c); it is found in Wis. Stat. § 973.09(3)(d). *See State v. Dowdy*, 2012 WI 12, ¶41, 338 Wis. 2d 565, 808 N.W.2d 691. That statute authorizes the DOC to "modify a person's period of probation and discharge the person from probation" if certain conditions have been met, one of which is that "the person has completed 50 percent of his or her period of probation." Wis. Stat. § 973.09(3)(d).[3] The rule does demonstrate that the DOC may, as Greer asserts, "take actions that are contrary to the original sentence

[3]As noted above, Greer was only five days into his three-year term of probation when the DOC erroneously issued the discharge certificate. *See supra*, pp. 14-15.

structure of the circuit court," Greer's brief at 15, but only when the DOC is statutorily authorized to do so. It was not authorized to do so in this case.

Greer also argues that "[i]f this Court were to find this certificate was invalid and did not operate to terminate jurisdiction or actually reinstate Greer's civil rights, then Greer's actions in relying on the certificate and voting in the 2008 Presidential Election would be committing a new felony offense and would subject him to further criminal liability, all due of [sic] the recklessness of the DOC." Greer's brief at 15. Greer does not explain why a potential adverse consequence of finding that the DOC retained jurisdiction compels the conclusion that the DOC lost jurisdiction. Moreover, he does not explain why he would be subject to prosecution; he simply cites the election fraud statutes. *See* Greer's brief at 31. This court does not address arguments presented in such an undeveloped and conclusory fashion. *Wisconsin Conference Bd. of Trustees of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶38 243 Wis. 2d 394, 627 N.W.2d 469.

In any event, Greer's concern is unfounded. He cites Wis. Stat. §§ 12.13(1)(a) and (b), which provide that "[w]hoever intentionally does any of the following violates this chapter: (a) Votes at any election . . . if that person does not have the necessary elector qualifications," or "(b) Falsely procures registration or makes false statements to the municipal clerk, board of election commissioners or any other election official whether or not under oath." A person convicted of a felony is disqualified an elector until his or her right to vote has been restored through a pardon or completion of the term of imprisonment or probation. *See* Wis. Stat. §§ 6.03(1)(b), 304.078(3).

A violation of Wis. Stat. § 12.13(1) is a class I felony. *See* Wis. Stat. § 12.60(1)(a).

Given that the discharge certificate informed Greer, albeit erroneously, that his right to vote had been restored (3:54; Pet-Ap. 209), it seems highly doubtful that Greer had the requisite criminal intent to support a prosecution under Wis. Stat. § 12.13(1)(a). "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." Wis. Stat. § 939.23(3); *see also* Wis. Stat. § 939.43(1) ("An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."). Under these circumstances and given that scienter requirement, it is difficult to imagine that Greer would be prosecuted for election fraud or, if he were, that the prosecution would be successful.[4]

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[4]Greer also says that if he had served on a jury after receiving his discharge certificate and if the parties later discovered that his civil rights had not been restored, that "could lead to additional appellate issues" about the validity of the verdict. *See* Greer's brief at 15. This court should not address this undeveloped and conclusory argument. *See Wisconsin Conference Bd.*, 243 Wis. 2d 394, ¶55. Moreover, Greer does not assert that he actually served on a jury. Accordingly, the court "need not venture there now: 'Grotesque or fanciful situations, such as those supposed, will have to be dealt with when they arise.'" *U.S. Bank Nat'l Ass'n v. City of Milwaukee*, 2003 WI App 220, ¶17, 267 Wis. 2d 718, 672 N.W.2d 492 (quoting *Gaines v. City of New York*, 109 N.E. 594, 596 (N.Y. 1915) (Cardozo, J.)).

Greer argues that the Department of Corrections lost jurisdiction over him when it issued the certificate of discharge. If he is right, the department would have been unable to correct its error even if it had discovered it the next day. Because there is nothing in the statutes, administrative code or case law that supports Greer's jurisdictional argument, the court should conclude that the department retained jurisdiction over Greer notwithstanding the erroneous issuance of the discharge certificate.

III. GREER'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

The Due Process Clauses of the United States and Wisconsin Constitutions protect both procedural and substantive due process rights. *State v. Laxton*, 2002 WI 82, ¶10 n.8, 254 Wis. 2d 185, 647 N.W.2d 784. Greer argues that both components of due process were violated by the revocation of his probation and that the Division therefore did not act according to law when it revoked his probation. The court should reject both claims.

A. Procedural due process.

Greer argues that his procedural due process rights were violated because he "did not receive proper notification of which case the DOC was seeking revocation[.]" Greer's brief at 18. The court of appeals said that "[t]his issue is a nonstarter." *Greer*, 344 Wis. 2d 639, ¶27 (Pet-Ap. 113). The court explained:

> [Greer] contends his procedural due process rights were violated because the DOC failed to provide him with proper notice of which

case it was seeking to revoke. He points out that one DOC revocation-related form identifies the case involved as "04CF1184B" and another identifies the case as "04CF1184A" and two others just cite the case number and do not reference "A" or "B." This issue is a nonstarter.

With regard to case No. 2004CF1184, Greer was only convicted of Counts 1 and 3. He knew he had completed serving his three-year prison sentence on Count 1 and received the discharge certificate related to his completion of that sentence. There could be only one count remaining on No. 2004CF1184 that could possibly relate to the revocation. Further, each of the four documents complained of refers to case No. 2004CF1184 in the context of a *probation* revocation. As we have noted, Greer was present at his sentencing to hear that he was only ordered to serve probation on Count 3, the felon in possession of a firearm count.

The Division points to an exhibit from the revocation hearing, the Notice of Violation, Recommended Action, Statement of Hearing Rights and Receipt as being the document which actually provided Greer with notice of the nature of the allegations. Finding Greer was provided with adequate notice, the ALJ observed that that exhibit identifies the case on which the DOC was recommending revocation, No. 2004CF1184, and identifies the behavior the DOC believed Greer engaged in "contrary to this status on probation." At the hearing, the ALJ noted, without contradiction from Greer, that the exhibit indicated it was served on Greer "prior to his case running out." Notably, Greer does not contend he was actually uncertain about what case was being revoked. Greer received adequate notice regarding the revocation. His procedural due process rights were not violated.

Greer, 344 Wis. 2d 639, ¶¶27-29; Pet-Ap. 113-14.

The court of appeals was correct.

A probationer is entitled to notice of the alleged violations of probation. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). The document that provided notice to Greer of the nature of the allegations is the "Notice of Violation, Recommended Action, Statement of Hearing Rights and Receipt" that was provided to Greer on September 16, 2010 (3:24-25; Supp-Ap. 101-02). That document identifies the court case for which revocation was recommended as 2004CF1184 (3:24; Supp-Ap. 101). The Administrative Law Judge found that that document provided proper notice of the case on which the DOC was seeking to revoke Greer's supervision (13:10-11; Pet-Ap. 151-52).

Greer does not claim that he did not know that the department was seeking to revoke the consecutive probation term imposed in case no. 2004CF1184. His supervising agent testified at the revocation hearing that she told Greer on September 2, 2010, that he was being taken into custody for violations of his three-year consecutive probation (13:28; Pet-Ap. 169). Greer's notice claim lacks merit.

B. Substantive due process.

The due process clause of the United States Constitution creates a substantive protection from certain arbitrary, wrongful government actions. *State v. Schulpius*, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495. The test to determine if the state conduct complained of violates substantive due process is if the conduct "'shocks the conscience . . . or interferes with rights implicit in the concept of

ordered liberty.'" *Id*. (quoted source omitted). "In addition, when analyzing a substantive due process violation claim, [the court] also consider[s] 'whether the government officer's conduct was either a 'deliberate decision[ ]' to "deprive" [the individual] of his liberty interest, or reflected the officer's "deliberate indifference" to that liberty interest. . . .'" *Id*. (quoted source omitted).

"[T]he core of the concept" of due process is "protection against arbitrary action." *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998). When the action alleged to violate substantive due process is one taken by the executive branch, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id*. at 846 (quoted source omitted); *see also State v. Schulpius*, 2004 WI App 39, ¶37, 270 Wis. 2d 427, 678 N.W.2d 369, *aff'd*, 2006 WI 1, 287 Wis. 2d 44, 707 N.W.2d 495. "It is one thing to say that officials acted badly, even tortiously, but – and this is the essential point – it is quite another to say that their actions rise to the level of a constitutional violation." *Tun v. Whitticker*, 398 F.3d 899, 903 (7th Cir. 2005) (noting that the court had "declined to impose constitutional liability in a number of situations in which [it] f[ou]nd the officials' conduct abhorrent").

The "misconduct" in this case consisted of the Department of Corrections' failure to enter Greer's consecutive probation term into its computerized record keeping system and the ensuing issuance of a discharge certificate after Greer had completed his sentence on one of the two counts on which he was sentenced. In his court of appeals brief, Greer described the DOC's actions as negligent. *See* Greer's court of appeals brief at 13, 19, 22, 26, 29, 30, 31, 32. In his

supreme court brief, he has upped the rhetorical ante a bit, substituting recklessness for negligence. *See* Greer's brief at 15, 20, 21, 22, 23, 24, 25, 32. But regardless of the label Greer places on the department's conduct, its administrative errors cannot reasonably be described as the type of egregious governmental conduct that "shocks the conscience" and rises to the level of a constitutional violation.

In a recent decision that the State will discuss more fully in the next section of this brief, the Seventh Circuit found no unfairness in a case with very similar facts. In *Matamoros v. Grams*, 706 F.3d 783 (7th Cir. 2013), a federal parolee, Matamoros, was erroneously issued a Notice of Discharge before he completed his parole term and was later convicted of a new crime. *Id.* at 785-86. He filed a petition for a writ of habeas corpus in federal court challenging his federal parole violation detainer, arguing that the government was equitably estopped from enforcing the detainer. *Id.* at 786.

The Seventh Circuit found that Matamoros had not shown that the notice was "anything more than the result of mere negligence" rather than the result of affirmative misconduct. *Id.* at 794. The court held that "[e]stoppel will only be applied 'where justice and fair play require it'" and concluded that "[t]his case is not one of those situations." *Id.* at 794 (quoted source omitted). "Ultimately," the court held, "Matamoros' own criminal conduct is the basis for his continued incarceration and the detainer." *Id.* Thus, it found "nothing unfair about this case that would justify the extreme remedy of applying the doctrine of equitable estoppel against the government." *Id.*

The same rationale applies here. There is nothing in the record that suggests that the erroneous issuance of the discharge certificate was anything more than the result of mere negligence. Greer's own new criminal conduct is the basis for his probation revocation. Under these circumstances, there was nothing unfair about the probation revocation, much less egregious governmental conduct that "shocks the conscience."

Greer also argues that revoking his probation deprived him of his "fundamental rights to freedom from the intrusion of the government and physical freedom from being taken and held in custody without warning or legal basis[.]" Greer's brief at 21. That argument lacks merit because there was a legal basis for taking him into custody. As the court of appeals explained:

> [T]here was a legal basis for Greer's custody and revocation. Greer was present when the sentencing court ordered him to serve a three-year period of probation on Count 3 consecutive to his three-year prison term on Count 1. The DOC's issuance of the discharge certificate to Greer did not nullify or supersede the court's order imposing that three-year period of probation. Greer was still within that three-year period of probation when he committed the new felony offense and when revocation proceedings were initiated. Knowledge that he cannot commit a criminal offense is imputed to Greer. The DOC's initiation of revocation proceedings based upon Greer's new felony offense does not "shock the conscience" and did not violate his substantive due process rights

Greer, 344 Wis. 2d 639, ¶31; Pet-Ap. 114-15.

Revocation of Greer's probation did not violated his procedural or substantive due process rights. For that reason, the court should reject Greer's argument that the Division did not act according to law because it violated his rights to due process.

IV. EQUITABLE ESTOPPEL DOES NOT APPLY IN CERTIORARI REVIEW, BUT EVEN IF IT DID, GREER COULD NOT REASONABLY HAVE RELIED ON THE DISCHARGE CERTIFICATE WHEN HE COMMITTED THE NEW CRIME FOR WHICH HIS PROBATION WAS REVOKED.

Greer did not argue in the circuit court that the Department of Corrections was equitably estopped from seeking to revoke his probation (1:1-7; 4:1-17). Nevertheless, the circuit court held that the Division had not acted according to law because the department was equitably estopped from seeking revocation (7:8-12; Pet-Ap. 126-30). Greer has adopted the circuit court's rationale on appeal.

Greer's equitable estoppel argument fails for two reasons. The first is that under the limited scope of certiorari review, a circuit court may not grant equitable relief. The second is that even if equitable estoppel were theoretically applicable, Greer could not reasonably have relied on the discharge certificate when he committed a new crime.

A. Equitable estoppel does not apply in certiorari review.

Greer challenges the court of appeals' conclusion that "[e]stoppel is an equitable remedy and thus cannot be employed in this certiorari action to estop the DOC from seeking revocation of Greer's probation or the Division from revoking Greer." *Greer*, 344 Wis. 2d 639, ¶22 (Pet-Ap. 110-11). The court of appeals was correct.

This court discussed the availability of equitable relief in a certiorari action in *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis. 2d 109, 675 N.W.2d 470. In *Winkelman*, the town zoning board placed certain conditions on its approval of a zoning variance for property owned by the Winkelmans, including a requirement that they remove a rental residence from the property. *See id.* at ¶6. The Winkelmans sought certiorari review of the board's decision, but the certiorari court upheld the board's decision. *See id.*, ¶7. The Winkelmans did not appeal. *Id.*

When the Winkelmans did not comply with the condition, the town brought a motion requesting the certiorari court to order the Winkelmans to raze the house or allow the town to do so. *Id.*, ¶8. The certiorari court granted the town's motion and the Winkelmans appealed. *Id.* The court of appeals reversed, holding that the town board needed to obtain jurisdiction over the Winkelmans for the enforcement action by serving either a summon and complaint or an appropriate original writ. *Id.*, ¶9.

The town then commenced a new action by filing a complaint requesting forfeitures along

with an order directing the Winkelmans to remove the rental residence. *Id*., ¶10. The circuit court granted the town's summary judgment motion. *Id*., ¶11. The court rejected the Winkelmans' argument that it was required to hear their equitable argument, concluding that it did not have the equitable power in the context of the enforcement action to deny injunctive relief. *Id*.

The supreme court disagreed. It held that when a governmental body exercises its statutory authority and seeks injunctive relief in the circuit court, the court has the power to consider a property owner's equitable arguments against granting that relief. *Id*., ¶28.

The supreme court then addressed the town's argument that the Winkelmans already had an opportunity to present their equitable arguments before the certiorari court and had in fact done so. *Id*., ¶29. The town argued that allowing the enforcement court to consider the property owners' equitable arguments would deny finality to the certiorari court's decision and upset the doctrines of issue and claim preclusion. *Id*.

The supreme court stated that "[t]he difficulty we have with the Town's position is its premise that certiorari review is a proper forum for consideration of the equities." *Id*., ¶30. The court explained:

> By its nature, certiorari review is limited in scope. Unless otherwise provided by statute, the traditional standards of common-law certiorari review apply. These include determining (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and

> (4) whether the evidence was such that it might reasonably make the order of determination in question. Although the Town maintains that the third prong of certiorari review reflects the same criterion that is required for making decisions on equitable arguments, we are not persuaded.
>
> In its decision, the court of appeals noted, "we find no authority, and counsel at oral argument was unable to cite to any, that says that courts sit in equity in certiorari actions." Like the court of appeals, we too have discovered no precedent that allows certiorari courts to sit in equity. Indeed, the Town acknowledges in its brief that, "Wisconsin Courts have developed no legal authority with regard to this issue." As a result, we agree with the court of appeals that, "[w]hile in certain circumstances a certiorari court has the authority to take additional evidence . . . simply allowing a court to add to the record does not mean that the court is then sitting in equity.

Id., ¶¶30-31 (citations omitted).

Equitable estoppel is an equitable doctrine, and a court applying equitable estoppel is employing its equitable power. *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶28, 270 Wis. 2d 384, 677 N.W.2d 630; *Nugent v. Slaght,* 2001 WI App 282, ¶¶29–30, 249 Wis. 2d 220, 638 N.W.2d 594. A certiorari court may not use equitable estoppel as the basis for its decision because a certiorari court is not "sitting in equity." *Winkelman*, 269 Wis. 2d 109, ¶31; *see also Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶9, 337 Wis. 2d 484, 805 N.W.2d 127 ("a court on certiorari review is without statutory authority to provide the equitable relief Guerrero requests").

Greer argues that "[e]quitable estoppel is not limited to claims brought in equity." Greer's

brief at 29. He notes that equitable estoppel has been applied in non-equity actions such as actions under a note or contract and in family law cases. *See id*.

Greer is correct that the defense of equitable estoppel is not limited to actions brought in equity. *See, e.g., Gabriel v. Gabriel*, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973). Indeed, Wisconsin has "abolished the distinction between actions at law and suits in equity." *White v. Ruditys*, 117 Wis. 2d 130, 140, 343 N.W.2d 421 (Ct. App. 1983) (citing 1 E. Bryant, *Wisconsin Pleading and Practice* § 6.10, at 278 (1978)). But it does not follow that equitable estoppel is available in every type of action that may be brought in circuit court. For example, equitable estoppel is not available as a defense to a criminal prosecution. *See State v. Drown*, 2011 WI App 53, ¶¶6-14, 332 Wis. 2d 765, 797 N.W.2d 919. And, because of the limited scope of certiorari review, it likewise is not available in certiorari review actions. *See Winkelman*, 269 Wis. 2d 109, ¶36.

B. Even if equitable estoppel could be invoked in a certiorari proceeding, the Department of Corrections was not estopped from seeking to revoke Greer's probation.

Even if the doctrine of equitable estoppel were applicable in a certiorari review proceeding, Greer has not established an essential element of equitable estoppel, reasonable reliance. "The defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by

the other, either in action or non-action, which is to his detriment." *State v. City of Green Bay,* 96 Wis. 2d 195, 202, 291 N.W.2d 508 (1980) (quoted source omitted). "Three facts or factors must be present: (1) *Action or nonaction* which induces (2) *reliance* by another (3) to his *detriment*." *Gabriel*, 57 Wis. 2d at 429. "It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable." *City of Green Bay,* 96 Wis. 2d at 202.

Greer argues that he reasonably relied on the discharge certificate when he voted in the 2008 presidential election. *See* Greer's brief at 31. Had the Division revoked Greer's probation for conduct that would have been lawful had he not been on probation, a claim of reasonable reliance might have some traction. But the only basis for revocation upon which the Administrator relied was Greer's new criminal conduct (3:105; Pet-Ap. 135).[5] Greer could not have reasonably relied on the issuance of the discharge certificate as a basis for believing that he could commit a new felony offense.

The Seventh Circuit recently declined to apply equitable estoppel in the parole context in a case in which the parolee was erroneously issued a Notice of Discharge and later committed a new crime. *Matamoros v. Grams*, 706 F.3d 783 (7th Cir. 2013). Matamoros was sentenced to ten years in prison, with a three-year special parole term to

[5]Greer correctly notes that the administrative law judge found that he violated the condition of probation that prohibited him from possessing alcohol. *See* Greer's brief at 23. However, this court's review is of the Administrator's decision, *see Warren,* 211 Wis. 2d at 717, and the only basis for the Administrator's decision was Greer's new criminal conduct (3:105; Pet-Ap. 135).

follow. *Id*. at 785. When the ordinary parole term for his prison sentence expired in 2005, Matamoros' parole officer wrote him a letter and issued a Notice of Discharge which explained that Matamoros' parole term had expired and that he was no longer subject to supervision by the U.S. Parole Commission. *Id*. at 785-86. Neither the Parole Commission nor Matamoros' parole officer noticed that Matamoros still had the special parole term left to serve until about one month later. *Id*. at 786.

A month after Matamoros received the Notice of Discharge, he participated in an armed robbery, for which he was later convicted in Wisconsin state court and sentenced to prison. *Id*. Because Matamoros was subject to the federal special parole term when he committed the robbery, the Parole Commission issued a warrant for Matamoros' arrest for violating the conditions of his special parole term release. The arrest warrant was later lodged as a detainer. *Id*.

Matamoros filed a petition for a writ of habeas corpus in federal court. *Id*. One of his arguments was that the government should be estopped from enforcing the detainer because he was mistakenly told he was no longer subject to the Commission's supervision. *Id*.

The Seventh Circuit said that it had "not yet evaluated whether equitable estoppel may be applied in the parole context, and that '[i]t is an open question whether equitable estoppel is [even] available against the government.'" *Id.* at 793 (quoted source omitted). The court found it unnecessary to answer that question. "[T]his is not the case to decide whether equitable estoppel is available against the government," the court said,

"because the record is devoid of any affirmative misconduct" by the Parole Commission or Matamoros' parole officer. *Id*. at 794.

The court stated that "[t]he doctrine of equitable estoppel is based on the principle of fairness and is used to prevent a party from being harmed as a result of actions taken in reasonable reliance of another's assertions." *Id.* at 793. When a party seeks to estop the government, the court held, it must satisfy the elements of estoppel and "must additionally demonstrate some 'affirmative misconduct.'" *Id*. (quoted source omitted).

The Seventh Circuit observed that "[f]aced with similar circumstances, the Fifth Circuit said that '[a] notice of discharge issued by mistake does not estop the [Commission] from acting on a violator's warrant absent a showing of affirmative misconduct by the government and a showing that the parolee was prejudiced.'" *Id*. at 794 (quoting *Ward v. U.S. Parole Comm'n,* 233 Fed. Appx. 360, 361 (5th Cir. 2007)). "Affirmative misconduct requires an affirmative act to misrepresent or mislead; mere negligence is not enough." *Id*.

The court acknowledged that "the Notice of Discharge incorrectly stated that Matamoros was no longer subject to the Commission's supervision." *Id*. It held, however, that Matamoros was unable to demonstrate that the notice and the letter from his agent were "anything more than the result of mere negligence." *Id*.

The court further stated that "[e]stoppel will only be applied 'where justice and fair play require it.'" *Id.* (quoted source omitted). "This case is not one of those situations," the court concluded. *Id*. "Ultimately, Matamoros' own criminal conduct is

the basis for his continued incarceration and the detainer. We find nothing unfair about this case that would justify the extreme remedy of applying the doctrine of equitable estoppel against the government." *Id.*

Here, too, Greer's own criminal conduct is the basis for revoking his probation. He could not have reasonably relied on the discharge certificate when he committed a new felony. Even if equitable estoppel were available on certiorari review, Greer has not established the reasonable reliance element necessary for the application of that doctrine.

CONCLUSION

For the reasons stated above, the court should affirm the decision of the court of appeals.

Dated this 8th day of August, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,818 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of August, 2013.

_____
Jeffrey J. Kassel
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