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STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT II

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Case No. 2011AP2188

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STATE OF WISCONSIN  
EX REL. ARDONIS GREER,  
Petitioner-Respondent,  
v.

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

---

ON APPEAL FROM A FINAL ORDER  
ENTERED IN THE RACINE COUNTY  
CIRCUIT COURT, THE HONORABLE  
CHARLES H. CONSTANTINE, PRESIDING

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BRIEF AND APPENDIX OF  
PETITIONER-RESPONDENT

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DIVISION OF HEARINGS AND APPEALS,  
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**BRIEF OF RESPONDENT-APPELLANT**

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**STATEMENT OF THE ISSUE**

Whether the Petitioner-Respondent, Ardonis Greer, is entitled to certiorari relief reversing a decision of the Division of Hearings and Appeals that revoked his probation after the Department of Corrections issued him an absolute discharge from any and all supervision and reinstated his civil rights.

The circuit court reversed the Division's decision to revoke Greer's probation. The court ruled that the Department of Corrections was equitably estopped from seeking revocation because it had issued a certificate absolutely discharging Greer from any and all supervision and reinstating his civil rights which Greer reasonably relied upon by voting in the 2008 Presidential Election, exposing him to new criminal liability.



## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Petitioner-Respondent, Ardonis Greer, requests oral argument pursuant to *Wis. Stat.* § 809.22. Oral argument would help further develop the theories of the parties.

Furthermore, publication of the court's decision is also warranted as this is a matter of first impression.

## **STATEMENT OF THE CASE**

While Petitioner-Respondent, Ardonis Greer, agrees that the facts as recited by the Respondent-Appellant are substantially accurate, there are additional facts that are essential for the understanding of Greer's arguments.

In Racine County Case Number 2004CF1184, Ardonis Greer pled no contest and was convicted of Possession with Intent to Deliver - THC (>200-1000g) in Count 1 and Possession of Firearm by a Felon in Count 3. Count 2 was dismissed and read-in. (3:28; A-Ap. 124). On Count 1, Greer was sentenced to 3 years Wisconsin State Prison, bifurcated as 14 months initial confinement, followed by 22 months extended supervision. (*Id.*). On Count 3, Greer was sentenced to 6 years WSP, bifurcated as 3 years initial confinement, 3 years extended supervision, which was stayed and he was placed on 3 years probation to be served consecutive to Count 1. (3:16, 28; A-Ap. 128, 124).

It is undisputed that the Department of Corrections failed to input Count 3 - Possession of a Firearm by a Felon into its record system (OATS/CACU); therefore, at no point during Greer's initial confinement or extended supervision was there any discussion of the 3 year consecutive probation sentence. (1:1, 3:27; A-Ap. 123)

After serving his initial confinement time, Greer was released from prison on November 22, 2005 to extended supervision. (3:28; A-Ap. 124). During the 22 months of Greer's extended supervision, he was supervised in Racine County, he committed no major violations, was never placed on a hold, never received an ATR and revocation proceedings were never initiated for any reason. (13:30-32, 38-39; R-Ap. 130-32, 138-39). During his time on extended supervision, Greer lived with his mother at 1008 Villa Street, attended school, worked, and made some payments towards his court obligations. (*Id.*).

Greer was told by his supervising agent, Sarah Zupke, that his maximum discharge date was September 28, 2007 and he would be done with all supervision at that time. (3:50; 13:30-31; R-Ap. 167, 130-31). On September 12, 2007, Greer met with his agent to sign documents converting his unpaid court costs and supervision fees into a civil judgment. (3:50). On September 22, 2007, Greer's agent received the completed DOC 101 form indicating that a civil judgment had been entered. (3:47-48, 50).

On September 28, 2007, Greer called his agent to verify that his supervision was done on that date and he no longer needed to report. (3:50). His agent informed him that he was technically on supervision until midnight but that his paperwork had been signed off on and he did not need to see the agent again. (*Id.*). Greer was told that when a copy of his discharge certificate was received a copy would be mailed to his house for his own records. He thanked his agent for working with him and was wished good luck on his future endeavors. (*Id.*).

Greer received an absolute discharge certificate in the mail dated October 3, 2007, ordering that "effective September 28, 2007, you are discharged completely." (3:54, A-Ap.131). Furthermore, the document indicated Greer's civil rights were restored, including his right to vote. (*Id.*).

Greer also received a second discharge certificate on the same date that specifically referenced the drug charge. (3:55, A-Ap. 132).

Greer remained at his mother's address and had the same telephone number throughout his period of supervision and continued to have the same contact information after his discharge from supervision until he was taken into custody on the hold in question on September 2, 2010. (13:41, 50; R-Ap. 141, 150). Greer was never contacted by anyone from the DOC. (13:32, 41; R-Ap. 132, 141). During the time period after his discharge from supervision, Greer attended school at Gateway Technical College, and worked full-time for Valvoline as an Assistant Manager, and voted in the 2008 Presidential Election. (13:41-2; R-Ap. 141-42).

On November 5, 2009, Greer was involved in an argument with his girlfriend and was arrested and charged in Racine County Case Number 09CF1478. (3:37-39). Greer was released from custody on a cash bond on November 5, 2009, the same day as the incident, and remained out of custody during the pending new charges. (13:43, 45; R-Ap. 143, 145).

Greer entered a no contest plea to Intimidation Witness/Threat of Force on June 25, 2010 relating to the November 5, 2009 incident where he used a "airsoft pistol toy gun" to threaten a witness. (3:12, 85; A-Ap. 120). Per court order, Greer reported for a Presentence Investigation Interview on September 1, 2010 with PSI writer, Agent Melissa Shambo. (3:27; A-Ap. 123). It was during Agent Shambo's review of Greer's file that she discovered the 3 year consecutive probation on 2004CF1184, which was scheduled for maximum discharge on September 28, 2010, a mere 27 days away. (*Id.*).

On September 2, 2010, Greer was called by Agent Leah Zeni and told to report to the DOC office, but he was not told why they needed to see him. (13:28-29; R-Ap.

128-29). When Greer reported to the office, he was immediately taken into custody on a DOC hold by Racine Police and placed in custody at the Racine County Jail. (*Id.*).

On September 8, 2010, Greer gave a statement to Agent Leah Zeni indicating that he was not aware of the 3 year consecutive probation, and that his former agent told him he had been completely discharged and no longer needed to report. (3:32-35). In this statement he admitted to receiving a recent speeding ticket and to consuming alcohol occasionally. (*Id.*). Greer indicated to Agent Zeni that if he had known about his probation he would have continued to report. (*Id.*).

Greer was initially told the DOC would likely permit him to pay supervision fees and discharge on the 28th. (3:47-48, 50). However, the DOC decided to proceed with revocation after talking with the Assistant District Attorney prosecuting the new charges who told them they believed Greer had used a real gun in the incident, not a toy gun, but could not prove it. (3:27; A-Ap. 123)

The DOC initiated revocation proceedings with the following allegations:

1. On or about 09/28/2007, Ardonis Greer failed to report for Consecutive Probation Supervision. This behavior is in Violation of Rules of Community Supervision 1 and 16; and in violation of the Judgment of Conviction for Racine Case 2004CF1 184.
2. On or about 11/05/2009, Ardonis Greer threatened Shawn Griffin This behavior is in Violation of Rules of Community Supervision 1; and in violation of the Judgment of Conviction for Racine Case 2004CF1 184.
3. On or about 11/05/2009, Ardonis Greer possessed a gun. This behavior is in Violation of Rules of Community Supervision 1 and 12; and in violation of the Judgment of Conviction for Racine Case 2004CF1184.

4. On or about 07/20/2010, Ardonis Greer operated a motor vehicle that exceeded the posted speed limit. This behavior is in Violation of Rules of Community Supervision 1; and in violation of the Judgment of Conviction for Racine Case 2004CF 1184.

5. On or about 08/20/2010, Ardonis Greer consumed alcohol. This behavior is in Violation of Rules of Community Supervision 1; and in violation of the Judgment of Conviction for Racine Case 2004CF1184. (3:6; A-Ap. 123).

Prior to the revocation hearing, on November 8, 2010, Greer objected to the jurisdiction of the DOC on several grounds through a written motion prepared by counsel. (3:40-52). The objection was supplemented on November 11, 2010 when counsel provided his original discharge certificates. (3:53-58). Upon receiving his original discharge certificates, counsel also wrote a letter to Lisa Yeates, the regional supervisor of the DOC, regarding the unlawful detainer of Greer and demanding his release. (1:53-54). Counsel received no response. (1:4).

Greer reiterated the jurisdictional objections at the hearing on November 15, 2010, as well as objecting to *ex parte* communication between the ALJ and Agent Zeni prior to the hearing. (13:5-7, 1:55-56; R-Ap. 105-7). Greer further objected to the hearing being conducted via video conference. The ALJ rejected the jurisdictional objections as well as the other objections and proceeded to hearing. (13:5-11; R-Ap. 105-11).

On November 23, 2010, the ALJ ordered Greer's probation revoked, rejecting Greer's jurisdictional and other objections. (3:104-05; A-Ap. 116-17). The ALJ found violation two – that Greer had threatened another man - had been proven by Greer's plea to intimidation of a witness based on the same incident. (3:27, 12; A-Ap. 123, 120). The ALJ also found violation five – that Greer had consumed alcohol – had been proven by Greer's own

admission in his statement. (3:13; A-Ap. 121). The other allegations were found to have not been proven. (3:12-13; A-Ap. 119-121). The ALJ found revocation was warranted based on the seriousness of the new criminal conduct and the need to protect the public. (3:11-13; A-Ap. 119-21).

On December 8, 2010, Greer filed an administrative appeal to David Schwarz, the Division of Hearings and Appeals Administrator, requesting that the revocation decision be overturned based upon numerous factors. (3:67-78). The appeal decision, issued by David Schwarz and dated December 22, 2010, sustained the ALJ's decision rejecting Greer's jurisdictional arguments and finding the new criminal conduct warranted revocation. (3:104-05; A-Ap. 116-17).

Greer timely filed a Writ of Certiorari in the Circuit Court of Racine County. (1:1-7). In a decision dated June 23, 2011, the court granted the petition and reversed the decision of the Division of Hearings and Appeals. (7:12; A-Ap. 113). The court held the department had acted with jurisdiction, that its actions were not arbitrary, oppressive or unreasonable, and that its determination was warranted by the evidence. (7:4-8; A-Ap. 105-109). However, despite these findings, the court concluded the Division did not act according to the law and had in fact been equitably estopped from proceeding with revocation against Greer. (7:8-12; A-Ap. 109-113). The court recognized the legal significance of discharge certificate and ruled that because an absolute discharge certificate had been issued, Greer reasonably relied upon it, acted upon it (by voting in the 2008 Presidential election) and suffered detriment based on this reliance. (*Id.*). The court also found that "the revocation of probation under circumstances as unique as found here would violate the basic principles of decency and fairness." (7:8; A-Ap. 109).

Administrator Schwarz filed a motion for reconsideration arguing that equitable estoppel did not

apply in certiorari review cases. (8:1-2). The court rejected this contention and denied the motion to reconsider on August 2, 2011. (10:1-2; A-Ap. 114-15). An order was entered August 4, 2011 stating that “the Respondent was estopped from pursuing revocation against Petitioner and the decision to revoke Petitioner’s probation is reversed.” (11:1; A-Ap. 101). Administrator Schwarz filed a notice of appeal on September 16, 2011 resulting in this action. (12:1-2).

### **ARGUMENT**

The decision of Administrator Schwarz affirming the revocation of Greer’s probation was without jurisdiction, was contrary to the law, was arbitrary and capricious, oppressive and unreasonable, representing his will and not his judgment, and is not supported by the evidence in the record. Therefore, this Court should affirm the circuit court’s decision reversing the Division’s decision to revoke Greer’s probation.

The circuit court held that the Department had not lost jurisdiction, its action was not arbitrary, oppressive or unreasonable, and that evidence supported its decision. (7:4-8; A-Ap. 105-109). However, the circuit court found the Department had not acted according to law because it was equitably estopped from proceeding with revocation against Greer due to the issuance of the absolute discharge certificate which Greer reasonably relied upon to his own detriment. (7:8-12, A-Ap. 109-113). As the Appellant noted, this 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)).

While Greer disagrees with the circuit court findings regarding jurisdiction, whether the action was arbitrary, oppressive or unreasonable, and whether the evidence

supported revocation as a reasonable decision, Greer agrees with the circuit court in its finding that the Division did not act according to law. Greer asks this Court to hold that the Division lacked jurisdiction to initiate revocation proceedings against Greer, that it failed to act according to law, that its action was arbitrary, oppressive, and unreasonable representing its will, not its judgment, and that the evidence presented could not reasonably support the revocation decision.

## I. APPLICABLE LAW AND STANDARD OF REVIEW

This Appellate Court reviews the decision of the Division of Hearings and Appeals to determine whether: (1) the Division of Hearings and Appeals kept within its jurisdiction; (2) the Division acted according to law; (3) the Division's actions were arbitrary, oppressive or unreasonable; and (4) the evidence was such that the Division might reasonably make the order or determination in question. *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶15, 257 Wis.2d 40, 654 N.W.2d 438. The court may not conduct a *de novo* review of the facts by weighing the evidence, but does review the question of whether the agency acted according to law *de novo*. *Warren*, 219 Wis.2d at 629.

## II. THE DECISION OF THE DIVISION OF HEARINGS AND APPEALS TO REVOKE GREER'S PROBATION SHOULD BE REVERSED.

The decision of David H. Schwarz, Administrator of the Division of Hearings and Appeals, to revoke Greer's probation was without jurisdiction, was contrary to the law, and was arbitrary and capricious, oppressive and unreasonable, representing his will and not his judgment, contrary to the evidence in the record. Therefore, this



Court should reverse the decision of the Division of Hearings and Appeals.

- A. The Division of Hearings and Appeals lacked jurisdiction over Greer because it issued an absolute discharge certificate restoring his civil rights.

Pursuant to *Wis. Stat.* § 304.072(3) the DOC's jurisdiction is limited to actions taken prior to the expiration of the term of supervision. *Wis. Stats.* §304.072(3) (2009-10). The phrase "term of supervision" applies to all violations occurring "before the offender's date of discharge from his or her entire sentence." *Dept. of Corr. v. Schwarz*, 2005 WI 34, ¶36, 279 Wis. 2d 223, 244, 693 N.W.2d 703, 713. Therefore, the burden is on the Department to establish jurisdiction, not the Defense.

It is undisputed that the DOC issued Greer an absolute discharge certificate on Racine County Case 04CF1184 stating "***[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; A-Ap. 131)(emphasis added). This certificate also included language telling Greer that his civil rights, including his right to vote and the obligation for jury duty were being restored to him, effective September 28, 2007. (*Id.*). This discharge certificate was issued and signed by the Secretary of the Department of Corrections, Rick Raemisch, on October 3, 2007 pursuant to Ch. 304 & 973. (*Id.*). Pursuant to *Wisconsin Statue* Sec. 304.078 (2) - Restoration of Civil Rights of Convicted Persons, "[t]he certificate of the department ... that a convicted person has served his or her sentence ... ***is evidence of that fact and that the person is restored to his or her civil rights.***" *Wis. Stats.* §304.078(2)(emphasis added).

The Appellant appropriately cites *Wisconsin Statute Secs.* 973.09(1)(a) and 302.11(4) for the proposition that

consecutive sentences are treated as one continuous sentence. *Wis. Stats.* §§ 973.09(1)(a), 302.11(4). Furthermore, Wisconsin's probation statute provides that a discharge certificate reinstating civil rights will be provided when the period of supervision has expired. *See Wis. Stats.* § 973.09(5). The administrative code further provides that probationers will 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)(2006).

The Appellant argues that "[t]he discharge certificate was invalid...and did not operate to terminate the DOC's jurisdiction over Greer." (Ap. Br. p. 10). The Appellant argues that the DOC issued the certificate "in violation of the statute and the department's rules," because it was not issued at the expiration of the term of supervision, and therefore "it could not affect the department's legal custody of Greer." (Ap. Br. p. 13). Appellant also argues that "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." (Ap. Br. p. 12).

It is true that administrative agencies only have the power expressly conferred or necessarily implied from the statutory provisions under which it operates. *See Conway v. Board of the Police and Fire Comm'rs*, 2002 WI App 135, ¶7, 256 Wis.2d 163, 647 N.W.2d 291. (Ap. Br. p. 13). The Appellant further relies on *Seider v. O'Connell*, 2000 WI 76, ¶¶ 26, 28, 236 Wis.2d 211, 612 N.W.2d 659, and *State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶ 20, 234 Wis.2d 626, 610 N.W.2d 821, for the proposition that "[a]n agency act performed in excess of those powers is invalid." (Ap. Br. p. 13). In *Seider*, the court was reviewing an administrative rule that conflicted with the statute and found that a "rule out of harmony with the statute is a mere nullity," *id.* In *Anderson-El*, the court was examining the

failure of the Department to provide proper notice of hearing as required by the administrative code and found that because it did not comply the proceedings were rendered invalid. *Anderson-El*, 2000 WI 40, ¶20. However, neither of these cases addressed the issuance of a document with significant legal repercussions being rendered invalid as the Appellate argues occurred in this case.

Greer acknowledges that the Department did issue the absolute discharge certificate before the “expiration of the term noted on the court order...” with regards to the probation case. The three years of consecutive probation would have discharged on September 28, 2010. However, that does not render the certificate invalid or lacking in legal significance as the Appellant argues.

The Department did not act in excess of its expressly conferred or necessarily implied powers in issuing Greer the absolute discharge certificate in question. The Department does have the ability and is well within its administrative operational limitations pursuant to *Wisconsin Administrative Code* § DOC 328.17(2)(c) 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 department retain custody, and discharge is merited.” *Wis. Admin. Code* § DOC 328.17(2)(c)(2006). In these cases, “the client shall be discharged at the date of expiration of the modification of the term *or earlier if the client receives a discharge from the governor or department, or a pardon.*” (*Id.*)(emphasis added). In this case Greer *did* receive an absolute discharge from the department.

If 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 the negligence of the Department.

The Appellant also argues that *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) are not instructive because in neither case was a discharge certificate issued by mistake. (Ap. Br. p. 13). While it is true that these cases present different factual scenarios than the ones at issue here, Greer continues to stress that these cases are instructive in addressing the role and importance of a discharge certificate. Because there are no cases that specifically address an absolute discharge certificate which restores an individual's civil rights being issued prior to the termination of a probation period due to the negligence of the Department in maintaining its records, these cases become all the more important.

Both *Rodriguez* and *Stefanovic* recognize that the issuance of a discharge certificate is a "significant legal moment." *Stefanovic*, 215 Wis.2d at 315-16, *see Rodriguez*, 133 Wis.2d 47. Furthermore, the certificate issued to Greer is even more significant than those considered in these cases because it not only absolutely discharged him from all supervision, it also restored his civil rights.

As the Appellant noted, the probationer in *Rodriguez* was verbally told by his agent that his supervision would be terminated on April 6, 1985, because she was unaware of a consecutive two year probation sentence. *Rodriguez*, 133 Wis.2d at 49. She discovered her mistake on May 21, 1985 and learned that he had committed an assault on a woman between those two dates. *Id.* *Rodriguez* argued they lacked jurisdiction due to the fact that he did not know he was on supervision at the time of that offense. *Id.* at 50. The court found 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." *Id.* at 51-52.

There is no direct discussion of what would have occurred *had* this discharge certificate been issued, whether validly or invalidly, and received by Rodriguez prior to the initiation of revocation proceedings, but this statement clearly indicates that *had* the department issued a discharge certificate on the child abuse and battery conviction in this case, the court's decision regarding jurisdiction would have been different.

Furthermore, the court in *Stefanovic* reiterated the importance of a discharge certificate and noted that the sentencing scheme of the court may be "frustrated" by facts and circumstances of a given case, but that if jurisdiction is lost, the court cannot act. *Stefanovic*, 215 Wis. 2d at 319. In *Stefanovic*, the probationer was placed on probation and conditional jail time was stayed pending appeal, but probation was not. *Id.* at 312. *Stefanovic* successfully completed the term of her probation while an appeal was pending and was issued a certificate of discharge. *Id.* The trial court ordered her to serve the conditional jail time, but the court of appeals reversed acknowledging the certificate was properly issued to *Stefanovic* and that the "department's issuance of a discharge certificate is a significant legal moment." *Id.* at 315-16.

While the facts of *Stefanovic* are admittedly different than those in this case because the certificate was issued at the end of the term of supervision, a "frustration" of the sentence as discussed by the court is precisely what occurred here. The court's sentencing scheme may be frustrated by the fact that Greer was not supervised for the three years of consecutive probation, but once Greer received his absolute discharge and was reinstated his civil rights, the DOC no longer had jurisdiction to initiate the revocation proceedings. The discharge certificate was

issued effective September 28, 2007 and he was taken into custody by the DOC on September 2, 2012, almost three years after this absolute discharge reinstating his civil rights and nullifying any jurisdiction it might have.

The absolute discharge certificate was not invalid and operated to terminate the jurisdiction of the Department. Therefore, this Court should find the Department lacked jurisdiction in this matter.

- B. The Division did not act according to law when it placed Greer into custody and initiated revocation proceedings against him after he had been absolutely discharged and had his civil rights restored and when it failed to accurately maintain its records and properly notify Greer of what case revocation was being sought.

The circuit court held that the Division had not acted according to law because the Department of Corrections was equitably estopped from seeking revocation. (7:8-12; A-Ap. 109-113). Greer agrees with the decision of the circuit court that the Division did not act according to law when it revoked Greer's probation because it was estopped from revoking Greer due to the issuance of the absolute discharge certificate and Greer's subsequent reasonable reliance upon it to his own detriment. The circuit court also held that "revocation of probation under circumstances as unique as found here would violate the basic principles of decency and fairness." (*Id.*).

Appellant argues that this logic is wrong for two reasons. First, Appellant argues that equitable relief may not be granted by a circuit court under certiorari review. (Ap. Br. p. 22). Second, Appellant argues that even if equitable estoppel were applicable, Greer could not have reasonably relied on the discharge certificate when he committed a new crime. (Ap. Br. p. 22-23). Because

equitable estoppel is a valid form of relief under certiorari review and because the elements for equitable estoppel have been met in this case, this Court should reverse the decision of the Division revoking Greer's probation. Furthermore, to revoke Greer under these circumstances does violate the "basic principles of decency and fairness" and implicates Greer's due process rights.

**i. Equitable Estoppel is a valid form of relief under certiorari review.**

Equitable estoppel is a valid form of relief under certiorari review because equitable estoppel is not merely an equitable doctrine, it is also a valid defensive doctrine against governmental action.

The Appellant relies on *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis.2d 109, 675 N.W.2d 470, for the proposition that equitable relief is unavailable in certiorari actions. (Ap. Br. p. 23-24). However, in *Winkelman*, the Supreme 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 the enforcement action, the second action in this 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.

The issue of equity powers of a certiorari court was only briefly discussed in the context of distinguishing a hearing before a certiorari court and a circuit court for the purposes of discussing issue and claim preclusion. *Id.* at ¶ 29-37. The court found there was no identity of causes of action in the certiorari action and the enforcement action. *Id.* at ¶35. In the certiorari action owners sought certiorari review to challenge board's decision to impose raze condition on variance, while in the second action the town sought enforcement of that condition. *Id.* There were

significant differences in quality or extensiveness of certiorari and enforcement proceedings, and owners had inadequate opportunity or incentive to obtain full and fair adjudication in certiorari action, as they did not know what relief town would be seeking. *Id.* at ¶36.

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.

It is true, as the *Winkelman* court noted, that the "traditional criteria by which certiorari review a board's decision do not involve consideration of equitable arguments," *id.* at ¶36; however, that does not preclude this Court from finding that equitable estoppel applies as a defensive doctrine in certiorari cases. Equitable estoppel has been recognized as a legitimate defensive doctrine in contract actions. Equitable estoppel is not limited to claims brought in equity; it may also apply to "preclude the assertion of rights and liabilities under a note or contract." *Gabriel v. Gabriel*, 57 Wis.2d 424, 428, 204 N.W.2d 494 (1973). Furthermore, equitable estoppel has been applied in various family law contexts. *See Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶ 26, 270 Wis.2d 384, 677 N.W.2d 630. The court has also permitted equitable estopped to be used to "prevent raising a statutory defense in other types of actions. *See Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis.2d 336, 345-46, 515 N.W.2d 328 (Ct.App.1994)(concluding that a school district was equitably estopped from raising a teacher's failure to comply with the notice of claim requirements of Wis. Stat.



§ 893.80(1)(b) because of the conduct of the school district's agents)." *Id.*

The circuit court recognized that "[e]stoppel may be available as defense against government if government's conduct would work serious injustice and if public's interest would not be unduly harmed by application of estoppel." (7:9; A-Ap. 110) *citing Department of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 639 (1979). The circuit court noted that the "application of estoppel as a defense against the government, therefore, involves balancing the injustice that might be caused if the doctrine is not applied against the public interest at stake if the doctrine is applied." *Id.* Furthermore, "[a] court can at its discretion apply the doctrine of equitable estoppel if undisputed facts in the record lead to the conclusion that elements of equitable estoppel are present and no alternative view of the facts supports a contrary conclusion." (7:8; A-Ap. 109) *citing Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 291 Wis.2d 259 (2006).

While the Court of Appeals held in a recent decision that 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, there is no case law expressly finding that a certiorari court *cannot* apply equitable estoppel when the elements of equitable estoppel have been met in a civil probation revocation matter. As the circuit court noted, a criminal prosecution is substantially different from a revocation proceeding. (7:10; A-Ap. 111). A criminal proceeding is presided over by a circuit court judge and defendant's rights are protected by the statute of limitations, due process and the Fifth Amendment, none of which are available to probationers under the control and supervision of the DOC. *Id.* As the circuit court also recognized, "[s]ince the DOC cannot invalidate a court order, a probationer is effectively without recourse if he is erroneously discharged from supervision." *Id.*

This case is unique and is an issue of first impression for this Court. Greer urges this Court to acknowledge the distinction between this case and previous cases cited by Appellant. In this case, Greer is not seeking protection of property rights, or to avoid payment of forfeitures, or for any monetary compensation. This case involves the civil rights and physical freedom of an individual – basic fundamental constitutionally protected rights and the negligence of the State Department of Corrections. This case involves an individual who now faces new criminal liability, liability that could result in further deprivation of life and liberty due to the DOC.

The circuit court in this case did not order the Department to take any certain actions, and did not offer Greer any monetary or otherwise equitable relief; rather, it used equitable estoppel as a defensive doctrine and deemed the Department to be precluded from revoking Greer, leaving it up to the Department as to how to proceed in handling the issue. This Court should find that equitable estoppel is a proper form of relief under the “contrary to the law” analysis of a certiorari court.

**ii. The Division is equitably estopped from revoking Greer because he reasonably relied on the absolute discharge certificate to his own detriment.**

“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)(quoting *Chicago & Northwestern Transportation Co. v. Thoreson Food Products, Inc.*, 71 Wis.2d 143, 153, 238 N.W.2d 69 (1976). Therefore, equitable estoppel requires proof of three elements: (1) an

action or an inaction that induces; (2) reliance by another; and (3) to his or her detriment. *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶ 26, 270 Wis.2d 384, 677 N.W.2d 630. Furthermore, that reliance must be reasonable. *City of Green Bay*, 96 Wis.2d at 202.

In this case, Greer was issued an absolute discharge certificate which was an affirmative action with substantial legal significance taken by the Department of Corrections. (3:54; A-Ap. 131).

Greer reasonably relied on the certificate as being a valid document because he was not only told had completed supervision, but he was never told anything that would have caused him to question the validity of a document signed by the Secretary of the Department of Corrections. As Greer noted in his written statement, “I was in court the date of sentencing but I did not know if the 3 years were consecutive since I went to prison and then had 22 months on extended supervision.” (3:34). He also said he would have continued to report had he known about the consecutive probation. *Id.* Given his stellar performance on extended supervision for 22 months, there is no reason to doubt that he would have continued to report as he asserts. As the circuit court noted, the fact that Greer was present for sentencing does not negate the reasonableness of his reliance on the certificate. (7:10; A-Ap. 111). 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 Department of Corrections. Furthermore, “[a]brogation of the DOC’s custody of a probationer cannot occur absent the issuance of a discharge certificate.” *Id. citing Rodriguez*, 133 Wis.2d at 51. It is reasonable for an individual who has never heard otherwise to accept a document of this significance as valid and rely upon it.

Finally, Greer acted upon that reasonable reliance to his own detriment by voting in the 2008 Presidential Election, thereby committing a felony in violation of and exposing himself to further prosecution under Wis. Stats. §§ 12.13(1)(a), 12.13(1)(b) and 12.60(1)(a) if the certificate is invalid as the Appellant argues.

The Appellant argues Greer could not have reasonably relied upon the discharge certificate to “commit a new felony offense.” (Ap. Br. p. 27). Appellant is of course referring to the new criminal conduct, intimidation of a witness, to which Greer entered a plea and was the basis for the revocation decision. However, Appellant fails to address the issue of the felony offense of voting in the 2008 Presidential Election which occurred *solely* because of the issuance of the discharge certificate reinstating Greer’s civil rights and his reasonable reliance on it. Had it not been for that document, Greer would never have attempted to vote in the election. In fact, Greer testified at the revocation hearing that he specifically noticed one part of the discharge certificate, that “[a]ll my civil rights were restored and I was able to vote...I went and actually voted for the President. (13:40-41; R-Ap. 140-41 ).

There can be no doubt that elements of equitable estoppel are proven in this case. Estoppel is available as a defense against a governmental entity if the government’s conduct would work serious injustice and if the public’s interest would not be unduly harmed by application of estoppel. *State v. City of Green Bay*, 96 Wis.2d 195, 210, 291 N.W.2d 508 (1980).

Once the elements of equitable estoppel have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion. *Nugent v. Slaght*, 249 Wis.2d 220, 238, 638 N.W.2d 594 (2001). As discussed above, when applying equitable estoppel against a government, the court must balance the injustice that might be caused if the doctrine is not applied

against the public interest at stake if the doctrine is applied. *Moebius Printing*, 89 Wis.2d at 638. In this case, the circuit court found that “the danger faced by the public is minimal” because the government is not precluded from prosecuting and sentencing Greer for the charge underlying the revocation, which in fact has already occurred. The court ultimately held that “[t]he injustice that will be faced by [Greer] if this court affirms [the revocation] is greater than the danger the public will face if this court decides to reverse.” (7:12; A-Ap. 113).

Greer concurs with the circuit court’s analysis and finding regarding the application of equitable estoppel. As the circuit court acknowledged, revoking Greer under “circumstances as unique as found here would violate the basic principles of decency and fairness.” (7:8; A-Ap. 109). There must be a remedy available to Greer, and that remedy is found in equitable estoppel.

Upon reaching a conclusion that a government agency did not act according to the law, a certiorari court can reverse the agency's decision and remand it to the agency to hold a new hearing but cannot order the agency to perform a certain act. *See State ex rel. Richards v. Leik*, 175 Wis.2d 446, 455, 499 N.W.2d 276, 280 (Ct.App.1993), *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶ 9. As discussed above, the circuit court did not order the Department to perform a certain act, rather, it found the Department was estopped from proceeding with revocation and left it up to the Department to determine what alternative to pursue.

The Division cannot seriously argue that there are no negative legal ramifications for the negligence of the Department. The Division cannot seriously argue that after reinstating someone’s civil rights it can simply say “oops” three years later and take that person into custody with no warning saying they never had valid civil rights during that time period. If that were the case, and that is the argument

the Appellant is making, then the Division is conceding that its actions induced Greer to commit a felony by voting in the 2008 Presidential Election. These are precisely the type of ramifications that are completely ignored and never addressed by the ALJ or the Administrator in their decisions and are not addressed by Appellant in this case.

Because the elements of equitable estoppel have clearly been met in this case, this Court should find that the Division did not act according to law and was estopped from proceeding with revocation of Greer's probation.

**iii. Greer's fundamental due process rights were violated by the actions of the Department and therefore it did not act according to law.**

Greer's procedural and substantive due process rights were violated by the actions of the Department. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property without due process of law." U.S. Const. amend XIV. The Supreme Court has interpreted the constitutional guarantee of due process to protect both procedural and substantive rights. *See Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

Part of the certiorari analysis is whether the DOC followed its own rules and complied with Due Process requirements. *See Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. "When used in conjunction with certiorari review, the phrase 'acted according to law' includes the common law concepts of due process and fair play. *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 740, 454 N.W.2d 18, 20-21 (Ct. App. 1990). "The cardinal and ultimate test of the presence or absence of due process of law in any administrative proceeding is the presence or absence of the 'rudiments of fair play long

known to our law.’’ *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 153, 285 N.W. 504, 507 (1939).

Prior to the revocation hearing, Greer objected to the proceedings on the basis that the DOC failed to provide accurate notice as to which case it was seeking revocation. Procedural due process requires that Greer has an absolute right to have notice of the case for which DOC is seeking revocation. U.S. Const. amend XI; Wis. Const., Article 1, §8; and *Wis. Admin. Code Sec. HA 2.05- Revocation Hearing Notice*.

Basic notice requirements mean that the Department must identify what case, and the type of case it is seeking revocation. In this case, the DOC did not provide adequate notice. The DOC Form 44 - Recommendation for Administrative Action, lists Case #04CF1184B as the case revocation is being sought on. (3:23). The Face Sheet of the revocation packet provides Case #04CF1184A as the case revocation is being sought on. (3:22). The revocation hearing request (DOC-429) and the revocation summary (DOC-1950) make no distinction between an "A" or a "B" case. (3:6,27).

The law provides that it is the DOC’s responsibility to carry out the sentence which the court imposes. *See, Wis. Stats. §§ 301.01 and 302.11(1)*. Furthermore, *Wis. Admin. Code § 328.04(2)(n)* outlines the duties of agents and tasks them with “[m]aintaining complete and accurate case records for each client under supervision...”. Here the Department admits it failed to maintain accurate records of Greer and that it failed to do so for a period of almost 6 years from the time of his sentencing on the underlying case until he reported for his PSI interview.

The Department had no distinction between an “A” or “B” case and created this distinction on September 2, 2010 in order to have a case on which to place Greer into custody on a hold. Case Number 04CF1184A, was added to

the record system on September 2, 2010, and indicates a maximum discharge date of September 28, 2010, when the 3 year consecutive probation would have been completed. (13:28; R-Ap. 128). This is apparently the probation case in question, yet DOC still cannot keep its paperwork straight. As the DOC-3 states that the Department is seeking revocation in the "A" case which has been **completed** and for which Greer has received a discharge certificate. (3:22, 54). Even the reissued discharge certificate requested by counsel prior to the discovery of the original certificates, lists the "A" case as that being discharged. (3:49). This only adds to the confusion the discharge certificate already created. Therefore, Greer did not receive proper notification of which case the DOC was seeking revocation in violation of his due process rights.

Due solely to DOC's failure to maintain accurate records, Greer was released from supervision and given a full and complete discharge including a restoration of civil rights, he went about his life, including voting in the 2008 Presidential election. Then, after taking responsibility for new conduct, and following court orders, he was taken into custody with no warning, placed on a hold and put through revocation proceedings which resulted in Greer being held unlawfully in custody for almost 10 months. Greer was only ultimately released upon demand of counsel after the circuit court issued its decision overturning the Division's revocation decision.

To revoke Greer under these circumstances deprives him of his right to procedural due process as discussed in both *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972) which require fundamental procedural due process rights to apply to revocation proceedings. The Court in *Morrissey* recognized that fundamental liberties are at stake and that termination of supervision inflicts "grievous loss" on the person and therefore the decision must be made in



conformity with due process standards. *Morrissey*, 408 U.S. at 482.

Furthermore, Greer's substantive due process rights have also been 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 substantive component of the Due Process Clause protects individuals from 'certain arbitrary, wrongful actions 'regardless of the fairness of the procedures used to implement them.'" *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521, 533 (1997)(internal citations omitted). In evaluating a substantive due process claim, the claimant must demonstrate that he has been deprived of a liberty or property interest that is constitutionally protected. *Penterman*, 211 Wis.2d at 480.

This case clearly involves a constitutionally protected liberty – Greer's fundamental rights to freedom from the intrusion of the government and physical freedom from being taken and held in custody with no legal basis. The ALJ and Administrator here had an incentive to find in favor of the Department as the negligence of the Department could leave them open to civil liability. The failure of the ALJ or Administrator to address all the facts and contradictory nature of the decisions demonstrates this inability to be neutral. Even if the court finds the procedures were fair here, the decision to revoke Greer's probation under these circumstances is arbitrary and violates basic fundamental fairness and decency.

As Greer argued in his original certiorari brief, to revoke Greer would also offend the basic canons of decency and fairness. *See Rochin v. California*, 342 U.S. 165 (1962). The circuit court agreed that revoking Greer under these circumstances "would violate the basic principles of decency and fairness." (7:8; A-Ap. 109). The sheer negligence and subsequent actions of the Department

in taking Greer into custody and initiating revocation proceedings against him under these circumstances does “shock the conscience” and offends the basic canons of fairness and decency and must be remedied. Therefore, the Division did not act according to law in revoking Greer’s probation.

C. The Division’s action was arbitrary and capricious, and its decision to revoke Greer’s probation was oppressive and unreasonable representing its will rather than its judgment.

The Division’s decision to revoke Greer’s probation is arbitrary and capricious, oppressive and unreasonable, and represents its will rather than its judgment because it does not represent a proper exercise of discretion.

An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173, 178 (Ct. App. 1997) aff'd, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical explanation founded upon a proper legal standard, this includes considering whether alternatives are available and feasible. *Id.* at 179. Here, the Division ignored and failed to consider all the facts of the record and ignored legal ramifications when making its decision, making such decision an improper exercise of discretion.

The Division Administrator determined revocation was appropriate based on Greer’s new criminal offense. (3:105; A-Ap. 117). Appellant argues that the “Administrator provided a reasoned and reasonable explanation for why alternatives to probation revocation were not appropriate.” (Ap. Br. p. 28). The Administrator found that Greer “engaged in threatening behavior involving the use of a weapon to intimidate a witness,

resulting in a new criminal conviction” and that “[t]his conduct shows that Greer is a potential danger to others” (3:105; A-Ap. 117). He also found that this is “especially true given the serious nature of his underlying firearm offense.” *Id.*

However, the Administrator’s finding that “[t]he need to protect the community from further violent crime outweighs the positive factors Greer cites on appeal,” (3:105; A-Ap. 117), overlooks the evidence presented at the hearing.

First, the DOC offered to let Greer pay his supervision fees and toll the time, thus being released from supervision on September 28, 2010 at maximum discharge. (13:33-34, 49; R-Ap. 133-34, 149). The DOC, even with the new charges, did not believe a revocation was warranted or that Greer was a threat to the community. The DOC only revoked this offer after talking with the Assistant District Attorney on the new case, based on his statement that he “thinks” it was a real gun but can’t prove it. (13:49 R-Ap. 149). Greer testified at the revocation hearing that the “gun” used in the intimidation incident was a toy gun. (13:44; 3:27; A-Ap. 123; R-Ap. 144). When police questioned him about the incident he told them where to find the toy gun and they located it under the mattress of his bed. (13:44; R-Ap. 144). Furthermore, Shawn Griffin, the victim of the intimidation charge, testified at the revocation hearing and the ALJ found him to be credible, yet the ALJ found that the DOC did not prove that Greer had a real gun. (A-Ap. 121). Even under the reduced standard of preponderance of the evidence, the DOC could not prove Greer had a real gun.

Second, Shawn Griffin also testified that Greer never contacted him since the incident occurred and that he was unaware of Greer ever making any threats or there being any problems while Greer was released on bond since the day of the incident. (13:18; R-Ap. 118). While out on

bond for 10 months between the arrest date and being taken into custody by the DOC, Greer continued to work, continued to attend school, and went about his daily life, not posing any threat to the community, waiting for his sentencing day when he would need to face the consequences of his actions. (13:41-46; R-Ap. 141-46).

This clearly demonstrates the fact that Greer was not a threat to the community. Confinement in the form of revocation is not necessary to protect the public from further criminal activity by Greer. To the contrary, Greer complied with all the rules of supervision during his extended supervision period. Further, during the time from September 2007 through November 2009, Greer had no further criminal charges and was attending school, working full-time, and acting as a productive member of society. After the incident in November, Greer spent ten months out on bond, complying with the terms and conditions of that bond and reported for his PSI as ordered. Clearly Greer is capable of complying with supervision terms, whether that be extended supervision, probation or bond and was in no way threatening to members of the public.

Third, the Administrator failed to address the legal ramifications of the issuance of an absolute discharge certificate, restoring civil rights, and the fact that Greer was induced to commit a felony by voting due to the negligence of the DOC. In fact, the negligent actions of the DOC are never mentioned in the Administrator's decision at all.

The Administrator also never addresses the contradictory nature of the ALJ's decision. The ALJ found that Greer did not have any rules in effect at the time of the admitted speeding incident on July 20, 2010. (3:13; A-Ap. 121). The ALJ found that Greer was not under any rules after September 28, 2007 and the only basis for proceeding with the revocation was therefore to rely on the court ordered terms of probation as listed on the judgment of conviction. In regard to allegation 5, the ALJ found that

Greer violated the court ordered condition of probation not to possess alcohol. (3:13; A-Ap. 121). However, neither he, nor the Administrator ever addresses the fact that same court ordered terms of probation includes "Voting prohibited during terms of prison, extended supervisions and probation." (A-Ap. 128). This important fact is clearly not addressed by the ALJ or Administrator because it demonstrates how the argument of the Department contradicts its own findings. Addressing this issue of Greer's voting in the 2008 Presidential Election would mean admitting that the negligence of the DOC in maintaining accurate records in the case induced Greer to commit a felony by voting.

In *State ex. Rel Anderson-El v. Cooke*, 234 Wis.2d 626, 641, 610 N. W.2d 821 (2000), the court explained that requiring the DOC to follow its own rules promotes respect for the rules and the people who enforce them. The DOC has clearly failed to fulfill its obligations under the rules. The Administrator never addresses the fact that Greer suffered constitutional violations due to the DOC's inability to maintain accurate records and comply with its own rules and procedures. As discussed above, the DOC admittedly failed to maintain accurate records as required by *Wis. Admin. Code* § 328.04(2)(n) which lead to several violations of Greer's constitutional rights. Correcting these violations is the only way to promote respect for the law and the entities entrusted to enforce them. Greer should not be punished due to the negligence of the Department.

The only reason the Department even became aware of its negligence in maintaining Greer's records is because Greer accepted responsibility for his actions and entered a plea. Had Greer contested the charges and scheduled a trial date, the expiration of the 3 year consecutive probation, September 28, 2010, would undoubtedly have passed. He was out on bond while the new charges were pending with no bond violations. He reported for his presentence investigation interview, was made aware of DOC's mistake,

and was taken into custody the next day, a mere 27 days before the expiration of the 3 year consecutive probation case. This is the very definition of arbitrary, that the date he enters his plea and schedules his PSI interview for determines whether revocation occurs. He spent almost three years of his life believing he had successfully completed his entire sentence, that his civil rights were restored, and that he was free from jurisdiction of the DOC.

The Administrator failed to even address the clear negligence of the DOC and violations of DOC rules and procedures that occurred in this case. He also failed to address all the facts presented at the hearing and his decision in fact contradicts much of what was presented. This demonstrates that the Administrator was making this decision based upon his will and *not* the facts. Here there was no proper exercise of discretion because the Administrator blatantly ignored and failed to address or consider facts in the record and ignored legal ramifications of the reinstatement of Greer's civil rights and his subsequent act of voting in the 2008 Presidential Election. There can be no proper exercise of discretion when these important matters are not addressed. Therefore, the Division's action was arbitrary, capricious, unreasonable and oppressive.

D. The Division could not reasonably make the decision to revoke Greer based upon the evidence presented.

The Division made the decision to revoke Greer without considering all the evidence and therefore the decision was not made reasonably.

Greer admits he entered a no contest plea to Intimidation of a Witness/Threat of Force on June 25, 2010, and the only allegations the ALJ found were proven by the Department were that Greer threatened Shawn Griffin and that he consumed alcohol. (3:85, 13; A-Ap. 121). The

Division's decision affirming revocation says that Greer "engaged in threatening behavior involving the use of a weapon to intimidate a witness." (3:105; A-Ap. 117). This statement ignores certain facts presented at the hearing which are essential to making a reasonable decision.

As discussed in the preceding section, the DOC offered to let Greer pay his supervision fees and discharge, demonstrating that even in spite of the new charges, the DOC did not believe a revocation was necessary or that Greer was a threat to the community. (13:33-34, 48; R-Ap. 133-34, 148). The DOC made the decision to proceed with revocation based upon a belief by the District Attorney's office that a real gun was involved, a contention that the DOC was not able to prove through testimony of the only witness Shawn Griffin. (A-Ap. 121). Shawn Griffin's testimony also established that Greer had not threatened him nor had there been any problems the entire 10 months he was out on bond on the new charges, demonstrating that Greer was not a danger to the community. (13:41-46; R-Ap. 141-46).

Furthermore, as is also discussed above, the Administrator ignored certain facts, like the DOC violation of its own rules and regulations and negligent handling of this matter and the legal ramifications that exist because of it. Had the Division taken these facts into consideration, it could not have reasonably made its decision to revoke Greer's supervision.

### **CONCLUSION**

For the reasons set forth above, Petitioner-Respondent respectfully asks this Court to reverse the decision of the Division of Hearings and Appeals revoking Greer's probation supervision.

Dated this 28<sup>th</sup> day of March, 2012.

Respectfully Submitted,

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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 9,491 words.

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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 28th day of March, 2012.

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