STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP1140

STATE OF WISCONSIN ex rel.
WISCONSIN DEPARTMENT OF CORRECTIONS,
DIVISION OF COMMUNITY CORRECTIONS,

Petitioner-Respondent-Petitioner,

v.

BRIAN HAYES, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,

Respondent-Appellant,

KEYO SELLERS,

Intervenor-Co-Appellant.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. McADAMS, PRESIDING

PETITION FOR REVIEW

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INTRODUCTION

This certiorari case involves a challenge by the Wisconsin Department of Corrections (DOC) to a decision made by Brian Hayes, Administrator of the Division of Hearings and Appeals (DHA). DHA reversed an administrative law judge's (ALJ) revocation of Keyo Sellers's probation after he was criminally charged with sexually assaulting a stranger, K.A.B., in her home and later trespassed on her property.

This Court's review is warranted to clarify the type of evidence admissible to support a probation revocation based on allegations of sexual assault and trespass. K.A.B. did not testify at the revocation hearing to avoid retraumatizing her and because she could not readily identify her attacker, but DOC presented evidence including the police report; the victim's report to DOC; DNA evidence and testimony supporting it; video evidence of Sellers on the victim's porch days after the assault, peeping into her home; the probation agent's testimony that the man on the porch was Sellers; and the fact of the victim's report to police, submission to a SANE examination, and immediate purchase of surveillance equipment after the attack.

The ALJ concluded that DOC had proved the violations without relying exclusively on out-of-court statements. But on appeal, DHA concluded that the statements were necessary to prove the "account of events." Although Sellers had not objected to their use or the victim's absence from the hearing, DHA concluded sua sponte that the use of those statements would violate Sellers's due process rights because they were hearsay. It then held that DOC failed to prove the probation violations. On certiorari review, the circuit court reversed DHA; but on appeal, the court of appeals reversed the circuit court in a per curiam decision. Their disagreement reflects three key questions this Court should answer.

In reversing the revocation decision on appeal, DHA misunderstood the law in two ways. First, DHA failed to consider whether all the non-hearsay evidence in the record supported a finding that Sellers committed the probation violations of sexual assault and trespass, even if it believed it could not consider the victim's out-of-court statements. Second, DHA misunderstood what due process requires in a revocation setting and imposed a rule even stricter than in a criminal proceeding. The U.S. Supreme Court held in *Morrissey v. Brewer*, 408 U.S. 471, 487, 489–90 (1972), that while an offender has a conditional right to confront the victim, the revocation process should be flexible enough to consider materials that would not be admissible in an adversarial criminal trial.

A third issue is presented by the court of appeals's reversal of the circuit court: in deferring to DHA's "findings," the court of appeals did not properly apply the standard of review in certiorari actions where the agency makes an error of law. The court of appeals ignored DHA's legal errors and affirmed on the theory that it could have reached the decision it did had DHA reviewed the evidence in the record. But a reviewing court cannot ignore an agency's legal errors under the concept of "substantial evidence": certiorari review requires the court to consider whether the agency's decision conformed to law.

ISSUES PRESENTED

1. Even if a sexual assault victim's out-of-court statements are found inadmissible, must the agency in a revocation proceeding still consider whether other unobjected-to, non-hearsay evidence supports a finding of the probation violations?

DHA's decision did not consider the remaining evidence presented by DOC, none of which was objected to by Sellers.

The circuit court granted DOC's request for a writ of certiorari and reversed DHA's decision.

The court of appeals reversed the circuit court's final order.

2. Does a probationer's conditional right to confront the victim under *Morrissey v. Brewer*, 408 U.S. 471, 487, 489–90 (1972), allow an agency to consider out-of-court statements by a sexual assault victim?

The hearing examiner did not address this issue because she believed there was sufficient other evidence that she did not need to rely on those statements. DHA disagreed, treating the statements as needed but inadmissible purely because they were hearsay.

The circuit court granted DOC's request for a writ of certiorari and reversed DHA's decision.

The court of appeals reversed the circuit court's final order.

3. Where an agency commits an error of law about its ability to consider certain evidence and thus fails to consider it, does a reviewing court properly ignore that error and simply consider the remaining evidence under certiorari review?

DHA did not address this issue.

The circuit court granted DOC's request for a writ of certiorari and reversed DHA's decision.

The court of appeals reversed the circuit court's final order.

CRITERIA FOR GRANTING REVIEW

This case meets the criteria for granting review in Wis. Stat. § (Rule) 809.62(1r)(a), (c)2., and 3.

First, this Court's review is warranted to develop, clarify, and harmonize the evidentiary standard in Wisconsin for a finding of sexual assault or trespass in revocation proceedings: whether, even if the agency determines that the victim's out-of-court statement cannot be considered, it must consider if other, non-hearsay evidence would support the findings of violation.

Second, the case presents a real and important question about federal constitutional law: under *Morrissey*, whether and in what circumstances out-of-court statements by sexual assault victims are admissible in a probation-revocation proceeding.

Third, this Court's review is warranted to develop, clarify, and harmonize the law regarding how reviewing courts should conduct certiorari review when the agency's probation-revocation decision makes an error of law about the evidence it considers.

Given the number of probation revocation appeals each year,[1] this Court's decision will have statewide impact. It will affect when DOC is able to avoid potentially retraumatizing sexual assault victims by having them testify, especially in situations like this one where the victim cannot identify her attacker.

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[1] In 2023, DHA processed and closed 3,027 cases by hearing. DOA, Corrections Appeals - 2023, https://doa.wi.gov/Pages/LicensesHearings/CorApp.aspx (last visited June 12, 2024). 945 of those cases were appealed to the DHA administrator. *Id.*

STATEMENT OF THE CASE

I. Factual background

A. Sellers was convicted of delivering narcotics as party to a crime, received an imposed-and-stayed sentence, and was placed on probation for three years.

On February 18, 2019, Sellers was convicted of one count of delivery of schedule I or II narcotics as party to a crime in Milwaukee County Case No. 17-CF-4997. (R. 7:51; 8:1.) The circuit court imposed and stayed a sentence of 30 months of initial confinement followed by 30 months of extended supervision. (R. 7:51.) Sellers was placed on probation for three years. (R. 7:51.) His rules of supervision required him to "[a]void all conduct which is in violation of federal or state statute . . . or which is not in the best interest of the public welfare or [his] rehabilitation." (R. 8:15.)

B. Police received a report from K.A.B. of a home invasion, sexual assault, and theft; security cameras K.A.B. installed immediately after captured the same man trespassing on her porch, peeping into her window.

On September 15, 2021, police received a report of a stranger home invasion and sexual assault. The victim, K.A.B., reported that a man entered her home without her consent. (R. 7:16, 33–34 (K.A.B.'s Jan. 25, 2022, statement to DOC), 40 (probable cause statement and judicial determination).) While there, he sexually assaulted her and took $30 without her consent. (R. 7:16, 34–35, 40.)

K.A.B.'s January 25, 2022, statement to DOC provided a detailed account of the assault (R. 7:33–37), and was consistent with the narrative account of the assault and trespass stated in a probable cause statement and judicial determination signed by a circuit court commissioner on

December 30, 2021, finding probable cause to hold Sellers in jail custody (R. 7:40–42).

According to K.A.B.'s account, a man entered her house when she was asleep on the couch in her living room. (R. 7:33.) The man appeared suddenly and walked into the living room carrying a large knife. (R. 7:34.) He smelled strongly of cigarettes and alcohol and wore a red bandana that covered his nose and mouth. (R. 7:34.)

The man ordered K.A.B. upstairs, where he ordered her to remove her clothes. (R. 7:34.) He ordered her to lie on her stomach and then put his fingers inside her vagina, forcing them in and out, telling her he had been watching her for a year and going inside her house when she walked her dog. (R. 7:34.) He appeared to use his phone as a flashlight, told her to look into his phone's camera, and appeared to take a photo. (R. 7:35.)

After he was finished assaulting K.A.B., he picked up the knife and asked K.A.B. if she had any money. (R. 7:35.) She gave him $30 from her pants pocket. (R. 7:35.) He told her to wait until she heard him leave before calling the police. (R. 7:35.) K.A.B. went downstairs minutes later and called 911. (R. 7:35–36.)

Police arrived, interviewed her, and then took her to the hospital. (R. 7:36; 8:90.) K.A.B. consented to a sexual-assault (SANE) examination, including samples from her vaginal area. (R. 7:46; 8:90, 110.)

Shortly after the assault, K.A.B. arranged to have a security system installed with cameras at every entrance to her home and glass-break sensors. (R. 7:36; 8:90.) Only a few days after the installation, during the early morning of September 22, that camera took two different videos, four minutes apart, of a man standing on K.A.B.'s porch, peeping into her window. (R. 7:36, 1 (noting that DHA filed a CD labeled Exhibit #6 in the circuit court containing

video files named "1246nCass_Video1.mp4" and "1246nCass_Video2.mp4"); R. 65–67 (granting a motion to supplement the record with the disc).) K.A.B. believed that the man in the videos was the same man who sexually assaulted her based upon his height, weight, build, approximate age, receding hairline, prominent forehead, and cigarette tucked behind his ear. (R. 7:37.)

C. Sellers was charged with second-degree sexual assault of K.A.B. and burglary and is awaiting trial after several delays.

On December 29, 2021, Sellers turned himself into custody at the Milwaukee Police Department. (R. 7:38–39.) Pursuant to a warrant, buccal swabs were taken from him for analysis at the Wisconsin State Crime Laboratories. (R. 7:43.) DNA material found on K.A.B.'s pubic area after her sexual-assault examination was consistent with Sellers's profile. (R. 7:48; 8:110, 114.)

On January 12, 2022, Sellers was charged in Milwaukee County Case No. 22-CF-0136 for his actions at K.A.B.'s residence with: (1) second-degree sexual assault/use of force, a class C felony, and (2) burglary-room within a building, etc., a class F felony. (R. 7:44–45.)

Per CCAP, Sellers's trial is set for August 5, 2024. It has been delayed several times. It was set for May 9, September 6, and October 24, 2022; April 3, July 24, and November 6, 2023; and April 1, 2024, before its current date of August 5. Per CCAP, on October 24, 2022, nine law enforcement officers who would testify were present in court. But the state could not proceed because of a trial that day in another court. On July 24, 2023, the court could not proceed due to a trial commencing that day in an unrelated case in the same branch. The same thing happened on November 6, 2023. On April 1, 2024, defense counsel advised the court that Sellers was hospitalized, and the trial was again adjourned.

II. Procedural history of the revocation

A. DOC initiated revocation proceedings based upon Sellers's assaulting K.A.B., taking her money, trespassing at her home, and lying to his probation agent.

In March 2022, DOC initiated revocation proceedings. (R. 7:16–17.) DOC alleged that Sellers violated his rules of supervision by (1) entering K.A.B.'s residence without her consent on September 15, 2021; (2) shoving his fingers into her vagina without her consent; (3) taking $30 from her without her consent; (4) trespassing at her home on September 22, 2021; and (5) providing false information to his agent on February 4, 2022. (R. 7:16.) Sellers contested the first four allegations and stipulated to the fifth. (R. 8:80–81.)

B. The ALJ heard testimony and received evidence and issued a decision revoking Sellers's probation.

On March 29 and May 4, 2022, Sellers appeared with counsel before ALJ Martha Carlson at a revocation hearing. (R. 8:77, 124.) DOC appeared by probation agent Geraldine Kellen. (R. 8:77, 124.)

1. DOC presented witness testimony, documents, videos, and audio files to prove Sellers's rules violations.

In support of alleged rules violations 1 through 4, DOC presented the testimony of Michelle Burns, an analyst with the Wisconsin State Crime Laboratories who analyzed K.A.B.'s sexual assault kit and Sellers's buccal swabs; Agent Kellen; and Officer Michael Walker, who is assigned to the Sensitive Crimes Division at the Milwaukee Police Department and was involved in investigating K.A.B.'s assault and the trespass on her porch. (R. 8:86–137.)

Analyst Burns testified regarding the analysis she performed on K.A.B.'s sexual assault kit and Sellers's buccal swab. (R. 8:104–21.) She prepared a DNA report. (R. 8:105; 7:46–50 (report).) She testified that, based upon Y-STR DNA analysis she completed, a male DNA profile was developed from "the non-sperm fraction of the mons pubis swabs collected from the kit from [K.A.B.]." (R. 8:110.) "[T]he data that was returned was consistent with Mr. Sellers' profile." (R. 8:110.) On cross-examination, Analyst Burns confirmed that the "profile that [she] got as a result of the STR testing is consistent with Keyo Sellers." (R. 8:114.)

Analyst Burns explained that a profile match on a Y-STR DNA analysis would not necessarily exclude male individuals from the same genetic background, such as a father, son, full siblings, or even half siblings, if they share a father. (R. 8:110–11.) They would share the same Y-STR DNA profile. (R. 8:111.) Additionally, other unrelated males could share the same profile. Specifically, Analyst Burns testified that, as a "statistical estimate," "the DNA that [she] found that matches Mr. Sellers could also match one in every 278 African Americans." (R. 8:116.) Based upon census data, Sellers's counsel asked the ALJ to take judicial notice of the fact that there would be 289 African Americans in Milwaukee also who would match Sellers's DNA profile. (R. 8:116–17, 55 (data Sellers's counsel relied upon).)

Agent Kellen testified that she had supervised Sellers since October 2019. (R. 8:128.) She authored the revocation summary. (R. 8:128.) She viewed the surveillance videos from K.A.B.'s ADT security system and was "99%" certain that "it was Mr. Sellers [on the videos] based on his appearance, based on his walk, and based on the fact that [she] supervised him, you know, for almost 18 months." (R. 8:129.) Agent Kellen met with K.A.B. in person, took a written statement from her, and spoke to her a few times after that on the phone. (R. 8:130.)

Officer Walker investigated a porch-trespass complaint at K.A.B.'s residence one week after the assault. (R. 8:90.) He testified that, the day after the assault, K.A.B. had ADT security cameras installed around her house. (R. 8:90.) On September 22, 2021, K.A.B. reported to police that an unknown black male was prowling on her front porch. (R. 8:90–91.) Patrol officers obtained video footage from the security cameras and gave it to Officer Walker. (R. 8:91.) He spoke to K.A.B. and then gave the video footage to the Greenfield Police Department to run through facial-recognition software. (R. 8:91.) The software generated a report (that is not in the record), and three of Sellers's Milwaukee County Jail booking photos found in the software's database matched at 98.2%, 92.7%, and 85.5%, respectively, to video-still images from the security-camera footage of the man on K.A.B.'s porch. (R. 8:91–92.)

Officer Walker testified that he or his colleague showed the video-still images to K.A.B., and she believed that the man in the images was her assailant based upon their similar stature, height and weight, his walk, receding hairline, and the fact that the man in the video appeared to be unzipping his pants, which is consistent with what the assailant told K.A.B. about being outside her house masturbating. (R. 8:92–93.) Two of Officer Walker's colleagues at the police department interviewed Sellers's ex-wife, Jacquelyn Rule, and showed her the video stills. (R. 8:93–94.) Ms. Rule identified Sellers in the stills. (R. 8:94.) Officer Walker testified that K.A.B. was shown two photo lineups that included photos of Sellers in them, but K.A.B. did not identify Sellers as her assailant from the photos. (R. 8:99.)

Officer Walker testified also about the investigation his colleagues did. He testified that Detective Ka Yeng Kue interviewed K.A.B. the night she was assaulted. (R. 8:87.) Officer Walker testified that K.A.B. reported to police that around 2:30 a.m. on September 15, 2021, she was sexually

assaulted by a man who broke into her home, took $30 from her, and then fled the scene. (R. 8:88.) K.A.B. phoned the police, who arrived shortly thereafter. (R. 8:88–89.) She described the assailant as a black male, late thirties or early forties, receding hairline, 180 to 200 pounds, smelling strongly of cigarettes and alcohol, wearing a white tank top, black pants, and with a red handkerchief covering the lower half of his face. (R. 8:89.)

K.A.B. did not testify at the hearing. Agent Kellen testified that DOC did not subpoena her to testify because "she told the police and she's told [Agent Kellen] she can't 100% ID her assailant," so Agent Kellen "didn't feel it was necessary to have her come in and provide testimony and go through the trauma of her assault to only say that she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (R. 8:130.) Instead of testifying, K.A.B.'s January 25, 2022, written statement to Agent Kellen was part of the record. (R. 7:33–37; 8:80 (the statement is part of revocation-hearing Ex. 1, DOC's revocation packet).) In the statement, K.A.B. recounted the events of September 15, 21, and 22, 2021. (R. 7:33–37.)

Sellers provided statements to DOC on January 12 and March 4, 2022, that are in the record. (R. 7:28–32; 8:80.) He denied ever being on K.A.B.'s property, stated that he was not the person in the security-camera video from K.A.B.'s porch, and denied sexually assaulting anyone. (R. 7:31.) He also stated that "[t]he police will not find any DNA of mine at this crime scene." (R. 7:31.)

Lastly, DOC filed the security-camera video from K.A.B.'s porch showing Sellers trespassing and audio files of calls that Sellers made to his girlfriend while he was in jail custody on a probation hold. (R. 8:58 ("Exhibit 6 from the revocation hearing is a DVD that contains six audio or video files."); R. 7:1; 65–67 (granting a motion to supplement the record with the disc DOC filed in the revocation proceedings).)

2. The ALJ revoked Sellers's probation based upon the five rules violations that she found had occurred.

On May 9, 2022, ALJ Carlson issued a decision revoking Sellers's probation in Milwaukee County Case No. 17-CF-4997. (R. 8:61–66, App. 157–62.)

ALJ Carlson relied upon non-hearsay evidence to find the rules-of-supervision violations. (R. 8:64–65, App. 160–61.) She first explained that "K.A.B. did not provide testimony at the final revocation hearing as the Department did not subpoena her." (R. 8:64, App. 160.) She noted that "[a]lthough hearsay is admissible in a revocation proceeding, that evidence may not form the basis for a revocation decision unless it bears some substantial indicia of reliability." (R. 8:64, App. 160.) She explained that "[t]he submitted crime laboratory report is not hearsay, as Analyst Burns provided testimony at the final revocation hearing." (R. 8:65, App. 161.)

ALJ Carlson then held that "[t]he credible testimony of Analyst Burns confirms that a DNA profile consistent with Mr. Sellers was recovered from K.A.B. There is no credible explanation for why Mr. Sellers' DNA would be on K.A.B. but for the assault." (R. 8:65, App. 161.) She also found that "Mr. Sellers can be seen on surveillance video trespassing onto K.A.B.'s porch and looking into her windows without permission on a later date after the sexual assault occurred. K.A.B. reported that she believed the individual seen on the surveillance video was the same individual who assaulted her based on his physical appearance and mannerisms." (R. 8:65, App. 161.) ALJ Carlson concluded that "allegations 1 – 4 have been established by a preponderance of the evidence." (R. 8:65, App. 161.) Based upon Sellers's stipulation, ALJ Carlson also found he committed rule violation 5. (R. 8:65, App. 161.) ALJ Carlson determined that revocation was appropriate under *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 217 N.W.2d 641 (1974). (R. 8:65, App. 161.)

C. Sellers appealed the revocation, and DHA reversed because K.A.B. did not testify.

Sellers appealed ALJ Carlson's decision to DHA. (R. 8:69–71.) On June 17, 2022, DHA issued a decision reversing ALJ Carlson's revocation decision. (R. 8:72–74, App. 154–56.)

DHA disagreed that K.A.B.'s out-of-court statements were unnecessary to finding that the violations had occurred. DHA concluded that the only "non-hearsay account of events" was offered by Sellers, who asserted he had never been to K.A.B.'s home. (R. 8:73, App. 155.) Sellers's account was not presented through testimony either, but DHA treated his statements as admissible non-hearsay admissions by a party opponent in litigation. (R. 8:73, App. 155.)

DHA concluded that none of K.A.B.'s hearsay statements were admissible under the rules of evidence. (R. 8:72, App. 154.) DHA did not consider whether the out-of-court statements satisfied the residual exception to the hearsay rule or whether other, non-hearsay statement supported the rule violations. (R. 8:72–74, App. 154–56.) It concluded that rule violations 1 through 4 "were not proven," and the ALJ's decision was reversed. (R. 8:73, App. 155.)

DHA concluded that revocation and confinement were not necessary under *Plotkin* in light of Sellers's stipulated rule violation 5. (R. 8:74, App. 156.)

D. DOC sought judicial review: the circuit court granted DOC's request for certiorari, reversed DHA's decision, and stayed its final order pending appeal.

On August 1, 2023, DOC filed a summons and complaint requesting that the circuit court issue a writ of certiorari and reverse DHA's decision. (R. 2.) Sellers

intervened in the case and was appointed counsel. (R. 14; 22; 23.) After DHA answered the complaint (R. 24), the parties briefed the merits (R. 25; 29; 30; 31).

On May 1, 2023, the circuit court entered a written decision granting DOC's request for a writ of certiorari and reversing DHA's decision. (R. 36:42, App. 152.) The court concluded that DHA's decision was "based on an incorrect view of the law," failing the second prong of the applicable standard for certiorari. (R. 36:39, App. 149.) It concluded that DHA's decision also failed the third and fourth prongs of the test. (R. 36:40, App. 150.)

First, the court explained that DHA's decision was "legally flawed in that it seems to require K.A.B. to testify." (R. 36:25, App. 135.) Consent was part of whether DOC established the sexual assault and trespass rule violations, and the court held that "[n]on-consent can be proven in more than one way and it can be proven circumstantially based on the totality of the evidence," which "is what happened here." (R. 36:25, App. 135.) The court pointed to the criminal jury instructions for second-degree sexual assault and circumstantial evidence in support of its conclusions about the validity of the use of circumstantial proof of non-consent in Sellers's case. (R. 36:23–25, App. 133–35.)

Second, the court held that "there was substantial additional evidence before the ALJ to support a circumstantial finding of non-consent and identification [of Sellers]." (R. 36:25–26, App. 135–36.) The court relied upon a summation of facts in DOC's opening brief to explain the reasons why the evidence allows a finding of non-consent. (R. 36:26–28, App. 136–38.) The summation focused on the testimony from Agent Kellen, Analyst Burns, and Officer Walker, which established the rules-of-supervision violations. (R. 36:26–28, App. 136–38.)

Third, the court held that "[a]n ALJ can permissibly rely on hearsay and non-hearsay" (R. 36:28, App. 138), and "there were reasons supporting 'good cause'" for K.A.B. not testifying (R. 36:34 (citation omitted), App. 144). Specifically, the court explained that K.A.B. "could not identify the assailant because the assailant wore a mask when he sexually assaulted [her]." (R. 36:34, App. 144.) "It would have been a useless gesture to call her as a witness **not to identify** Mr. Sellers." (R. 36:34, App. 144.) In other words, confrontation of K.A.B. at cross-examination would have been "futile, and a waste of time." (R. 36:34, App. 144.) The court also explained that it was "a reasonable decision" to not have K.A.B. "relive her victimization" under the circumstances. (R. 36:34, App. 144.) The court found that the ALJ gave "clear" reasoning for her decision about K.A.B. not testifying, and "simply chose to rely on the DNA evidence." (R. 36:35, 36, App. 145, 146.) While the ALJ did not expressly make a "good cause" finding, the reasoning to find "good cause" for K.A.B. not testifying "is found in the record." (R. 36:36, App. 146.) Ultimately, "[a] revocation hearing is clearly not a criminal trial, and a requirement was imposed here [by DHA] that does not exist even at a criminal trial where the burden of proof is much higher." (R. 36:36–37, App. 146–47.)

DHA and Sellers filed motions requesting that the circuit court stay its decision pending appeal, and DOC filed a brief in opposition. (R. 40–43; 45.) The court held a motion hearing and entered an order granting a stay of its final order pending appeal. (R. 39; 46.)

On May 18, 2023, the circuit court entered a final order granting DOC's request for a writ of certiorari and reversing DHA's decision. (R. 47.)

DHA and Sellers appealed. (R. 50; 54.)

E. The court of appeals reversed the circuit court's final order.

The court of appeals reversed the circuit court in a per curiam decision. *State ex rel. Wis. Dep't of Corrs., Div. of Cmty. Corrs. v. Hayes*, No. 2023AP1140, 2024 WL 2146952 (Wis. Ct. App. May 14, 2024) (unpublished); (App. 101).

After describing the evidence from the revocation hearing and the procedural history, the court addressed the certiorari standard of review, which "is limited to" four questions: "(1) whether DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether DHA's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; (4) and whether the evidence was such that DHA might reasonably make the decision in question." *Hayes*, 2024 WL 2146952, ¶ 13 (quoting *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 10, 250 Wis. 2d 214, 640 N.W.2d 527); (App. 106).

The court then addressed K.A.B.'s not testifying at the revocation hearing. *See Hayes*, 2024 WL 2146952, ¶¶ 14–16; (App. 106–07). It observed that "a defendant has a conditional Fourteenth Amendment right to confront adverse witnesses" in a revocation case, and that a hearing officer must find "good cause" before denying the right to confront. *Hayes*, 2024 WL 2146952, ¶ 14; (App. 106). The court found that DHA applied the two available tests for "good cause" and concluded that DOC failed to satisfy either one. *Hayes*, 2024 WL 2146952, ¶ 15; (App. 106–07).

The court next considered whether, regardless of whether the victim's out-of-court statements could be considered, revocation non-hearsay evidence should have been considered and supported a finding of the rule violations. *Hayes*, 2024 WL 2146952, ¶ 15; (App. 107).

The court did not answer whether DHA had an obligation to review that evidence. Instead, it stated that a court "do[es] not review the ALJ's decision; instead [it] review[s] DHA's decision not to revoke Sellers's probation, and [it] defer[s] to DHA's determinations." *Hayes*, 2024 WL 2146952, ¶ 16; (App. 107). In a footnote, the court rejected DOC's argument that Sellers forfeited any confrontation argument on the theory that DHA could raise the issue sua sponte. *Hayes*, 2024 WL 2146952, ¶ 15 n.4; (App. 107). The court held that "[i]f substantial evidence exists supporting DHA's decision, it must be affirmed, even where the evidence supports a contrary conclusion." *Hayes*, 2024 WL 2146952, ¶ 17; (App. 107).

The court went on to consider on its own evidence DHA had not even considered—the DNA evidence and security-camera footage—and concluded that it "was not unreasonable, based on the evidence in the record, to conclude that K.A.B.'s testimony was necessary for DOC to prove all the elements of the alleged probation violations (e.g., non-consent, and that the person on the porch was also the person who sexually assaulted K.A.B.)." *Hayes*, 2024 WL 2146952, ¶ 19; (App. 108).

The court ultimately "defer[red] to the conclusion reached by DHA." *Hayes*, 2024 WL 2146952, ¶ 20; (App. 109). It determined that "DHA's findings on the evidence are reasonable, and as such, they are conclusive." *Hayes*, 2024 WL 2146952, ¶ 21; (App. 109).

ARGUMENT

I. This Court's review is warranted to develop, clarify, and harmonize the law about whether an agency must consider other probative, non-hearsay evidence even if it determines the sexual assault victim's out-of-court statements cannot be considered.

Once it decided that K.A.B.'s out-of-court statements could not be considered, DHA failed to consider whether other evidence supported finding the rule violations. That approach was legally incorrect and promotes a rule that victims must testify, risking re-traumatization, even when that testimony would have little value and can be replaced by other evidence.

A. The evidentiary burden for revocation is preponderance of the evidence, a standard lower than in a criminal case.

At a revocation hearing, DOC has the burden of proving a violation of the rules of supervision by a preponderance of the evidence. Wis. Admin. Code HA § 2.05(6)(f); *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶ 17, 239 Wis. 2d 443, 620 N.W.2d 414. Notably, there is no acknowledgement of DOC's preponderance-of-the-evidence burden in the court of appeals's decision.

Hearsay is not disallowed at a revocation hearing. The ALJ "may accept hearsay evidence," and "[t]he rules of evidence other than ch. 905, Stats., with respect to privileges do not apply except that unduly repetitious or irrelevant questions may be excluded." Wis. Admin. Code HA § 2.05(6)(d), (e).

B. The agency must consider all the evidence presented that supports DOC's revocation.

An agency fails the "substantial evidence" test when it ignores key evidence. That is because "reasonable

minds could [not] arrive at the same conclusion [that DHA] reached" without similarly—and erroneously—ignoring the key non-hearsay evidence. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). A decision that ignores key evidence fails certiorari review because it is "unreasonable and represent[s] [DHA's] will and not its judgment" where "the evidence was such that [DHA could not] reasonably make the order or determination in question." *Washington*, 239 Wis. 2d 443, ¶ 16 (citation omitted).

C. DHA ignored evidence beyond the victim's out-of-court statements.

DHA erred as a matter of law by failing to consider at all the evidence that showed that Sellers broke into K.A.B.'s home, sexually assaulting her, taking her money, and later trespassing on her porch. It stopped looking once it excluded K.A.B.'s out-of-court statements, but its job was to look at all the evidence.

First, DHA ignored credible testimony from Analyst Burns explaining that a specimen containing DNA consistent with Sellers was retrieved from K.A.B.'s pubic area shortly after the assault. DHA's decision did not *mention*, let alone address, this probative evidence, even though it was a focus of the ALJ's revocation decision. (R. 8:65, App. 161 ("The credible testimony of Analyst Burns confirms that a DNA profile consistent with Mr. Sellers was recovered from K.A.B. There is no credible explanation for why Mr. Sellers' DNA would be on K.A.B. but for the assault.").) Specifically, Analyst Burns testified that a sample taken from K.A.B.'s pubic area in a sexual-assault examination shortly after the assault was consistent with Sellers's DNA profile, which would be found in only 1 in 278 African Americans. (R. 8:110, 114, 116.)

Second, DHA ignored multiple pieces of circumstantial evidence that K.A.B. had not consented to the sexual contact or Sellers's presence on her porch. Specifically, she immediately called the police and reported the assault. (R. 7:18, 19, 36, 45; 8:87, 90.) She consented to a sexual assault forensic examination at a hospital shortly after the assault. (R. 7:36, 46–48; 8:70, 90.) She installed a security system at her home a few days after the assault. (R. 8:90.) And Sellers never argued that he had consensual sexual contact with K.A.B. (R. 7:28–32 (Sellers's statements).)

Third, DHA did not address security-camera footage from K.A.B.'s porch showing a man who witnesses identified as Sellers peeping into the first-floor window. It also ignored testimony by Agent Kellen, who knew Sellers and identified him in the videos. Sellers's window peeping one week after the assault supported both the trespassing and assault violations: it corroborated K.A.B.'s statements that her attacker told her that he had been watching her for a year and had gone into her home when she was not there. (R. 7:34.)

II. This case presents a real and important question of federal constitutional law about how to interpret *Morrissey v. Brewer*.

This case presents a real and important question of federal constitutional law: under *Morrissey*, whether and in what circumstances out-of-court statements by sexual assault victims are admissible in a probation-revocation proceeding.

A. In *Morrissey*, the U.S. Supreme Court held that evidence should be considered that would not be admissible in court.

In *Morrissey*, the U.S. Supreme Court held that an offender has a conditional right to confront the victim, but that the revocation process should be flexible enough to

consider materials that would not be admissible in an adversarial trial.

The *Morrissey* Court explained that offenders are not entitled to the "full panoply of rights" due to criminal defendants. *Morrissey*, 408 U.S. at 480. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481.

The Fourteenth Amendment requires an opportunity to be heard before a revocation decision is made. *Id.* at 482. The *Morrissey* Court concluded that among the "minimum requirements of due process" is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489. The Court emphasized that it had "no thought to create an inflexible structure for parole revocation procedures" and that the "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489–90.

The Supreme Court extended *Morrissey*'s holding to probation-revocation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

B. Wisconsin courts have recognized that *Morrissey* allows out-of-court statements by a sexual assault victim in revocation proceedings.

The *Morrissey* Court did not spell out what due process would mean in all circumstances. But Wisconsin courts have recognized that hearsay is admissible and that victims need not always testify.

In *State ex rel. Flowers v. Department of Health and Social Services*, 81 Wis. 2d 376, 260 N.W.2d 727 (1978), this Court recognized the general principle under *Morrissey* that "a revocation hearing is not in any sense equivalent to a

criminal prosecution and noted . . . that parole may be revoked on the basis of a lesser showing." *Id.* at 387 (citation omitted). In both *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 684, 230 N.W.2d 890 (1975), and *Simpson*, 250 Wis. 2d 214, ¶¶ 23–30, the courts held that hearing examiners could permit out-of-court statements by sexual assault victims.

Simpson held that due process permitted the admission of out-of-court statements by a child sexual assault victim in a probation-revocation proceeding where the evidence would meet an exception to the hearsay rules. The court of appeals held that the ALJ erred by failing to make a good cause finding as to why the offender was not permitted to cross-examine the six-year-old victim of a sexual assault of which he was accused. *Simpson*, 250 Wis. 2d 214, ¶¶ 1–2. The court reviewed the administrative record, however, and found that the error was harmless because there was good cause shown. *Id.* ¶ 2. The court said that whatever *Morrissey* meant by good cause, it would allow the use of out-of-court statements by the child sexual assault victim that met the residual exception to the hearsay rule. *Id.* ¶ 22.

C. As the circuit court recognized, DHA interpreted *Morrissey* as imposing a rule stricter than in a criminal trial.

Here, DHA rejected the ALJ's decision that evidence other than K.A.B.'s out-of-court statements was sufficient to find the probation violations. It decided that those statements were necessary for the findings, but then rejected them categorically as "hearsay" under *Morrissey*. DHA misunderstood the standard as articulated in *Morrissey* and the Wisconsin cases.

Morrissey specifically blessed the use of evidence that would not be admissible in a criminal trial. And under *Simpson*'s interpretation of *Morrissey*, a sexual assault victim's out-of-court statements are admissible at least

where it would meet the residual exception to the hearsay rules in a court proceeding. *See Simpson*, 250 Wis. 2d 214, ¶¶ 23–30.

Although DHA recited *Simpson*'s holding that out-of-court statements are admissible at least where they would satisfy the rules of evidence, DHA did not conduct an analysis to determine whether the statements here met that standard. (R. 8:73, App. 155.) Instead, it treated the victim's out-of-court accounts as per se out of consideration on the basis that they were "hearsay," standing alone. (R. 8:72–73, App. 154–55.) As the circuit court recognized, DHA applied a standard even stricter than in a criminal trial. (R. 36:40–41, App. 150–51.) That cannot be a correct reading of due process as articulated by the U.S. Supreme Court.

III. The court of appeals misunderstood the standard for certiorari review.

This Court should grant the petition for review because the court of appeals' decision failed to consider DHA's errors of law, which required reversal regardless of how the court of appeals viewed the evidence other than the victim's statements.

Under certiorari review, a reviewing court must analyze "whether *the evidence* was such that DHA might reasonably make the decision in question." *Simpson*, 250 Wis. 2d 214, ¶ 10 (emphasis added). The court of appeals failed in this task because it ignored that DHA's decision did not consider the DNA and security-camera evidence *at all*. It turned a blind eye to DHA's willful ignorance, compounding the basic problem with DHA's decision.

The court of appeals rejected DOC's arguments as to the importance of the DNA and security-camera evidence, disposing of them in four brief paragraphs with almost no analysis of the evidence or how it fit into DOC's theory of the case. *Hayes*, 2024 WL 2146952, ¶¶ 18–21; (App. 108–09). DOC's position was that no reasonable decisionmaker could refuse to revoke Sellers's probation on this record.

The court of appeals deferred to DHA's reasoning, which had not considered the evidence. The court held that "[i]f substantial evidence exists supporting DHA's decision, it must be affirmed, even where the evidence supports a contrary conclusion." *Hayes*, 2024 WL 2146952, ¶ 17; (App. 107). The court held that "DHA's *findings on the evidence* are reasonable, and as such, they are conclusive." *Hayes*, 2024 WL 2146952, ¶ 21 (emphasis added); (App. 109). The problem with this logic is that DHA made no *findings* as to the DNA and security-camera evidence. (R. 8:72–74; App. 154–56.) It ignored the evidence.

In sum, the court of appeals endorsed DHA's turning a blind eye to key evidence that proved Sellers's violations by a preponderance of the evidence. This Court should not allow DHA's approach to stand.

CONCLUSION

This Court should grant the petition for review and reverse the court of appeals.

Dated this 13th day of June 2024.

Respectfully submitted,

Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § (Rules) 809.19(8)(b), (bm), and 809.62(4) for a petition produced with a proportional serif font. The length of this petition for review is 6662 words.

Dated this 13th day of June 2024.

Electronically signed by:

Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF E-FILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Petition for Review* with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of June 2024.

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