STATE OF WISCONSIN

IN SUPREME COURT

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Appeal No. 2023AP1140

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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

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ON APPEAL FROM A DECISION AND ORDER
IN THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. MCADAMS, PRESIDING

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# RESPONSE BRIEF OF INTERVENOR-CO-APPELLANT KEYO SELLERS

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's acceptance of this case for review signifies it merits both oral argument and publication.

This case presents a fairly ordinary example of decision-making by the Wisconsin Division of Hearings and Appeals ("DHA"). Following a corrections revocation decision, one party typically disagrees with DHA's reasoning. On this rare occasion, that party is the Department of Corrections ("DOC"). It is not this Court's duty, however, to decide which party's view of the evidence is preferable, but instead to determine whether DHA's decision presents one reasonable view of the facts contained in the record before the agency. Because DHA followed state and federal law faithfully, correctly applied *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527, and because its view of the facts was a reasonable evaluation of the evidence, this Court should affirm DHA's order.

## STATEMENT OF THE CASE

To avoid unnecessary repetition, Mr. Sellers will rely on the Statement of the Case presented by DHA in its Response Brief.

Mr. Sellers objects, however, to the last three paragraphs of the DOC's section entitled "Factual Background", in which the DOC describes facts of a separate criminal proceeding involving Mr. Sellers (see DOC Brief at 12-13).

When reviewing an agency decision by certiorari, a court may not consider new evidence. See *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis.2d 3, 796 N.W.2d 411; *State ex rel. Conn v. Board of Trustees of Wis. Retirement Fund***,** 44 Wis.2d 479, 482, 171 N.W.2d 418 (1969). Certiorari is intended to examine whether an agency's decision was reasonable and whether it acted according to law at the time the decision was made. For that reason, the certiorari court may only consider the record before the agency at the time of its decision. Should new evidence be discovered after the agency's action, it can be brought directly to the agency, either by the DOC or the supervisee, by other means. *See State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶¶ 13-14, 270 Wis.2d 745, 678 N.W.2d 361.

Therefore, it is respectfully requested that the Court strike that section from the DOC's brief and the record and not consider it.

## STANDARD OF REVIEW

On appeal of a certiorari decision, the appellate court reviews the decision of the governmental body, not the decision of the circuit court or, in this case, the court of appeals. *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 13, 336 Wis.2d 654, 807 N.W.2d 131. "When reviewing a decision to revoke probation, [appellate 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.

Review of administrative decisions in parole and probation revocation matters is "by certiorari directed to the court of conviction," *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306, 311 (1971). The certiorari court is limited in its inquiry to examine:

> (1) Whether the Division kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

*State ex rel. Foshey v. DHSS*, 102 Wis.2d 505, 307 N.W.2d 315, 318, (Ct. App. 1981).

It must be presumed that the agency "acted according to law and the official decision is correct and the weight and credibility of the evidence cannot be assessed." *State ex rel. Ruthenberg v. Annuity & Pension Bd. Of Milwaukee*, 89 Wis.2d 463, 473, 278 N.W.2d 835 (1979). "[T]he petitioner bears the burden to overcome the presumption of correctness." *Ottman*, 2011 WI 18 at ¶50.

"Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior

tribunal." *Id.* at ¶ 34. "When conducting common law certiorari review, a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision." *Id.* at ¶ 35.

## ARGUMENT

### I. The DHA considered the entire record and properly exercised its discretion in determining that the DOC failed to meet its burden to establish that Mr. Sellers violated the rules of his supervision.

In its brief, DOC repeatedly states, in section headings and elsewhere, that DHA "ignored" certain evidence in Sellers' case and that K.A.B.'s hearsay statements were declared "inadmissible". (See DOC Brief at 23, 25-27). DHA did neither. It considered all the evidence presented in Sellers' case and came to a reasonable conclusion, based on that evidence and in accordance with the law.

#### A. DOC misapplies the Substantial Evidence Test and misunderstand's the nature of the decision under review.

DOC states in its brief, in the title to Section A, that "The evidentiary burden for revocation is low and, if substantial evidence supported the revocation decision, it must be upheld". (DOC Brief at 24). That section heading is both confusing and misleading. An agency's decision must be upheld if there is substantial evidence supporting it but, in this case, there is no decision to revoke probation at issue.

An explanation for the odd phrasing may lie in the DOC's continued confusion as to the nature of the DHA decision under review. As in earlier stages of this litigation, DOC appears to interpret DHA's decision as a decision to reverse the ALJ, rather than a decision declining to revoke Mr. Sellers' probation. It was not. DHA's decision was, in fact, a decision not to revoke Sellers' probation. On certiorari review, the court reviews the final action of the agency and not intermediary decisions within the agency. This Court does not have before it a choice between the ALJ's decision and the administrator's.

In not requesting any particular relief from the court, except that "[t]his Court should reverse the court of appeals" (DOC Brief at 35), DOC appears to believe that reversing a decision (from the court of appeals) which upholds DHA's final order would automatically reinstate the ALJ's decision. It would not. DHA's final decision found that Mr. Sellers' supervision could not be revoked without using K.A.B.'s hearsay statements and those statements could not be used without violating Sellers' due process rights. (R. 8:72-73). Should this Court find that Sellers' due process rights do not require K.A.B. to be called as a witness and that there is no bar to considering her hearsay statements, it is still for the DHA Administrator to consider whether that evidence proves allegations 1-4. A grant of certiorari does not require the administrator to become subordinate to the ALJ.

DOC also assumes, in the section heading cited above, that the substantial evidence test constrains the DHA administrator when reviewing an ALJ's decision to revoke. It does not. The substantial evidence test limits courts when reviewing the *final* decision of an agency. Courts, when reviewing agency decisions by certiorari, must leave the agency's final determination in place if there is any substantial evidence that would support it. See *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 585–86, 326 N.W.2d 768 (1982).

The administrator in this case specifically states in his administrative appeal decision his authority to conduct a *de novo* review of the ALJ's decision. "This appeal decision represents a de novo review of the evidence presented before the Administrative Law Judge (ALJ)." (R. 8:72, citing *Foshey*, 102 Wis.2d at 516). Having done so, "the administrator's decision is 'the final decision.'" *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶7, 242 Wis.2d 94. 624 N.W.2d 130. Having exercised his authority to make a final decision on behalf of his agency, it is the administrator's decision that is reviewed and no other. "Certiorari lies only to review a final agency determination." *State ex rel. Braun v. Krenke,* 146 Wis.2d 31, 39, 429 N.W.2d 114 (Ct. App. 1988).

DOC correctly states in its brief that "The question under the "substantial evidence test" is "whether reasonable minds could arrive at the same conclusion [that DHA] reached." (DOC Brief at 24-25 (citation omitted)). And that "Substantial evidence" is a "low burden of proof." (Id. at 25 (citation omitted)). It is the final decision of the agency however, the administrator's decision, that benefits from this high level of deference, not the ALJ's.

### B. DHA correctly reviewed all of the evidence in Mr. Sellers' case and drew reasonable conclusions.

The Wisconsin Rules of Evidence do not apply to revocation hearings (with the exception of certain privileges) and hearsay is generally admissible. See Wis. Admin. Code § HA 2.05 (6)(e). Contrary to DOC's assertions, none of K.A.B.'s hearsay statements were ruled "inadmissible" (DOC Brief at 23), they were accepted into evidence and they remain in the record.

DHA instead found that no 'good cause' existed for DOC's failure to call K.A.B. to testify, that, in addition to the other evidence, her testimony was necessary to tell her story and prove that a rules violation had been committed, and that her hearsay statements could not be used in lieu of her testimony without violating Mr. Sellers' due process rights.

> K.A.B.'s account of events is critical to DOC's allegations. It is the only account that describes the alleged non-consensual entry into K.A.B.'s house, the alleged non-consensual sexual contact with her, the alleged non-consensual taking of $30 dollars from her, and the subsequent alleged trespassing on her property (which requires evidence of non-consent). Each of these allegations requires K.A.B.'s account of events. However, to rely on her hearsay account (without a finding of good cause) violates Seller's [sic] constitutional right to due process. And without K.A.B.'s hearsay statements, there is no evidence to explain what took place.

(R. 8:72, "Administrative Appeal Decision").

#### 1. DHA did not "ignore" DNA or video evidence.

DOC alleges that DHA "ignored the DNA evidence… establishing that Sellers assaulted K.A.B." (DOC Brief at 25) and "ignored the videos …

establishing that Sellers trespassed on K.A.B.'s porch. (Id. at 27). DHA did not 'ignore' any of the evidence in this case. The administrator found that, in order to prove the allegations, K.A.B.s account is necessary in addition to other evidence presented by DOC. "Each of these allegations requires K.A.B.'s account of events." (R. 8:72).

DHA can, and often does, find violations proven when they can be independently verified by evidence other than witness testimony. Commonly, the defendant's confession to a police officer, a video tape of a crime be perpetrated by the defendant or even the defendant's own posts on social media can prove a violation to DHA's satisfaction.

In this case, however, if the allegations against Mr. Sellers were true, he and K.A.B. would be the only witnesses to the rules violations. The DOC submitted evidence that either Mr. Sellers' DNA, or the DNA of approximately 389 other African-American males in Milwaukee County alone, was found during an examination of K.A.B., as well as a video, that no one can be absolutely sure shows Mr. Sellers, from K.A.B.'s front porch a week after the alleged assault. Absent testimony from K.A.B. that there was an assault, that she did not consent to that or a later trespass, her explanation of the circumstances and her availability for cross-examination, that evidence alone does not prove the allegations against Mr. Sellers to a preponderance of the evidence. (See R. 8:32).

**2. Other "circumstantial" evidence cited by DOC is drawn from K.A.B.'s hearsay statements.**

DOC points to other "circumstantial" evidence that it claims proves that Sellers' is guilty of misconduct as described in allegations 1-4. The problem is that most of the evidence DOC cites is either not present in the record or comes directly from K.A.B.'s hearsay statements.

The DOC claims that "testimony from Analyst Burns explains that … DNA … was retrieved from K.A.B.'s pubic area shortly after the assault". (DOC Brief

at 28). Ms. Burns testified that she reviewed a DNA sample that she understood to be from K.A.B.'s pubic area but she gives no details as to when, where or under what circumstances that sample was taken. (R. 8:105-6). The DOC claims "K.A.B. immediately called the police reporting the assault." (DOC Brief at 28). The DOC's citations to the record are directly to K.A.B.'s hearsay statements – in the agent's Revocation Summary, in K.A.B.'s statement to the agent, from K.A.B.'s statement relayed in a criminal complaint, and from Officer Walker's understanding of statements made by K.A.B.[1] DOC also claims the evidence shows that K.A.B. "had a SANE examination at the hospital shortly after the assault" and that "she then installed a security system at her home right after the assault." (Id.). All of the "circumstantial" evidence the DOC points to has K.A.B.'s hearsay statements as its source. These assertions simply underline how critical K.A.B.'s testimony was to proving allegations 1-4 against Mr. Sellers.

**3. DHA acted reasonably based on the evidence.**

DHA did not, of course, "ignore" DNA evidence or the surveillance video, as DOC claims. (Pet.'s Brief, 25-28). The administrator in his decision is not required to address and provide commentary on every item in the record, he must only provide an explanation of his decision. Wis. Admin. Code § HA 2.05 (9). In this case, it appears he stopped his inquiry when he found that, absent K.A.B.'s live testimony, neither a sexual assault nor a trespass could be proven without violating Mr. Sellers' due process rights. That decision followed state and federal law correctly and, insofar as he made factual determinations, they were well founded and certainly conclusions upon which reasonable minds might agree.

[1] In his answers to the questions from the agent, Officer Walker says K.A.B. was interviewed by Detective Ka Yeng Kue (R. 8:87) and he does not use the construction "she said to me", or anything like it, in reference to the alleged complaint of September 15, 2021. It appears that Officer Walker was testifying about either his review of a report or a conversation he had with officers who did speak to K.A.B.. No police reports were submitted by DOC at the hearing.

The DOC argues that, even excluding hearsay evidence from K.A.B., the other evidence that Mr. Sellers committed the contested violations is so strong that no reasonable fact-finder could fail to have found the allegations proven. That is not true.

The bar that the DOC must clear in this case is very high, as it is for revocation defendants seeking certiorari. The burden to prove that the DHA's actions were arbitrary or unreasonable rests with the party attacking that decision, in this case the DOC. See *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). "The agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion." Id. at 656. The agency properly exercises its discretion if it engages in "a reasoning process based on the facts and a conclusion based on a logical rationale founded upon proper legal standards." Id.

In this case, the administrator found that allegations 1-4 presented by the DOC could not be proven absent any context or explanation of events from K.A.B. Given that, without K.A.B.'s testimony, no violation of Sellers' rules is even described, the administrator's decision was a reasonable one, and perhaps the only reasonable one. The final decision from DHA therefore was not arbitrary, oppressive to the DOC or unreasonable, nor was it an exercise of the agency's will rather than its reason.

DHA's final decision was supported by the evidence. On certiorari and appeal, the court considers a challenge to sufficiency of the evidence by examining whether substantial evidence supports the agency's findings. See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis.2d 443, 620 N.W.2d 414. If substantial evidence supports the agency's decision, the court must uphold that decision, even if the evidence might also support contrary conclusions. See *Van Arx*, 185 Wis.2d at 656. The agency, not the court, weighs the evidence presented at a revocation hearing. See *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17 (1978).

### 4. The Court should not weaken the high level of deference afforded to agencies.

If the Court in this case steps in and directs the DHA as to which evidence it must find persuasive, it might irrevocably reverse the longstanding rule of deference to agency decisions in certiorari cases in Wisconsin. Courts are not currently permitted to direct agencies on which of several reasonable interpretations of the evidence it should adopt.

In this case, DHA decided that the DNA evidence and video footage alone did not prove allegations 1-4 by a preponderance of the evidence. That is at least one reasonable view of the evidence. If this court were to give certiorari courts the ability to impose their own preferred view of the evidence on agencies, the number of certiorari cases in Wisconsin would explode. Only a very small number of corrections revocation cases now are challenged by certiorari each year, in part because of the strict deference court are required to give agency decisions. If certiorari courts became a place to re-argue the persuasiveness of the evidence, many more agency decisions would be appealed.

This would affect not only corrections decisions but decisions taken by a wide variety of agencies, municipalities and local boards whose actions are protected by limiting certiorari courts to the four strict questions cited under standard of review in virtually every challenge to agency actions in Wisconsin: 1) whether the agency acted within its jurisdiction; 2) whether the agency acted according to law; 3) whether the action was arbitrary, oppressive or unreasonable and represented the agency's will and not its judgment; 4) whether the evidence was such that the agency might reasonably make the order or determination in question. See *Washington*, 2000 WI App 235, ¶ 16.

## II. DHA followed federal and state law correctly.

DHA followed the requirements of the law, from both *Morrissey* and *Simpson*, faithfully and came to the correct legal conclusion after performing the balancing test required by *Simpson*.

The DOC contends that K.A.B.s statements to police and to Agent Kellen should be considered without a need for confrontation required by *Morrissey* and *Simpson*. It argues that 'good cause' exists to dispense with confrontation, though it doesn't explain on what basis 'good cause' can be established. Alternatively, it appears to propose that the rule in *Simpson* be set aside, thought it does not propose a new blueprint for securing a right to confrontation.

We observe that DOC did not make any of these arguments before the court of appeals. That court noted, "[o]n appeal…, DOC does not appear to argue that [DHA's] conclusion was erroneous, and it concedes that DHA kept within its jurisdiction and acted according to law." *State ex rel. Wis. Dep't of Corrs., Div. of Cmty. Corrs. v. Hayes*, No. 2023AP1140, 2024 WL 2146952, ¶ 15 (Wis. Ct. App. May 14, 2024) (DOC App. at 107).

### A. *Morrissey* established the right to confrontation as one of the minimum elements of due process in revocation hearings.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the U.S. Supreme Court addressed the question of which, if any, procedural rights parolees are entitled to before their paroles are revoked for violations of their rules. The court concluded that parole is unrelated to criminal prosecutions and so the parolee is not entitled to "the full panoply of rights" due to a criminal defendant. *Morrissey*, 408 U.S. at 480. However, the parolee may expect, at a minimum, certain procedural guarantees rooted in the Fourteenth Amendment:

> [T]he 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. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By

> whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

*Id*. at 482.

*Morrissey* then provides a non-exhaustive list of rights in parole revocations that the court describes as the "minimum requirements of due process"[2]:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reason for revoking parole.

*Id*. at 489.

As the DOC notes, before defining this list of minimum requirements of due process, *Morrissey* observes that due process is flexible and the same elements do not apply to every situation in which due process is constitutionally required. *Id*. at 481 (DOC Brief at 30). While the court says that revocation hearings should remain flexible and accept some evidence not allowed in criminal prosecutions, *Id.* at 489, the list of minimum requirements of due process is just that, and is non-negotiable.

The Supreme Court extended the rights in *Morrissey* to probationers facing revocation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), and reaffirmed its decision in *Black v. Romano*, 471 U.S. 606, 611-13 (1985).

[2] Wisconsin has since discovered additional due process rights that must be observed in revocation hearings. See *State ex rel. Vanderbeke v. Endicott,* 210 Wis. 2d 502, 563 N.W.2d 883 (1997) (the right to be mentally competent at a revocation hearing).

### B. The rules for administering a limited right to confrontation in revocation hearings in Wisconsin were established by *Simpson* in 2002.

Of the minimal due process rights enumerated in *Morrissey* that must be afforded to revocation defendants, the right to confrontation and cross-examination is a qualified right. The agency may excuse the live testimony of an accusing witness if it finds "good cause". *Morrissey*, 408 U.S. 489. In 2002, the Wisconsin Court of Appeals took up the question of what constitutes 'good cause' for dispensing with confrontation in *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527 (Ct. App.).

#### 1. *Simpson* established a test for guaranteeing a right to confrontation in appropriate circumstances in revocation hearings that is more flexible than in criminal trials.

*Simpson* established a straightforward, two-pronged test that should be easily understood by the DOC and defendants alike. It allows DHA, using its discretion, to evaluate whether the defendant's need for confrontation outweighs difficulties encountered by the DOC in presenting a witness, even when that witnesses testimony would be required in a criminal proceeding.

Under *Simpson*, 'good cause' to dispense with the right to confrontation can be found in either of two ways. First, an adverse witness's statements are automatically excepted from the confrontation requirement if they show "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule". *Simpson*, 2002 WI App 7, ¶ 21.

Alternatively, even if an adverse witness' statements are not covered by a firmly rooted hearsay exception and would not be admissible under the Wisconsin Rules of Evidence, 'good cause' can still be found, and the need for confrontation dispensed with, by balancing "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. at ¶ 20. In performing this balancing test, DHA may certainly consider efforts the DOC has made to produce a witness to testify and may be moved to find 'good cause' if those efforts were in good faith yet unsuccessful. However, "[b]ecause '[c]ross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested,' see *Davis v. Alaska*, 415 U.S. 308 (1974), the State should provide a reason for why it will not make a witness available for cross-examination." *Simpson*, 2002 WI App 7, ¶ 20.

**2. No firmly-rooted hearsay exceptions would allow K.A.B.'s hearsay statements under the Wisconsin Rules of Evidence.**

In Sellers' case, the ALJ did not address any confrontation problem. (R. 8:61-66). The administrator, on appeal, quite appropriately did. He examined the statements attributed to K.A.B. in the record and concluded correctly that, "in this cases, there is no basis to find that K.A.B.'s hearsay statements were admissible under the rules of evidence." (R. 8:73). K.A.B.'s statements in the record about events of September 15, 2022, consist of statements allegedly made by her to Milwaukee Police and a statement made to Agent Kellen on January 25, 2023. (R. 7:33-37). As noted above, it appears from Officer Walker's testimony that he did not speak directly with K.A.B. until some point after the incident on the front porch on September 22, 2022. (R. 8:87-91). Officer Walker testified that K.A.B. was initially interviewed by "patrol officers" but it appears Walker spoke to her subsequently. (R. 8:90-91). Other hearsay statements attributed to K.A.B. are in the record in a Criminal Complaint and a probable cause document (R. 7:44-45 and 40-42), neither of which would be allowed as evidence proving the truth of K.A.B.'s alleged statements in a criminal proceeding.

While the DOC typically submits police reports as evidence in revocation cases, it is notable that in this case there are no original reports of officers' interviews with K.A.B. contemporaneous with the alleged complaint. Not only

does the DOC offer only a statement made to the agent over four months after the incident but we are unable to see from police reports if that statement was consistent with what police might have been told when K.A.B. was interviewed.

The DHA administrator correctly concluded that none of the statements in the record attributed to K.A.B. would be subject to a firmly rooted hearsay exception under the Wisconsin Rules of Evidence.

### 3. DHA properly applied the balancing of interests, called for in *Simpson*, and found it could not excuse the DOC's failure to call K.A.B. as a witness.

The administrator continued his search for 'good cause' under the second prong of the test in *Simpson*. (R. 8:73). He considered that Agent Kellen was offered an opportunity by the ALJ to explain why K.A.B. was not called as a witness and noted the agent stated DOC had made no effort to produce K.A.B. because they didn't think it was necessary. (R. 8:130). The administrator concluded "[t]herefore, 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).

The administrator used his discretion in balancing the interests at stake in this part of *Simpson's* two-prong test. DHA's exercise of discretion should not be disturbed by the courts unless it is arbitrary or unreasonable, and it is not arbitrary or unreasonable if it consists of "a reasoning process based on the facts and a conclusion based on a logical rationale founded upon proper legal standards." *Von Arx*, 185 Wis. 2d at 656. DHA properly concluded, based on the hearing testimony, that there were no obstacles preventing the DOC from calling K.A.B. as a witness, nor was there any evidence that K.A.B. was reluctant to testifying. Therefore, 'good cause' for excusing K.A.B.'s live testimony cannot be found under *Simpson*.

### 4. The DOC fails to establish any applicable hearsay exception for K.A.B.'s out-of-court statements

In its brief, the DOC states, "[t]his Court should hold that, under *Morrissey* and its progeny, good cause was shown to exempt K.A.B. from confrontation by Sellers." (DOC Brief at 33). However, it makes no argument for that position and does not explain in what form 'good cause' was established.

The DOC offers an analysis of *Morrissey* (DOC Brief at 30), then an analysis of *Simpson* and *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 230 N.W.2d 890 (1975) (DOC Brief, 31-32), demonstrating that those courts "held that hearing examiners could permit out-of-court statements by sexual-assault victims." (DOC Brief, 31). *Simpson* and *Schmidt* certainly did except those statements from the confrontation requirement. Both statements were made by very young children who were the victims of sexual misconduct, a 6 year old in *Simpson* and a 5 year old in *Schmidt*, and in both cases the exceptions were based on firmly rooted hearsay exceptions.

In *Schmidt*, the child's statement to his mother the day after the incident, and then later to the probation agent, fit the parameters of the "excited utterance" hearsay exception. This Court noted that, "[a] broad and more liberal interpretation is given to what constitutes an excited utterance when applied to young children especially when the child is alleged to have been the victim of sexual assault." *Schmidt*, 69 Wis. 2d at 684.

In *Simpson*, the court found that the child's statement was subject to the residual hearsay exception, because the Wisconsin Supreme Court had, over a decade earlier, established that out-of-court statements from child sexual assault victims may be subject to the residual hearsay exception in criminal proceedings. See *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77 (1988). The residual hearsay exception is a 'catch all' meant to cover hearsay evidence "not specifically addressed in the other exceptions, which contains 'comparable circumstantial guarantees of trustworthiness'." *State v. Petrovic*, 224 Wis. 2d 447, 484, 592

N.W.2d 238 (Ct. App. 1999) (quoting Wis. Stat. § 908.045(6)). "The residual exception should only be applied to the 'novel or unanticipated category of hearsay that does not fall under one of the named categories'." *Petrovic*, 223 Wis. 2d at 484-5 (citation omitted).

Because the residual rule is meant to cover instances not covered in hearsay exceptions enacted by the legislature, this Court in *Sorensen* conducted a five-part test to ensure that, in that case, the hearsay statements contained "'circumstantial guarantees of trustworthiness' comparable to those existing for enumerated exceptions." *Sorensen*, 143 Wis. 2d at 243. The court of appeals in *Simpson* also applies that five-part test to the statements at issue even after it determines the residual exception can be applied to child sexual assault victims. *Simpson*, 2002 WI App 7, ¶¶ 23-30.

The DOC makes no argument beyond observing that hearsay statements were allowed in *Schmidt* and *Simpson*. It does not explain which "firmly rooted" hearsay exception it wishes to apply to K.A.B.'s statements in this case and offers no explanation as to why it should apply.

In fact, there is no established hearsay exception that would cover K.A.B.s statement to the agent and to police detectives (relayed through Officer Walker's testimony). The DOC appears to endorse, without justification, making an exception to the confrontation requirement for all adult sexual assault victims – or possibly of all crime victims – in revocation hearings in Wisconsin. We ask the Court to note that the first part of the two-prong test in *Simpson* allows the finding of 'good cause' if the proffered hearsay statement "has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule." *Simpson*, 2002 WI App 7, ¶ 21 (citation omitted). In order for out-of-court hearsay statements from sexual assault victims, or all victims, to be allowed under that standard in revocation hearings, they would first have to be generally allowed in criminal proceedings under the Wisconsin Rules of Evidence. Hearsay statements, such those offered at Sellers' hearing, are not.

### 5. DOC fails to offer any reason why the balancing test in *Simpson* should weigh in the DOC's favor.

DOC also asks this Court to create a new rule that victims of alleged sexual assaults be exempted from rules guaranteeing a revocation defendant's right to confrontation because failing to do so would "revictimize" the witness. (See DOC Brief at 33). The DOC makes no legal argument for this position, nor does it offer any assurances as to reliability of the witness's hearsay statements or the protection of the defendant's due process rights.

In response, we would only highlight the situation particular to Sellers' hearing. First, the agent was given an opportunity to explain any difficulty, obstacles or other reasons why K.A.B. did not appear to testify. She did not state that K.A.B. had any reluctance to appearing, only that the DOC decided not to call the witness because she didn't think it would be necessary. (R. 8:130).

Furthermore, the process of testifying at Sellers' hearing was substantially less cumbersome for the witness than it would have been before the COVID pandemic. As is clear in the transcript, during the many dates of Sellers' hearing, Sellers appeared on video feed from Milwaukee Secure Detention (sometimes with his attorney beside him), but the ALJ and agent appeared from their respective offices and witnesses appeared via video from whatever location they chose. (See, e.g., for May 4, 2022, R. 8:124). In counsel's experience, prior to COVID, hearings in Milwaukee took place in a small room at MSDF, the Milwaukee Jail or the Milwaukee House of Corrections, with the ALJ, agent, the defendant and his attorney and the witness all sitting around a table. If a witness requested, or was particularly vulnerable, the judge could have him or her testify using a microphone from an adjacent room with a window into the hearing room. Since 2020, however, all revocation hearings have been conducted remotely, by video link, and the witness no longer has to appear in the same room as the accused, or see him on-screen if the ALJ so decides. There is as yet no indication that DHA intends to return to in-person hearings.

Rather than making an argument under existing law for how it believes DHA should have analyzed the facts in Sellers' revocation, the DOC offers a critique of the circuit court and court of appeals decisions in this case, citing the circuit court decision at points as if it were binding authority. (DOC Brief, 32-34). As noted above, however, when reviewing a decision to revoke probation, appellate courts examine the decision of the agency, applying the same standards as the circuit court. See *Simpson*, 2002 WI App 7, ¶10. This Court does not review, or afford any level of deference, to the circuit court's certiorari decision.

The requirements for finding 'good cause' to dispense with confrontation in Wisconsin have been well established since 2002, and the DOC should have been well aware of them. The DOC had an obligation to call K.A.B. as a witness in Sellers' case and it failed to do so. DHA had an obligation to protect Sellers' due process rights and ruled, correctly, that his supervision could not be revoked based on information from K.A.B. without affording him a chance to cross-examine her. The agency followed state and federal law correctly in doing so.

### C. A strong affirmation of *Simpson* and DHA's actions in this case would have beneficial effects across the state.

The result DOC objects to in Sellers' case were brought about by DOC's own mistakes in its presentation of evidence at the revocation hearing. Those mistakes likely have two sources: 1) a haphazard handling of confrontation by DHA in the years since *Simpson*, and 2) DOC's strong preference to have professional law enforcement officers testify about what a witness told them, rather than presenting witnesses in person for cross-examination.

In undersigned counsel's experience in revocation cases since 2002, DHA was often unlikely to address confrontation claims in its decisions until six or seven years ago. Since then, confrontation has been handled, in counsel's opinion,

somewhat inconsistently. Published decisions in Wisconsin have not addressed confrontation in revocations since *Simpson* in 2002.

In these circumstances, it's easier to understand how Sellers' agent and her supervisor could have made the mistake of ignoring the requirement for confrontation in *Simpson*. That requirement has not been made clear enough to them in the past.

This Court has an opportunity to reinforce the rule in *Simpson* and clearly define under what circumstances it is necessary to present, or try to present, a witness to testify and be cross-examined in a revocation context.

A clear statement from the Court would allow DOC to better train its agents on evidentiary requirements in revocation hearings, making it unlikely this type of mistake would often be repeated in the future. 'Excited utterance' is, by far, the most common hearsay exception to be cited by DHA. With an understanding of that exception, a knowledge that agents may be asked to explain what difficulties they had producing a witness to testify, and an awareness that DHA may expect defendants to be able to ask questions of accusers, DOC will likely have little trouble correctly evaluating what sort of evidence is called for in revocations.

Revocation cases are routine for agents and they have some expertise in those proceedings. Each agent reviews a revocation case with her supervisor and the DOC has a substantial staff of attorneys to address and advise on any ambiguity. All that's lacking is a clear and recent statement from Wisconsin courts that confrontation is required under certain circumstances in revocation hearings and an explanation of the two-prong test that might excuse that requirement. This Court has an opportunity to provide that clarification.

## CONCLUSION

DHA's decision regarding Keyo Sellers appropriately protected Mr. Sellers' due process rights, followed state and federal law correctly and, insofar as

DHA made factual determinations, they were well-founded and certainly conclusions upon which reasonable minds might agree. That reasonable minds, as the DOC contends, could also prefer the ALJ's view of the case is irrelevant to this appeal.

Because the final decision of the agency keeps within its jurisdiction, comports with the law and takes a view of the facts that is not unreasonable, the agency's action must be upheld.

Respectfully submitted this 6th day of January, 2025.

*Electronically signed by Daniel R. Drigot*

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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 produced in proportional serif font. The length of the brief is 6,313 words.

Dated this 6th day of January, 2025.

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