STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 20011AP1770-CR and 2011AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDON M. MELTON,

Defendant-Appellant.

APPEAL FROM JUDGMENTS OF CONVICTION AND ORDERS ENTERED IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE RICHARD CONGDON AND THE HONORABLE MARK D. GUNDRUM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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

DISTRICT I

Case No. 2011AP1770-CR and 2011AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDON M. MELTON,

Defendant-Appellant.

APPEAL FROM JUDGMENTS OF CONVICTION AND ORDERS ENTERED IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE RICHARD CONGDON AND THE HONORABLE MARK D. GUNDRUM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

ISSUE PRESENTED

Melton casts the issue presented as follows: Does the circuit court have the authority to order the destruction of a presentence investigation report (PSI) when a new PSI has been prepared to replace it? (Melton's Brief at 1). Judge Richard Congdon implicitly answered yes to this question by ordering that the first PSI be sealed and destroyed. Judge Mark D. Gundrum answered no, modifying Judge Congdon's order to direct that the PSI be sealed but not destroyed.

The State respectfully submits that the issue presented on appeal is whether a circuit court has the authority to destroy a PSI after sentencing and after entry of judgment for purposes related to DOC administration. The State maintains that the answer to this question is no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument, as the positions of the parties are fully set forth in the briefs. Publication is likely inappropriate as the facts of this case are highly unique and are unlikely to be repeated.

SUPPLEMENTAL STATEMENT OF THE CASE

Melton was convicted upon guilty pleas of second degree-sexual assault of a child for having sexual intercourse with 13-year old C.R., and theft of moveable property greater than $2,500. (2011AP1770--1:1; 31:1; 2011AP1771—25:1; A-Ap. G1, H1). Additional charges of second-degree sexual assault of a child under the age of 16, battery and felony bail jumping were dismissed and read-in (2011AP1770—43:2-10; 2011AP1771—25:2; A-Ap. H2). (Melton's Brief at 2).[1] The court later ordered a PSI (2011AP1770--44:9).[2]

Upon receiving the PSI, Melton moved to strike portions of the PSI that discussed certain uncharged offenses under a section entitled "Description of

[1]The read-in and dismissed charge of second degree sexual assault of a child under the age of 16 was charged in a separate case, Waukesha Case No. 2009CF000287, and is not included in the appellate record.

[2]Except where noted, all subsequent record references in this consolidated appeal of Nos. 2011AP1770 and 2011AP1771 are to the file in No. 2011AP1770.

Offenses" (20:1-3; 49:3-4; A-Ap. A3-4). It is apparent from the transcript of the motion hearing that these uncharged offenses were sexual in nature (49:5, 10; A-Ap. A5, A10).[3] The court, Judge Richard Congdon presiding, determined that the information about the uncharged offenses would be "of little use to the court at a sentencing" (49:12; A-Ap. A12). The court then concluded that leaving the objected-to information in the first PSI would be prejudicial to Melton—an apparent reference to use of PSIs by Department of Corrections (DOC) in correctional administration:

> So, the Court has already made a finding that such information would be of little use to the Court, this information about this other activity, and the Court would find that or believe that it could very well be prejudicial to Mr. Melton as he goes through whatever route is eventually—that the Court will set for him. It will be prejudicial to him. The Court will note that this information is uncharged and unverified except for what—the alleged statements.

(49:12-13; A-Ap. A12-13). The court issued a written order directing the DOC to prepare an updated PSI omitting the objected-to information in the first PSI (21:1; A-Ap. D1). The order also directed that the first PSI

[3]The question of whether the objected-to information was, in fact, proper for inclusion in a PSI is not before this court. The State notes, however, that an offender's personal history, including sexual behavior, is an appropriate subject for inclusion in a PSI under DOC rules. *See* Wis. Admin. Code § DOC 328.27(3)(a)6. (PSI should include discussion of offender's "personal history"); Probation and Parole Operations Manual, Wisconsin Department of Corrections, Division of Community Corrections, Sec. 5.01.04 at 7 (listing "sexual behavior" as a component of "personal history"). Even if the information was appropriate to include in the PSI, the decision to order a PSI and, ultimately, the issuing of sentence, is addressed to the court's discretion, and the State does not argue that the court misused its discretion in ordering the new PSI. The State has not filed a motion in the circuit court to cite to the first PSI in its brief, and the objected-to information is therefore not set forth herein. *See State v. Parent*, 2006 WI 132, ¶ 49, 298 Wis. 2d 63, 725 N.W.2d 915.

"shall be sealed and destroyed following the expiration of any appellate time limits. . . ." (21:1; A-Ap. D1).

A new PSI was provided to the court, and Melton was sentenced to four years' initial confinement and eight years' extended supervision on the conviction for second-degree sexual assault of a child, and six months' incarceration on the theft conviction, to be served concurrently (31:1; 51:2-3; 2011AP1771—25:1; A-Ap. G1, H1).

A review hearing was held by the court, Judge Mark D. Gundrum, presiding (53:1; A-Ap. B1). The court scheduled the hearing after reviewing the case record and discovering the order ordering that the first PSI be sealed and destroyed after expiration of appellate time limits (53:2; A-Ap. B2). At the hearing, the court determined upon reviewing the PSI statute, Wis. Stat. § 972.15, that the original court lacked the authority to order that the PSI be destroyed (53:2; A-Ap. B2). The court concluded that "keeping [the PSI] confidential" was all that was "envisioned by the statute" (53:2; A-Ap. B2). The court entered a written order entitled "modified order" that was identical to the previous court's order, except that it deleted the directive to destroy the PSI (15; A-Ap. E1). The modified order thus mandated that the PSI be sealed but not destroyed (15; A-Ap. E1).

In the record, this modified order is attached with adhesive tape to the front of the sealed envelope containing the PSI (15). The back of the sealed envelope contains the message "Ordered Sealed" in large, hand-written letters (15).

On Melton's appeal, this court directed the parties to file memorandum addressing whether, by entering guilty pleas, Melton had waived his right to raise any issues on appeal. *State v. Melton*, 2011AP1770-CR and 2011AP1771-CR (September 14, 2011 order). In its memorandum, the State conceded that Melton had not waived his right to challenge the modified order directing

that the first PSI be sealed but not destroyed because the order was entered after Melton's guilty plea. This court agreed that Melton had not waived this challenge, and determined the court had jurisdiction to hear the appeal *State v. Melton*, 2011AP1770-CR and 2011AP1771-CR (November 3, 2011 order). Additional facts from the record are provided as necessary in the Argument to follow.

SUMMARY OF ARGUMENT

The State believes that the circuit court likely would have had the authority under case law interpreting the PSI statute, Wis. Stat. § 972.15, to destroy the PSI *prior to sentencing to bar the PSIs use at sentencing*. But the circuit court ordered the PSI destroyed *after sentencing and after entry of judgment to bar the PSIs use in DOC administration*. The State submits that, under these circumstances, the court lacked the authority to enter an order to destroy the PSI for the following reasons. First, the power to destroy a PSI is not provided by Wis. Stat. § 972.15, which instead authorizes a court to place the documents under seal after sentencing. Second, the power to destroy a PSI is not an inherent power of the circuit court because it is not essential to the court's proper functioning, particularly where the statute already authorizes the court to place the PSI under seal. Third, an inherent power to destroy a PSI after entry of judgment would be contrary to the Supreme Court Rule mandating to the retention of court records. And, fourth, the court lacks the inherent authority to order a PSI destroyed when, as here, the purpose of the order is to bar the PSIs use in DOC administration. Accordingly, the circuit court's modified order directing that the PSI be sealed but not destroyed should be upheld.

ARGUMENT

A CIRCUIT COURT LACKS THE AUTHORITY TO DESTROY A PSI AFTER SENTENCING AND AFTER ENTRY OF JUDGMENT.

On appeal, Melton does not challenge his conviction or his sentence. He takes issue only with the circuit court's decision to seal but not destroy the first PSI. Melton is concerned that, if the PSI is only sealed but not destroyed, it may be obtained by DOC and used in correctional programming, or by another agency or person for some other purpose. (Melton's Brief at 11-12). He argues that the circuit court erred in concluding that it lacked that authority to destroy the PSI, and maintains that the power to destroy a PSI is an inherent power of the circuit court. (Melton's Brief at 9-13).

A. Standard of review.

Melton's arguments on appeal concern the scope of a circuit court's judicial authority. This case also involves the interpretation of statutes and Supreme Court Rules. A question of a circuit court's judicial authority, as well as its interpretation of statutes and court rules, are matters of law subject to independent review. *Hefty v. Strickhouser*, 2008 WI 96, ¶ 27, 312 Wis. 2d 530, 752 N.W.2d 820; *Ball v. District No. 4, Area Board*, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

B. Applicable law.

1. Inherent authority.

In addition to the powers expressly granted by the state constitution and statutes, Wisconsin circuit courts have "'inherent, implied and incidental powers.'" *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350 (citation omitted). Circuit courts exercise inherent authority in three areas. *City of Sun Prairie v. Davis*,

226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999). First, courts have inherent authority to manage the internal operations of the court "to guard against any action that would unreasonably curtail the powers or materially impair the efficacy of the courts or judicial system." *Id.* (*discussing Barland v. Eau Claire County*, 216 Wis. 2d 560, 587-88, 575 N.W.2d 691 (1998) (court had inherent authority to retain judicial assistant); *In re Courtroom*, 148 Wis. 109, 134 N.W. 490 (1912) (the court had inherent authority to refuse substandard facilities proposed by the county). Second, courts have inherent authority to regulate attorneys and judges. *Id.* Third, courts have inherent authority to "ensur[e] that the court functions efficiently and effectively to provide the fair administration of justice." *Id.* at 749-50. Courts exercise this inherent authority to dispose of cases on their dockets. *Id.* at 750.

"[A]n inherent power is one without which a court cannot properly function." *State v. Braunsdorf*, 98 Wis. 2d 569, 580, 297 N.W.2d 808 (1980); *see also In Interest of E.C.*, 130 Wis. 2d 376, 381, 387 N.W.2d 72 (1986) (the circuit court lacked the inherent authority to expunge juvenile police records because such power "is not essential to the existence or the orderly functioning of a circuit court, nor is it necessary to maintain the circuit court's dignity, transact its business or accomplish the purpose of its existence"). *Id.* at 387.

2. The PSI statute, Wis. Stat. § 972.15.

In felony convictions, the court may order an employee of the Department of Corrections to conduct the presentence investigation report (PSI). Wis. Stat. § 972.15(1). The "primary purpose" of the PSI is "to provide the sentencing court with accurate and relevant information upon which to base its sentencing decision." Wis. Admin. Code § DOC 328.27(1). In preparing the report, the PSI author "functions as an agent of the court."

State v. Thexton, 2007 WI App 11, ¶ 5, 298 Wis. 2d 263, 727 N.W.2d 560.

"Except as provided in sub (4m), (5) and (6)," the PSI "shall be confidential and shall not be made available to any person" "after sentencing" "except upon specific authorization of the court." Wis. Stat. § 972.15(4). One of the three exceptions noted in § 972.15(4) is reserved for DOC. Section 972.15(5) authorizes DOC to use the presentence investigation for correctional programming, care and treatment of any person sentenced to imprisonment released on extended supervision, among other purposes. *See also* Wis. Admin. Code § DOC 328.27(1). Subsection (6) of § 972.15 provides that the PSI may be used by DOC and the Department of Health and Human Services and certain persons in a Chapter 980 proceeding.[4]

C. A circuit court would appear to have the authority under case law to "destroy" a PSI for purposes of barring its use at sentencing.

Melton correctly observes that neither Wis. Stat. § 972.15 nor any other statute explicitly provides a circuit court with the authority to order a PSI destroyed. (Melton's Brief at 9-10). Melton then contends that a circuit court has the inherent authority to destroy a PSI. (Melton's Brief at 9-13).

It would appear under Wisconsin case law interpreting Wis. Stat. § 972.15 that a court *does* have the authority to "destroy" a PSI, *but only before sentencing for purposes of barring the PSIs use at sentencing*. A defendant has a due process right to be sentenced on the basis of "true and correct" information. *Bruneau v. State*,

[4]The third exception, Wis. Stat. § 972.15(4m), provides that a district attorney and defense counsel may keep a copy of the PSI, an unrepresented defendant may view but not keep a copy, and all parties must keep the PSIs contents confidential.

77 Wis. 2d 166, 174-75, 252 N.W.2d 347, 351 (1977). Prior to sentencing, courts routinely ask the defendant and the State whether the PSI contains inaccuracies, and a court may correct the PSI accordingly. *See, e.g. State v. Anderson*, 222 Wis. 2d 403, 405, 588 N.W.2d 75 (Ct. App. 1998); *see also State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997) (defendant is entitled to an evidentiary hearing if he or she wishes to challenge any factual matter in a PSI). Further, a court may "strike" an entire PSI within its discretion to bar its use at sentencing. *See Suchocki*, 208 Wis. 2d at 520 (circuit court erred in failing to strike PSI where PSI author was biased). In the cases, a court's exercise of authority to correct or correct or "strike"[5] a PSI is always tied to the court's sentencing function; no Wisconsin case suggests that a circuit court may correct or strike a PSI after entry of judgment for purposes not related to sentencing. *See State v. Bush*, 185 Wis. 2d 716, 722-24, 519 N.W.2d 645 (Ct. App. 1994).

In this case, the court did not order the PSI destroyed to bar its use at sentencing. It directed that the PSI be "destroyed" *after sentencing* "following the expiration of any appellate time limits." (21:1; A-Ap. D1) Thus, at sentencing, the first PSI remained intact--the court simply disregarded it and relied on the second PSI in issuing sentence. The court explained in issuing the order that the PSI was to be destroyed long after sentencing to bar its use in DOC programming: "The Court would find that or believe that [information contained in the first PSI] could very well be prejudicial to Mr. Melton as he goes through whatever route . . . that the Court will set for him" (49:12; A-Ap. A12). The State believes that the first judge lacked the authority to order that the PSI be destroyed for this purpose after sentencing, and that the second judge properly concluded after judgment had been entered that the court lacked the authority to destroy the PSI.

[5]The State perceives no difference between "striking" a PSI from the record and "destroying" it.

D. However, a circuit court does not possess the authority to destroy a PSI after sentencing and after entry of judgment.

When, as here, the court is ordered to destroy a PSI after sentencing and after entry of judgment, it lacks the authority to destroy the PSI. As explained below, this is because: (1) such authority is not granted by the PSI statute, Wis. Stat. § 972.15, which instead authorizes placing the PSI under seal; (2) such authority is not inherent because it is not essential to the court's proper functioning; (3) an inherent power to destroy a PSI after entry of judgment would be contrary to the Supreme Court Rule mandating the retention of court records; and (4) the inherent authority to destroy a PSI does not exist where the purpose of destroying a PSI is to bar its use in DOC administration.

1. Wisconsin Stat. § 972.15 provides for placing the PSI under seal after sentencing, and does not contemplate destruction of a PSI.

As noted, Wis. Stat. § 972.15(4) states that, except as provided in (4m), (5) and (6), the PSI "shall be confidential and shall not be made available to any person except upon specific authorization of the court" "after sentencing." Implicit in § 972.15(4) is the power for the court to place the PSI under seal after sentencing. Such power is plainly necessary to effectuate the confidentiality requirement of § 972.15(4).

However, the power to destroy the PSI is not implicit in Wis. Stat. § 972.15(4), and, in fact, is contrary to the statute's twin purposes. Section 972.15(4) contemplates that the PSI will be kept confidential *and* be kept intact after sentencing so that it may be accessed upon court order. Placing a PSI under seal achieves the same general ends as destruction by preventing public disclosure of the contents of the PSI. The circuit court was correct in observing that the statute "envisions" "keeping [the PSI] confidential," not destroying it (53:2; A-Ap. B2).

2. A circuit court lacks the inherent authority to destroy a PSI after sentencing and after entry of judgment because the power to destroy a PSI is not essential to the proper functioning of a court where Wis. Stat. § 972.15(4) authorizes the court to order the PSI sealed.

Melton contends that the circuit court had the inherent authority to destroy the PSI in this case. (Melton's Brief at 9-13). Melton maintains that the court's "ability to decide which documents will be accepted for filing" is among the "internal operations" of the court, and the court "essentially indicated" that the first PSI "will not be accepted by the Court." (Melton's Brief at 11). Melton also argues that destruction of the first PSI will promote the efficient functioning of the court by eliminating confusion that may result from having two sealed PSIs in the case file. (Melton's Brief at 11). The State respectfully disagrees.

First, the State does not dispute that a circuit court has the power, whether inherent or statutory, to accept or

reject filings. However, the court in this case did not reject the first PSI, it accepted the document into the file and ordered it sealed, and directed that, "upon expiration of appellate time limits," the PSI be removed from the case file and destroyed (21:1; A-Ap. D1).

Second, there is little chance that the presence of the two PSIs in the file would cause confusion. Both are sealed and cannot be accessed without a court order. The envelope containing the first PSI is clearly distinguishable from the envelope containing the second, as the court's modified order is affixed by adhesive tape to the front of the first PSI envelope (14; A-Ap. E:1). The modified order affixed to the envelope tells the story of why there are two PSIs in the file (14; A-Ap. E:1). The modified order states: "IT IS HEREBY ORDERED: . . . 1. The Department of Corrections shall prepare an updated presentence investigation report" (14; A-Ap. E:1). The modified order then states that the updated PSI shall not include certain parts that should have been left out of the first PSI (14; A-Ap. E:1). A person examining the file might note the presence of two PSIs but, upon reading the one-page modified order affixed to the first PSI, would quickly understand why the file contained both documents.

While asserting that courts have the inherent power to destroy a PSI, Melton does not cite any cases in which circuit courts were found to possess an inherent power that might resemble in some way to the power to destroy a PSI. (Melton's Brief at 9-12). And the State has found no cases in which circuit courts were found to have inherent power in contexts similar to the present case. *See, e.g. Joni B. v. State*, 202 Wis. 2d 1, 9, 549 N.W.2d 411 (1996) (courts have inherent authority to appoint counsel for indigent parties); *State ex. rel Friedrich v. Dane County Cir. Ct.*, 192 Wis. 2d 1, 19, 531 N.W.2d 32 (1995) (inherent authority exists to determine compensation for court-appointed attorneys); *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 98, 516 N.W.2d 4 (1994) (municipal

courts have inherent authority to vacate judgments obtained without subject matter jurisdiction).

Additionally, the authority to destroy a PSI after entry of judgment is not necessary for the court "to control disposition of causes on its docket with economy of time and effort." *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964) (courts have inherent authority to dismiss an action for the failure of an attorney to obey an order to appear at a pretrial conference). The power to destroy a PSI would not assist the court in controlling the disposition of a case, and, regardless, the power to destroy a PSI *after entry of judgment* would necessarily be exercised *after disposition*, and thus not concern the inherent power to dispose of causes.

The State submits that the power to destroy a PSI after sentencing is not an inherent power of a circuit court because it is not a power "without which a court cannot properly function." *Braunsdorf*, 98 Wis. 2d at 580. This is particularly true where Wis. Stat. § 972.15(4) already provides the court with the power to keep confidential the contents of a PSI (or a duplicate PSI) after sentencing by placing the PSI under seal, and plainly does not authorize the destruction of the PSI after sentencing. *See* Wis. Stat. § 972.15(4).

The case of *In Interest of E.C.*, 130 Wis. 2d at 381, is instructive. There, a circuit court dismissed several juvenile delinquency actions, and entered orders expunging police files associated with the dismissed actions. *Id.* at 379-80. The city police department appealed, arguing that the court lacked the power to enter the orders. *Id.* at 380-81. The juveniles maintained that the court had inherent authority to expunge the police records. The supreme court agreed with the police department, concluding that the court did not have the inherent authority to order the expunction of the police files because such power "is not essential to the existence or the orderly functioning of a circuit court, nor is it necessary to maintain the circuit court's dignity, transact

its business or accomplish the purpose of its existence." *Id.* at 387.

Further, the *Interest of E.C.* court specifically rejected the juveniles' equitable arguments—which were based on the fact that the police records were linked to delinquency cases that had been dismissed—in concluding that the court lacked the authority to expunge the records.[6] *Interest of E.C.*, 130 Wis. 2d at 388-89. This court should likewise reject Melton's argument that the court must have an inherent authority to destroy the PSI (after sentencing and after entry of judgment) because otherwise DOC might use the first PSI in correctional programming. (Melton's Brief at 11-12). Setting aside for the moment the reasonableness of these concerns, see discussion below at pages 16-18, courts simply do not have the inherent power to address all claims of unfairness. *See Interest of E.C.*, 130 Wis. 2d at 389 ("[N]ot every perceived injustice is actionable.").

3. An inherent authority to destroy a PSI after judgment would conflict with SCR 72.01(15), which mandates that all papers in felony case files be retained for 50 years after entry of judgment.

The power to destroy a PSI after entry of judgment is not only not essential to the court's proper functioning, it would appear to conflict with Supreme Court Rules (SCR) relating to record retention.

[6]The court addressed the juvenile's equitable arguments under the rubric of "equitable authority," while noting that equitable authority is "a variant of the inherent authority doctrine." *In Interest of E.C.*, 130 Wis. 2d at 381. Melton does not argue that the court had the equitable authority to destroy the PSI, and the State therefore does not address the issue of equitable authority any further.

The applicable rule, SCR 72.01, provides for retention of "the original paper records of any court" for "50 years after entry of final judgment" for all felony cases but Class A felonies, for which the term is 75 years.[7] SCR 72.01(15). The first PSI is plainly an "original paper record," and is thus subject to this rule.[8]

Here, the first judge directed that the PSI be destroyed well after entry of judgment, and it was after judgment was entered against Melton that the second judge properly determined that the court lacked the authority to implement the order to destroy the PSI. Destruction of the PSI in this case would have implicated SCR 72.01(15).

The State submits that, in light of SCR 72.01, the power to destroy an original court record after entry of judgment must be provided by statute or other clear legal authority. In this case, such power is not provided in the statutes and is not plainly necessary for the proper functioning of the court, and therefore should not be found to exist where destruction of the PSI would be contrary to supreme court rules.

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[7]Supreme Court Rule 72.01 provides, in pertinent part:

> [T]he original paper records of any court shall be retained in the custody of the court for the following minimum time periods: . . . .
>
> (15) Felony case files. All papers deposited with the clerk of circuit court in proceedings commenced as felonies: 50 years after entry of final judgment; except for Class A felonies, 75 years after entry of final judgment.

[8]The State observes that SCR 72.06 accounts for the expunction of records, and provides instructions for courts to follow when expunction of a case file is directed by statute or court order. SCR 72.06 merely explains how courts are to carry out expunction orders; it does not suggest that courts may issue orders to expunge (or destroy) records in contravention of SCR 72.01without having the statutory or inherent authority to do so.

4. A court does not have the inherent authority to destroy a PSI for purposes of barring its use in DOC administration.

As noted above, the State believes that a court likely has the authority to "destroy" a PSI prior to sentencing *to bar its use at sentencing*. *See Suchocki*, 208 Wis. 2d at 520. However, this court has declared that circuit courts should not alter a PSI for the purpose of barring its use in DOC programming. *Bush*, 185 Wis. 2d at 724. It was for this disfavored purpose that the court ordered the PSI destroyed in this case.

In *Bush*, a circuit court declined to correct a PSI where the offender claimed that DOC was relying on incorrect information in making correctional programming decisions. *Bush*, 185 Wis. 2d at 721-22. The circuit court concluded it lacked jurisdiction to issue such an order. *Id.* This court upheld the circuit court, concluding that, while a circuit court "could appropriately modify [an offender's] sentence based on erroneous information contained in the PSI," a motion to correct a PSI *for purposes of DOC programming* should be directed to DOC, not the circuit court. *Id.* at 723. The *Bush* court concluded that "policy principles and considerations of judicial administration dictate that courts should not exercise their jurisdiction to correct PSIs for reasons solely related to the Department of Corrections administration." *Bush*, 185 Wis. 2d at 724.

Here, the hearing transcript and the fact that the PSI was ordered to be destroyed *after sentencing* establish that the PSI was ordered destroyed for purposes of DOC administration. The court explained that it was ordering the PSI destroyed after appellate time limits had passed because the PSI "could very well be prejudicial to Mr. Melton as he goes through whatever route . . . the Court will set for him" (49:12; A-Ap. A12). Under *Bush*, the court's concern that DOC might potentially use of the

uncorrected PSI in correctional programming was an inappropriate reason to order the destruction of a PSI.

For a circuit court's purposes, the PSI is a tool upon which it may rely at its discretion in issuing sentence. Whether and how a PSI is used in correctional programming is a matter for DOC officials. *Bush* counsels that courts should not issue orders to direct DOC's use of a PSI in DOC administration outside the context of an appeal from a DOC administrative decision. *See id.* at 722-24. DOC has wide discretion in determining correctional programming, and courts are ill-equipped to make decisions in this area--particularly where, as here, DOC was not even a party to the case and could not provide relevant information to the court. Thus, considerations of policy and judicial administration strongly weigh against the recognition of an inherent authority to destroy a PSI after sentencing for purposes related solely to DOC administration.

Finally, Melton's concerns that DOC may use the first PSI in correctional administration are overstated. Pursuant to DOC's own regulations, the PSI author would likely have removed the objected-to information from all copies of the PSI in DOC's possession. *See* Probation and Parole Operations Manual l, Wisconsin Department of Corrections, Division of Community Corrections, Sec. 5.01.04 at 7 ("If significant inaccuracies are revealed after the investigation has been distributed, the preparer shall be responsible for ensuring that all copies are corrected."). Thus, while Wis. Stat. § 972.15(4) and (5) would appear to exempt DOC from the requirement that it obtain a court order to access the PSI at issue, the copy of the PSI in DOC's possession was likely corrected and is likely identical to the second PSI submitted to the court.

Moreover, even if the objected-to information remains on DOC's copy of the PSI, and DOC relies on this information in correctional programming, Melton is not without a remedy. In such a case, Melton may petition DOC to correct his PSI using the inmate complaint review

process. If the warden should deny his request to correct the PSI, Melton may seek certiorari review in the circuit court. *See Bush*, 185 Wis. 2d at 724 (inmate filed a complaint requesting correction of his PSI that was denied by warden, but inmate had declined to seek certiorari review in circuit court).

CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm the modified order placing the first PSI under seal and removing from a prior order the instruction that the PSI also be destroyed.

Dated this 31st day of January, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,590 words.

Dated this 31st day of January, 2012.

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Jacob J. Wittwer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of January, 2012.

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