STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN EX REL. JAMIE A. COOGAN,

Petitioner-Appellant,

v.

Iowa County Case No. 2017CV000142
Appeal No. 2018AP002350

STEVEN P. MICHEK, SHERIFF, IOWA COUNTY SHERIFF'S OFFICE,

Respondent-Respondent.

ON APPEAL OF A DECISION DENYING SUMMARY JUDGMENT AND AN ORDER DISMISSING THE WRIT, ENTERED IN THE IOWA COUNTY CIRCUIT COURT, THE HONORABLE W. ANDREW SHARP, PRESIDING

BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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C O U R T O F A P P E A L S

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BRIEF AND APPENDIX OF PETITIONER-APPELLANT

STATEMENT OF THE ISSUES

I. DOES THE SHERIFF'S CONSTITUTIONAL POWER AND DUTY TO HAVE THE CUSTODY AND CONTROL OF THE COUNTY JAIL AND THE PRISONERS THEREIN PRECLUDE THE LEGISLATURE FROM LIMITING THE CIRCUMSTANCES UNDER WHICH A SHERIFF MAY DENY PRISONERS THE EXERCISE OF HUBER PRIVILEGES GRANTED TO THEM BY THEIR SENTENCING COURT?

The trial court answered: yes.

II. DOES THE GENERAL DUTY IMPOSED UPON THE SHERIFF TO "TAKE THE CHARGE AND

CUSTODY OF THE JAIL MAINTAINED BY THE COUNTY AND THE PERSONS IN THE JAIL, AND [TO] KEEP THE PERSONS IN THE JAIL PERSONALLY OR BY A DEPUTY OR JAILER" BY WIS. STAT. § 59.27(1) AND/OR THE OPERATION OF WIS. STAT. § 302.36 AND WIS. ADMIN. CODE CH. DOC § 350.21 CONSTITUTE A GRANT OF AUTHORITY TO THE SHERIFF TO RESTRICT OR DENY THE EXERCISE OF HUBER PRIVILEGES NOTWITHSTANDING THE RESTRICTIONS ON THE SHERIFF'S POWER TO DO SO CONTAINED IN WIS. STAT. § 303.08?

The circuit court answered: yes.

III. DOES THE SHERIFF HAVE A PLAIN DUTY TO RESTRICT OR DENY THE EXERCISE OF HUBER PRIVILEGES ONLY IN ACCORDANCE WITH THE PROVISIONS OF WIS. STAT. § 303.08, AND CONVERSELY STATED, DOES A PERSON GRANTED HUBER PRIVILEGES HAVE A CLEAR LEGAL RIGHT TO RESTRICTION OR DENIAL OF THE EXERCISE OF SUCH PRIVILEGES ONLY IN ACCORDANCE WITH THE PROVISIONS OF WIS. STAT. § 303.08, SUCH THAT MANDAMUS RELIEF WILL LIE?

The circuit court answered: no.

STATEMENT ON ORAL ARGUMENT

Appellant believes that the issues raised in this appeal are issues of first impression in the State of Wisconsin, and as such, oral argument may be appropriate.

STATEMENT ON PUBLICATION

Because the issues raised in this appeal are issues of first impression in the State of Wisconsin, and because they are issues of great public importance concerning the administration of justice, publication is warranted.

STATEMENT OF THE CASE

On September 19, 2017, Coogan was sentenced to serve one year in the Iowa County Jail following revocation of his probation in Iowa County Case No. 16 CF 54. (R20: 3, 9). In his judgment of conviction, Coogan was granted Huber release privileges pursuant to the court's authority to grant such privileges under Wis. Stat. § 303.08(2). (R20: 3, 9). On or around October 6, 2017, the jail reclassified Coogan to "maximum" housing status as a result of an alleged infraction of jail rules committed by Coogan, and Coogan was not reclassified to a housing status lower than "maximum" until November 26, 2017. (R20: 4, 9-10).

This was significant because at the time, the jail utilized its housing classification system not just for the purposes enumerated in Wis. Stat. § 302.36 and Wis. Admin. Code ch. DOC § 350.21, but also for purposes of determining whether a prisoner who was granted Huber privileges under Wis. Stat. § 303.08(2) in his or her judgment of conviction would be allowed to exercise their Huber privileges and if so, the amount of hours in any given day during which the prisoner would be allowed to exercise such privileges. (R21: 2, 5).

Specifically, inmates classified to "maximum" housing status are not allowed to exercise Huber privileges *at all* until such time as they are reclassified to something less than "maximum" housing status, and further, inmates classified to "medium" housing status are restricted to working no more than eight hours in any given day and no more than five days in any given week. (R21: 2). Coogan was accordingly completely denied Huber privileges from the period running from October 6, 2017 to November 26, 2017 on the basis of his classification to "maximum" housing status during that time period. (R20: 4, 9-10). The sheriff neither petitioned the court to revoke Coogan's Huber privileges during this time period under Wis. Stat. § 303.08(3) nor invoked the authority of Wis. Stat. § 303.08(10) to deny Coogan the exercise of his Huber privileges, but instead relied entirely upon the jail's inmate housing classification system which it is required to develop and implement pursuant to Wis. Stat. § 302.36 and Wis. Admin. Code ch. DOC § 350.21. (R20: 11-13).

On December 7, 2017, Coogan, through counsel, filed a petition for a writ of mandamus, alleging, *inter alia*, that the Iowa County Sheriff's Office and Iowa County Sheriff Steven P. Michek (hereinafter "Michek") violated a plain duty to restrict or deny Huber privileges only as permitted in the Huber statute, Wis. Stat. § 303.08, and requesting that the court issue a writ compelling Michek to refrain from denying or restricting the exercise of Huber privileges on the part of inmates granted such privileges in their judgments of conviction except as such denial or restriction would be allowable under Wis. Stat. § 303.08. (R1: 1-6).

On May 17, 2018, Coogan, again through counsel, filed a notice of motion and motion for partial summary judgment, again requesting mandamus relief compelling Michek to refrain from limiting or denying the exercise of Huber privileges except as permitted under Wis. Stat. § 303.08, and requesting that should the court determine that mandamus does not lie, that the court enter a judgment declaring that Michek may not restrict or deny the exercise of Huber privileges except as permitted by Wis. Stat. § 303.08. (R18: 5-6).

In his brief in support of his motion, Coogan argued, as is relevant to this appeal,[1] that neither Michek's constitutional powers as the sheriff nor any other authority allowed him to restrict or deny the exercise of Huber privileges other than pursuant to the provisions of Wis. Stat. § 303.08, and as such, Michek's utilization of the inmate housing classification scheme to restrict or deny entirely the exercise of Huber privileges violated his plain duties to administer Huber privileges only in accordance with the dictates of Wis. Stat. § 303.08, entitling Coogan to either mandamus relief or in the alternative, a declaration that Michek may only restrict or deny the exercise of Huber privileges as permitted by the provisions

[1] Coogan also alleged and argued that the classification system utilized by Michek was not objective and therefore violated the requirements of Wis. Stat. § 302.36 and Wis. Admin. Code ch. DOC § 350.21. (R18: 1-6; R19: 30-32). Coogan additionally argued that Michek denied him due process of law when Michek refused to allow him the exercise of his Huber privileges on the basis of his housing classification. The circuit court's rulings on these issues are not being appealed and will therefore not be addressed by Coogan here.

of Wis. Stat. § 303.08. (R19: 6-30).

Michek responded to Coogan's motion for summary judgment by arguing that (1) the sheriff's inherent constitutional authority and duty to maintain the custody and control of the prisoners in the county jail and (2) the sheriff's statutory power and duty to do the same under Wis. Stat. § 59.27(1) superseded any restrictions on the sheriff's authority to restrict or deny the exercise of Huber privileges contained within Wis. Stat. § 303.08, and further, that this result was mandated by the concept of separation of powers. (R25: 7-12).

On October 15, 2018, the circuit court, the Honorable W. Andrew Sharp presiding, entered a memorandum decision and order denying Coogan's motion for summary judgment and granting Michek dismissal of the petition and writ. (R32: 8). In its ruling, the circuit court first determined that Coogan was not entitled to mandamus relief because "the management of prisoners and their release on Huber are acts where the Sheriff is expected to exercise his discretion and sound judgment." (R32: 4). As to the issue of whether Coogan would nonetheless be entitled to a declaratory judgment requiring Michek to restrict or deny Huber only in accordance with the provisions of Wis. Stat. § 303.08, the court made all of the following rulings: (1) the sheriff's constitutional duty and power to maintain the custody of the jail and the prisoners therein superseded any limitations the legislature may have placed on the sheriff's ability to deny or restrict the exercise of Huber privileges, (R32: 4-5); (2) Wis. Stat. § 59.27(1) grants the sheriff the statutory authority to restrict or deny the exercise of Huber privileges notwithstanding any restrictions on such authority imposed by Wis. Stat. § 303.08, (R32: 5); and (3) the doctrine of separation of powers precludes a circuit court from acting to enforce the grant of Huber privileges in its judgment of conviction as against the county sheriff. (R32: 5-6).

Coogan, through counsel, filed a timely notice of appeal on November 30, 2018, challenging the circuit court's rulings enumerated above; the present appeal follows. (R33: 1-2).

ARGUMENT

I. NEITHER THE SHERIFF'S CONSTITUTIONAL POWER AND DUTY TO HAVE THE CUSTODY AND CONTROL OF THE COUNTY JAIL AND THE PRISONERS THEREIN NOR THE SHERIFF'S STATUTORY POWER AND DUTY TO THE SAME EFFECT PRECLUDES THE LEGISLATURE FROM LIMITING THE CIRCUMSTANCES UNDER WHICH A SHERIFF MAY DENY PRISONERS THE EXERCISE OF HUBER PRIVILEGES GRANTED TO THEM BY THEIR SENTENCING COURT, NOR DOES THE DOCTRINE OF THE SEPARATION OF POWERS PRECLUDE A CIRCUIT COURT FROM ACTING TO ENFORCE ITS GRANT OF HUBER PRIVILEGES AS AGAINST THE SHERIFF, AND IN FACT THE COMMON LAW DUTY OF THE SHERIFF TO EXECUTE ALL LAWFUL COURT ORDERS COMPELS THE OPPOSITE RESULT.

A. Summary of Arguments and Standard of Review

Contrary to the circuit court's rulings, the only powers and duties of the sheriff which may not be abridged, restricted, or modified by the legislature or a court are those powers and duties which "gave character and distinction" to the office of sheriff at common law." ***Manitowoc County v. Local 986B***, 168 Wis. 2d 819, 826, 484 N.W.2d 534 (1992). At common law, the sheriff did not have any discretion to release persons committed to the jail even temporarily for any purpose, and as such, the administration of Huber release privileges, which are themselves a creature of modern statute unknown to the common law at the time of the ratification of the Wisconsin Constitution, does not implicate any of the powers and duties of the sheriff which gave that office character and distinction at common law. Accordingly, the legislature may limit or restrict the sheriff's authority to deny or restrict the exercise of Huber privileges once such privileges are properly granted by a sentencing court.

Similarly, nothing in Wis. Stat. § 59.27(1) authorizes the sheriff to deny or restrict the exercise of Huber release

privileges, for much the same reason that the sheriff's constitutional power and duty to take custody of the county jail and the prisoners therein does not authorize the sheriff to restrict or deny the exercise of Huber privileges other than in accordance with the dictates of Wis. Stat. § 303.08. In fact, the sheriff has a constitutional and statutory duty to faithfully execute the orders of the circuit court, including judgments of conviction requiring that the prisoner convicted by allowed to exercise Huber privileges granted therein, and at common law, contrary to the circuit court's ruling regarding the separation of powers issue, courts were affirmatively empowered to enforce their orders committing persons to the jail as against the sheriff. *See* 2 Walter H. Anderson et al., *A Treatise on the Law of Sheriffs, Coroners, and Constables* § 623, at 591-92 (1941) (hereinafter Anderson on Sheriffs) ("If a term of imprisonment in the penitentiary is imposed, then, of course, it is the duty of the sheriff to carry out the judgment insofar as he is directed to do so . . . [i]n short, it is the duty of the officer to carry out whatever judgment is rendered in a criminal case; *see also* 1 Anderson on Sheriffs § 250, at 259 ("Failure to retain and keep the prisoner, as in the commitment directed, is contempt of court. After a person is committed to prison, the gaoler has no discretion except to carry out the mandates of the commitment") *and* Wis. Stat. § 59.27(4) (stating that the sheriff shall "serve or execute all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff.").

Finally, because the sheriff has an absolute duty, both constitutionally and under statute, to execute all orders of the circuit court, the doctrine of separation of powers does not preclude the circuit court from acting to enforce its orders, including a grant of Huber privileges in a jail prisoner's judgment of conviction. It therefore follows that the circuit court erred when it determined that the sheriff does not have a plain duty to refrain from restricting or denying the exercise of Huber privileges granted in a person's judgment of conviction other than as authorized by the Huber law and/or the sentencing court, and as such, the circuit court also erred when it determined that Coogan did not have a clear legal right to be denied or restricted in the exercise of his Huber privileges only in accordance with the provisions of Wis. Stat. § 303.08.

> It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. [This court] first examine[s] the complaint to determine whether it states a claim, and then review[s] the answer to determine whether it presents a material issue of fact or law. If [this court] conclude[s] that the complaint and answer are sufficient to join issue, [this court] examine[s] the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If they do, [this court] look[s] to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial.

State v. Dunn, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997) (internal citations omitted; brackets added).

In the context of a petition for a writ of mandamus, "It is well-recognized that mandamus will not lie unless the following requirements are met: (1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted, and (4) no other adequate remedy at law." ***State ex rel. S.M.O.***, 110 Wis. 2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982).

Regarding the analysis of the constitutional powers and duties of a county sheriff in Wisconsin, "It is the nature of the job [in question] . . . which must be analyzed in light of the sheriff's constitutional powers." ***Wisconsin Prof'l Police Ass'n v. Dane County***, 149 Wis. 2d 699, 710, 439 N.W.2d 625 (Ct. App. 1989) (***WPPA II***) (ellipses in original; quoting ***Wisconsin Prof'l Police Ass'n v. County of Dane***, 106 Wis. 2d 303, 312, 316 N.W.2d 656 (1982) (***WPPA I***)). "If the duty is one of those immemorial principal and important duties that characterized and distinguished the office of sheriff at common law, the sheriff 'chooses his own ways and means of performing it.'" ***Id.*** (quoting ***WPPA I***, 106 Wis. 2d at 314). On the other hand, if the duties at issue are "mundane and commonplace" or consist of "internal management and administrative duties, even if they are ever-present aspects of the constitutional office," such duties "are not accorded constitutional status." ***Kocken v. Wis. Council***, 2007 WI 72, ¶42, 301 Wis.2d 266, 732 N.W.2d 828.

In short, caselaw "establish[es] the following criteria for

identifying a sheriff's constitutional powers, rights, and duties: certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office are constitutionally protected from legislative interference." ***Id.*** at ¶39. (brackets added) "Nevertheless, the constitution does not prohibit all legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. [I]internal management and administrative duties . . . [that] neither gave `character' nor `distinction' to the office of sheriff . . . fall within the mundane and common administrative duties of a sheriff which may be regulated by the legislature." ***Id.*** at ¶40 (internal citations and quotation marks omitted; brackets and ellipses in original).

The construction and application of statutes represents an issue of law which this court reviews independently of the circuit court, but benefiting from its analysis. ***State v. Popenhagen***, 2008 WI 55, ¶32, 309 Wis.2d 601, 749 N.W.2d 611. Similarly, interpretation and application of constitutional provisions is a question of law which this court reviews *de novo*. ***State v. Anderson***, 2006 WI 77, ¶66, 291 Wis.2d 673, 717 N.W.2d 74.

B. The sheriff's constitutional power and duty to maintain the custody and care of the jail and the persons imprisoned therein does not preclude the legislature from limiting the circumstances under which the sheriff may permissibly deny or restrict the exercise of Huber privileges by those prisoners granted such privileges by the circuit court, and as such, no separation of powers issue arises.

The office of county sheriff, as is noted above, is invested by the constitution with certain powers and duties which cannot be removed by statute or administrative rule. ***WPPA I.***, 106 Wis. 2d at 305 (stating that "[w]e conclude that under the Wisconsin Constitution the sheriff has the power and prerogatives which that office had under the common law[,]" and that "[t]hese powers may not be limited by a collective bargaining agreement entered into by the county and a labor

union representing deputy sheriffs.") (brackets added). As is relevant in the present case, "one of the most characteristic and well acknowledged [of the traditional common law powers and duties of the office of county sheriff] was the custody of the common jail and of the prisoners therein." ***State ex rel. Kennedy v. Brunst***, 26 Wis. 412, 414 (1870).

That said, there existed no such thing as Huber release privileges under the common law; indeed, the Huber law was not enacted in Wisconsin until 1913. *See* L.1913 c. 625; *see also* Wis. Stat. § 56.08 (1947-48), Comment of Interim Committee 1947 (noting that what is commonly known as the Huber law was first enacted by ch. 625, Laws of 1913). Prior to 1913, a sentence to jail confinement was to either "hard labor" or "actual confinement" (and in fact "hard labor" was the default option absent a judicial pronouncement to the contrary requiring actual confinement) without any option to continue work for an existing employer of the inmate available to said inmate. *Compare* Wis. Stat. § 697c (1911-12) (stating that "whenever any male person over sixteen years of age shall be convicted within such county of any offense of which a justice of the peace under general law has jurisdiction to hear, try and determine he shall be punished by imprisonment in the workhouse at hard manual labor, and the commitment shall be to such workhouse at hard manual labor" and making no provision for non-county employment of prisoners) *with* Wis. Stat. § 697c (1913-14) (requiring the sheriff to make contracts for the gainful employment of jail prisoners and providing for collection of earnings from employment and distribution of same to various payees).

Accordingly, release of inmates pursuant to the Huber law, and the rules and regulations governing such privileges, does not fall within the class of powers and duties that were inherent in and characteristic of the office of sheriff at common law. *See* ***WPPA I***, 106 Wis.2d at 311 (holding that the inherent powers of the sheriff are limited "to those immemorial principal and important duties that characterized and distinguished the office.") (quoting ***State ex rel. Milwaukee County v. Buech***, 171 Wis. 474, 481-82, 177 N.W. 781 (1920)).

This proposition is amply supported by the following

admonition from the Supreme Court of Wisconsin in its opinion in ***Buech***:

> It should not be held, in our judgment, that the constitution prohibits any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. If that were true, a constitutional amendment would be necessary in order to change the duties of sheriffs in the slightest degree and, in this respect, the state would be stretched on a bed of Procrustes.

141 Wis.2d at 482. "It is the nature of the job assigned rather than the general power of job assignment which must be analyzed in light of the sheriff's constitutional powers." ***WPPA I***, 106 Wis.2d at 312. Ultimately, it is only those powers and duties which give character and distinction to the office of the sheriff which are constitutionally protected. ***Heitkemper v. Wirsing***, 194 Wis. 2d 182, 191-92, 533 N.W.2d 770 (1995).

Accordingly, it is appropriate to look to treatises describing the powers and duties attaching to the office of sheriff at common law. *See* ***WPPA II***, 149 Wis.2d at 705-07 (looking to historical treatises to determine the nature of the sheriff's powers and duties at common law). For example, at common law, the sheriff did indeed have the power and duty to maintain custody of the county jail and the persons imprisoned therein, but that power and duty was not without limitations; for instance, the sheriff was under a duty to "carry out whatever judgment is rendered in a criminal case." 2 Anderson on Sheriffs, § 623. As such, "[i]f the prisoner was acquitted, the duty of the sheriff is to immediately release him from custody, if he was in custody. If a term of imprisonment in the penitentiary is imposed, then, of course, it is the duty of the sheriff to carry out the judgment insofar as he is directed to do so." ***Id.***

In addition, the sheriff was required at common law to carry out all lawful orders of the court, and in default of said duty, could be held in contempt. *See* 1 Anderson on Sheriffs, § 250. That treatise explains in detail what the duty of the sheriff was in relation to an order of the court:

> Failure to retain and keep a prisoner, as in the commitment directed, is contempt of court. After a person

> is committed to prison a gaoler has not discretion except to carry out the mandates of the commitment. He has no right to consult his own convenience nor that of the prisoner. ***He may not lawfully permit the prisoner to leave the jail and return thereto at his pleasure.*** Persons are committed to jail for the purpose of imposing on them the penalties they have incurred because of a violation of law and it is not for the gaoler having custody of the prisoner to conclude that he will remit any part of the punishment. Even in case the prisoner becomes ill or other intervening circumstance shall arise which make it proper to grant the prisoner some indulgence, ***the sheriff, constable, or jailer having the prisoner in custody has no discretion in the matter but he must apply to the proper court or other lawfully constituted authority to grant the same***. A violation of duty in this regard constitutes contempt of court subjecting the custodian of the prisoner to punishment therefor.

1 Anderson on Sheriffs, § 250 (emphasis added). As can be seen from the emphasized portions of the text, not only did Huber release not exist at common law, but in addition the sheriff was expressly forbidden from allowing anything resembling such relief on pain of suffering sanctions for contempt of court. Accordingly, it cannot be the case that the power to allow a prisoner to exercise Huber privileges is one of the powers which gave the office of the sheriff "character and distinction" at common law; quite the opposite. Until the advent of the Huber law, the sheriff could not release prisoners committed to the jail for any purpose absent express authorization from a court. ***Id.***

As can be seen, the administration of Huber law privileges is not a duty or power that even existed at common law, much less a duty or power that gave "character and distinction" to the office of the sheriff. *See* ***Heitkemper***, 194 Wis.2d at 191-92. Therefore, it becomes important to recall that "[a]dministrative powers are not freely and readily implied. Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it." ***Madison Metro. Sch. Dist. v. Wisconsin Dep't of Pub. Instruction***, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995). "Whether a power is to be implied turns on the intent of the legislature." ***Id.*** "Intent to confer such power may be inferred when the power rises from fair implication from expressed powers . . . or if the power is necessarily implied by the statutes under

which an agency operates." ***Id.***

No separation of powers issue arises in this context, therefore, because, as can be seen from the above discussion, the constitution does not provide the sheriff with any power to override legislative and judicial decision making regarding whether a person who is sentenced to a term of imprisonment in a jail is to be allowed to exercise Huber release privileges, which are a creature entirely of statute and which did not exist at common law. *See* ***State v. Schell***, 2003 WI App 78, ¶ 14, 261 Wis. 2d 841, 661 N.W.2d 50 (implying that in order to conduct a separation of powers analysis, one must first identify the powers which belong to each branch of government at issue). The analysis above clearly shows that sheriff had no constitutional power whatsoever regarding the release of prisoners during their term of imprisonment in the jail. Given the lack of any constitutional power to do so, the sheriff's power to restrict or deny altogether the exercise of Huber privileges must exist, if it exists at all, either by virtue of the express terms of the statutes or regulations of the State of Wisconsin, or by necessary implication of said statutes and regulations.

C. The Sheriff's general power and duty to take custody of the county jail and the prisoners therein under Wis. Stat. § 59.27(1) does not authorize the Sheriff to restrict or deny the exercise of Huber privileges on any basis other than those enumerated in Wis. Stat. § 303.08.

In order to determine whether the sheriff is authorized to utilize an inmate classification system or other device to restrict or even deny completely the exercise of Huber privileges to an inmate who otherwise qualifies, the court must interpret the statutes dealing with the sheriff's powers and duties as well as those governing Huber privileges, and in particular, must look to see whether any such statutes would operate to grant the sheriff the power to utilize custody classification systems to condition the exercise of Huber privileges. The methodology a court is to follow when interpreting a statute is as follows:

[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute. . . .

[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history.

Some statutes contain explicit statements of legislative purpose or scope. A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole. Many words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used. Accordingly, it cannot be correct to suggest, for example, that an examination of a statute's purpose or scope or context is completely off-limits unless there is ambiguity. It is certainly not inconsistent with the plain-meaning rule to consider the intrinsic context in which statutory language is used; a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose.

What is clear, however, is that Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous. By "extrinsic sources" we mean interpretive resources outside the statutory text—typically items of

legislative history.

State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶¶45-46, ¶¶48-50, 271 Wis. 2d 633, 663–66, 681 N.W.2d 110. However, so-called "extrinsic" sources may be consulted even where a statute is not ambiguous as a means of confirming the plain meaning of the statute. ***Teschendorf v. State Farm Ins. Companies***, 2006 WI 89, ¶14, 293 Wis. 2d 123, 717 N.W.2d 258. The purpose of doing so "is merely to contribute to an informed explanation that will firm up statutory meaning." ***Id.*** With these principles in mind, the following discussion begins with a general discussion of the powers and duties of the sheriff before turning to the question whether the Huber law allows a sheriff to utilize a mechanism other than that provided at Wis. Stat. § 303.08(10) to restrict or deny the exercise of Huber privileges. As shall be seen, it does not.

Wis. Stat. § 59.27 sets forth the powers and duties of county sheriffs in Wisconsin insofar as such powers and duties are relevant to the case at bar. It is reproduced in relevant part here:

> The sheriff of a county shall do all of the following:
>
> (1) Take the charge and custody of the jail maintained by the county and the persons in the jail, and keep the persons in the jail personally or by a deputy or jailer.
>
> . . .
>
> (4) Personally, or by the undersheriff or deputies, serve or execute all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff.
>
> . . .
>
> (7) Perform all other duties required of the sheriff by law.

Wis. Stat. § 59.27. As can be seen, nothing in the statute conveys upon a sheriff the duty or power to refuse to comply with an order of court directing the sheriff to allow a person to exercise Huber privileges based upon an inmate classification system. The only provisions which conceivably touch on that subject are subs. (1), (4), and (7). Wis. Stat. § 59.27(1) imposes on the sheriff the duty to maintain a jail, and to ensure that the

inmates are kept there personally or by a deputy. Wis. Stat. § 59.27(4) requires that the sheriff, either personally or by a deputy, execute all orders of the court. Wis. Stat. § 59.27(7) simply requires the sheriff to perform any legal duties which may be imposed upon him or her lawfully. These second and third provisions would seem to require the sheriff to give effect to the terms of a judgment of conviction committing a person to the county jail, including any provision in the judgment of conviction granting the person committed the ability to leave the jail for work or various other purposes under the Huber law. What neither of those provisions do, however, is empower the sheriff to override on his or her own motion the court's grant of Huber privileges based on an unrelated classification statute. As such, if the Iowa County Sheriff has the authority to deny or otherwise restrict the exercise of Huber privileges granted to an inmate, it must come from somewhere other than the basic statutory grant of power conveyed by Wis. Stat. § 59.27.

Wis. Stat. § 302.36 is the source of the mandate contained in Wis. Admin. Code ch. DOC § 350.21 that the sheriff maintain an objective system of classification of inmates; in its present form, Wis. Stat. § 302.36 is captioned "Classification of prisoners," and provides in full as follows:

> The sheriff, jailer, or keeper of a jail shall establish a prisoner classification system *to determine prisoner housing assignments, how to supervise and provide services and programs to a prisoner, and what services and programs to provide a prisoner*. The prisoner classification system shall be based on objective criteria, including a prisoner's criminal offense record and gender, information relating to the current offense for which the prisoner is in jail, the prisoner's history of behavior in jail, the prisoner's medical and mental health condition, and any other factor the sheriff, jailer, or keeper of a jail considers necessary to provide for the protection of prisoners, staff, and the general public.

Wis. Stat. § 302.36 (emphasis added). As can be readily seen from the emphasized language, the purpose of jail inmate classification is expressly limited to placing inmates in appropriate housing assignments, supervising and providing services and programs to inmates, and deciding which services and programs to provide to any given inmate. This language

clearly refers only to what is to be done with an inmate *within* the jail, and importantly fails to even mention the words "Huber" or work release.

The contention that the classification system is meant to deal only with what is done with an inmate while that inmate is within the jail is reinforced by the Department of Corrections regulation promulgated to give effect to Wis. Stat. § 302.36, entitled "Inmate classification":

> All jails shall meet the requirements set forth in s. 302.36, Stats. The sheriff shall establish and maintain an objective prisoner classification system *to determine prisoner custody status and housing assignment, and develop eligibility criteria for prisoner participation in available work assignments, programs, and community service projects*. The jail shall have policies and procedures relating to classification, including the following components:
>
> (1) Description of the objective prisoner classification system, including the identification and training of staff authorized to classify prisoners, initial classification and reclassification procedures, and prisoner appeal process.
>
> (2) Eligibility criteria for prisoner participation in available work assignments, programs, and community service projects.
>
> (3) Review of prisoner classification decisions.

Wis. Admin. Code ch. DOC § 350.21 (emphasis added). The emphasized language nearly tracks that of Wis. Stat. § 302.36, but is slightly more specific; it adds that the classification system is to be used to decide whether an inmate is eligible for participation in "available work assignments, programs, and community service projects." This language, as with the similar language in Wis. Stat. § 302.36, does not mention either Huber privileges or work release; it instead rather clearly refers only to programming, work assignments, and community service within the jail and/or conducted directly by the sheriff, not work release to allow the inmate to carry on private employment, and as such, cannot be construed to allow a sheriff the authority to restrict or even entirely abrogate the grant of Huber privileges the Iowa County sheriff claims here.

This conclusion is reinforced by the history of the classification statute. Prior to 2005, the statute was titled "Segregation of prisoners," and provided in full that:

> (1) All jails shall be provided with suitable wards or buildings or cells in the case of jail extensions under s. 59.54 (14) (g) for the separation of criminals from noncriminals; persons of different sexes; and persons alleged to be mentally ill. All prisoners shall be kept segregated accordingly.
>
> (2) Notwithstanding sub. (1), the sheriff, jailer or keeper may permit prisoners of different sexes to participate together in treatment or in educational, vocational, religious or athletic activities or to eat together, under such supervision as the sheriff, jailer or keeper deems necessary.

Wis. Stat. § 302.36 (2003-04). The statute was then repealed and recreated in 2005 to its current form by 2005 Wis. Act 295, which enacted into law 2005 A.B. 36. The analysis of the bill by the Legislative Reference Bureau is instructive as to the purpose of the recreation of the statute when it states that "[u]nder this bill county jails have the option, until January 1, 2006, of segregating prisoners under current law or of establishing a prisoner classification system for determining prisoner housing assignments, how to supervise and provide services and programs to prisoners, and the particular services and programs to provide them." 2005 A.B. 36, *Analysis by the Legislative Reference Bureau* (brackets added). This language strongly implies that the purpose of the classification system is aimed squarely and solely at controlling what is done with an inmate while that inmate is physically in the jail or in the direct custody of the sheriff, not when and under what conditions a prisoner may exercise Huber work release privileges.

The conclusion that the classification statute was never intended to be used to restrict or entirely abrogate Huber privileges is reinforced by the legislative history of 2005 A.B. 36. *See* ***Teschendorf***, 293 Wis. 2d 123, ¶14 (legislative history may be resorted to as a means of confirming the plain meaning of a statute). In its written comments in support of 2005 A.B. 36 to the Assembly Committee on Corrections and the Courts, the Wisconsin Counties Association stated the following regarding the bill:

> Under current law, county jail inmates who have not been convicted must be kept separate from prisoners who have been convicted, prisoners who are mentally ill must be kept separate from prisoners who are not mentally ill and prisoners of different sexes must be kept separate. However, it has been proven that there are better ways to classify jail inmates. Studies produced by the National Institute of Corrections and other entities clearly show that more objective factors should be used to determine prisoner housing assignments, type of prisoner supervision, and the delivery of services and programs to prisoners. . . .
>
> Why is objective classification a good idea for county jails? First, objective jail classification increases safety for the general public, county jail staff, and county jail inmates, especially in jails with capacity issues. Second, classifying prisoners based on objective factors, as opposed to whether or not they have been convicted, will limit a county's liability if an incident should occur in the jail. Third, objective jail classification allows for better decision-making and resource management within the jail, especially when determining housing assignments and inmate programming.

Assembly Record of Committee Proceedings regarding 2005 A.B. 36, Committee on Corrections and the Courts, at 12-13.

In addition, the bill's sponsor, Representative Donald Friske, discussing the advantages of an objective system of inmate classification over subjective systems, had the following to say in support of the bill: "Subjective standards increase the risk of mistakes and injury if an inmate is placed in an improper housing assignment." *Id.* at 15. These pieces of legislative history contain no indication whatsoever that the current language of Wis. Stat. § 302.36 was intended in any way to allow a sheriff to condition the exercise of Huber privileges by reference to the inmate's classification; to the contrary, they show that the primary concern of the legislature in recreating the statute was to ensure that inmates are housed and given programming based on an objective system of determining the safety risk to other inmates and jail staff posed by a prisoner *within the jail*. Accordingly, there is nothing in Wis. Stat. § 302.36 or its legislative history which grants the sheriff the power, either expressly or by necessary implication, to utilize the inmate classification system to restrict or even

entirely abrogate the exercise of Huber privileges. If the sheriff does have such a power, that power must come from the Huber law itself. As shall be shown, the Huber law conveys no such power either.

Finally, the language of Wis. Admin. Code ch. DOC § 350.21, read in concert with surrounding and closely related provisions of the statutes and regulations, *see* ***Kalal***, 271 Wis.2d 633, ¶46, also indicates that the inmate classification system it mandates was never intended to be used as authority to restrict or deny entirely the exercise of Huber privileges. That language expressly states that the classification system mandated is to be used only to "determine prisoner custody status and housing assignment, and develop eligibility criteria for prisoner participation in available work assignments, programs, and community service projects." Wis. Admin Code ch. DOC § 350.21 (intro). The only part of that purpose that could even conceivably apply to Huber privileges is the phrase "available work assignments." When this phrase is read in context with other closely related statutes, it becomes clear that the phrase is referring only to work assignments within the jail or while supervised by jail staff on the grounds of the jail or other government property, and not to outside employment or any other purpose authorized by the Huber law

For instance, Wis. Stat. § 302.37(4) describes what likely is being referred to by the phrase "available work assignments" in Wis. Admin Code ch. DOC § 350.21 (intro) when it states the following: "The sheriff or other keeper of a jail may use without compensation the labor of any prisoner sentenced to actual confinement in the county jail or, *with the prisoner's consent*, any other prisoner in the maintaining of and the housekeeping of the jail, including the property on which it stands. Any prisoner who escapes while working on the grounds outside the jail enclosure shall be punished as provided in s. 946.42." Wis. Stat. § 302.37(4) (emphasis added). The requirement that a prisoner who is not sentenced to "actual confinement" actually consent to performing labor without compensation strongly implies that when the DOC regulation refers to "available work assignments," it refers to work assignments which can be ordered by the sheriff under Wis. Stat. § 302.37(4). The fact that prisoners not sentenced to "actual confinement" cannot be made to do uncompensated

work without their consent further reinforces the conclusion that "work assignments" referred to in the DOC regulation are entirely separate from the work activities performed by an inmate with Huber privileges' gainful employment when they work at their jobs. Accordingly, the classification statute and regulation were not intended to govern the exercise in any way of Huber privileges ordered by a court pursuant to Wis. Stat. § 303.08(2), neither expressly nor by implication.

II. COOGAN IS ENTITLED TO MANDAMUS RELIEF AS REQUESTED IN HIS PETITION, AND IS THEREFORE ENTITLED TO SUMMARY JUDGMENT, AS THE SHERIFF'S DUTY TO RESTRICT OR DENY HUBER PRIVILEGES ONLY IN ACCORDANCE WITH THE PROVISIONS OF WIS. STAT. § 303.08 IS PLAIN, AND A PRISONER GRANTED SUCH PRIVILEGES HAS A CLEAR LEGAL RIGHT TO HAVE THOSE PRIVILEGES DENIED OR RESTRICTED ONLY IN ACCORDANCE WITH THE PROVISIONS OF WIS. STAT. § 303.08, AND IN THE ALTERNATIVE, COOGAN IS NONETHELESS ENTITLED TO AN ORDER DECLARING THAT THE SHERIFF MAY ONLY RESTRICT OR DENY HUBER PRIVILEGES IN ACCORDANCE WITH THE PROVISIONS OF WIS. STAT. § 303.08.

The Huber law is codified at Wis. Stat. § 303.08, and allows a court in sentencing an inmate to a term of incarceration in the county jail to order that the inmate shall have the privilege of being released during such hours as are "necessary and reasonable" so as to allow the inmate to, among other things, work at employment. Wis. Stat. § 303.08(1)(b). As is relevant here, the statute provides but two means of restricting or revoking the exercise of Huber privileges once such privileges are granted. First, "[t]he *court* may withdraw the privilege at any time by order entered with or without notice." Wis. Stat. § 303.08(2) (emphasis added). Second, "[t]he sheriff may refuse to permit the prisoner to exercise the prisoner's privilege to leave the jail as provided in sub. (1) for not to exceed 5 days for any breach of discipline or other violation of jail regulations." Wis. Stat. § 303.08(10).

No other provision not related specifically to persons convicted of OWI offenses exists in the Huber statute which allows the restriction or abrogation of Huber privileges by anyone other than the sentencing court itself or other authorized court under Wis. Stat. § 303.08(7)(b), and even the provision requiring the sheriff to refuse to permit the exercise of Huber privileges by persons convicted of OWI-related offenses limits itself to situations where the inmate, despite having the financial wherewithal to do so, has failed to complete an alcohol and other drug abuse assessment and driver's safety plan ordered under Wis. Stat. § 343.30(1q)(c) or has failed to comply with an order to install an ignition interlock device in his or her vehicle. *See* Wis. Stat. §§ 303.08(10m) and (10r). The principle of statutory construction known as *espresso unius est exclusio alterus* compels the conclusion that the legislature intended to restrict the sheriff's authority to restrict or deny the exercise of Huber privileges to those situations described in subs. (10), (10m), and (10r).

As such, the use of the classification system to restrict or even completely abrogate the exercise of Huber privileges by inmates whose judgments of conviction specify that they are to have such privileges is an *ultra vires* act, which as with all state officials, the sheriff has a plain duty not to engage in. *See* ***Madison Metro. Sch. Dist.***, 199 Wis. 2d at 13 ("[a]dministrative powers are not freely and readily implied. Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it."). The Huber law on its face does not support an implied power residing in the sheriff to restrict or abrogate entirely the exercise of Huber privileges based upon an inmate's classification, and nothing in its legislative history, discussed below, supports such an implied power either. *See* ***id.*** ("Whether a power is to be implied turns on the intent of the legislature.").

As noted above, the Huber law was created by Laws of 1913 c. 625, and at the time provided that any person sentenced to confinement in a county jail would be ordinarily speaking required to serve the sentence at "hard labor," and that their earnings were to be used first and foremost for the support of the prisoner's dependents. R.S. section 697c(2)(a) to (f) (1913-14). Section 697c was then transferred to a newly-created

chapter 56 of the statutes by Laws of 1919 c. 350, and renumbered as Wis. Stat. § 56.08, entitled "EMPLOYMENT FOR THE BENEFIT OF DEPENDENTS." L. 1919 c. 350, s. 10. Notably, the law contained no provision allowing the sheriff to refuse to allow a prisoner to work at such employment as the sheriff could arrange for him or her, and further, provided that if a sheriff unreasonably neglected or refused to find suitable employment for an inmate, the sheriff would be liable to the imposition of a fine of not more than one hundred dollars for the first such offense, and for any subsequent offense, in addition to the fine, the sheriff was subject to removal from office. Wis. Stat. § 56.08(5) (1919-20).

The Huber law was amended again in 1947 to something much closer to its present form, and for the first time was amended to expressly provide that a court sentencing a person to a county jail could order that the person be allowed to continue his or her regular employment, rather than being put to work directly by the sheriff. L. 1947 c. 366, s. 7. Chapter 366 of the Laws of 1947 renamed section 56.08 "EMPLOYMENT OF MISDEMEANANTS" and revised section 56.08(2) to state that "[i]f the convicted person has been regularly employed in any job, the sheriff shall arrange for a continuation of said work in so far as possible without interruption." *Id.* § 7; *see also* Wis. Stat. § 56.08(2) (1947-48). The same subsection went on to require that if a person was sentenced to hard labor, which was the default under the newly revised statute, *see* Wis. Stat. § 56.08(1) (1947-48) ("Any person sentenced to the county jail is committed to hard labor unless the court specifies otherwise. The court may order any part of the imprisonment to be in ordinary confinement or may order his hospitalization for needed treatment."), "the sheriff shall make every effort to secure some suitable employment." Wis. Stat. § 56.08(2) (1947-48). The subsection concluded by requiring that "[a]ny prisoner so employed shall be paid a fair and reasonable wage for such work and shall work at fair and reasonable employment and hours per day and per week." *Id.*

As can be seen, the sheriff under the Huber law was, as a general matter, required to either allow a person committed to the jail to continue working at his or her regular employment, or if the person did not have such employment,

to find some kind of gainful employment for him or her. The statute also provided for a remedy in the event that the inmate violated the conditions of his or her "conduct, custody and employment," namely that the inmate was to be "returned to the court" which could then, in its discretion, "require that the balance of his sentence be spent in actual confinement and cancel any earned diminution of his term." Wis. Stat. § 56.08(6) (1947-48). Other than this subsection (6), nothing in the Huber law of 1947 allowed the sheriff to restrict or deny an inmate employment. The committee's comment to 1947 A.B. 359, which was enacted as L. 1947 c. 366, expressly notes that the Huber law "is a type of probation or parole." Wis. Stat. § 56.08 (Comment of Interim Committee 1947) (1947-48).

This strongly suggests that the legislature at that point had no intention of allowing the sheriff to deny a prisoner employment for anything other than a violation of rules governing the person's "conduct, custody and employment," as probation or parole has always been understood to be a condition under which a person is allowed freedom of movement in the community while at the same time being subject to close government control and restriction of his or her liberty as a result of his or her conviction for the commission of a crime. *See, e.g.*, ***Griffin v. Wisconsin***, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) ("To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions."") (quoting ***Morrissey v. Brewer***, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (ellipsis in original)).

The next revision to chapter 56 of the statutes of interest here took place in 1951. Chapter 433 of the Laws of 1951 amended Wis. Stat. § 56.08(1) by adding the following language to the 1947 language of that same subsection: "Where the sentence originally imposed is at ordinary confinement, or where hard labor has been revoked, the court may thereafter, at any time during the time of such sentence, place such person at hard labor." L. 1951 c. 433; Wis. Stat. § 56.08(1) (1951-52). Notably, the 1951-52 version of section 56.08, as with the 1947-48 version, provided that hard labor (and thus the

privilege of working at employment while serving a jail sentence) could be revoked only by the court, not the sheriff. *See* Wis. Stat. § 56.08(6) (1951-52).

In 1959, the Huber law was again revised extensively, and it was then that the language currently appearing in Wis. Stat. § 303.08(10) was first added; in addition, section 56.08 as a whole was repealed and recreated to read substantially the same as present-day Wis. Stat. § 303.08. L. 1959 c. 504. Chapter 504 of the Laws of 1959 enacted 1959 S.B. 488, as amended by 1959 S.A. 1 to S.B. 488. This change is highly significant in the present context, as it for the first time granted the sheriff the authority to refuse to allow a prisoner the benefit of the Huber law based upon a rule violation or other infraction, but only for five days or less with respect to any one incident, just as Wis. Stat. § 303.08(10) presently does, and further moved to a new subsection (2) the power of the court to withdraw Huber privileges previously contained in subsection (1) of section 56.08. L. 1959 c. 504, s. 3; *compare* Wis. Stat. § 56.08(1) (1957-58) *with* Wis. Stat. § 56.08(1) and (2) (1959-60).

Notably, the new version of the Huber law allowed, but did not require, the sheriff of Milwaukee County (but only Milwaukee County) to transfer a person whose Huber privileges had been withdrawn or revoked to the county house of corrections. L. 1959 c. 504, s. 3; Wis. Stat. § 56.08(12) (1959-60). The significance of this change, which was added at the request of Milwaukee County, *see* 1959 S.A. 1 to S.B. 488, is that it contains an implicit assumption that only a court, not the sheriff, may withdraw or revoke entirely a prisoner's Huber privileges for more than the brief period authorized by Wis. Stat. § 56.08(10) (1959-60), one that is contradicted by nothing else in the statutes. This is reinforced by the new language of the final sentence of subsection (2), which is identical to the language of present day Wis. Stat. § 303.08(2), and which remains the only statutory means of completely abrogating Huber privileges: "The court may withdraw the privilege at any time by order entered with or without notice." Wis. Stat. § 56.08(2) (1959-60).

The conclusion that the 1959 legislature did not intend to allow the sheriff the discretion to effectively revoke Huber

privileges by operation of any mechanism other than an actual violation of Huber or jail rules is reinforced by the legislative history of 1959 S.B. 488, which contains the report of the citizen's committee tasked with examining, among other things, problems in Wisconsin's jails. Three items in the report are of particular interest. First, the report recommended legislation to amend the Huber law, and the proposed legislation which became 1959 S.B. 488 was drafted at the citizen's committee's request and approved by the attorney general's office. Citizens Advisory Committee on Jail Problems and the Detention of Female Misdemeanants, *Report to the State Board of Public Welfare* (February 5, 1959) at 6 ("To effect the changes referred to above, a bill has been drafted and cleared with a representative of the Attorney General's office. This proposed bill was carefully reviewed by the full committee and the attached draft of recommended legislation has the approval of the committee."). As such, the report itself is a particularly probative piece of legislative history, as it explains in some detail the purpose of repealing and recreating the Huber law as was done via the legislation the committee recommended, 1959 S.B. 488.

Second, the committee's recommendations were in part based on its conclusion that it would be highly desirable to have the courts screen offenders for suitability for work release, and made no mention of the sheriff participating in that screening in any way. *Id.* at 4, ¶4. Third, and finally, the committee noted that "[i]t is the opinion of the committee that some limitations should be placed on the number of days good time which may be taken away *by the sheriff himself* and accordingly it is our recommendation that the sheriff be permitted to deduct not to exceed two days of earned good time for each rule infraction. *Any deduction in excess of that amount should be authorized by the committing court.*" *Id.* at 5, ¶5 (emphasis added).

This last portion of the citizen's committee's recommendations is highly significant here because in addition to the changes made to Wis. Stat. § 56.08 by L. 1959 c. 504 s. 3, chapter 504 of the Laws of 1959 also repealed and recreated section 53.43 of the statutes dealing with "good time" to, for the first time, limit the sheriff's discretion to deny good time. L. 1959 c. 504, s. 1; c*ompare* Wis. Stat. § 53.43 (1957-58)

(captioned 'Credit for good conduct.' and providing in full as follows: "If approved by the committing court, a prisoner sentenced to the county jail obtains a diminution of one-fourth of his term if his conduct, diligence and general attitude merit such diminution" and thus apparently leaving to the sheriff's discretion whether to grant or deny, whether in whole or in part, credit for good behavior) *with* Wis. Stat. § 53.43 (1959-60) (captioned 'Good Time' and providing in relevant part that "[a]n inmate who violates any law, any regulation of the jail, or neglects or refuses to perform any duty lawfully required of him, may be deprived by the sheriff of such good time, except that the sheriff shall not deprive him of more than 2 days good time for any one offense without the approval of the court.").

The same citizen's committee who drafted the 1959 revision to Wis. Stat. § 53.43 drafted the remainder of 1959 S.B. 488, including the newly-created version of Wis. Stat. § 56.08(10), which is substantially identical to the present day Wis. Stat. § 303.08(10): "The sheriff may refuse to permit the prisoner to exercise his privilege to leave the jail as provided in sub. (1) for not to exceed 5 days for any breach of discipline or other violation of jail regulations." Wis. Stat. § 56.08(10) (1959-60). The structure of this provision is nearly the same as that of Wis. Stat. § 53.43 (1959-60), and the concern the citizen's committee had that the sheriff's discretion to deny good time should largely be taken away in favor of vesting such discretion mainly in the court while leaving only a limited role for the sheriff tied to individual incidents which clearly informed the drafting of Wis. Stat. § 53.43 (1959-60) appears to have equally informed the committee's drafting of Wis. Stat. § 56.08(10) (1959-60). Thus, the legislative history of the Huber law appears to foreclose any assertion that the sheriff was intended by the legislature to have the power to undo what the committing court ordered when it allowed a prisoner Huber privileges, and as such, further forecloses any assertion that the classification statute was intended to impliedly be available to the sheriff as a means to evade the strictures of Wis. Stat. § 303.08(10) limiting his independent authority to refusal of Huber privileges for not more than 5 days as a sanction for a breach of discipline or jail rules.

The law regarding revocation of good time and that regarding revocation of Huber work release was further linked

together elsewhere in the newly recreated Wis. Stat. § 56.08 (1959-60). Section 56.08(7)(a) (1959-60) provided that a county court of record with criminal jurisdiction was to have authority to "make all determinations and orders under [§ 56.08, Stats.] and s. 53.43 [1959-60] as might otherwise be made by the sentencing court after the prisoner is received at the jail." Wis. Stat. § 56.08(7)(a) (1959-60) (brackets added). This is significant because in both the 1959 version of § 56.08 and the 1959 version of § 53.43, the only determinations and orders to be made were those relating to the grant or denial of work release and good time, respectively, with the only difference being that good time was to be automatically granted unless there was some reason to take it away, whereas work release as of 1959 now had to be affirmatively ordered by the court, as the default had now changed to ordinary confinement. *Compare* Wis. Stat. § 53.43 (1959-60) ("Every inmate of a county jail is entitled to a diminution of his sentence in the amount of one-fourth of his term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored.") *with* Wis. Stat. § 56.08(2) (1959-60) ("Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement.").

In both § 56.08 (1959-60) and § 53.43 (1959-60), the court is vested with the sole authority to completely deny or revoke work release and good time, respectively, but the sheriff is also allowed to revoke a limited amount of work release and good time, respectively, without recourse to the court. The main difference between the two statutes is that § 53.43 (1959-60) made this limitation explicit, *see* Wis. Stat. § 53.43 (1959-60) ("An inmate who violates any law or regulation of the jail . . . may be deprived by the sheriff of such good time, except that the sheriff shall not deprive him of more than 2 days good time for any one offense without the approval of the court."), whereas § 56.08 (1959-60) left the restriction only implicit by virtue of its structure, wherein court action is required to entirely revoke work release under Wis. Stat. § 56.08(2) (1959-60), but the sheriff is expressly allowed to revoke up to five days of work release for any one infraction under Wis. Stat. § 56.08(10) (1959-60).

Future revisions of the Huber law reinforce the conclusion that Wis. Stat. § 303.08(10) is presently the only

source of authority for a county sheriff (outside of the Milwaukee County sheriff, as noted below), without benefit of an order from the committing court, to restrict or completely deny an inmate the right to exercise his or her Huber privileges. First, in 1977, the legislature amended section 56.08 to expressly provide that only in Milwaukee County (or more precisely, any county with a population exceeding 500,000, of which Milwaukee was the only Wisconsin county at the time, *see* Theobald, H. Rupert and Robbins, Patricia V. (eds.), THE STATE OF WISCONSIN 1977 BLUE BOOK, p. 763 (table of population of Wisconsin by county and race)) may the sheriff on his or her own motion and without benefit of an order of the committing court transfer a prisoner with Huber privileges to the county house of corrections. L. 1977 c. 126, ss. 2-4. Prior to 1977, such a transfer could only be lawfully affected with permission from the committing court. *Id.*

Second, although various revisions of the Huber statute have been made over the years between 1977 and the present, the basic substance of the law has remained stable with respect to any of the provisions relevant to the present case. The most major change in the intervening time, in fact, has been that wrought by the 1989 budget act, which renumbered all of chapter 56's provisions to a new chapter 303, and which further renumbered a number of other related provisions, including Wis. Stat. § 53.43 (1987-88). *See* 1989 Wis. Act 31, §§ 1667 (renumbering Wis. Stat. § 53.43 to § 302.43), 1672-89 (renumbering all of ch. 56, 1987-88 Stats. to ch. 303 and amending selected provisions of ch. 303, 1989-90 Stats.). The provisions regarding revocation or denial of Huber privileges remained functionally identical to those in the 1959-60 version of Wis. Stat. § 56.08, as they have to the present day. *Compare* Wis. Stat. § 56.08(2) (1959-60) ("Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement. The prisoner may petition the court for such privilege at the time of sentence or thereafter, and in the discretion of the court may renew his petition. The court may withdraw the privilege at any time by order entered with or without notice.") and Wis. Stat. § 56.08(10) (1959-60) ("The sheriff may refuse to permit the prisoner to exercise his privilege to leave the jail as provided in sub. (1) for not to exceed 5 days for any breach of discipline or other violation of jail regulations.") *with* Wis. Stat. § 303.08(2) ("Unless such

privilege is expressly granted by the court . . . the person is sentenced to ordinary confinement. A prisoner . . . may petition the court for such privilege at the time of sentence or thereafter, and in the discretion of the court may renew the prisoner's petition. The court may withdraw the privilege at any time by order entered with or without notice.") (ellipses added) and Wis. Stat. § 303.08(10) ("The sheriff may refuse to permit the prisoner to exercise the prisoner's privilege to leave the jail as provided in sub. (1) for not to exceed 5 days for any breach of discipline or other violation of jail regulations.").

Finally, the provisions of the good time statute, Wis. Stat. § 302.43, have likewise remained substantially identical to those contained in the 1959 version wherein the limitation on the sheriff's ability to revoke good time without benefit of a court order was first enacted. *Compare* Wis. Stat. § 53.43 (1959-60) ("Every inmate of a county jail is entitled to a diminution of his sentence in the amount of one-fourth of his term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored. An inmate who violates any law or any regulation of the jail, or neglects or refuses to perform any duty lawfully required of him, may be deprived by the sheriff of such good time, except that the sheriff shall not deprive him of more than 2 days good time for any one offense without the approval of the court.") *with* Wis. Stat. § 302.43 ("Every inmate of a county jail is eligible to earn good time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored. An inmate shall be given credit for time served prior to sentencing under s. 973.155, including good time under s. 973.155 (4). An inmate who violates any law or any regulation of the jail, or neglects or refuses to perform any duty lawfully required of him or her, may be deprived by the sheriff of good time under this section, except that the sheriff shall not deprive the inmate of more than 2 days good time for any one offense without the approval of the court. . . . [.]") (ellipsis added).

Given that the substance of Wis. Stat. §§ 303.08(2), (10), and 302.43 has not changed in any way relevant to the present action since those provisions were first enacted in their present form nearly sixty years ago, and given that the clear intent of Wis. Stat. § 56.08(10) (now 303.08(10)) is to restrict

the power of the sheriff to refuse to allow the exercise of work release privileges to periods of not more than five days for any one violation or infraction, that intent must have carried forward to the present day: Wis. Stat. § 303.08(10) provides the sole authority for the sheriff to restrict or revoke Huber privileges (outside of the OWI context, which is not relevant here) on his or her own motion, just as Wis. Stat. § 302.43 provides the sole authority for the sheriff to revoke good time on his or her own motion. As such, Michek had a plain legal duty to restrict or deny Coogan's exercise of Huber privileges only in accordance with the provisions of Wis. Stat. § 303.08, and further, Coogan had a clear legal right to insist on compliance with that duty. Mandamus relief was and is therefore appropriate.

CONCLUSION

For the reasons discussed above, Coogan does respectfully request that this court vacate the circuit court's order denying his motion for partial summary judgment and dismissing the writ of mandamus, and remand with instructions that the court shall grant Coogan's motion for partial summary judgment and conduct such further proceedings as may be necessary.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,996 words.

Dated 5/25/2019:

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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 5/25/2019:

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CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated 5/25/2019:

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