COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN EX REL.
JAMIE A COOGAN,

Petitioner-Appellant,

v. Appeal No. 2018AP002350

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

Respondent-Respondent.

Appeal from Circuit Court for Iowa County
The Honorable W. Andrew Sharp, Presiding,
Case No. 2017CV000142

RESPONDENTS' SHERIFF STEVEN P. MICHEK AND IOWA COUNTY SHERIFF'S OFFICE RESPONSE BRIEF

William S. Cole (1011623)
Axley Brynelson, LLP
2 E. Mifflin St., Ste. 200
Madison, WI 53703
(608) 283-6766
wcole@axley.com

Attorneys for Respondent-Respondent
Steven P. Michek, Sheriff and
Iowa County Sheriff's Office

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Wisconsin Administrative Code

Wisconsin Constitution

Other Authority

STATEMENT OF THE ISSUES

I. Is Appellant Coogan's action moot?

Issue noted but not answered by the circuit court.

II. Does a sheriff have the constitutional and statutory power to restrict or deny the exercise of Huber privileges to otherwise eligible inmates in order to comply with his constitutional and statutory obligation to maintain custody and control of the county jail and the prisoners therein?

Answered by the circuit court: Yes.

III. Is a sheriff's power to restrict or deny the exercise of Huber privileges limited to solely the provisions set forth in Wis. Stat. § 303.08 and conversely does an individual granted Huber privileges have a clear legal right to restriction or denial of those Huber privileges only in accordance with the provisions of Wis. Stat. § 303.08, such that mandamus relief will lie?

Answered by the circuit court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondents do not believe oral argument is necessary pursuant to Wis. Stat. § 809.22, as this case does not present any novel legal issues.

The Briefs adequately and completely discuss the issues at hand and there is no need for this Court to entertain oral argument on this subject.

Furthermore, there is no need to publish this case. The issue in this case is straightforward. The law behind this subject is well settled, and this case does not require publication.

STATEMENT OF THE CASE

As noted by the circuit court, the primary facts of this case are straightforward and not in dispute. (R. 32 at 1.) However, Appellant Coogan's Statement of the Case warrants the following brief clarification.

On September 19, 2017, Appellant Coogan was sentenced after revocation of probation to serve one year in Iowa County jail, with Huber privileges granted by the sentencing judge. (R. 20 at 3, 9.) Although he was not actively working at the time of sentencing, Appellant Coogan was housed in a work release area of the Iowa County jail. (R. 20 at 4, 9.)

The Sheriff's Department used an "Inmate Classification System" to determine a prisoner's eligibility for Huber release. (R. 20 at 4, 10.) If a prisoner was classified as "maximum," he or she was not allowed to leave the jail to exercise Huber privileges. (R. 20 at 5, 11.) While the inmate classification system utilized at the jail pursuant to Wis. Stat. § 302.36 and Wis. Admin. Code DOC § 350.21 may affect inmate custody status and therefore impact the exercise of Huber privileges, it is not used nor intended as a disciplinary tool. (R. 21 at 5.)

Under the objective inmate custody classification system utilized by the Sheriff, Appellant Coogan never qualified for anything less restrictive

than "maximum" custody status except for those times where jail staff, to his benefit, manually overrode the "maximum" classification to a less restrictive classification. (R. 20 at 10.) Appellant Coogan's Inmate Classification Documents provide a chronological history of Appellant Coogan's classification status over time, as well as examples of how the inmate classification system is applied. (R. 20 at 1-19.)

Appellant Coogan has set forth the procedural history of this matter on pages 9-10 of his appellate brief, which is not in dispute. (App. Br. at 9-10.)

STANDARD OF REVIEW

Appellate courts review a circuit court's grant of summary judgment *de novo*, without deference to the circuit court but applying the same standards and methods that should have been applied by the circuit court. *Nierengarten v. Lutheran Social Services of Wisconsin*, 219 Wis. 2d 686, 694, ¶ 15, 580 N.W.2d 320 (1998); *City News and Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 21, 487 N.W.2d 316 (Ct. App. 1992); *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when "there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

Statutory interpretation and application present questions of law which appellate courts review independently, while benefiting from the analyses of the circuit court and the court of appeals. *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶ 12, 254 Wis. 2d 266, 647 N.W.2d 158 (*Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996)).

Decisions regarding a petition for a writ of mandamus are reviewed under the erroneous exercise of discretion standard. The reviewing court will sustain a court's exercise of discretion if the court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge could reach. *In Re Doe*, 2009 WI 46, ¶ 9, 317 Wis. 2d 364, 766 N.W.2d 542.

While mandamus is the appropriate means to compel public officers to perform duties arising out of their offices and due to be performed, "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." *In re State ex rel. S.M.O.*, 110 Wis. 2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982).

ARGUMENT

At the outset, the Respondents, Sheriff Micheck and the Iowa County Sheriff's Office, raised the issue of mootness with the circuit court. (R. 25 at 3.) Appellant Coogan has completed his sentence, and therefore, has been released from jail. (R. 32 at 4.) The circuit court noted this fact, but declined to rule on the issue of mootness, finding other grounds to deny Appellant Coogan's request for mandamus relief. (*Id.*) However, it remains clear that Appellant Coogan's action is moot, as he is no longer in the custody of the Iowa County Sheriff's Office or Sheriff Micheck, so he is unable to satisfy the third element of mandamus, which is substantial damages should relief not be granted. *In re State ex rel. S.M.O.*, 110 Wis. 2d at 449.

Notwithstanding the issue of mootness, Appellant Coogan argues that Sheriff Michek did not have any constitutional power or other statutory authority to restrict or deny him the exercise of Huber privileges other than those powers specifically set forth in Wis. Stat. § 303.08, and therefore, he argues that he is entitled to either mandamus relief or a declaration that

Sheriff Michek may only restrict or deny the exercise of Huber privileges as set forth in Wis. Stat. § 303.08.

In response to these arguments, the circuit court correctly ruled that (1) a 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 a sheriff's ability to deny or restrict the exercise of Huber privileges; (2) Wis. Stat. § 59.27(1) grants the sheriff statutory authority to restrict or deny the exercise of Huber privileges notwithstanding any restrictions on such authority imposed by Wis. Stat. § 303.08; 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 a county sheriff. (R. 32 at 4-7.)

It follows that Appellant Coogan's request for mandamus should be denied as a matter of law because he fails to satisfy the first two requirements for relief, as set forth above. First, Appellant Coogan fails to establish that he has a clear legal right to exercise Huber privileges in contravention of the custody status assigned under the objective inmate classification system used by Sheriff Michek. Second, Appellant Coogan fails to show that Sheriff

Michek has a plain and positive duty to allow him to exercise Huber privileges without deference to his objective inmate classification.

For these reasons and the reasons set forth below, this Court should affirm the decision of the Iowa County circuit court denying Appellant Coogan's motion for partial summary judgment, his alternative request for declaratory judgment, and granting Sheriff Michek's motion to dismiss the petition and writ.

I. Appellant Coogan's Action is Moot.

As noted above, while the primary focus in the circuit court was the legal rights and duties of the parties, Respondents Sheriff Micheck and the Iowa County Sheriff's Office also raised the issue of Appellant Coogan's failure to satisfy the third requirement for mandamus (substantial damages or injury should the relief not be granted) as he is no longer incarcerated. (R. 25 at 3; *see also In re State ex rel. S.M.O.*, 110 Wis. 2d at 449.) Respondents pointed out that Appellant Coogan's request for mandamus relief could be properly denied on this ground as well. (R. 25 at 3.) The circuit court took note of this, but did not base its decision on these grounds. (R. 32 at 4.) However, Appellant Coogan's action is moot, as he is no longer in the custody of the Iowa County Sheriff's Office or Sheriff Micheck, so he is

unable to satisfy the third element of mandamus. *In re State ex rel. S.M.O.*, 110 Wis. 2d at 449.

II. A Sheriff has the Constitutional and Statutory Power to Restrict or Deny the Exercise of Huber Privileges to Otherwise Eligible Inmates in Order to Comply with his Constitutional and Statutory Obligation to Maintain Custody and Control of the County Jail and the Prisoners Therein.

A sheriff has the constitutional and statutory authority and duty to maintain the custody and control of the prisoners in a county jail. Consistent with this duty, a sheriff has the constitutional and statutory power to restrict or deny the exercise of Huber privileges to otherwise eligible inmates. Appellant Coogan incorrectly contends the Sheriff only has statutory authority – not constitutional authority – insofar as Huber privileges are concerned and offers a constrained view of that statutory authority. Specifically, Appellant Coogan asserts the Sheriff has no inherent constitutional power to restrict or deny the exercise of Huber privileges to otherwise eligible inmates and must allow the exercise of Huber privileges granted by a court without regard to an inmate's classification status.

Appellant Coogan's legal theories and statutory and constitutional interpretations are strained and simply incorrect. This is evidenced by his reliance on obscure legislative history. In fact, the operation of the jail is the

primary duty of the sheriff that gives "character and distinction to the office" and thus is within the "constitutional prerogative" of the sheriff and is distinct from other mundane and commonplace managerial duties that are not constitutionally protected. *Kocken v. Wisconsin*, 2007 WI 72, ¶¶ 44, 75, 301 Wis. 2d 266, 732 N.W.2d 828. Further, a sheriff's statutory power and duty to do the same under Wis. Stat. § 59.27(1) supersedes any restrictions on a sheriff's authority to restrict or deny the exercise of Huber privileges contained within Wis. Stat. § 303.08. This result was mandated by the concept of separation of powers.

At the outset, Appellant Coogan does not argue that those duties which give "character and distinction to the office" of sheriff are not constitutionally protected duties. *Kocken.* 2007 WI 72, ¶¶ 44, 75. (App. Br. at 17 (citing *Heitkemper v. Wirsing*, 194 Wis. 2d 182, 191-92, 533 N.W.2d 770 (1995)). Rather, Appellant Coogan employs a strained application of this standard to reach an illogical conclusion. It follows that the circuit court rejected Appellant Coogan's "narrowly sliced up" view of a sheriff's

constitutional powers. (R. 32 at 5.) Instead, the circuit court recognized the constitutional grant of power to the sheriff is broad, not narrow. (*Id.*)

Yet, Appellant Coogan argues a sheriff does not have the inherent constitutional power to restrict or deny Huber privileges because Huber release did not exist under common law, as it was not enacted in Wisconsin until 1913. (App. Br. at 15.) Appellant Coogan goes on to make the inferential leap that because a treatise states "[a sheriff] may not lawfully permit the prisoner to leave the jail and return thereto at his pleasure," that it follows a sheriff has no authority to restrict or deny the exercise of Huber privileges. (App. Br. at 17 (citing Water H. Anderson et al., *A Treatise on the Law of Sheriffs, Coroners, and Constables* (1941)).) It is beyond illogical for Appellant Coogan to draw such a parallel. All that can be drawn from Appellant Coogan's citation to this treatise is that the sheriff cannot arbitrarily allow a prisoner to come and go "at his pleasure," which should go without saying. It certainly does not follow that a sheriff cannot restrict a prisoner's Huber privileges as part of his or her charge to provide for the care and custody of the jail.

Appellant Coogan's position is without merit and the authority upon which he relies ultimately refutes, rather than supports, his strained argument

that the sheriff lacks constitutional power to restrict or deny Huber privileges. For example, as the circuit court aptly pointed out, Appellant Coogan ultimately *concedes* the sheriff has the common law power *and duty* to provide for the care and custody of the jail and the prisoners therein. (App. Br. at 15 and R. 32 at 4 (citing *State ex. rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (1870)).) Simply put, a sheriff has charge of the prisoners and that gives him or her authority to supervise a prisoner's ability to exercise the "privilege" of the Huber program. (R. 32 at 5.)

Wis. Stat. § 59.27(1) codified this broad power, which provides for the sheriff to "take the charge and custody of the jail maintained by the county and the persons in the jail." In sum, the sheriff has charge of the prisoners, which gives him the authority to supervise their release under the Huber program or otherwise. The sheriff is under no duty to allow the exercise of Huber privileges granted by a sentencing court without regard for inmate custody classification status because the sheriff has both a constitutional and statutory *obligation* to maintain custody of the jail and its inmates.

Despite this broad constitutional and statutory grant of authority to provide for the care and custody of the jail and the prisoners therein,

Appellant Coogan contends Sheriff Michek has a duty to allow the exercise of Huber privileges granted by a court without regard to an inmate's classification status. Consideration of whether the sheriff has a "plain and positive" duty to Coogan to exercise the privilege of Huber granted by the sentencing court without regard for his inmate custody classification status necessitates a separation of powers analysis, under which it is apparent that the sheriff owes Appellant Coogan no such duty.

> This [separation of powers] doctrine, while not explicitly set forth in the Wisconsin Constitution, is implicit in the division of governmental powers among the judicial, legislative, and executive branches. The constitutional powers of each branch fall into two categories: exclusive and shared powers. No branch may intrude on the exclusive powers of another. Shared powers lie at the intersections of these core constitutional powers and are not confined to any one branch. The branches may exercise powers and are not confined to any one branch. The branches may exercise power within these intersections, but may not unduly burden or substantially interfere with another branch.

State v. Schell, 2003 WI App 78, ¶ 14, 261 Wis. 2d 841, 661 N.W.2d 503 (internal citations omitted). To conduct a separation of powers analysis, one must first identify the sources of authority for the judiciary and the sheriff. The circuit courts of Wisconsin are constitutional courts that are not dependent solely upon statute for their power; rather, their power is derived from the Wisconsin Constitution, which grants, "Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." *In re the Guardianship of*

Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981); Wisconsin Constitution, Art. VII. § 8.

The office of sheriff also is constitutionally created, but the sheriff's powers are not specifically delineated in the Constitution. Wisconsin Constitution, Art. VI. § 4; *see also Wisconsin Prof'l Police Ass'n ("WPPA") v. Dane Cty.*, 106 Wis. 2d 303, 309-10, 316 N.W.2d 656 (1982). Rather, it is case law that has defined those powers, rights, and duties of the office of sheriff, which are protected by the state constitution. *WPPA*, 106 Wis. 2d. at 310.

In 1870, the court "concluded that the framers of the constitution intended the office of sheriff to have 'those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted.'" *Kocken,* 2007 WI 72, ¶ 34 (quoting *Brunst*, 26 Wis. at 414). Included among those duties, "one of the most characteristic and well acknowledged was the custody of the common jail and of the

prisoners therein," and the court therefore held that the legislature could not transfer that function to another office. *Brunst*, 26 Wis. at 414.

This custodial authority has been further entrenched in legislation, as Wis. Stat. § 59.27, which directs that 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.

Since the *Brunst* decision, "[c]ase law and the opinions of the attorney general have continued to recognize that the operation of the jail is a primary duty of the office of sheriff that 'gave character and distinction to the office' at common law and thus is within the constitutional prerogative of the sheriff." *Kocken*, 2007 WI 72 at ¶ 44. This constitutionally protected, "immemorial and distinctive" duty of custody over prisoners is readily distinguishable from "mundane and commonplace, internal management and

administrative" duties of the sheriff that are not constitutionally protected (e.g., hiring and firing of food service personnel, *Kocken*, 2007 WI 72, ¶ 75, and appointment and dismissal of deputies, *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474 (1920)). In sum, determining the custody status of inmates is not a mundane duty — it goes to the heart of the sheriff's constitutional (and statutory) obligation to take charge and custody of the jail and its inmates.

In *Schell*, the Wisconsin Court of Appeals held that by precluding the sheriff from releasing an inmate on home monitoring as authorized by Wis. Stat § 302.425, the trial court had substantially interfered with the sheriff's authority under Wis. Stat. § 59.27(1) to manage the county jail. 2003 WI App 78, ¶ 16. The court further justified this holding through considerations of public policy:

> The decision to place a person on home monitoring is no doubt informed by the particular safety, budgetary and space constraints of each sheriffs office and county jail. The sheriff, perhaps more than any other person, is in the best position to undertake these analyses. The legislature has determined that the judiciary is best situated to determine whether and how to place a person on probation. It is not similarly well suited to oversee the various decisions attendant to the execution of a county jail term. The legislature has left county jail oversight to the sheriff, and the trial court's decision to prevent home monitoring when jail time is ordered as a probation condition interferes with those responsibilities.

Id. ¶ 19.

Similarly, while the legislature has determined the judiciary is best suited to determine eligibility to exercise Huber privileges under Wis. Stat. 303.08(2), the judiciary is not well suited to oversee the various decisions attendant to the execution of that privilege. Instead, the legislature has prescribed certain requirements for objective inmate classification by the sheriff and jail that are intended to provide for the protection of prisoners, staff, and the general public in the course of incarceration:

> **Wis. Stat. 302.36 Classification of prisoners.** 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 to 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 the 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. Admin. Code DOC § 350.21 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.

The Wisconsin Supreme Court recently reiterated its basic method for statutory interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 100. In sum, "[w]here the meaning of a statute is plain based on the language of the statute, analysis ends there." *State v. Reyes Fuerte,* 2017 WI 104, ¶ 26, 378 Wis. 2d 504, 904 N.W.2d 773 (citing *Kalal*, ¶ 46). Appellant Coogan provides a full-page cite to *Kalal*, but fails to follow its simple holding.

Rather, Appellant Coogan attempts to draw inferences from a belabored legislative history to suggest that this inmate classification system applies only "within the jail," but there is no such limitation in the clear statutory language. (App. Br. at 22.) To the contrary, in asking the Court to make this inferential leap, Petitioner improperly ignores the clear language of these classification provisions in Wis. Stat. § 302.36 and of the sheriff's duties in Wis. Stat. § 59.27, which direct use of an objective inmate classification system "to determine prisoner custody status" (*see* Wis. Admin. Code DOC § 350.21; *Kalal*, 2004 WI 58, ¶ 44, holding, "We assume that the legislature's intent is expressed in the statutory language...It is the enacted law, not the unenacted intent that is binding on the public.").

Furthermore, neither the Huber law as presently codified, nor Appellant Coogan's exhaustive analysis of the legislative history of that statute going back to 1913, do anything to change the constitutionally protected and "most characteristic and well acknowledged" duty of the sheriff to maintain custody of the jail and its inmates — a duty acknowledged at common law more than 40 years prior to enactment of even the earliest version of the Huber statute.

Appellant Coogan notes the jail inmate classification provisions make no mention of Huber or work release; however, neither does the Huber statute make mention of jail inmate classification. That does not mean the Huber statute and jail classification provisions are necessarily in conflict with one another; to the contrary, the statutes can be readily harmonized. Precluding an inmate from exercising Huber privileges based on an inmate's objective custody classification does not substantially interfere with the authority of the judicial branch to grant that privilege. To be sure, only the court may authorize Huber — if not so authorized, an inmate is otherwise restricted to ordinary confinement and is not eligible for outside employment. Wis. Stat. 303.08(2). Once again, this is consistent with Appellant Coogan's reference to the Anderson on Sheriffs treatise's statement that, "[the sheriff] may not

lawfully permit the prisoner to leave the jail and return thereto at his pleasure." (App. Br. at 16-17.)

However, as noted in *Skow v. Goodrich*, once the judiciary has exercised its sentencing power, "[t]he adversary process then terminates and the executive branch assumes the responsibility of directing 'the correctional and rehabilitative processes.'" 162 Wis. 2d 448, 451, 469 N.W.2d 888 (Ct. App. 1991). In other words, "once 'a defendant has been sentenced, the administrative process, vested in the executive branch, takes over.'" *Id.* That administrative process includes the sheriff's exercise of constitutional and statutory authority over the custody of jail inmates through the application of an objective inmate classification system that expressly requires him to "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." Wis. Admin. Code DOC § 350.21; *see also* Wis. Stat. § 302.36.

In sum, determining the custody status of inmates is not a mundane duty — it goes to the heart of the sheriff's constitutional and statutory obligation to take charge and custody of the jail and its inmates. Therefore,

this Court should affirm the decision of the Iowa County circuit court denying Appellant Coogan's motion for partial summary judgment, denying Appellant Coogan's alternative request for declaratory judgment, and granting Sheriff Michek's motion to dismiss the petition and writ.

III. A Sheriff's Power to Restrict or Deny the Exercise of Huber Privileges is Not Limited Solely to the Provisions Set Forth in Wis. Stat. § 303.08 and Conversely an Individual's Subjection to that Right, Restriction, or Denial of Huber Privileges is Not Limited to Being Only in Accordance with the Provisions of Wis. Stat. § 303.08 Such that Mandamus Relief Lies.

Sheriff Michek has no plain and positive duty to permit the exercise of Huber, as it is not a constitutionally protected legal right. Therefore, Appellant Coogan fails to meet the requirements for mandamus, which requires both a plain and positive duty and protected legal right. It follows that the circuit court properly held Appellant Coogan was not entitled to mandamus, summary judgment, or declaratory relief.

Appellant Coogan incorrectly contends he is entitled to mandamus relief, and therefore, summary judgment, as to Sheriff Michek's duty to restrict or deny Huber only in accordance with the provisions of Wis. Stat. § 303.08. Appellant Coogan argues Sheriff Michek cannot restrict the exercise of Huber privileges beyond the language of Wis. Stat. § 303.08(10), which permits the sheriff to refuse the exercise of Huber privileges "for not to

exceed 5 days for any breach of discipline or other violation of jail regulations." Therefore, Appellant Coogan contends Sheriff Micheck violated his plain duty in denying him the exercise of Huber privileges and that he has a clear legal right to insist on compliance with this duty, entitling him to mandamus relief. Alternatively, he contends he is nonetheless entitled to an order declaring Sheriff Michek may only restrict or deny Huber in accordance with the provisions in Wis. Stat. § 303.08.

Appellant Coogan conflates the first and second requirements for mandamus in his lengthy and irrelevant discussion of the history of the Huber statutes. In sum, it appears Appellant Coogan contends this history shows Sheriff Michek lacks the authority to restrict or revoke Huber privileges except as provided in Wis. Stat. § 303.08. Conversely, he argues a prisoner granted such privileges has a clear legal right to have those privileges denied or restricted only in accordance with Wis. Stat. § 303.08. For the reasons set forth below, Appellant Coogan's lengthy legislative analysis ultimately fails to satisfy either the first or second prongs for mandamus, namely a 1) clear legal right and 2) a plain and positive duty. *In re State ex rel. S.M.O.*, 110 Wis. 2d at 447.

At the outset, embedded in Appellant Coogan's examination of the legislative history of Huber laws, Coogan seemingly suggests the Huber privilege is a legal right or liberty interest. (App. Br. at 29 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).) Appellant Coogan fails to cite the threshold test established more recently by the United States Supreme Court in *Sandin v. Conner* for determining when the language of the state statutes, regulations, and orders creates a liberty interest. 515 U.S. 472 (1995). In *Sandin*, the Court recognized that while "States may under certain circumstances create liberty interests which are protected by the Due Process Clause...these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84 (internal citations omitted). Applying this standard, the Court held that disciplining a prisoner for thirty days in segregated confinement "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." *Id.* at 486.

In support of this conclusion, the Court further held that "prisoners do not shed all constitutional rights at the prison gate, [*Wolff v. McDonnell,* 418 U.S. 539, 555 (1974)], but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Sandin*, 515 U.S. at 485 (citing *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119, 125 (1977), quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). Ten years later, the Court reaffirmed the *Sandin* standard in *Wilkinson v. Austin*, holding that "[a]fter *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life." 545 U.S. 209, 223 (2005) (quoting *Sandin*, 515 U.S. at 483-84).

While Wisconsin courts have not directly addressed the applicability of *Sandin* in the context of Huber or work release privileges, this issue has been addressed in other jurisdictions. For example, in *Carter v. McCaleb*, a federal court held a county jail sentence authorizing release from jail to either work or seek work did not create a liberty interest in participating in the work

release program. 29 F.Supp.2d 423, 429 (W.D. Mich. 1998). In *Dominique v. Weld*, a federal appeals court held removal of a prison inmate from a work release program and transfer to a more restrictive medium security facility did not affect a liberty interest, in part because it did not affect the length of his sentence and in part because "his transfer to a more secure facility subjected him to conditions no different than those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." 73 F.3d 1156, 1160 (1st Cir. 1996). Stated another way, confinement within the four walls of the jail was an "ordinary incident of prison life," not an "atypical" deprivation that would create a liberty interest under *Sandin*. *Id.*

Beyond cases holding there is no constitutional liberty interest in work release, the 5th Circuit also has held there is no liberty interest at stake in inmate custodial classification which results in denial of outdoor and out-of-cell exercises, noting the court had "repeatedly affirmed that '[p]rison officials should be accorded the widest possible deference' in classifying prisoners' custodial status as necessary 'to maintain security and preserve internal order.'" *Hernandez v. Velasquez*, 522 F.3d 556, 562 (5th Cir. 2008). A Mississippi state appellate court likewise has held there is no liberty

interest at stake in the denial of custody reclassification that could have allowed an inmate to return to a Community Work Center. *McDonald v. Jones*, 816 So. 2d 448, ¶ 8 (Miss. Ct. App. 2002).

Based on the foregoing reasoning, Huber is properly viewed as a statutorily created privilege, and the withholding of that privilege under the objective inmate classification system employed by the sheriff is not an "atypical" hardship warranting constitutional protection under the *Sandin* standard. As the circuit court aptly noted, "being held in jail when one was sentenced to serve jail time is not an atypical hardship." (R. 32 at 7.) Appellant Coogan has no clear legal right to insist on compliance with this duty. As such, Appellant Coogan fails to satisfy the first prong of mandamus.

Appellant Coogan also contends this history shows the sheriff lacks the authority to restrict or revoke Huber privileges except as provided in Wis. Stat. § 303.08(10). (App. Br. at 33.) However, this specific statutory limitation presupposes the inmate qualifies for the exercise of the Huber privilege under the objective classification system required of the sheriff in fulfilling his duty to determine an inmate's custody status, and that the restriction is limited in scope to apply only to disciplinary scenarios. Nothing in Wis. Stat. § 303.08 otherwise precludes the sheriff from independently

employing the statutorily required objective jail classification system to disallow the exercise of Huber privileges otherwise authorized by the judiciary.

Stated another way, in keeping with *Skow,* once the judiciary has sentenced a defendant and authorized Huber privileges under Wis. Stat. § 303.08, the inmate then becomes subject to the sheriff's objective inmate classification system for purposes of determining whether his prisoner custody status will allow the exercise of that privilege. 162 Wis. 2d at 451.

While the court determines eligibility for Huber at the time of sentencing under Wis. Stat. § 303.08(2), the sheriff is best situated to exercise his inherent constitutional and explicit statutory authority under Wis. Stat. § 59.27(1), Wis. Stat. § 302.36, and Wis. Admin. Code DOC § 350.21 to determine whether and how that privilege is to be exercised based on an inmate's objectively determined custody classification. This make sense from a practical perspective. Under Appellant Coogan's view of the law, a prisoner would continue Huber privileges if initially granted by a sentencing court *no matter what* occurred after that prisoner was behind the four walls of the jail. Certainly, it should be within the sheriff's discretion to determine

whether Huber privileges should continue based on the specific circumstances within the four walls of the jail.

Mandamus will not lie when the official act in question requires the exercise of judgment and discretion. *Beres v. New Berlin*, 34 Wis. 2d 229, 231-32, 148 N.W.2d 653 (1967). The circuit court reached the correct decision when it ruled Appellant 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." (R. 32 at 4.) Because the sheriff has no plain and positive duty under this framework to permit the exercise of Huber, which is not a constitutionally protected legal right, Appellant Coogan's motion for summary judgment was properly denied by the circuit court for failure to meet the requirements for mandamus. Likewise, the circuit court properly held that Appellant Coogan was not otherwise entitled to declaratory relief.

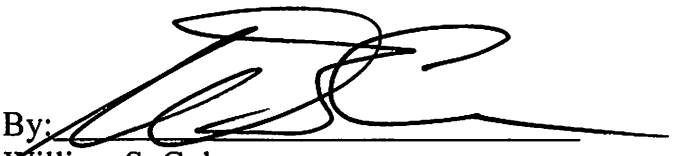
CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's decision denying summary judgment to Appellant Coogan, denying his alternative request for declaratory judgment, and its dismissal of the case.

Dated this 27th day of September, 2019.

AXLEY BRYNELSON, LLP

Attorneys for Respondent-Respondent
Steven P. Michek, Sheriff and Iowa
County Sheriff's Office



By:
William S. Cole
State Bar No. 1011623

ADDRESS:

William S. Cole
State Bar No. 1011623
2 E. Mifflin St., Ste. 200
Madison, WI 53703
(608) 283-6766
wcole@axley.com

FORM AND LENGTH CERTIFICATION

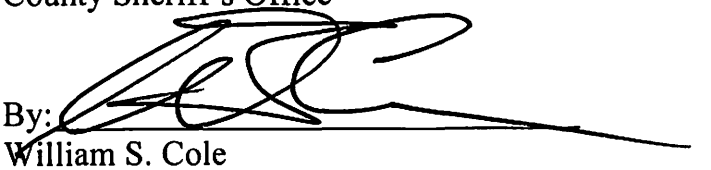
I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional font.

The length of this brief is 5,659 words.

Dated this 27th day of September, 2019.

AXLEY BRYNELSON, LLP

Attorneys for Respondent-Respondent
Steven P. Michek, Sheriff and Iowa County Sheriff's Office



By:
William S. Cole
State Bar No. 1011623

ADDRESS:

William S. Cole
State Bar No. 1011623
2 E. Mifflin St., Ste. 200
Madison, WI 53703
(608) 283-6766
wcole@axley.com

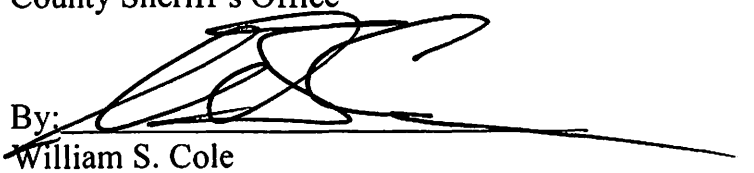
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated this 27th day of September, 2019.

AXLEY BRYNELSON, LLP

Attorneys for Respondent-Respondent
Steven P. Michek, Sheriff and Iowa County Sheriff's Office

By: 
William S. Cole
State Bar No. 1011623

ADDRESS:

William S. Cole
State Bar No. 1011623
2 E. Mifflin St., Ste. 200
Madison, WI 53703
(608) 283-6766
wcole@axley.com

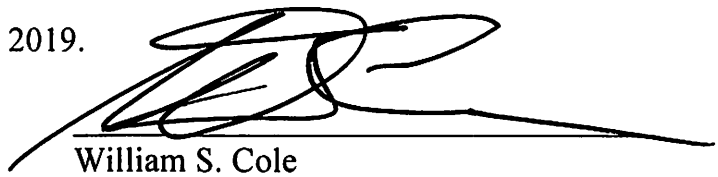
CERTIFICATION OF FILING AND SERVICE

I certify that on September 27, 2019, this brief was hand delivered to the Clerk of the Court of Appeals.

I further certify that on September 27, 2019, three (3) true and correct copies of this brief were placed in the U.S. mail to the following:

Atty. Jeremiah Meyer-O'Day
Martinez & Ruby LLP
144 4th Ave. # 2
Baraboo, WI 53913-2180

Dated: September 27, 2019.



William S. Cole