SUPREME COURT OF WISCONSIN

Appeal 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

BRIEF OF RESPONDENT-APPELLANT ADMINISTRATOR BRIAN HAYES

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INTRODUCTION

Having lost a probation revocation hearing it believes it should have won, the Department of Corrections ("DOC") filed for certiorari review and now seeks to revisit settled law governing revocation hearings and certiorari review of agency decisions. The Court should reject this attempt.

In revocation proceedings before the Division of Hearings and Appeals ("DHA"), DOC failed to meet its burden to obtain revocation of Keyo Sellers's probation. DHA Administrator Brian Hayes ("the Administrator") conducted a *de novo* review of the record of Sellers's probation revocation hearing before an Administrative Law Judge ("ALJ"), performed the correct legal analyses, and concluded in his discretion that revocation was not warranted. The DOC had decided not to have the alleged victim testify at the hearing, and instead introduced hearsay statements. Based on decades of U.S. Supreme Court and Wisconsin appellate case law, the Administrator determined that he could not rely on the hearsay evidence without violating Sellers's constitutional rights. *See, Morrissey v. Brewer*, 408 U.S. 471, 479–89 (1972). Consequently, DOC failed to prove violations sufficient to revoke Sellers's probation. DOC now argues that the Administrator weighed the evidence incorrectly and should have considered the hearsay statements of Sellers's accuser, and that the court of appeals improperly ignored these alleged errors.

DOC fatally misunderstands both the deference due to the Administrator's decision and the law governing probationers' constitutional rights in revocation hearings. DOC offers no compelling reason to change long-standing Wisconsin law on these issues. Weakening the deference courts afford the Administrator's decisions, as DOC

requests, invites endless challenges to revocation decisions. And accepting DOC's invitation to expand the hearsay exception for victims' statements would infringe on the constitutional rights of the accused.

The Court should affirm the court of appeals and uphold the Administrator's decision.

ISSUES PRESENTED

DOC's statement of the issues relies on faulty premises of both fact and law and departs from the issues properly presented on certiorari review. The following questions reflect the long-established criteria for certiorari review of a DHA decision:

1. Was the Administrator acting within his jurisdiction when he decided not to revoke Sellers's probation?

   Circuit Court: Yes. (App. 123–24, 150.)
   Court of Appeals: Yes. (App. 107.)

2. Was the Administrator's decision not to revoke Sellers's probation made according to law?

   Circuit Court: No. (App. 123–24, 150.)
   Court of Appeals: Yes. (App. 106–09.)

3. Was the Administrator's decision not to revoke Sellers's probation arbitrary, oppressive, or unreasonable?

   Circuit Court: Yes. (App. 123–24, 150.)
   Court of Appeals: No. (App. 109.)

4. Was the Administrator's decision not to revoke Sellers's probation one that he might have reasonably made based on the evidence?

   Circuit Court: No. However, the court noted that "if this decision were solely about the sufficiency of the evidence, the standard of review would dictate that the DHA's discretion prevail." (R App. 123–24, 150.)

   Court of Appeals: Yes. (App. 107–08.)

ORAL ARGUMENT AND PUBLICATION

The Court has indicated it will hear oral arguments on this case, and Supreme Court decisions are typically published. However, because the case "involve[s] no more than the application of well-settled rules of law to a recurring fact situation," and the issues can be "decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent," the Administrator does not believe publication is warranted. Wis. Stat. § 809.23(1)(b).

STATEMENT OF THE CASE

This case is a certiorari review of a probation revocation decision of the Administrator of the Division of Hearings and Appeals ("DHA"). The Petitioner, Department of Corrections ("DOC"), also raises questions about the proper procedure in probation revocation proceedings and the standard of review courts employ when reviewing DHA decisions on certiorari. This Court is not tasked with deciding whether Keyo Sellers's probation should have been revoked or whether he committed the offenses for which the DOC sought revocation. It is therefore remarkable that the DOC devotes 13 full pages to its Statement of the Case, lingering

repeatedly over graphic accounts of the allegations underlying the revocation hearing in an apparent attempt to divert the Court's attention from the legal issues at hand.[1] The Administrator here offers a more streamlined account of the relevant facts and procedural history of this matter.

Over two years ago, Respondent-Appellant-Respondent Brian Hayes, in his role as DHA Administrator ("the Administrator"), decided not to revoke Intervenor-Co-Appellant Keyo Sellers's probation. (R. 8:72-75; App. 154–56.) The circuit court granted a writ of certiorari in favor of DOC and reversed the Administrator's decision. (App. 110–53.) The court of appeals overturned the circuit court's holding, thereby affirming the Administrator's original decision. *State ex rel. Wisconsin Dep't of Corr., Div. of Cmty. Corr. v. Hayes*, 2024 WI App 37, 9 N.W.3d 305 (unpublished, per curiam) (App. 101–09).

The Administrator oversees the administrative law judges ("ALJs") who serve as DHA hearing examiners including in probation revocation hearings. *See* Wis. Stat. § 301.035. When an ALJ's decision is appealed, the Administrator has the discretion to "modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review." Wis. Admin. Code HA § 2.05(9)(a).

In the appeal process, the Administrator of the DHA has an obligation to ensure that when a probationer's liberty is at stake, the ALJ

[1] It is particularly inappropriate for DOC to seek to introduce evidence of Sellers's criminal trial, which occurred long after the revocation hearing. Pet. Br. at 12–13. On certiorari review, the court considers the same record the agency considered. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 10, 250 Wis. 2d 214, 222, 640 N.W.2d 527, 532.

who conducted the hearing recognized and enforced the probationer's due process rights. *See Morrissey v. Brewer*, 408 U.S. 471, 479–89 (1972). That obligation is particularly important because probation can be revoked for alleged acts committed while on probation after a hearing in which the burden of proof is well below the standard of "beyond a reasonable doubt" and where incarceration almost surely follows. *See id.* Probationers have a conditional due process right to confront their accusers unless the state can show "good cause" to forego in-person testimony and rely instead on hearsay. *Id.* at 489; *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 15, 250 Wis. 2d 214, 640 N.W.2d 527.

In June 2019, Sellers was placed on probation in Milwaukee County case number 2017CF4997 on a drug conviction. (R. 7:51, 8:1.) In March 2022, DOC initiated revocation proceedings, alleging that Sellers committed five violations of the terms of his probation: (1) entering K.A.B.'s residence without her consent; (2) sexually assaulting K.A.B.; (3) taking $30 from K.A.B. without her consent; (4) several days later, walking on K.A.B.'s porch and looking through the windows of her home without her consent; and (5) providing false information to his probation agent. (R. 7:16-17.) Sellers stipulated to allegation (5) at the revocation hearing. (R. 8:80–81.)

In support of the remaining allegations, DOC introduced testimony by Milwaukee Police Officer Michael Walker; Michelle Burns, an analyst with the Wisconsin State Crime Laboratories; and Sellers's probation agent Geraldine Kellen. (R. 8:86-137.) DOC introduced DNA evidence consistent with approximately 389 individuals in Milwaukee, including Sellers. (R. 8:115–17); *Hayes*, 2024 WI App 37, ¶5 n.2 (App. 103). DOC chose not to present any testimony from K.A.B., the complaining witness and alleged

victim. (R. 8:130.) Agent Kellen testified that she chose not to subpoena K.A.B. for the revocation hearing because "she can't 100% ID her assailant [so] I 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 she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (*Id.*) Instead, DOC called a law enforcement officer to present hearsay testimony regarding K.A.B.'s statements to the police, describing K.A.B.'s reported experience of sexual assault, her description of her assailant, and her inability, after reviewing photo lineups and surveillance camera footage, to positively identify Sellers as her assailant, or the person on her porch several days later as her assailant. (R. 8:87–90, 92–93, 95–96, 98–100, 130–31.) The record also included K.A.B.'s written statement. (R. 7:33–37.) Sellers's admissible statement asserted that he had never been to K.A.B.'s residence and "did not sexually assault anyone." (R. 7:31.)

The Administrator, after reviewing the evidence *de novo*, decided not to revoke Sellers's probation. (R. 8:72-75; App. 154–56.) Reversing an ALJ's initial decision to the contrary, the Administrator found that DOC had not proven any of the contested allegations. (R. 8:73; App. 155.) The Administrator determined in his discretion that "K.A.B.'s account of the events is critical to the DOC's allegations" as "the only account that describes the alleged non-consensual entry into K.A.B.'s home, the alleged non-consensual sexual contact with her, the alleged non-consensual taking of $30 from her, and the subsequent alleged trespassing on her property (which requires evidence of non-consent)." (R. 8:72; App. 154.) The Administrator found that without K.A.B.'s testimony, Sellers's statement denying the allegations was "the only non-hearsay account of what Sellers was actually doing." (R. 8:73; App. 155.)

The Administrator found that to rely on hearsay statements that DOC attributed to K.A.B. would deprive Sellers of his constitutionally protected right to confront his accuser in violation of *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), *Black v. Romano*, 471 U.S. 606, 611–613 (1985), and *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 15, 250 Wis. 2d 214, 640 N.W.2d 527. (R. 8:72-73; App. 154–55.) The Administrator evaluated whether there was good cause to justify denying Sellers his right to confrontation and found there was not, because DOC's choice not to subpoena K.A.B. was not due to any "difficulty, expense, or other barrier to obtaining live testimony." (*Id.*) He also determined there was no alternate path to admitting K.A.B.'s out-of-court statements under Wisconsin's rules of evidence. (R. 8:73; App. 155.)

The Administrator then applied the relevant criteria and decided that, based on the only proven allegation (that Sellers provided false information to his probation agent), as well as Sellers's subsequent confinement and intervening conduct, revocation of his probation was not warranted. (R. 8:74; App. 156.) In making that determination, the Administrator noted that Sellers's probation officer, Agent Kellen, testified that "the DOC would not have pursued revocation for [only] the proven violation." (R. 8:74; App. 156.)

DOC challenged the Administrator's decision on a petition for a writ of certiorari in circuit court, which reversed the Administrator's decision not to revoke Sellers's probation. (R. 2:3-10, 36:37-42; 47; App. 146–51.) The circuit court stayed the effect of its decision pending appeal. (R. 46:1-2.) In a per curiam decision, the court of appeals reversed the order of the circuit court and affirmed the Administrator's DHA's decision not to revoke Sellers's probation. *Hayes*, 2024 WI App 37 (App. 101–09).

Additional facts are discussed as necessary below.

STANDARD OF REVIEW

When the Supreme Court reviews a writ of certiorari, it reviews the agency's decision, not the decision of the circuit court or the ALJ. *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, ¶ 10, 261 Wis. 2d 485, 662 N.W.2d 294. When reviewing a revocation decision, courts "defer to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court." *Simpson*, 2002 WI App 7, ¶ 10. The review is limited to the following 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." *Id.; see also Van Ermen v. State Dept. of Health and Social Services*, 84 Wis. 2d 57, 63, 267 N.W.2d 17, (1978).

ARGUMENT

The Administrator's decision can and should be upheld under the well-established criteria for certiorari review. The first section of this brief analyzes his decision under these criteria, which involves engaging with the very issues of law and fact DOC claims were neglected. As this approach demonstrates, existing law answers all three questions DOC has posed to this Court and supports affirming the Administrator's decision.

The remaining sections of this brief address DOC's three improperly framed questions directly. The law already requires DHA to consider the evidence, and the record shows the Administrator did so. The law already

allows DOC to rely upon hearsay in revocation hearings, but it must show good cause first, which it failed to do in Sellers's case. Finally, the law already requires reviewing courts to evaluate DHA's potential errors of law, and to examine the underlying evidence—and the court of appeals did so. To the extent DOC implies or argues that this Court should rewrite the rules governing the reliance on hearsay in revocation hearings, and revisit the certiorari review standard, the Court should decline to do so.

This Court should uphold the Administrator's decision.

I. Under the well-settled certiorari review standard, the Administrator's decision should be upheld.

The Administrator's decision not to revoke Sellers's probation should be upheld because the record shows that: 1) he acted within his jurisdiction; 2) he acted according to law; 3) his decision was neither arbitrary and capricious, oppressive, nor unreasonable; and 4) he reasonably made his decision based on the evidence. *Simpson*, 2002 WI App 7, ¶ 10. The court of appeals correctly upheld the Administrator's decision after analyzing these four factors. *Hayes*, 2024 WI App 37, ¶¶ 16–21 (App. 106–109).

Although DOC cites *Simpson* in its Standard of Review, its Argument immediately veers off track: it significantly misstates the relevant standards for certiorari review and incorrectly focuses on the decision of the ALJ, which is not under review. Subhead I.A. of DOC's Argument reads: "The evidentiary burden for revocation is low and, if substantial evidence supported the revocation decision, it must be upheld." (Pet. Br. at 24.) This framing is flat wrong, as is the analysis that follows. It is true that at the contested hearing stage before the ALJ, DOC

must prove a rules violation by a preponderance of the evidence, as DOC argues. (Pet. Br. at 24); Wis. Admin. Code HA § 2.05(6)(f). However, the ALJ's decision is not final if a timely administrative appeal is filed. Wis. Admin. Code HA § 2.05(7)(i). And the Administrator's review of the ALJ's non-final decision affords it no deference, given that he "may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review." Wis. Admin Code. HA § 2.05(9)(a). Moreover, the administrative appeal of an ALJ's revocation hearing decision is a *de novo* review of the evidence presented before the ALJ. *See State ex rel. Foshey v. Department of Health & Social Services*, 102 Wis. 2d 505, 516, 307 N.W.2d 315 (Ct. App. 1981). On appeal, this Court reviews the final decision of the agency, which is the Administrator's decision—*not* the ALJ's—and upholds it if it meets the four criteria listed in *Simpson*, 2002 WI App 7, ¶ 10. This review includes evaluating whether the Administrator's decision—again, *not* the ALJ's—is supported by substantial evidence. *Van Ermen*, 84 Wis. 2d at 64. DOC's pairing of its evidentiary burden for revocation with the substantial evidence test on certiorari review is either legal error or deliberately misleading.

A. The Administrator acted within his jurisdiction when he decided not to revoke Sellers's probation.

The Administrator's decision was within his jurisdiction under Wis. Stat. § 301.035 and Wis. Admin. Code HA § 2.05(9). The Administrator of DHA has a statutory duty to "be the administrative reviewing authority for decisions of the division." *See* Wis. Stat. § 301.035. Upon an administrative appeal of the decision in a probation revocation hearing,

the "administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review" and shall produce a written decision. *See* Wis. Admin. Code HA § 2.05(9). Here, in accordance with his jurisdiction as defined by statute and administrative code, the Administrator reviewed the ALJ's decision, reversed it, and produced a written decision. (*See* R. 8:72-75; App. 154–56.) The court of appeals noted that DOC conceded the jurisdictional question, and DOC does not appear to dispute it here. *Hayes*, 2024 WI App 37, ¶ 15 (App. 107).

B. The Administrator acted according to law when he decided not to revoke Sellers's probation.

The Administrator's decision hinged primarily on his determination that relying on K.A.B.'s out-of-court statements would violate Sellers's constitutional rights, and that those statements therefore had to be excluded from evidence—a determination the court of appeals affirmed. *Hayes*, 2024 WI App 37, ¶¶ 15, 21 (*See* R. 8:72-75; App. 106–09, 154–56). DOC chose not to call K.A.B. to testify at Sellers's hearing (R. 8:130) and relied instead on her out-of-court statements to provide her account of the events (R. 7:18–20, 23–24, 33–37, 40–41, 44–45; 8:32–33, 37–40, 87–93, 95–98, 130–31). Agent Kellen testified that she chose not to subpoena K.A.B. for the revocation hearing because "she can't 100% ID her assailant [so] I 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 she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (R. 8:130.)

Sellers's non-hearsay statement asserted that he had never been to K.A.B.'s residence and "did not sexually assault anyone." (R. 7:31.)

The Administrator correctly noted in his decision the "minimum requirements of due process" include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)," citing *Morrissey*, 408 U.S. at 489 (1972), and that the ALJ did not make such a finding of good cause. (R. 8:72-73; App. 154–55.) The Administrator also evaluated the record *de novo* and found "there was no basis upon which to find good cause." (R. 8:72-73; App. 154–55.) The Administrator concluded that he could not rely upon K.A.B.'s out-of-court statements without violating Sellers's constitutional right to due process, that DOC did not prove the relevant allegations, and that revocation of Sellers's probation was therefore not warranted. (R. 8:73-74; App. 155–56.)

The Administrator's decision to exclude K.A.B.'s out-of-court statements was based on two well-established due process principles: (1) a defendant has a conditional right to confront adverse witnesses during a probation revocation hearing, and (2) there must be good cause to deny a defendant's right to confront adverse witnesses. The Administrator correctly stated and proceeded according to each principle of law in his decision.

1. The Constitution provides a defendant with a conditional right to confront adverse witnesses during a probation revocation hearing.

In revocation cases, a defendant has a Fourteenth Amendment right to confront adverse witnesses. In *Morrissey v. Brewer*, the United States

Supreme Court affirmed that a revocation hearing must incorporate the "minimum requirements of due process." 408 U.S. at 489. This minimum due process includes "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.*

Although *Morrissey* involved parole revocation, the Supreme Court extended this holding to probation revocation proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (a case that arose from Wisconsin administrative probation revocation proceedings). The Court held that administrative processes for probation revocation required the "conditional right to confront adverse witnesses" and the other minimum due process guaranteed in *Morrissey*. *Id.* at 786.

In both of those seminal cases, the Supreme Court deemed the right to confront an adverse witness guaranteed unless a hearing officer finds good cause to deny it because confrontation is the only way to ensure that "liberty is not unjustifiably taken away" from a parolee or probationer. *Id.* at 785.

In his decision, the Administrator properly cited and applied those well-established principles of law. (R. 8:72-73; App. 154–55.)

2. There must be good cause to deny a defendant's right to confront adverse witnesses.

A hearing officer in a probation revocation hearing must find there is "good cause" to deny a defendant's conditional right to confront adverse witnesses to "protect the defendant against revocation of probation in a constitutionally unfair manner." *Black*, 471 U.S. at 611–13; *see also Simpson*, 2002 WI App 7, ¶ 15 ("an ALJ may not avoid making [a good cause]

finding whenever he or she determines that [hearsay] evidence is reliable."). The court in *Simpson* confirmed that "*Morrissey*, *Gagnon*, and *Black* hold unequivocally that hearing examiners must specifically find that good cause exists for not allowing confrontation of adverse witnesses." *Simpson*, 2002 WI App 7, ¶15. The court further noted that a hearing examiner's failure to specifically make a good cause finding does not *require* automatic reversal. *Id.* at ¶¶ 15–16. "[T]he failure to make a specific finding of good cause is harmless [and therefore permissible] where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling." *Id.* at ¶ 16.

There are two recognized tests for determining whether "good cause" exists to deny a probationer his constitutional right to confront an adverse witness. *See Simpson*, 2002 WI App 7, ¶¶ 20, 22. The good cause analysis involves "a balancing of the need of the probationer in cross-examining the witness and the interest of the State in denying confrontation, including consideration of the reliability of the evidence and the difficulty, expense, or other barriers to obtaining live testimony." *Id.* ¶ 20 (citing *Gagnon*, 411 U.S. at 782 n.5). Under this "balancing test," a critical factor is whether there was any barrier to obtaining the live testimony of the adverse witness. *Id.* In *Simpson*, the court noted that even in criminal cases, exceptions to the rule barring hearsay may apply and can overcome the defendant's right to confrontation. *Id.* ¶ 21. Therefore, the court concluded that, as an alternative test, good cause to deny confrontation is always shown "when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence." *Id.* ¶ 22.

The *Simpson* case addressed whether it was permissible for an ALJ to rely on the testimony of a minor's mother about the minor's out-of-court statements to prove allegations of her sexual abuse, and the court relied on case law specific to child victims to find good cause. *See* 2002 WI App 7, ¶¶ 23–30. The court had previously "upheld a hearing examiner's finding of good cause after both concluding that the hearsay evidence met the excited utterance exception under WIS. STAT. § 908.03 and that it was reasonable not to produce the witness because of the nature of the charge (sexual assault) and the age of the alleged victim (five years old).)" *Id.* ¶ 20 (citing *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 683–84, 230 N.W.2d 890 (1975)). After analyzing the facts before it, the court in *Simpson* concluded "that [the six-year-old victim's] statements possess sufficient circumstantial guarantees of trustworthiness to qualify under the residual hearsay exception," and found good cause on that basis. *Id.* ¶ 30.

The Administrator correctly applied both tests for good cause. Under the first test, the Administrator evaluated the record and determined that DOC had demonstrated no "difficulty, expense, or other barriers" to K.A.B.'s testimony that could overcome Sellers's interest in cross-examining her, meaning there was not good cause to deny Sellers's right to confront K.A.B. (R. 8:73; App. 155.) K.A.B. is an adult. (R. 7:18.) No evidence exists in the record suggesting that she was unable to appear at the hearing. Nor is there evidence that K.A.B. was unwilling to participate or that securing her participation created any burden on DOC. As the Administrator noted in the decision, a DOC representative testified that she chose not to present K.A.B. because K.A.B. could not unequivocally identify Sellers as the assailant, and because the DOC representative—not K.A.B.—wished to spare K.A.B. the experience of testifying. (R. 8:130; R.

8:73; App. 155.) Sellers had a strong need to cross examine K.A.B., given that her "account of the events is critical to the DOC's allegations." (R. 8:72; App. 154.) When Agent Kellen testified that K.A.B. could not identify her assailant with certainty, Sellers's interest in cross-examining her only grew stronger. (R. 8:72–73; App. 154–55.) DOC needed to argue some barrier to her testimony that would overcome Sellers's need but failed to raise any real barrier at all. *Id.* As the Administrator correctly noted, there was no basis to find that there was any "difficulty, expense, or other barriers to obtaining live testimony" of K.A.B. (R. 8:73, App. 155); *see Simpson*, 2002 WI App 7, ¶ 20. This precluded a finding of good cause under the first test.

Under the second test, the Administrator evaluated the record and determined "there is no basis to find that K.A.B.'s hearsay statements were admissible under the rules of evidence." (R. 8:73; App. 155.) DOC argues that "DHA did not consider whether the out-of-court statements satisfied the residual exception to the hearsay rule or whether other, non-hearsay statements supported the rule violations." (Pet. Br. at 18.) But DOC offers no reason for this court to believe that the Administrator's analysis of the Rules of Evidence for some reason ignored the residual exception. The residual exception simply did not apply. (*See* Section III, *infra*.)

Having found that Sellers had a conditional right to confront adverse witnesses at his revocation hearing, the Administrator went on to cite and apply the relevant law to determine that K.A.B.'s out-of-court statements must be excluded. (R. 8:73; App. 155.) The court of appeals specifically affirmed this aspect of the Administrator's decision, citing the two possible routes for the DOC to establish good cause, and noting that the Administrator examined both and found good cause lacking. *Hayes*,

2024 WI App 37, ¶ 15 (App. 106–07.) Administrator Hayes acted according to law when he conducted his good cause analysis.

C. The Administrator's decision not to revoke Sellers's probation was not arbitrary, oppressive, or unreasonable.

On a petition for a writ of certiorari review, DOC has the burden of proving that the Administrator's decision was arbitrary and capricious. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). "An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion." *Id.* at 656 (citing *Van Ermen*, 84 Wis. 2d at 65). An agency properly exercises its discretion by conducting "a reasoning process based on the facts of record" and reaching "a conclusion based on a logical rationale founded upon proper legal standards." *Id.* (cleaned up).

The court of appeals found, and this Court should agree, that "DHA's actions were not arbitrary, oppressive, or unreasonable," satisfying the third requirement on certiorari review. *Hayes*, 2024 WI App 37 ¶ 21 (App. 109). In making this determination, the court of appeals necessarily determined that the Administrator had based his decision on "proper legal standards." *Von Arx*, 185 Wis. 2d at 655. This means the court of appeals did not "ignore" legal errors made by DHA, as DOC argues (Pet. Br. at 9), but rather, found there had been no error. (*See* section IV, *infra*.)

The Administrator properly exercised his discretion in determining (1) that there was not "good cause" to deny Sellers's Constitutional right to confront K.A.B. and (2) that based on the only proven allegation and the relevant factors, Sellers's probation should not be revoked.

1. The Administrator properly exercised his discretion in determining that there was not good cause to deny Sellers's Constitutional right to confront K.A.B.

Upon his inspection of the record, in his discretion, the Administrator properly determined that there was not good cause to deny Sellers his right to confront K.A.B. (R: 8:73; App. 155.) He detailed that Sellers had a strong need to cross-examine the witness because of the importance of her account of events to prove the allegations and evaluated DOC's stated reason for not having K.A.B. testify. (R. 8:72-73; App. 154–55.) He properly noted that the hearing officer had not found good cause and that he had separately evaluated the record and determined there was "no basis upon which to find good cause." (R. 8:73; App. 155.) That conclusion was neither arbitrary or capricious, oppressive, nor unreasonable, as the court of appeals affirmed. *Hayes*, 2024 WI App 37, ¶ 21 (App. 109).

2. The Administrator also properly exercised his discretion in determining that based on the only proven allegation and the relevant factors, Sellers's probation should not be revoked.

The Administrator concluded that, without admissible testimony providing K.A.B.'s account of the events, the only violation DOC had proven was the fifth, stipulated by Sellers: that he had provided false information to his probation officer. (R. 8:73-74; App. 155–56.) The Administrator decided not to revoke Sellers's probation for that stipulated violation based on his evaluation of the relevant factors under the standard for revocation set by the Wisconsin Administrative Code. (*See* R. 8:73-74; App. 155–56.) In his decision, he cited those factors and explained his reasoning:

> The decisions on revocation and confinement are governed by Wisconsin Administrative Code Chapter HA 2. In deciding whether to revoke supervision, findings must be made "on the basis of the original offense and the intervening conduct of the client." Wis. Admin. Code § HA 2.05(7)(b)3. Furthermore, revocation is justified only if: (a.) confinement is necessary to protect the public from further criminal activity by the client; or (b.) the client is in need of correctional treatment which can most effectively be provided if confined; or (c.) it would unduly depreciate the seriousness of the violation if supervision were not revoked. Wis. Admin. Code § HA 2.05(7)(b)3.

(R. 8:73; App. 155.) The Administrator went on to review the nature of Sellers's narcotics conviction, the sentence he received and served, and his "mixed" conduct while on supervision. (R. 8:73–74; App. 155–56.) He noted that Sellers's "agent testified that she would not have pursued revocation solely based on allegation 5, in the absence of any other violations. (May 4, 2022, Hearing Record Track 2 at 13:00—13:31)." (R: 8:74; App. 156.) The Administrator further noted that Sellers had been in custody on the allegations for nearly five months already, "a significant amount of time in response to the proven violation of providing false information to his agent." (*Id.*) Ultimately, the Administrator concluded that revocation was not warranted for the proven offense under the criteria laid out in Wis. Admin. Code HA § 2.05(7)(b)3. (*Id.*)

The Administrator based his decision on the correct factors, explained his reasoning with citations to the record, and that reasoning reflects his thoughtful analysis and application of his discretion. DOC's own probation officer testified in Sellers's revocation hearing that "[w]e wouldn't be here if that was the only violation… I wouldn't have been

proceeding or initiated revocation on Mr. Sellers not providing correct information." (R. 8:135.) The Administrator agreed with Sellers's probation officer and determined that revocation was not warranted based on the only proven violation. As the court of appeals affirmed, his decision was not arbitrary and capricious, unreasonable, or oppressive. *Hayes*, 2024 WI App 37 ¶ 21 (App. 109).

D. The Administrator's decision not to revoke Sellers's probation was one that he might have reasonably made based on the evidence.

The decision of whether to revoke probation is committed to the discretion of DHA. *See State ex rel. Lyons v. DHSS*, 105 Wis. 2d 146, 151, 312 N.W.2d 868 (Ct. App. 1981). On certiorari review, the court's inquiry into whether the Administrator "might reasonably have made the order or determination in question … is limited to whether there is substantial evidence to support the Department's decision." *Van Ermen,* 84 Wis. 2d at 64. Where there is substantial evidence, the agency's decision must be affirmed, even where "the evidence may support a contrary determination." *Von Arx*, 185 Wis. 2d at 656. "Substantial evidence" is evidence that is "relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assoc. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). On certiorari review, a court is not permitted to re-weigh or substitute a different view of the evidence in place of the Administrator's. *Van Ermen*, 84 Wis. 2d at 64. The agency's decision may be set aside only if "a reasonable man … could not have reached the decision from the evidence and its inferences." *Omernick v. Dep't of Nat. Res.*, 100 Wis. 2d 234, 250–51, 301 N.W.2d 437 (1981).

At bottom, all of DOC's arguments amount to an unsupported assertion that the Administrator could not reasonably have made his decision based on the evidence before him. This argument can survive neither a correct application of the deferential standard on certiorari review, nor a clear-eyed review of the evidence.

It was reasonable for the Administrator to find that there was insufficient evidence to prove the allegations. (*See* R. 8:73; App. 155.) The only account of events to support the relevant allegations came from the hearsay statements of K.A.B. (*Id.*) But that hearsay evidence could not be used without violating Sellers's due process right of confrontation. (R. 8:72-73; App. 154–55.) As a result, the only non-hearsay account of events was that of Sellers, which was not hearsay because it was offered against him as a party opponent at the hearing, Wis. Stat. § 908.01(4)(b). (R. 8:73; App. 155.) In Sellers's non-hearsay statement, he denied being at K.A.B.'s home and denied sexually assaulting anyone. (R. 7:28-31.)

Because K.A.B.'s hearsay statements were constitutionally impermissible and there was not good cause for not calling K.A.B. as a witness, the Administrator could not rely on K.A.B's statements. The only account of the events remaining was Sellers's—which was a complete denial of the allegations. (R. 7:28-31; 8:73; App. 155.) Therefore, it was reasonable to find that DOC did not meet its burden to prove that Sellers committed the alleged violations.

DOC argues that the Administrator's decision was flawed because he allegedly ignored DNA, video, and other circumstantial evidence that it says together constituted sufficient evidence to support revocation. (Pet. Br. at 25–29.) According to DOC, the Administrator "made no *findings* as to the DNA and security-camera evidence." (Pet. Br. at 34, emphasis in

original.) But the Administrator conducted a *de novo* review, which necessarily included reviewing this evidence; he simply did not consider it as persuasive as DOC does. (R. 8:72; App. 154.) DOC asks this Court to make significant logical leaps based on circumstantial evidence that are not as self-evident as DOC claims. (Pet. Br. at 25–29.) First, DOC leans heavily on the DNA evidence, which it repeatedly characterizes as "consistent with Sellers" (Pet. Br. at 12, 14, 17, 25, 26, 28)—without acknowledging that it was *also* consistent with nearly 400 other individuals in Milwaukee. (R. 8:115–17); *Hayes*, 2024 WI App 37, ¶ 19 (App. 108). Second, DOC notes that K.A.B. called the police and had a SANE examination after the alleged assault (Pet. Br. at 28)—facts that do nothing to identify Sellers as her assailant. Third, DOC argues that K.A.B.'s installation of security cameras proves that the individual on her porch on January 22 was trespassing (Pet. Br. at 27, 29)—but the installation of cameras does not transform all future visitors into trespassers. Even if the video footage does show that Sellers was present on the porch that day, it does not prove he assaulted K.A.B. a week earlier. *Hayes*, 2024 WI App 37, ¶ 19 (App. 108). Indeed, to try to link the identity of the individual on the porch with the assailant, DOC relies again only on K.A.B.'s hearsay statements. (Pet. Br. at 27.)

The Administrator's decision shows that he was aware of the non-hearsay record evidence but did not consider it sufficient to prove the crucial "non-consensual" element of four of the five charges against Sellers in the absence of K.A.B.'s testimony. (R. 8:72; App. 154.) Reasonable minds

could—and did—consider the evidence less damning than DOC would like.[2]

Based on the evidence he could consider without violating Sellers's rights, it was reasonable for the Administrator to determine that Sellers's probation should not be revoked. Because the Administrator's findings on the evidence are reasonable, they are conclusive. *See Omernick*, 100 Wis. 2d at 250–51. The court of appeals agreed. *Hayes*, 2024 WI App 37, ¶ 21 (App. 109). The Administrator reasonably made the decision not to revoke Sellers's probation based on the evidence.

In sum, The Administrator acted within his jurisdiction; acted according to law; was not arbitrary or capricious in his decision; and made a reasonable decision based on the evidence. Under the well-established criteria for certiorari review, and applying the proper deferential standard of review, his decision should be upheld.

II. Contrary to DOC's arguments, the law already requires DHA to consider the evidence, and the record shows the Administrator did so in this case.

Administrator Hayes adhered to well-established principles of law that govern DHA reviews of probation revocation decisions, including by reviewing the evidence presented to the ALJ. The short answer to DOC's first issue presented is "yes," of course, under established law the agency in a revocation proceeding must consider whether non-hearsay evidence

[2] DOC at one point implies that an agency can rely on uncorroborated hearsay provided it also relies on non-hearsay evidence, citing *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶ 56, 278 Wis. 2d 111, 692 N.W.2d 572. (Pet. Br. at 24.) This reliance on *Gehin* is misplaced. *Gehin* was not about a probation revocation hearing or any other proceeding where a party's liberty was at stake. As *Morrissey* and its progeny make clear, hearsay can only be relied upon in a revocation hearing if good cause is shown.

supports a finding of the probation violations even if hearsay evidence cannot be considered. In this case, the Administrator determined the non-hearsay evidence was insufficient to justify revocation.

When an administrator reviews an ALJ's decision on revocation, he "may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review." Wis. Admin. Code HA § 2.05(9)(a). The administrator conducts a *de novo* review of the evidence. *State ex rel. Foshey v. Wisconsin Dep't of Health & Soc. Servs.*, 102 Wis. 2d 505, 516, 307 N.W.2d 315 (Ct. App. 1981).

The Administrator conducted "a de novo review of the evidence presented before the Administrative Law Judge (ALJ)" in the matter of Keyo Sellers's probation revocation. (R. 8:72; App. 154.) He assessed that "K.A.B.'s account of the events is critical to the DOC's allegations." (*Id.*) He further determined that "in this case, there is no basis to find that K.A.B.'s hearsay statements were admissible under the rules of evidence," indicating that his *de novo* review of the record had uncovered no evidence that would allow him to consider K.A.B.'s statements. (R. 8:73; App. 155.)

DOC's real complaint is not that DHA did not consider the evidence, but that DHA did not draw DOC's desired conclusions after considering the evidence. DOC argues at length that the DNA evidence and the videotape evidence, as well as additional circumstantial evidence, together sufficed to prove the alleged probation violations. (Pet. Br. 25–29.) In its argument it refers repeatedly to the ALJ's decision, which is not under review here and receives no deference from either DHA or courts reviewing on certiorari. (*Id.*); *see Kraus*, 2003 WI 51, ¶10; *Foshey*, 102 Wis. 2d at 516.

But as discussed in section I.D, *supra*, and as the court of appeals concluded, reasonable minds *could* reach the conclusion the Administrator reached. The appellate court's opinion on this point is worth quoting at length:

> ¶18 DOC argues that DHA ignored the DNA and security camera evidence in reaching its decision, and that no reasonable person considering this evidence could have reached the decision not to revoke Sellers's probation. *See* ***Simpson,*** 250 Wis. 2d 214, ¶10.
>
> ¶19 We disagree. Excluding K.A.B.'s statement, the only account of the events was Sellers's account, which was a complete denial of the allegations. Although there was DNA evidence found in K.A.B.'s sexual assault kit that was "consistent with" Sellers's DNA, this evidence was by no means conclusive in that the DNA evidence was also "consistent with" almost 400 African American male profiles in Milwaukee alone. With respect to the security camera footage showing a man on K.A.B.'s porch, even if we accept that it would be unreasonable to conclude that the man in the video was anyone but Sellers, 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.). That is, DHA concluded that DOC had not met its burden of proof if K.A.B.'s statement was not considered.

Hayes, 2024 WI App 37, ¶¶ 18–19 (App. 108). The court went on to cite the *Von Arx* rule that if "'substantial evidence' supports two contrary conclusions, we defer to the conclusion reached by DHA." *Id.* ¶ 20 (App. 109). In this case, even if a reviewing court were to agree with DOC that the evidence also supports, or even *better* supports, DOC's theory, the

evidence *also* supports the DHA Administrator's conclusion. Therefore, the Administrator's decision must be upheld.

III. The law already allows DOC to rely on victims' hearsay statements, but it must show good cause first.

DOC seeks to expand its ability to rely on hearsay from sexual assault victims in revocation hearings to the detriment of defendants' due process rights. (Pet. Br. 30–33.) DOC is already permitted to rely on a victim's hearsay statements in revocation hearings, but it must show good cause by passing one of two tests. In Sellers's case, it failed to do so, and the Administrator determined he could not rely on K.A.B.'s out of court hearsay statements without violating Sellers's rights. DOC has given this Court no good reason to change the legal standards the Administrator correctly followed in this case.

A. In limited circumstances, DHA already may rely on hearsay in revocation hearings.

As discussed above, a probationer's conditional due process right to confront an adverse witness at a revocation hearing can be overcome by a showing of "good cause." *Morrissey*, 408 U.S. at 489; *Black*, 471 U.S. at 611–613; *Simpson*, 2002 WI App 7, ¶ 15. There are two recognized tests for showing good cause: whether there is some "difficulty, expense, or other barriers to obtaining live testimony" sufficient to overcome the probationer's need to cross-examine the witness, and whether the proffered testimony falls under a hearsay exception in the Wisconsin Rules of Evidence. *Simpson*, 2002 WI App 7, ¶¶ 20–22.

DOC overstates this Court's precedent when it says, "Wisconsin courts have recognized that *Morrissey* allows out-of-court statements by a sexual assault victim in revocation hearings." (Pet. Br. at 31.) The two cases in which this Court found that DOC had good cause to deny a probationer the right to confront his accuser both involved cases of alleged sexual assault of a young child, not an adult. *Simpson*, 2002 WI App. 7, ¶ 1; *Harris*, 69 Wis. 2d at 683. In both *Simpson* and *Schmidt*, the Court was grappling with the specific legal implications of eliciting testimony from a child victim. In concluding that the residual exception to hearsay does apply to child victims, it reasoned that "there is 'a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court'…." *Simpson*, 2002 WI App 7, ¶ 23, citing *State v. Sorenson*, 143 Wis. 2d 226, 243, 421 N.W.2d 77, 84 (1988). These considerations do not apply uniformly to adults and do not apply here.

B. The record in this case did not support finding good cause to allow DOC to rely on K.A.B.'s hearsay statements.

DOC made a strategic choice not to have K.A.B. testify—but this is not grounds to find good cause. As the Administrator noted in his decision:

> In this case, DOC Agent Geraldine Kellen testified that she decided not to present K.A.B. because K.A.B. could not unequivocally identify Sellers as the assailant. (May 4, 2022, Hearing Record Track 2 at 3:45–5:10). Therefore, there was no basis to find that there was any 'difficulty, expense, or other barriers to obtaining live testimony' of K.A.B., which is fatal to this particular good cause test.

(R. 8:73; App. 155.) When Agent Kellen testified, she explained the decision not to call K.A.B. this way:

> The decision was she has said, she told the police and she's told me she can't 100% ID her assailant therefore I 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 assailant, but she doesn't know 100%.

(R. 8:130:12–17.) There is no indication in the record that K.A.B. refused to testify, expressed that testifying would be difficult for her, or was unavailable for the revocation hearing. Perhaps one of those justifications would have provided the "good cause" DHA needed to rely on K.A.B.'s hearsay statements, but they *were not invoked*. The record does not even reflect whether Agent Kellen asked K.A.B. about whether she would testify. Courts should not be in the business of making assumptions about the unstated motivations behind parties' actions. *See, e.g., Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82 ("we will not abandon our neutrality to develop arguments"). Based on the reason DOC provided, there was not good cause to deny Sellers his right to confront K.A.B.

The Administrator completed his good cause analysis by citing *Simpson*'s rule that "good cause can be 'met when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence.'" (R. 8-73; App. 155.) He concluded DOC had also not met good cause under this test: "But, in this case, there is no basis to find that K.A.B.'s hearsay statements were admissible under the rules of evidence." (*Id.*) This conclusion was correct: the record does not

support finding any exception to the hearsay rules for K.A.B.'s testimonial statements.

C. This Court should reject DOC's attempt to change the standard for reliance on hearsay of sexual assault victims.

Even though the law already provides clear pathways for DOC to show good cause for DHA to rely on hearsay statements of victims, DOC argues for an ill-defined, new, and broad exception to probationers' due process rights. The Court should reject DOC's attempt to disrupt settled law.

DOC argues that good cause was shown to rely on K.A.B.'s statement, urging this Court to adopt the incorrect reasoning of the circuit court (whose decision is not under review here) and ignoring the well-established standards for good cause. (Pet. Br. at 33.) Conspicuously absent from DOC's argument that good cause was shown is the invocation of a specific exception to the hearsay rule under the Wisconsin Rules of Evidence, or to "difficulty, expense, or other barriers to obtaining live testimony," at least one of which is necessary to a finding of good cause. (*Id.*); *Simpson*, 2002 WI App 7, ¶¶ 20–22. At most, DOC seems to imply that the residual hearsay exception should be extended to K.A.B. and perhaps all victims of sexual assault, but this is an unsupportable argument. (Pet. Br. at 32.) DOC makes no attempt to argue that the special considerations specific to child victims should also apply to adults, or to otherwise explain why this Court's holding in *Sorenson* should be expanded to adults. The Administrator is unaware of any Wisconsin case applying the residual exception to the hearsay rule uniformly to all victims of sexual assault, and this Court should not create such a rule now.

As discussed in Section III, *supra*, the bar is not high for DOC to rely on hearsay evidence in revocation hearings—but it did not clear the bar in this case. Eliminating that bar entirely, as DOC seems to urge, would violate the due process rights of probationers and parolees, who already possess only a limited right to confront their accusers.[3]

It is not true that DHA interpreted *Morrisey* as imposing a rule stricter than in a criminal trial. (Pet. Br. 32–33.) The Administrator acknowledged that Sellers's right to confront K.A.B. could be overcome by a showing of good cause and cited the applicable legal standards, but he determined good cause had not been shown. (R. 8:72–73; App. 154–55.) As noted previously, DOC complains that "DHA did not conduct an analysis to determine whether the statements here" fell under an exception to the rules of evidence and could thus, under *Simpson*, be relied upon to support the ALJ's decision. (Pet. Br. 32.) This is a blatant misreading of the record. The Administrator specifically cited *Simpson* and wrote: "But, in this case, there is no basis to find that K.A.B.'s hearsay statements were admissible under the rules of evidence." (R. 8:73; App. 155.) DOC may disagree with this analysis, but it cannot seriously contend that the analysis did not take place.

[3] Affirming the Administrator's decision in this case will not make it impossible for DOC to obtain revocation of Sellers's probation, if that is its goal. DOC represents that Sellers was ultimately convicted of second-degree sexual assault and burglary. (Pet. Br. at 12.) Although irrelevant to the instant Petition, a subsequent conviction could form the basis for DOC to file a motion for a new probation revocation hearing. *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶¶ 9–15, 270 Wis. 2d 745, 678 N.W.2d 361; *State ex rel. Leroy v. Dep't of Health & Soc. Servs.*, 110 Wis. 2d 291, 295, 329 N.W.2d 229 (Ct. App. 1982). A judgment of conviction generally satisfies the standard to reopen a revocation hearing and obtain revocation. Wis. Admin. Code HA § 2.05(6)(f); *see also State ex rel. Flowers v. Dep't of Health & Soc. Servs.*, 81 Wis. 2d 376, 389 n.7, 260 N.W.2d 727 (1978).

As the U.S. Supreme Court wrote in *Morrissey*, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Morrissey*, 408 U.S. at 482. That is why parolees and probationers are entitled to the "minimum requirements of due process" under the Fourteenth Amendment, including the right to confront adverse witnesses, "unless the hearing officer specifically finds good cause for not allowing confrontation." *Id.* at 482, 488–89. Allowing DOC to rely on uncorroborated hearsay in revocation hearings *without* demonstrating good cause would directly contradict *Morrissey*, violate probationers' most basic due process rights, and very likely end in wrongfully depriving some individuals of their liberty. This Court should not adopt such a rule.

IV. The law already requires reviewing courts to evaluate DHA's potential errors of law, and to examine the underlying evidence—and the court of appeals did so.

The long-standing standard of review for agency decisions gives reviewing courts sufficient opportunity to review DHA's potential errors of law and failure to consider evidence. And indeed, the court of appeals did just that when it reviewed the Administrator's decision, which was the final decision of the agency.

DOC asks: "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?" (Pet. Br. at 9.) By way of an answer, DOC proposes a radical reworking of the certiorari review

standards: "Where an agency commits an error of law by failing to consider evidence altogether, the deference afforded under the 'substantial evidence' standard does not apply." (*Id.* at 34.) DOC cites no authority to support this claim because none exists. During certiorari review, courts already must consider whether DHA committed any errors of law or wrongfully overlooked record evidence. When an error is egregious enough, courts' deference to DHA may be overcome. But there is no basis in law to eliminate that deference entirely, nor should this Court create such a rule.

As discussed in Section I, *supra*, on certiorari review a court must analyze "whether DHA acted according to law… whether DHA's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment… and whether the evidence was such that DHA might reasonably make the decision in question." *Simpson*, 2002 WI App 7, ¶ 10. Where "substantial evidence" could support two contradicting conclusions, the court defers to DHA's determination. *Von Arx*, 185 Wis. 2d at 656. Appellate courts are not permitted to "ignore" errors of the agency, as DOC suggests. Rather, they evaluate any possible agency errors, including in the agency's review of the evidence.

The standard also clearly contemplates that, yes, reviewing courts *should* consider all the record evidence that could support the DHA's decision. The reviewing court must consider "whether the evidence was such that DHA might reasonably make the decision in question." *Simpson*, 2002 WI App 7, ¶ 10. Even if the Administrator conducted an inadequate analysis (not so here), the court reviews the record to determine if it supports his decision. For example, before revoking parole or probation, "the Department must exercise its discretion by at least considering

whether alternatives are available and feasible." *Van Ermen*, 84 Wis. 2d at 67. But this Court has explicitly ruled that skipping this step does not automatically invalidate the DHA's decision or reduce the deference a reviewing court shows it: "Although it is apparent that the Department did not exercise its discretion concerning alternatives to revocation in any formal manner, we may examine the record ab initio to see if it supports the Department." *Id.* This reasoning applies equally to other aspects of the Administrator's decision, in addition to being implicit in the certiorari review standard.

Courts certainly *can* reverse DHA decisions if they egregiously misread the facts of a case or misunderstand the applicable law, but that is not what happened here. The *Simpson* test requires courts to review DHA decisions with deference but ensure that the factual record supports the decision and that it was made according to applicable law. *Simpson*, 2002 WI App 7, ¶ 10. The court of appeals did so here, and upheld the Administrator's decision reversing Sellers's probation revocation, just as this Court should do. DOC may not like the outcome, but the process was lawful, fair, and it accounted for all the factors DOC now says were neglected.

This Court should be wary of DOC's apparent attempt to inject *de novo* factual review into the courts' certiorari review process of agency decisions. Deference to agencies' factual determinations is a cornerstone of certiorari review in Wisconsin. *See, e.g., State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979) ("Under this standard a court does not pass on questions of credibility, nor does it weigh the evidence."); *Van Ermen*, 84 Wis. 2d at 64 ("It is the province of the Department to weigh the evidence

in a revocation case. A certiorari court may not substitute its view of the evidence for that of the Department"); *see also Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 6, 278 Wis. 2d 111, 692 N.W.2d 572.. This deference appropriately recognizes the agencies' subject matter expertise and greater familiarity with the record. If the Administrator's decisions are no longer treated with deference, courts can expect a deluge of petitions for certiorari from both probationers and DOC.

This Court should affirm the Administrator's decision and leave undisturbed the certiorari standard of review.

CONCLUSION

The Court should uphold the court of appeals and affirm the Administrator's decision.

Respectfully submitted this 2nd day of January, 2025.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 9,150 words.

Dated this 2nd day of January, 2025.

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