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STATE OF WISCONSIN
SUPREME COURT

Case No. 2011AP2188

STATE OF WISCONSIN EX REL. ARDONIS GREER,
PETITIONER-RESPONDENT-PETITIONER,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION
OF HEARINGS AND APPEALS,
RESPONDENT-APPELLANT.

ON REVIEW OF A DECISION
OF THE COURT OF APPEALS, DISTRICT II
REVERSING A FINAL ORDER ENTERED IN RACINE
COUNTY CIRCUIT COURT CASE NUMBER 11CV952,
THE HONORABLE CHARLES H. CONSTANTINE,
PRESIDING

REPLY BRIEF OF
PETITIONER-RESPONDENT-PETITIONER

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STATE OF WISCONSIN
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Petitioner-Respondent-Petitioner,
v.

DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,
Respondent-Appellant.

**REPLY BRIEF OF
PETITIONER-RESPONDENT-PETITIONER**

ARGUMENT

In addition to the following reply, the Petitioner-Respondent-Petitioner, reaffirms the arguments presented in his brief-in-chief.

- I. THE ISSUANCE OF AN ABSOLUTE DISCHARGE CERTIFICATE REINSTATING THE CONSTITUTIONAL RIGHTS OF AN INDIVIDUAL DEPRIVES THE DEPARTMENT OF CORRECTIONS OF JURISDICTION OVER THAT INDIVIDUAL.

It is undisputed the DOC issued Greer an absolute discharge certificate on Racine County Case 04CF1184 indicating he was "discharged absolutely" reinstating his constitutional right to vote and obligation for jury duty. (3:54; A-209-210). It is also undisputed had the DOC

known about Greer's three year consecutive probation and never issued the absolute discharge certificate, the three year period would have completed on September 28, 2010.

While it is true that the applicable statutes and administrative rules provide a discharge certificate will be issued at the expiration of the term of probation noted on the court order, *see* Wis. Stat. § 973.09(5), Wis. Admin. Code § DOC 328.17(2), that neither negates the legal significance of the certificate issued to Greer nor does it immediately render it null and void.

The DOC adopts the interpretation of the Court of Appeals which indicated the legal significance of the discharge certificate is because it is issued "at the expiration of the term noted on the court order." DOC Brief at 19; *Greer*, 344 Wis.2d 649, ¶17 (A - 108). However, what the Court of Appeals and the DOC fail to acknowledge is the fact an absolute discharge certificate is not legally significant *only* because it is provided at the end of the term of supervision; it is also legally significant because an absolute discharge certificate reinstates the constitutionally protected civil rights of the individual and acknowledges their freedom from any future intrusion of the State.

While it is true neither *State ex rel. Rodriguez v. DHSS*, 133 Wis. 2d 47, 393 N.W.2d 105 (Ct. App. 1986), nor *State v. Stefanovic*, 215 Wis. 2d 310, 315-16, 572 N.W.2d 140 (Ct. App. 1997) addressed the issuance of an absolute discharge certificate reinstating civil rights issued prior to the expiration of the court ordered term, they are still instructive because the court in both cases specifically recognized the issuance of a discharge certificate as being a "significant legal moment."

Greer *did* receive a discharge certificate reinstating his constitutional rights and acted upon it. This may create a "frustration" of the sentence, *see Stefanovic*, 215 Wis. 2d at 319, but once he was granted his freedom from the

intrusion of the DOC and had his constitutional rights restored, there is no longer jurisdiction.

The DOC argues Greer's reliance on Wisconsin Administrative Code § DOC 328.17(2)(c) is flawed because "there is express statutory authority for Wis. Admin. Code § DOC 328.17(2)(c); it is found in Wis. Stat. § 973.09(3)(d)." DOC Brief at 23. The DOC argues because the action here was not statutorily authorized, it is therefore invalid. However, Wis. Stat. § 973.09(3)(d) authorizes the *court* to terminate probation early under certain circumstances, only referencing the role of the DOC relating to filing a petition for early discharge, there is nothing in the statute affirmatively preventing the DOC from terminating probation early.

The DOC also rejects Greer's concern over the potential criminal liability brought forth from Greer's reliance on the certificate and responds by saying Greer "does not explain why a potential adverse consequence of finding that the DOC retained jurisdiction compels the conclusion that the DOC lost jurisdiction." DOC Brief at 24. The DOC also says Greer "does not explain why he would be subject to prosecution..." *Id.* This is inaccurate.

The consequences of the finding regarding jurisdiction directly relate to the argument of the actual legal significance of the absolute discharge certificate. The receipt of such a certificate reinstating constitutional protected rights must itself mean something and cannot simply be taken back after almost three years without considering the constitutional consequences.

The very real consequence here to Greer is the potential new felony liability due to violation of Wis. Stats. § 12.13(1)(a) and (b), the voter fraud statutes, which make it a class I felony to vote in any election if a person has not met the elector qualifications which include, for a felon, having had the right to vote reinstated. *See* Wis. Stat. §

12.60(1)(a). DOC Brief at 24. The DOC dismisses Greer's concern over this potential liability saying

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).

DOC Brief at 25. The DOC then gives a lengthy explanation of the definition of "intentionally" for purposes of the scienter requirement of the statute and asserts that "it is difficult to imagine that Greer would be prosecuted for election fraud, or, if he were, that the prosecution would be successful." *Id.*

This argument, however, is disingenuous at best, conflicting with both the Court of Appeals decision and the DOC's own arguments. In one breath it argues Greer could not have reasonably believed the absolute discharge certificate was in actuality discharging him from his probation since he was physically present at sentencing, but in the next it argues he can't possibly face any criminal repercussions because the State couldn't prove he "intentionally" violated the law by illegally voting since he relied on the certificate. The DOC's inconsistent arguments are illogical. The reinstatement of civil rights is a direct correlation to the loss of jurisdiction of the DOC. Therefore, this Court should reverse the Court of Appeals and find the DOC lacked jurisdiction in this matter.

II. GREER'S FUNDAMENTAL DUE PROCESS RIGHTS WERE VIOLATED.

A. The procedural due process rights of Greer were violated.

The DOC did not provide adequate notice to Greer because the revocation forms listed various cases on which

revocation was being sought, switching between case “A” or “B” and sometimes offering no distinction at all, and never addressed how the DOC was claiming jurisdiction when the absolute discharge certificate had been issued almost three years earlier.

The Court of Appeals dismissed this concern, arguing Greer knew he completed his sentence on Count 1 and received a discharge certificate, so the only count remaining they could possibly seek revocation on was Count 3. (A-112). However, this is precisely the problem. Greer did receive a discharge certificate specifically referencing Count 1, but then he also received an *absolute discharge certificate* and was told his civil rights were restored and he had completed *all* his sentences. (A-209-10).

The DOC points to the Notice of Violation, Recommendation Action, Statement of Hearing Rights and Receipt as the document which actually provided Greer with notice of the nature of the allegations. DOC Brief at 28 (3:24-25, Supp-Ap. 101-02). The DOC argues this document identifies the case recommended for revocation as 2004CF1184 and identifies the behavior as “contrary to this status on probation.” *Id.* However, Greer repeatedly requested the DOC address the issue of jurisdiction as it related to the probation case and was repeatedly denied any response.

The law provides it is the DOC’s responsibility to carry out the sentence which the court imposes, see Wis. Stats. §§ 301.01 and 302.11(1), and the administrative code tasks agents with “[m]aintaining complete and accurate case records for each client under supervision...” Wis. Admin. Code § 328.04(2)(n). Here the DOC admits it failed to maintain accurate records of Greer for a period of almost 6 years. To revoke Greer under these circumstances deprives him of his right to procedural due process. *See*

Gagnon v. Scarpelli, 411 U.S. 778 (1973), *Morrissey v. Brewer*, 408 U.S. 471 (1972).

B. The substantive due process rights of Greer were violated.

Substantive due process prevents the government from engaging in conduct that “shocks the conscience.” *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The decision to revoke Greer’s probation under these circumstances is arbitrary and unreasonable, and “would violate basic principles of decency and fairness.” See *Rochin v. California*, 342 U.S. 165 (1962)(7:8; A-126).

The DOC points to a recent Seventh Circuit decision in *Matamoros v. Grams*, 706 F.3d 783 (7th Cir. 2013), as offering “a case with very similar facts” where the court found no unfairness. Resp. Brief p. 30. The DOC relies on this case for the due process violations and with respect to the application of equitable estoppel. However, the facts in *Matamoros v. Grams* are significantly different in several very important aspects that make the DOC’s reliance on it misplaced.

Matamoros was a federal parolee erroneously issued a Notice of Discharge at the end of one parole term before a consecutive special term of parole was to begin. *Id.* at 785-86. The mistake was caught within approximately a month of discharge and, while it was disputed by Matamoros, his agent stated in an affidavit he personally contacted Matamoros via telephone during business hours on September 9, 2005 (the date the mistake was found) to alert him that he was still subject to the special parole term. *Id.* at 785-88. At approximately 9:00 p.m. on September 9, 2005 Matamoros was involved in an armed robbery and was subsequently convicted of four felonies relating to the incident. *Id.* at 788. Matamoros filed a petition for a writ of habeas corpus challenging a federal parole violation

detainer arguing the government was equitably estopped from enforcing the detainer and also alleging a due process violation. *Id.* at 789.

In assessing Matamoros' due process argument, the Court took special note of the fact Matamoros "never asserted that he was not informed of the special parole term at his original sentencing...and thus, we assume that he was in fact so notified" and that "Matamoros had additional notice of the special parole term from many of the documents associated with his case." *Id.* at 790. The Court determined that no due process violation occurred because, while it was "undeniable" the parole commission made an initial mistake, it was acting in "everyone's best interests" by rectifying the mistake in the "most effective way possible..." *Id.* at 792.

The situation of Matamoros is significantly different than that of Greer. The record in Greer's case demonstrates he was unaware of the consecutive probation period. (3:32-35; A-203-6). The mistake in Matamoros' case was caught within a month of his discharge, whereas with Greer it was almost three years later. It is unclear what language existed, if any, in Matamoros' discharge notice regarding his civil rights, while Greer's were restored and he voted. Furthermore, unlike Matamoros, Greer was never provided with any written documents alerting him to the consecutive probation sentence as the DOC itself was not even aware.

The DOC applies the Seventh Circuit's analysis of the equitable estoppel issue to Greer's due process claim. The Court found Matamoros had not shown the notice was anything more than the result of mere negligence and his own criminal conduct was the basis for the continued incarceration and detainer. *Id.* at 794. Given these findings, it held "nothing unfair about this case that would justify the extreme remedy of applying the doctrine of equitable estoppel against the government." *Id.*

The DOC argues its “misconduct” in this case is merely its “failure to enter Greer’s consecutive probation into its computerized system and the ensuing issuance of a discharge certificate after Greer had completed his sentence on one of the two counts which he was sentenced” and “its administrative errors cannot reasonably be described as the type of egregious conduct that ‘shocks the conscience’ and rises to the level of a constitutional violation.” DOC Brief at 29-30.

While the initial conduct of failing to input the information may have been negligent administrative error, the continued deliberate indifference to maintaining accurate records amounts to egregious official conduct constituting a constitutional violation. *See State v. Schulpius*, 2006 WI 1, 287 Wis.2d 44, 707 N.W.2d 495. The DOC’s affirmative actions initiated the discharge process and produced the discharge certificates, not any action of Greer. Greer continues to assert there was no legal basis for the DOC to take him into custody since his constitutional rights had been restored almost three years earlier. The actions of the DOC do “shock the conscience” and offend the basic canons of fairness and decency in violation of due process as Greer was never given the opportunity to comply with probation because he was never made aware of the existence of the term.

III. EQUITABLE ESTOPPEL NOT ONLY APPLIES IN CERTIORARI REVIEW, BUT ALSO APPLIES TO GREER WHO REASONABLY RELIED ON THE DISCHARGE CERTIFICATE TO HIS OWN DETRIMENT.

A. Equitable estoppel does apply in certiorari review.

Equitable estoppel is not limited to claims brought in equity. Equitable estoppel has been applied in non-equity actions and as the DOC acknowledges, “Wisconsin has

‘abolished the distinction between actions at law and suits in equity.’” DOC Brief at 36 (citations omitted).

The DOC argues “it does not follow that equitable estoppel is available in every type of action that may be brought in circuit court.” DOC Brief at 36. That is true. As Greer has noted in his brief-in-chief, the Court of Appeals held in a recent decision equitable estoppel is not available to preclude a criminal prosecution, *see State v. Drown*, 2011 WI APP 53, 332 Wis.2d 765, 797 N.W.2d 919. However, what we are dealing with in Greer’s case is a civil probation matter, not a criminal matter. As Greer has already illustrated, the Wisconsin Court’s routinely apply equitable estoppel in contract, family and civil cases. *See Gabriel v. Gabriel*, 57 Wis.2d 424, 428, 204 N.W.2d 494 (1973); *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶ 26, 270 Wis.2d 384, 677 N.W.2d 630; *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis.2d 336, 345-46, 515 N.W.2d 328 (Ct.App.1994).

The DOC and the Court of Appeals rely on this Court’s decision in *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis.2d 109, 675 N.W.2d 470, for the proposition equitable estoppel is not available in certiorari actions. DOC Brief at 33 (A-101-18, ¶22). However, as Greer noted in his brief-in-chief, in *Winkelman*, this Court was not reviewing a certiorari decision. Rather, the issue of equitable powers of a certiorari court arose when the Court reviewed the question of whether the circuit court in an enforcement action, the second action in that case, was precluded from considering the Winkelman’s equitable arguments due to the prior certiorari review of the first action. *See Winkelman*, 2004 WI 17, 269 Wis.2d 109, 675 N.W.2d 470.

In the certiorari action, the Winkelman’s had claimed the board’s actions were unreasonable based on the contingency of the mortgage upon the rental income of the second residence but they failed to present any evidence to

support that contention. *Town of Delafield v. Winkelman*, 2003 WI App 92, 264 Wis. 2d 264, 276, 663 N.W.2d 324, 330 *aff'd*, 2004 WI 17, 269 Wis. 2d 109, 675 N.W.2d 470. The certiorari court did not dismiss their equitable arguments because it did not have the power to hear those arguments or rule on them, it dismissed them because they failed to present any evidence to support their contentions.

This Court noted the “traditional criteria by which certiorari review a board’s decision do not involve consideration of equitable arguments,” *id.* at ¶36. However, equitable estoppel is not merely an “equitable argument,” it is also applied as a defensive doctrine, as it was in this case by the circuit court. There is nothing that inherently prevents a certiorari court from applying equitable estoppel when all the elements have been met.

B. Applying equitable estoppel, the Department of Corrections is estopped from seeking to revoke Greer’s probation.

The DOC argues even if this Court were to accept equitable estoppel is available to Greer, he has “not established an essential element of equitable estoppel, reasonable reliance.” DOC Brief at 36. The DOC appears to concede all the other elements of equitable estoppel have been met, and therefore, Greer will focus on the question of reasonable reliance.

The DOC’s only argument is that because Greer’s new criminal conduct was the only basis for the Administrator’s affirmation of the revocation decision, and because Greer could not have relied on the discharge certificate as giving him permission to commit a new crime, the elements equitable estoppel have not been met. DOC Brief at 37. The problem with this argument is it dismisses Greer’s voting in the 2008 presidential election as essentially irrelevant because it was not the basis for the revocation. *Id.* While it is true the Administrator affirmed

the decision to revoke Greer based solely on his new criminal conduct, the action of Greer in voting in the 2008 presidential election is not moot to the equitable estoppel argument.

As discussed above, Greer faces potential felony charges for voting after relying on the certificate. The detriment he suffers does not have to be the revocation of probation for equitable estoppel to apply, rather, *any* detriment, such as authorizing him to perform acts that are per se illegal for a convicted felon, caused by the actions of the DOC brings equitable estoppel into the realm of applicable remedies.

The DOC again cites to *Matamoros v. Grams*, 706 F.3d 783 (7th Cir. 2013), for the proposition equitable estoppel does not apply when a parolee is erroneously discharged and later commits a new crime. DOC Brief at 37. However, as discussed above, the facts in *Matamoros v. Grams* are significantly different from what occurred in Greer's case. There was no question in *Matamoros* regarding the defendant taking actions directly related to something expressly provided for in the discharge notice. Moreover, the defendant in *Matamoros* had full knowledge and documentation of his consecutive parole period, unlike Greer.

The fact Greer was present for sentencing does not negate the reasonableness of his reliance on the certificate. (7:10; A-128). Greer was never told, during the three year time period he was in prison or on extended supervision that there was any consecutive probation and he received a legally signed absolute discharge certificate issued by the Rick Raemisch, the Secretary of the DOC. It is reasonable for an individual who has never heard otherwise to accept a document of this significance as valid and rely upon it.

Therefore, not only is equitable estoppel a proper form of relief under certiorari review, it is also properly

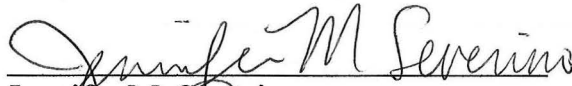
applied to Greer to estop the DOC from seeking revocation of his probation.

CONCLUSION

For the reasons set forth and those in his brief-in-chief, Petitioner-Respondent-Petitioner respectfully asks this Court to reverse the decision of the Court of Appeals.

Dated this 22nd day of August, 2013.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Jennifer M. Severino", written over a horizontal line.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of this brief is 2,986 words.

Dated this 22nd day of August, 2013.



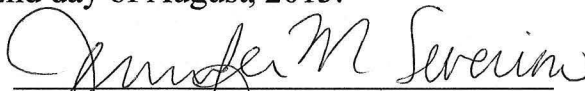
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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 22nd day of August, 2013.



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