STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2011AP1770-CR, 2011AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRANDON M. MELTON,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MARK D. GUNDRUM, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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QUESTION PRESENTED

Where the circuit court ordered the preparation of a second PSI report, did the circuit court have the inherent authority to destroy the first PSI report after judgment was entered in the case?

- The first circuit court, Judge Richard Congdon presiding, answered yes, entering an order directing that the first PSI report be sealed and destroyed upon the expiration of appellate time limits.

- Upon a sua sponte review of the file in Melton's case, a successor circuit court, Judge Mark D. Gundrum presiding, answered no, modifying the first court's order to mandate that the PSI report be sealed, but not destroyed.

- The court of appeals answered yes, concluding that the circuit court had the inherent authority to destroy the first PSI report to prevent the potential for confusion arising from the existence of two PSI reports in the record if a resentencing occurred.

- This court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting the State's petition for review, this court has indicated that publication and oral argument are appropriate.

STATEMENT OF THE CASE

Nature of the Case

This is a review of a published case of the Wisconsin Court of Appeals, District I, *State v. Melton*, 2012 WI App 95, 343 Wis. 2d 784, 820 N.W.2d 487, which reversed an order of the Circuit Court for Waukesha County, Judge Mark D. Gundrum presiding, directing that the first PSI report produced in this case be sealed but not destroyed (Pet-Ap. 101-11).

In the court of appeals, Melton did not challenge his conviction or sentence. He took issue only with the circuit court's order directing that the PSI report be sealed but not destroyed, and argued that the circuit court had the inherent authority to destroy the PSI report. The court of appeals agreed with Melton, concluding that the circuit court had the inherent authority to destroy the PSI report

to prevent confusion that might result from having two PSI reports in the file if Melton were ever resentenced.

The State has sought review to ask this court to overturn the court of appeals' decision, and to reinstate the circuit court order directing that the PSI report be sealed but not destroyed.

Procedural History of the Case

Melton was convicted upon guilty pleas of second degree-sexual assault of a child for having sexual intercourse with a 13-year old, and theft of moveable property greater than $2,500 (2011AP1770—1:1; 31:1; 2011AP1771—25:1). 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—43:2-13; 2011AP1771—25:2). The court later ordered the Department of Corrections (DOC) to produce a PSI report, and the report was produced and filed with the court (2011AP1770—12:1; 14).[1]

The Circuit Court's First Order

Upon reviewing the PSI report, Melton filed a motion to strike certain portions of the report, or, alternatively, to strike the entire PSI report and order a new report prepared without the objected-to information (20). A hearing was held on the motion, and it is apparent from the hearing transcript that the portions Melton took issue with described his admission to conduct constituting an uncharged sex offense (20; 49:3-5, 10; Pet-Ap. 114-16, 121).[2]

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

[2] The State did not file a motion in the circuit court to cite the first PSI report in its court of appeals' brief, and has not filed such a motion for purposes of this brief. *See State v. Parent*, 2006 WI 132,

At the motion hearing, Melton's attorney argued that inclusion of this information in the PSI report was contrary to DOC regulations, specifically Wis. Admin. Code § DOC 328.27 (49:6-7; Pet-Ap. 117-18). More importantly, he argued, Melton's admission could be used against him in corrections administration, or in support of a Chapter 980 petition (49:4-5; Pet-Ap. 115-16). Melton's attorney also noted that the presentence investigator wrote the following in a letter to the court: "'The decision to include this information outside of the sexual assault behavior of the report may be problematic when following the strict interpretation of the outline'" (49:7; Pet-Ap. 118).

The State argued that such information was proper for inclusion in a PSI report, and for the court to consider at sentencing (49:8; Pet-Ap. 119). However, in response to a court query about whether the State agreed with the investigator's statement that inclusion of the uncharged offense may have been inconsistent with a "strict interpretation" of DOC rules, the State responded: "If [the presentence investigator] does this every day, you know, I can't disagree with him" (49:7, 9; Pet-Ap. 118, 120).

Addressing the motion, the circuit court, Judge Richard Congdon presiding, declared that the information about the uncharged offense would be "of little use to the Court at a sentencing" (49:12; Pet-Ap. 123). The court then concluded that leaving the objected-to information in the first PSI report would be prejudicial to Melton as he went through the "route"—an apparent reference to use of the PSI report by the Department of Corrections (DOC) after sentencing:

> 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

---

¶ 49, 298 Wis. 2d 63, 725 N.W.2d 915. All descriptions in this brief about the contents of the PSI report are taken from the hearing motion transcript.

> 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; Pet-Ap. 123-24). The court then issued a written order dated March 31, 2010, directing the DOC to prepare a second PSI report omitting the objected-to information contained in the first report (21:1). The order also directed that the first report "shall be sealed and destroyed following the expiration of any appellate time limits . . ." (21:1). The State did not object to the order.[3]

The new PSI report was provided to the court, and Melton's case proceeded to sentencing. Melton was sentenced by the circuit court, the Honorable Robert Mawdsley, presiding, 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).

[3] Because the State ultimately did not object to the production of a new PSI that omitted the uncharged sex offense, the issue of whether a PSI report may include such uncharged offenses was not preserved for appeal. Nonetheless, the State notes that an offender's personal history, including sexual behavior, is an appropriate subject for inclusion in a PSI report 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"). Moreover, regardless of whether DOC rules permit uncharged offenses to be included in a PSI report, a court may consider a defendant's admissions to uncharged offenses at sentencing. *See State v. Leitner*, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341.

The Circuit Court's Second Order

Approximately two months after sentencing, a successor court, Judge Mark D. Gundrum, presiding, scheduled a hearing to address whether the court had the authority to destroy the PSI report (53:1; Pet-Ap. 131). The court ordered the hearing on its own motion after reviewing the case record and discovering Judge Congdon's order directing that the first PSI report be sealed and destroyed after expiration of appellate time limits (53:2; Pet-Ap. 132). At the hearing, the court determined upon reviewing the PSI statute, Wis. Stat. § 972.15, that the original court had lacked the authority to order that the PSI report be destroyed (53:2; Pet-Ap. 132). The court concluded that "keeping [the PSI report] confidential" was all that was "envisioned by the statute" (53:2; Pet-Ap. 132). The court did not explicitly address the question of whether it had the inherent authority to destroy the PSI report, although, in issuing its ruling, it acknowledged the possibility that "some law" might later be identified to justify such an action:

> [I]t's the intention of this Court to modify the order of May 14th to remove the portions which refer to destroying the presentence investigation report. It obviously can always be destroyed at some later date and the order can be revisited if some law is pointed out saying that that's something that's appropriate. But at this point I believe it would be inappropriate to destroy it. And rather than just ignore that order, it seems to make more sense to the Court to amend the order and just essentially keep it as is, except, [to change] [this] sentence as follows: Number 2, the presentence investigation report dated November 19th, 2009, shall be sealed, period. That's the intention of the Court.

(53:3-4; Pet-Ap. 133-34).

The court entered a written "Modified Order" that was identical to the previous court's order, except that it deleted the directive to destroy the PSI report (14). The

modified order thus mandated that the PSI report be sealed but not destroyed (14).

In the record, this modified order is attached with adhesive tape to the front of the sealed envelope containing the PSI report (14). The back of the sealed envelope contains the message "Ordered Sealed" in large, hand-written letters (14).

The Parties' Arguments in the Court of Appeals

Melton appealed Judge Gundrum's order directing that the first PSI report be sealed but not destroyed. In his brief-in-chief, Melton conceded that the PSI statute, Wis. Stat. § 972.15, did not confer the authority to destroy a PSI report, but argued that it was within the circuit court's inherent powers to destroy the report (Melton's court of appeals br. at 8-13). Melton argued he would be prejudiced if the PSI report were not destroyed because the DOC might then use it in corrections administration, § 972.15(5), or in a Chapter 980 proceeding, § 972.15(6) (Melton's court of appeals br. at 11-13). The circuit court asked the court of appeals to overturn the second order (seal but not destroy) and reinstate the first order (seal and destroy), or, in the alternative, to remand the case back to the circuit court "with instructions that the circuit court has the authority to order the destruction" of the first PSI report (Melton's court of appeals br. at 13).

In its brief, the State argued that the circuit court lacked the authority, statutory or inherent, to destroy the PSI report after sentencing and entry of judgment. The State maintained that Wis. Stat. § 972.15 provides for placing a PSI report under seal, and that destruction of a PSI would be contrary to the text and purpose of the statute (State's court of appeals br. at 10-11). The State then argued that the court lacked the inherent authority to destroy the PSI report for the following three reasons: (1) The power to destroy the PSI report is not essential to the proper functioning of the court (State's court of appeals br. at 11-14); (2) The power to destroy the PSI report

would conflict with Supreme Court Rule 72.01(15), which mandates the retention of "all papers" in felony case files for 50 years after entry of judgment, except that those in Class A felonies must be kept for 75 years (State's court of appeals br. at 14-15); and (3) The purpose for which Melton sought to destroy the PSI report—to prevent its use in correctional programming—is not one for which a circuit court may destroy a PSI report, citing *State v. Bush*, 185 Wis. 2d 716, 519 N.W.2d 645 (Ct. App. 1994) (State's court of appeals br. at 16-18).

In reply, Melton argued for the first time that the State should be estopped from opposing his inherent authority argument because, while the State originally opposed the creation of a new PSI report, it did not appeal the order directing that the first PSI be sealed and destroyed, and because the prosecutor turned over the State's copy of the first PSI report to Judge Congdon at the hearing (Melton's court of appeals reply br. at 1-5).

The Court of Appeals' Decision

In a July 17, 2012 decision and order, the Wisconsin Court of Appeals, District I, concluded that the circuit court had the inherent authority to order the destruction of the PSI under the "unique facts" of this case, and reversed the circuit court's order. *Melton*, 343 Wis. 2d 784, ¶ 1 (Pet-Ap. 101-02).

Citing *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W. 350, the court of appeals noted that courts have "'inherent, implied and incidental powers'" which "enable the 'courts to accomplish their constitutionally and legislatively mandated functions.'" *Melton*, 343 Wis. 2d 784, ¶ 13 (Pet-Ap. 105-06). The court of appeals observed that courts

> generally exercise their "inherent authority in three areas: (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to

> ensure the efficient and effective functioning of the court, and to fairly administer justice."

Id. (quoting *Henley*, 328 Wis. 2d 544, ¶ 73) (Pet-Ap. 105-06). "'A power is inherent,'" explained the court, when it "'is one without which a court cannot properly function.'" *Id.* (quoting *Henley*, 328 Wis. 2d 544, ¶ 73) (additional internal quotation marks omitted) (Pet-Ap. 105-06).

The court of appeals then briefly discussed the purposes of the PSI report, noting that "[t]he primary purpose of a PSI report is to assist the circuit court at sentencing," citing Wis. Admin. Code. § DOC 328.27(1). *Melton*, 343 Wis. 2d 784, ¶ 14 (Pet-Ap. 106-07). The court further explained that "[t]he circuit court's authority and use of a PSI report is necessarily confined to sentencing purposes," citing *State v. Anderson*, 222 Wis. 2d 403, 411, 588 N.W.2d 75 (Ct. App. 1998). *Melton*, 343 Wis. 2d 784, ¶ 14 (Pet-Ap. 106-07). The court noted that the DOC may also use the PSI report, in its case "for correctional programming, parole consideration or care and treatment of any person sentenced to imprisonment" and make the report "'available to other agencies or persons to use for purposes related to correctional programming, parole consideration, care and treatment, or research,'" pursuant to Wis. Stat. § 972.15(5). *Id.* ¶ 15 (Pet-Ap. 107).

The court of appeals noted that defendants may review the contents of the PSI report prior to sentencing and challenge any alleged inaccuracies in the report. *Melton*, 343 Wis. 2d 784, ¶ 16 (Pet-Ap. 107). However, the court then observed that requiring a court "to make clear findings resolving factual-inaccuracy challenges to the PSI report for the purpose of *sentencing* is not the same as requiring the circuit court to amend the PSI report for the purpose of *post-sentencing* use of the PSI report *by the DOC*," citing *Bush*, 185 Wis. 2d 716. *Melton*, 343 Wis. 2d 784, ¶ 17 (Pet-Ap. 107-08). The court cited *Bush*'s holding that "'policy principles and considerations of judicial administration dictate that courts should not

exercise their jurisdiction to correct PSI[] [reports] for reasons solely related to the Department of Corrections administration.'" *Id.* ¶ 17 (quoting *Bush*, 185 Wis. 2d at 724) (Pet-Ap. 107-08).

Having acknowledged that a circuit court's authority to alter a PSI is limited to sentencing purposes, the court of appeals held that the circuit court in this case "ha[d] the [inherent] authority to destroy the first PSI report to prevent confusion as to which PSI report in the file should be used" in a potential resentencing proceeding. *Melton*, 343 Wis. 2d 784, ¶¶ 22-23 (Pet-Ap. 110-11). "The existence of two PSI reports in a file," explained the court,

> presents an opportunity for confusion and injustice. Even if clearly labeled, the possibility exists that at resentencing the "wrong" PSI report would be used. Even without considering the DOC's subsequent use of the PSI reports, it would be reasonable for a circuit court to conclude that the "wrong" PSI report should be destroyed to prevent misuse. That is certainly a matter of efficient judicial administration and fairness at a potential resentencing, and as such, is within a circuit court's inherent powers. *See* [*Henley*, 328 Wis. 2d 544, ¶ 73].

Id. ¶ 23 (Pet-Ap. 110-11).[4]

The court of appeals distinguished *Bush* on grounds that *Bush* was not an inherent authority case; rather, the circuit court in *Bush* had declined to exercise jurisdiction to address Bush's request to correct his PSI report on public policy grounds, and the court affirmed without reaching the issue of whether the court had the inherent

[4] The court of appeals' opinion mistakenly twice states that "Melton's appeal was still pending" when discussing the timing of Judge Gundrum's order modifying the order to destroy the PSI report. *Melton*, 343 Wis. 2d 784, ¶¶ 11, 23 (Pet-Ap. 105, 110-11). Though Melton had filed a notice of intent to seek postconviction relief before Judge Gundrum's September 24, 2010 hearing, Melton did not file his notice of appeal until September 12, 2011. (33:1; 53:1; Pet-Ap. 131).

authority to alter a PSI report for purposes related to DOC administration. *Melton*, 343 Wis. 2d 784, ¶ 18 (discussing *Bush*, 185 Wis. 2d at 722) (Pet-Ap. 108-09). Nonetheless, the court of appeals did *not* hold that the court had the inherent authority to destroy the first PSI to discourage its use by DOC. In fact, in a footnote, the court suggested that Judge Congdon likely misused its discretion in ordering the destruction of the PSI for purposes of DOC administration pursuant to *Bush*, but concluded that issue was not before the court. *Melton*, 343 Wis. 2d 784, ¶ 11 n.2 (Pet-Ap. 105).

SUMMARY OF ARGUMENT

The court of appeals' holding that the circuit court had the inherent authority to destroy the first PSI report in Melton's case raises concerns about the scope of circuit courts' non-statutory powers, and, particularly, when circuit courts may destroy court documents in a case file.

As developed in the Argument below, the circuit court correctly determined that it lacked the authority to destroy the PSI report because the PSI statute, Wis. Stat. § 972.15, does not confer such power—a point that Melton concedes—and the court lacked the inherent authority to destroy the report. The State respectfully submits that the court of appeals' decision reversing the circuit court's order and holding that the circuit court had the inherent authority to destroy the PSI report must be overturned for the following three reasons.

First, the supreme court has already exercised inherent authority on behalf of the court system in the field of retention and destruction of court documents by adopting SCR 72 pursuant to its superintending authority, and destruction of the PSI report at this time would conflict with SCR 72. Specifically, under SCR 72.01(15), the Wisconsin Supreme Court granted circuit courts the power to destroy papers in felony case files—but *only after "all papers" have been retained for 50 years after entry of judgment*, or for 75 years in the case of Class A

felonies. By adopting a lengthy retention period, this court made a clear and sound public policy choice in favor of government transparency and accountability. Wisconsin has a unitary court system, and where this court sets policy in a given area, the circuit courts lack the authority to act in a manner that is inconsistent with those rules.

Second, the power to destroy the PSI report is, by definition, not inherent to the circuit court because it is not "essential to the existence or the orderly functioning of" the court, *In Interest of E.C.*, 130 Wis. 2d 376, 387, 387 N.W.2d 72 (1986). This power is not necessary where the PSI statute already authorizes sealing the PSI report. Melton's primary reason for seeking destruction of the PSI report is to prevent its use by DOC and other authorized parties. However, the power to destroy the PSI report to prevent its use by the DOC is contrary to Wis. Stat. § 972.15(4), (5) and (6), which specifically authorizes DOC to access and use the report without court approval. Moreover, courts lack the power to alter PSI reports for purposes related to DOC administration, *Bush*, 185 Wis. 2d at 722-24, and DOC's use of the PSI report is not a matter that concerns the circuit court's existence and functioning.

Third, the court of appeals' rationale for destroying the PSI report—to prevent "confusion" and "misuse" of the first PSI report at a resentencing proceeding—does not hold up. A court would not be confused by the presence of two PSI reports in Melton's file because they are sealed in separate, clearly-marked envelopes and the court's order permanently sealing the first PSI report is affixed to the envelope containing that report. More importantly, use of the first report at resentencing would not constitute "misuse" of the report. This is because *a resentencing court would be permitted to consider Melton's admission to the uncharged offense contained in the first PSI report.* This is not a case in which the disputed PSI report contains inaccurate information; Melton has never disputed the accuracy of his admission to the uncharged

child sex offense described in the first report. *He simply does not want DOC or other authorized parties to use his admission in corrections administration or in support of a Chapter 980 petition.* Sentencing courts may rely on the facts of uncharged offenses in passing sentence, *State v. Leitner*, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341, and a court could rely on Melton's admission contained in the first PSI report at a resentencing. Accordingly, the concern about "confusion" at a potential resentencing is a red herring.

ARGUMENT

THE CIRCUIT COURT PROPERLY CONCLUDED IT LACKED THE AUTHORITY TO DESTROY THE PSI REPORT, AND THE COURT OF APPEALS ERRED IN HOLDING THAT THE CIRCUIT COURT HAD THE INHERENT AUTHORITY TO DESTROY THE REPORT TO PREVENT "CONFUSION" AT A RESENTENCING.

A. Applicable Law.

1. The PSI Statute.

a. Wis. Stat. § 972.15.

In felony convictions, the court may within its discretion order an employee of the Department of

Corrections to prepare a presentence investigation report. Wis. Stat. § 972.15(1)[5]. The "primary purpose" of the PSI

[5] Wisconsin Stat. § 972.15 provides, as pertinent:

> (1) After a conviction the court may order a presentence investigation, except that the court may order an employee of the department to conduct a presentence investigation only after a conviction for a felony.
>
> . . .
>
> (4) Except as provided in sub. (4m) [pertaining to the access of parties and counsel to the PSI report], (5), or (6), after sentencing the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.
>
> . . .
>
> (5) The department may use the presentence investigation report for correctional programming, parole consideration or care and treatment of any person sentenced to imprisonment or the intensive sanctions program, placed on probation, released on parole or extended supervision or committed to the department under ch. 51 or 971 or any other person in the custody of the department or for research purposes. The department may make the report available to other agencies or persons to use for purposes related to correctional programming, parole consideration, care and treatment, or research. Any use of the report under this subsection is subject to the following conditions:
>
> > (a) If a report is used or made available to use for research purposes and the research involves personal contact with subjects, the department, agency or person conducting the research may use a subject only with the written consent of the subject or the subject's authorized representative.
> >
> > (b) The department or the agency or person to whom the report is made available shall not disclose the name or any other

report 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); *see State v. Washington*, 2009 WI App 148, ¶ 9, 321 Wis. 2d 508, 775 N.W.2d 535 (stating that the PSI is intended "to assist the judge in selecting the appropriate sentence for the individual defendant"). 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.

> identifying characteristics of the subject, except for disclosure to appropriate staff members or employees of the department, agency or person as necessary for purposes related to correctional programming, parole consideration, care and treatment, or research.
>
> (6) The presentence investigation report and any information contained in it or upon which it is based may be used by any of the following persons in any evaluation, examination, referral, hearing, trial, postcommitment relief proceeding, appeal, or other proceeding under ch. 980:
>
> (a) The department of corrections.
>
> (b) The department of health services.
>
> (c) The person who is the subject of the presentence investigation report, his or her attorney, or an agent or employee of the attorney.
>
> (d) The attorney representing the state or an agent or employee of the attorney.
>
> (e) A licensed physician, licensed psychologist, or other mental health professional who is examining the subject of the presentence investigation report.
>
> (f) The court and, if applicable, the jury hearing the case.

However, the statute provides that state agencies may use the PSI report for purposes of determining the appropriate course of treatment and security classification of persons in their custody. Wisconsin Stat. § 972.15(5) authorizes the DOC to use the PSI report to determine "correctional programming, parole consideration or care and treatment" for anyone in the DOC's custody. *See State v. Watson*, 227 Wis. 2d 167, 193, 595 N.W.2d 403 (1999). And § 972.15(6) authorizes DOC and other parties to use the contents of the PSI report in support of a commitment petition under Chapter 980. *See State v. Zanelli*, 212 Wis. 2d 358, 378, 569 N.W.2d 301 (Ct. App. 1997).

The statute mandates that the contents of the PSI report "shall be confidential and shall not be made available to any person . . . except upon specific authorization of the court." Wis. Stat. § 972.15(4). However, the DOC need not obtain court approval to access and use the PSI report in corrections administration, § 972.15(5), and, likewise, court approval is unnecessary for authorized parties seeking to obtain a copy of the PSI report for use in a Chapter 980 proceeding. Sec. 972.15(6).

b. Defendants have a right to challenge inaccurate information in a PSI report for sentencing purposes.

A defendant is entitled to challenge allegedly inaccurate information contained in a PSI report as a part of his or her due process right to be sentenced on the basis of "true and correct" information. *See State v. Greve*, 2004 WI 69, ¶ 27, 272 Wis. 2d 444, 681 N.W.2d 479. However, defendants do not have a post-sentencing right to challenge in the circuit court inaccurate information in a

PSI to prevent the DOC from relying on the disputed information in corrections administration. *See Bush*, 185 Wis. 2d 722-24. "[P]olicy 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.

Courts will "strike" portions of a PSI report containing inaccurate or disputed information, or "strike" the entire PSI report and direct the DOC to produce a new report. *See State v. Suchocki*, 208 Wis. 2d 509, 515, 520, 561 N.W.2d 332 (Ct. App. 1997) (circuit court erred by not "striking" the entire PSI report where the PSI author was married to the prosecutor), *abrogated on other grounds by State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

c. Wis. Stat. § 972.15 authorizes sealing PSI reports, but not destroying them.

As noted, Wis. Stat. § 972.15(4) provides that the PSI report "shall be confidential and shall not be made available to any person except upon specific authorization of the court" subject to the exceptions discussed above. 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).

Melton has not contended that the circuit court had the statutory authority under Wis. Stat. § 972.15 to destroy the PSI report, and the State agrees that the statute confers no such authority. In fact, the power to destroy a PSI would be contrary to the twin purposes of subsection (4): confidentiality *and* preservation. By providing that the report "shall not be made available to any person except

upon specific authorization of the court," § 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. The circuit court thus correctly observed that the statute "envision[s]" "keeping [the PSI] confidential," not destroying it (53:2; A-Ap. B2; Pet-Ap. 132).

In the court of appeals, the State asserted that it perceived no difference between the terms "strike" and "destroy," and, accordingly, conceded that a circuit court "would appear to have the authority under case law to 'destroy' a PSI" *before sentencing and entry of judgment* "for purposes of barring its use at sentencing" (State's court of appeals' br. at 8-9). Upon further consideration, the State respectfully requests leave to withdraw this concession. The State now believes that "strike" as used in this context is ambiguous, and may reasonably be read to also mean "disregard" or "ignore." *Cf. State v. Pitsch*, 124 Wis. 2d 628, 644 & n.8, 369 N.W.2d 711 (1985) (noting that the jury is presumed to disregard testimony a court orders stricken from the record).

While the State's concession in the court of appeals was not material to the issue presented in this case—which was and is whether a circuit court may destroy the PSI report *after entry of judgment*—the State requests its withdrawal in recognition that the power to destroy a PSI report *before sentencing* raises a larger unresolved question: Whether circuit courts have the inherent authority to destroy *any* document in a court record *once it has been filed* in a record. The State does not take a position on this question here, and, of course, this court need not address this issue to resolve the dispute in the present case.

2. Inherent Authority.

In addition to the powers expressly granted by the state constitution and statutes, Wisconsin circuit courts have "'inherent, implied and incidental powers.'" *Henley*,

328 Wis. 2d 544, ¶ 73 (citation omitted). This court has explained that "[t]hese terms

> 'are used to describe those powers which must necessarily be used' to enable the judiciary to accomplish its constitutionally or legislatively mandated functions. [*State ex rel.*]*Friedrich*[*v. Dane County Cir. Ct.*], 192 Wis. 2d [1], 16, 531 N.W.2d 32 [(1995)] (citing *State v. Holmes*, 106 Wis. 2d 31, 44, 315 N.W.2d 703 (1982) (quoting *State v. Cannon*, 199 Wis. 401, 402, 226 N.W. 385 (1929))). Inherent powers are those that "'have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence.'" *Jacobson v. Avestruz*, 81 Wis. 2d 240, 245, 260 N.W.2d 267 (1977) (quoting *State v. Cannon*, 196 Wis. 534, 536–37, 221 N.W. 603 (1928)). *See also Flynn*[v. Department of Admin.], 216 Wis. 2d [521,] 548, 576 N.W.2d 245 [(1998)]; *Friedrich*, 192 Wis. 2d at 16–17, 531 N.W.2d 32.

City of Sun Prairie v. Davis, 226 Wis. 2d 738, 747-48, 595 N.W.2d 635 (1999).

"A power is inherent when it 'is one without which a court cannot properly function.'" *Henley*, 328 Wis. 2d 544, ¶ 73 (quoting *State v. Braunsdorf*, 98 Wis. 2d 569, 580, 297 N.W.2d 808 (1980)).

Depending upon the subject matter, the court's inherent authority may be exclusive to the court or it may be shared with the inherent authority of the legislative or executive branches. *Davis*, 226 Wis. 2d at 748. "When the powers of the branches overlap, one branch is prohibited from unduly burdening or substantially interfering with the other." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 545-46, 576 N.W.2d 245 (1998).

Circuit courts exercise inherent authority in three general areas. *Davis*, 226 Wis. 2d at 749. 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 the inherent authority to retain judicial assistant); *In re Courtroom*, 148 Wis. 109, 134 N.W. 490 (1912) (court had the inherent authority to refuse substandard facilities proposed by the county). Second, courts have inherent authority to regulate attorneys and judges. *Davis*, 226 Wis. 2d at 749. 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.

Under this third area, courts have the inherent authority to

> appoint counsel for indigent parties, *Joni B. v. State*, 202 Wis. 2d 1, 9, 549 N.W.2d 411 (1996); determine compensation for court-appointed attorneys, *Friedrich*, 192 Wis. 2d at 19, 531 N.W.2d 32; vacate a void judgment because the court had no authority to enter the judgment in the first place, *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 98, 516 N.W.2d 4 (1994); assess the costs to the parties of impaneling a jury, *Jacobson*, 81 Wis. 2d at 247, 260 N.W.2d 267; order dismissal of a complaint if the attorney fails to appear for a pretrial conference and the attorney was warned of the possible sanction of dismissal, Latham[Casey & King Corp.], 23 Wis. 2d [311,] 315-16, 317, 127 N.W.2d 225 [(1964)]; and order parties to exchange names of lay witnesses, *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 180, 311 N.W.2d 673 (Ct.App.1981).

Davis, 226 Wis. 2d at 750. However, this court has also found that circuit courts lack the inherent authority to expunge juvenile police records, *In Interest of E.C.*, 130 Wis. 2d at 381, or to dismiss a criminal case with prejudice prior to attachment of jeopardy on nonconstitutional grounds, *Braunsdorf*, 98 Wis. 2d at 585.

Questions of judicial authority are subject to de novo review. *In Interest of E.C.*, 130 Wis. 2d at 381.

3. The Court Record Retention Rule, SCR 72.01.

In 1987, this court adopted Chapter 72 of the Supreme Court Rules relating to the retention of court records "in exercise of its constitutional authority over all courts" pursuant to Article VII, § 3 of the Wisconsin Constitution.[6] *In the Matter of the Creation of Supreme Court Rules Chapter 72: Retention of Court Records*, 136 Wis. 2d xi.

The current version of Chapter 72 provides that "all papers" in felony case files "shall be retained" for "50 years after entry of final judgment," except that the retention period is 75 years for Class A felonies:

> [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 courts in proceedings commenced as felonies: 50 years after entry of final judgment;

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[6] Article VII, § 3 of the state constitution provides as follows: "The supreme court shall have superintending and administrative authority over all courts."

Article VII, § 2 of the state constitution provides as follows:

> The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14.

> except for Class A felonies, 75 years after entry of final judgment.

SCR 72.01.

In 1997, this court amended Chapter 72 to establish a rule relating to the expunction of court records. *In the Matter of the Amendment of Supreme Court Rules: SCR 72.06—Expunction of Court Records*, 216 Wis. 2d xxi.

The expunction section currently provides as follows:

> When required by statute or court order to expunge a court record, the clerk of the court shall do all of the following:
>
> > (1) Remove any paper index and nonfinancial court record and place them in the case file.
> >
> > (2) Electronically remove any automated nonfinancial record, except the case number.
> >
> > (3) Seal the entire case file.
> >
> > (4) Destroy expunged court records in accordance with the provisions of this chapter.

SCR 72.06.

B. Destruction of the PSI Report Would Conflict With This Court's Rules Pertaining to the Retention and Destruction of Court Documents After Entry of Judgment.

Before engaging in an inherent power analysis by addressing whether the power to destroy the PSI report is inherent to the court's functioning and existence, the State respectfully submits that there is a more fundamental problem with the court of appeals' conclusion that the circuit court had the inherent power to destroy the PSI report: Such a power would conflict with this court's mandate on all state courts in SCR 72.01 that "all papers" be retained in felony case files for at least "50 years after entry of final judgment" SCR 72.01(15). This argument was made to the court of appeals (State's court of appeals' br. at 14-15), but was not addressed in the court's decision.

As noted, this court adopted the court record retention rules under Chapter 72 pursuant to its superintending and administrative authority over the courts of this state. In doing so, this court set policy for all courts within the state in a field in which the judicial branch has inherent power: the retention and destruction of court records.[7]

Under SCR 72.01(15), the Wisconsin Supreme Court granted circuit courts—in the person of the clerk of court or other records custodian, SCR 72.02(1)—the power to destroy papers in felony case files. But it

[7] The State observes that the courts likely share power with the legislature in this area, particularly given the costs of record storage. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 547-49, 576 N.W.2d 245 (1998) (supreme court and legislature shared inherent power where court exercised superintending authority to establish and maintain court automation program, and legislature held purse strings to fund program). However, this court's exercise of inherent authority in this area by adopting SCR 72 is not at issue in this case.

provided that circuit courts may exercise this power *only after "all papers" have been retained for 50 years after entry of judgment*, or for 75 years in the case of Class A felonies. Thus, a circuit court violates SCR 72.01 by destroying any paper in a felony case file after judgment has been entered in the case and before the 50/75-year retention period has expired.

Judge Congdon's order directing that the PSI report be destroyed after the expiration of appellate time limits was plainly contrary to SCR 72.01(15), and Judge Gundrum properly modified the order to direct that the PSI report be sealed but not destroyed. The PSI report in this case was clearly subject to SCR 72.01(15): it is a part of a felony case file, and it is a "paper" in that file. By the time of Judge Gundrum's order, judgment had been entered in the case, and thus the 50-year retention period had begun to run. *See* SCR 72.01(15). Had Judge Gundrum (or another court official) carried out Judge Congdon's order to destroy the PSI report, the court would have been in violation of SCR 72.01(15).

This court showed its disfavor for destruction of court records by adopting SCR 72.06, which clarified that state courts ordering the expunction of records are to seal but not destroy those records. Prior to adoption of SCR 72.06, courts were arguably permitted to destroy records targeted for expunction by statute or court order. In *Leitner*, 253 Wis. 2d 449, ¶ 2 n.3, this court observed that Wis. Stat. § 973.015, which permits courts to "expunge" criminal conviction records in some circumstances, did not define the term "expunge." This court further noted that the court of appeals in *State v. Anderson*, 160 Wis. 2d 435, 441, 466 N.W.2d 681 (Ct. App. 1991), had defined "expunge" in § 973.015 to mean "destroy," relying on a 1978 Attorney General's Opinion, 67 Op. Att'y Gen. 301. *Leitner*, 253 Wis. 2d 449, ¶ 2 n.3.

However, with the adoption of SCR 72.06, this court decided that court records targeted for expunction would be *sealed but not destroyed* until after the retention periods set forth in SCR 72 had expired. The rule

provides that the court must "seal the entire case file" and then "destroy [the] expunged court record[] *in accordance with the provisions of this chapter*." SCR 72.06 (emphasis added).

By requiring that felony case files be retained for a very long period of time—and by providing that even expunged records are to be preserved until the expiration of the retention period—this court has made a clear and sound public policy choice in favor of government transparency and accountability and against the premature destruction of public records. Felony case files do not belong to judges or to the parties; they belong to the public. *Cf.* Wis. Stat. § 19.32 (defining "authority" to which the public records law applies to include "any court of law"); *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597-98 (1978) (discussing acknowledgment among courts of a general right of the public, as opposed to parties, to inspect court records). Their essential public nature does not change when statutes or court orders provide that documents or entire case files are to be kept confidential. Destruction of a court document permanently shields that public record from review by anyone, for any purpose, ever. It prevents the public from assessing the performance of judges, prosecutors, and public defenders, and is subject to abuse by public officers seeking to hide their own misconduct or that of friends and associates. While there is no hint whatsoever that anything so sinister happened here, the point is that a rule that permits destruction of certain papers in felony case files under some circumstances is open to abuse.

This court wisely adopted a blanket rule that mandates the preservation of all papers in felony case files for a lengthy retention period. This policy choice is consistent with the legislature's declaration of policy regarding government transparency, that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31.

In light of the foregoing, the State respectfully asks this court to hold that the circuit court lacked the inherent authority to destroy the PSI report where this court, pursuant to its superintending authority, established under SCR 72.01(15) clear rules for all state courts pertaining to the retention and destruction of papers in felony case files. Wisconsin has a "unified" court system, Article VII, § 2, and, where this court exercises its superintending authority, lower courts lack the power to take actions that are inconsistent with those rules. *See State v. Perez*, 170 Wis. 2d 130, 137, 487 N.W.2d 630 (Ct. App. 1992) (superintending authority rests solely with the supreme court).

If this court declines to base its decision on this ground, the State submits that the supreme court's prior exercise of supervisory and inherent authority in the area of document retention and destruction should nonetheless factor heavily into the court's inherent authority analysis. The fact that the supreme court has set policy for the court system in this field by enacting SCR 72 *strongly argues against* the recognition of a circuit court power to destroy court documents that is not derived from SCR 72.

C. The Power to Destroy the PSI Report Is Not Necessary to the Circuit Court's Existence or Its Orderly Functioning.

If a circuit court were to have inherent authority to destroy a PSI report, it appears it could only be derived from the third general area of inherent power: to "ensur[e] that the court functions efficiently and effectively to provide the fair administration of justice." *Davis*, 226 Wis. 2d at 749-50. As noted, courts reviewing claims of power under this general area have said that, to be inherent to the circuit court, the claimed power must be "essential to the existence or the orderly functioning of" the court. *In Interest of E.C.*, 130 Wis. 2d at 387. Recently, this court in *Henley* affirmed the above-stated principle in the following words: "A power is inherent

when it 'is one without which a court cannot properly function.'" *Henley*, 328 Wis. 2d 544, ¶ 73 (quoting *Braunsdorf*, 98 Wis. 2d at 580).

Three main justifications have been advanced in support of the claim that the power to destroy the PSI report is necessary to the circuit court's existence and orderly functioning. First, Melton suggested in the court of appeals that destruction of the PSI report would fulfill the purpose in Wis. Stat. § 972.15(4) of keeping the PSI report confidential. Second, Melton argued in the court of appeals that destruction of the PSI report was necessary to prevent its use in corrections administration or in a Chapter 980 proceeding. Third, the court of appeals concluded that the circuit court had the inherent power to destroy the PSI report to prevent "confusion" and "misuse" of the PSI report at a resentencing. Each of these justifications fails for the reasons discussed below.

1. The Power to Destroy the PSI Report Is Not Inherent to the Circuit Court Where the PSI Statute Authorizes Sealing the PSI Report.

As noted above, the PSI statute implicitly authorizes circuit courts to place a PSI report under seal. Such a power is necessary to effectuate the confidentiality requirement of Wis. Stat. § 972.15(4). Of course, as Melton suggested in the court of appeals, destroying the PSI report would also accomplish the statute's purpose of keeping the PSI report confidential (Melton's court of appeals' brief-in-chief at 10). However, § 972.15(4) also envisions *preservation* of the PSI report by providing that it may be made available to persons "upon specific authorization of the court," and by providing that DOC may access the report without court approval for corrections administration and research, § 972.15(5), and that specified agencies and persons may access the report

without court approval in Chapter 980 proceedings, § 972.15(6).

Thus, like destruction, sealing the report as authorized by Wis. Stat. § 972.15 achieves the objective of preventing disclosure of the information to unauthorized parties. Destruction, however, would contravene the statute by preventing authorized parties and others who obtain court approval from ever accessing the PSI report. Moreover, as discussed in Section B. above, destruction would be contrary to this court's policy choice in favor of court document preservation expressed in SCR 72.

However, the primary reason Melton seeks destruction of the PSI report is not to keep it confidential from the general public; it is to prevent DOC and other parties who are exempted from the confidentiality requirement by Wis. Stat. § 972.15 (5) and (6) from accessing and using the report for their own legitimate statutory purposes. As explained in the next section, the circuit court lacks the inherent authority to destroy the PSI report to prevent these parties from exercising their statutory right under § 972.15 to access and use the PSI report.

2. The Power to Destroy a PSI Report to Prevent Its Use by the DOC and Other Authorized Parties Is Not a Power That Is Essential to the Court's Existence or Functioning.

In the court of appeals, Melton argued that allowing the PSI report to remain in the file "is like failing to disarm a ticking time bomb" (Melton's court of appeals brief-in-chief at 12). If, Melton argued, the PSI report containing his admission to an uncharged sex offense were not destroyed, the DOC could access the PSI report

and use it in corrections administration, and the DOC and other parties could access and use it in a Chapter 980 proceeding (Melton's court of appeals brief-in-chief at 11-13).

The State submits that the circuit court lacks the inherent authority to destroy the PSI report to prevent DOC from using the report in corrections administration, and to prevent authorized parties from using the report in a Chapter 980 proceeding because: (1) The DOC and these other parties have the statutory right to access and use the PSI report for purposes specified in Wis. Stat. § 972.15; (2) DOC's and other authorized parties' use of the PSI report does not interfere with the court's existence or functioning, and thus courts may alter PSI reports only for purposes related to sentencing; and (3) Melton has never challenged the accuracy of the information contained in the first PSI report.

First, as noted earlier, the PSI report serves two general purposes: to provide "accurate and relevant information" to the sentencing court "to assist [it] in determining the kind and extent of punishment to be imposed in the particular case," *Greve*, 272 Wis. 2d 444, ¶ 9., and to provide information to DOC and other parties for use in corrections administration, research and Chapter 980 proceedings. Wis. Stat. § 972.15(5) and (6).

Pursuant to this latter objective, the legislature explicitly authorized DOC and other specified parties to access and use the PSI report for certain purposes without court approval. *See* Wis. Stat. § 972.15(4), (5) and (6). Where the legislature has explicitly authorized DOC and other specified parties to access and use the PSI report, the circuit court lacks the inherent authority to destroy the PSI report for purposes of preventing its legitimate use by DOC and other authorized parties. An action by the circuit court meant to prevent access to and use of the PSI report for these purposes would thus be contrary to Wis. Stat. § 972.15.

Second, the use of the PSI report by DOC and other parties pursuant to Wis. Stat. § 972.15 does not implicate the *court's* existence or functioning, and thus the circuit court lacks the inherent power to destroy the PSI report to prevent its use by these parties. The court of appeals has wisely held that circuit courts should not correct an allegedly inaccurate PSI report (much less destroy one that is *factually correct*) for purposes related to corrections administration. *Bush*, 185 Wis. 2d at 722-24.

In *Bush*, a circuit court declined to correct a PSI report where the offender claimed that DOC was relying on incorrect information contained in the report in making correctional programming decisions. *Bush*, 185 Wis. 2d at 721-22. The circuit court declined to exercise jurisdiction to issue such an order. *Id.* On review, the court of appeals declined to explicitly address the question of whether the circuit court had the inherent authority to alter the PSI report, and instead affirmed on the basis that the circuit court properly exercised its discretion in declining to exercise jurisdiction. *Id.* at 722.

Nonetheless, the *Bush* court's analysis sets forth the reasons why circuit courts *should not* have the inherent authority to alter a PSI report for purposes of DOC's use. The court of appeals explained that Bush had "essentially requested the court to tell the Department of Corrections how it is to use its records and how it is to correct errors in those records." *Id.* at 723. "Courts are not well-situated to make judgments on the Department of Corrections' use of its own records and administration of its own rules," explained the *Bush* court. *Id.* at 723. "This conclusion is not only consistent with the statutory authority granted to the trial court, but also with sound public policy." *Id.* at 724. "[P]olicy principles and considerations of judicial administration," declared the *Bush* court, "dictate that courts should not exercise their jurisdiction to correct PSIs for reasons solely related to the Department of Corrections administration." *Id.*

The *Bush* court added that "[w]hile the trial court could appropriately modify Bush's sentence based on the

erroneous information in the PSI [report] . . . a motion to correct the information in the PSI [report]" for purposes related to DOC administration "should be directed to that agency." *Id.* at 723.

The State submits that *Bush*'s reasoning is sound. As noted, a defendant has a right to challenge allegedly inaccurate information contained in a PSI report to ensure that the defendant is sentenced on the basis of true and accurate information. *See Greve*, 272 Wis. 2d 444, ¶ 27. However, requests to correct PSI reports for purposes related to DOC's use of the report are beyond the expertise—and, more to the point, the authority—of the court, and should be directed to DOC. While it has been said that the PSI author (usually a DOC employee) acts as an "agent of the court" in *creating* the PSI report, *Thexton*, 298 Wis. 2d 263, ¶ 5, the DOC is not the court's "agent" when it uses the PSI report in corrections administration.

The case of *In Interest of E.C.*, 130 Wis. 2d at 381, is instructive as well. 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. This court agreed with the police department, concluding that the circuit 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.

While *In Interest of E.C.* differs from the present case in that the juvenile records there were in the police department's possession, and the PSI report here is in the court file, the issue of who has the records matters little to the inherent authority analysis in this case. DOC's use of

the PSI report under its authorization in Wis. Stat. § 972.15—like the police department's maintenance of juvenile records and use of those records in police work—is not a matter that concerns the court's existence or orderly functioning. Hence, the power to destroy (or even correct) a PSI report for purposes related to DOC administration is not a power that is inherent to the circuit court.

Finally, it bears repeating that this is not a case in which the disputed PSI report contains allegedly inaccurate information. Melton has never challenged the accuracy of his admission to conduct constituting the uncharged offense described in the PSI report. He simply does not want the DOC and other parties authorized by § 972.15 to have access to this truthful information. In *Bush*, the defendant at least had an equitable basis for asking the court to interfere with the DOC's management of his incarceration: DOC was allegedly relying on inaccurate information in making programming decisions. Melton cannot claim that a similar injustice would befall him if DOC possessed and used the first PSI report in his case.

Thus, if the first PSI report is, as Melton colorfully suggests, a "ticking time bomb," the State submits that the circuit court lacks the inherent authority to play demolition squad to "disarm" it (via destruction) to prevent parties authorized by Wis. Stat. § 972.15 from accessing and using the first PSI report. To take Melton's explosive metaphor one step further, because the accuracy of the PSI report is not in dispute, there would appear to be no good reason not to let the bomb go off—i.e., to permit DOC and other parties to have and use the report in carrying out their duties under § 972.15.

3. Contrary to the Court of Appeals' Decision, the Power to Destroy the PSI Report to Prevent "Confusion" and "Misuse" of the First PSI Report at a Resentencing Is Not a Power That Is Essential to the Court's Existence or Functioning.

The sole basis for the court of appeals' conclusion that the circuit court had the inherent power to destroy the PSI report was that destruction was necessary to prevent "confusion" caused by the presence of two PSI reports in the file and subsequent "misuse" by the resentencing court of the "'wrong'"—i.e., the first—PSI report. *Melton*, 343 Wis. 2d 784, ¶ 23 (Pet-Ap. 110-11). The confusion-at-resentencing rationale was never raised in the circuit courts, or briefed by the parties in the court of appeals. This rationale cannot withstand scrutiny for two simple reasons.

First, the court of appeals apparently did not examine the physical record to determine whether the theoretical possibility of "confusion" at a resentencing resulting from the existence of two PSI reports in the file would have been an actual possibility in this case. Had the court done so, it would have discovered that the two PSI reports are sealed in separate, clearly-marked envelopes (14; 22). Affixed to the sealed envelope containing the first PSI report is Judge Gundrum's order directing that the DOC "prepare an[] updated presentence investigation report" that excludes certain information contained in the first report. The order declares: "The presentence investigation report dated November 19, 2009 shall be sealed." (14). The other side of the sealed envelope contains an ink-stamped message: "DO NOT OPEN WITHOUT PERMISSION OF THE COURT" and

a large, double-underlined, handwritten note: "Ordered Sealed" (14).

A judge examining the file would note the presence of two sealed PSIs and, upon reading Judge Gundrum's order affixed to the first PSI, would quickly ascertain that a prior court ordered the second PSI report to replace the first PSI report. Thus, on this physical record, the chance for confusion at a resentencing arising from the existence of two PSI reports is virtually nonexistent. An inherent power to destroy the PSI report was therefore not necessary to prevent "confusion" at resentencing.

Second, and more importantly, the concern about "confusion" and "misuse" of the first PSI report at a resentencing is a red herring because *a resentencing court would be allowed to rely on the first PSI report in passing sentence*.

Based on the circuit court's order directing DOC to create a new PSI report, it would appear that the first and second reports are identical in all respects except that the first report contains (and the second report omits) Melton's admission to conduct constituting an uncharged child sex offense. As noted above, Melton has never disputed the accuracy of his admission to this conduct, and therefore reliance on his admission in passing sentence would not deny Melton his right to be sentenced on the basis of true and correct information. While the original court specifically declined to consider Melton's admission at sentencing, it is well-established the court could have—even should have—considered this fact in sentencing Melton. *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980) (sentencing judge may consider uncharged and unproven offenses).[8] Further, a

[8] Sentencing courts may also consider pending criminal charges, *State v. Jackson*, 110 Wis. 2d 548, 329 N.W.2d 182 (1983), and charged offenses for which the defendant was acquitted, *State v. Bobbitt*, 178 Wis. 2d 11, 503 N.W.2d 11 (Ct. App. 1993). "In the absence of any claimed factual error, the information presented by a PSI [report] may be considered by the court in its sentencing

resentencing court would not be bound by the original court's decision not to consider Melton's admission, and could rely on the admission in resentencing him. *See State v. Church*, 2002 WI App 212, ¶ 15, 257 Wis. 2d 442, 650 N.W.2d 873 (resentencing court may consider information not considered by sentencing court). Regardless whether the PSI author's inclusion of Melton's admission to conduct constituting an uncharged offense in the first PSI report violated DOC rules—an issue not presented here based on the procedural posture of this case—a court could consider that admission *in sentencing (or resentencing)* Melton. Thus, use of the first PSI report at resentencing would not constitute "misuse" of the report, as the court of appeals indicated, and the first PSI report would not be the "wrong" report at resentencing. *Melton*, 343 Wis. 2d 784, ¶ 23 (Pet-Ap. 110-11). Any "confusion" over having two PSI reports in the case file would not have any legal relevance where a resentencing court could consider the objected-to information in the first PSI report, and the two reports were otherwise identical.

For these two reasons, an inherent power to destroy the PSI report was not necessary to prevent "confusion" at resentencing. Accordingly, the court of appeals' sole justification for its holding that the circuit court had the inherent authority to destroy the PSI report fails.

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determination." *State v. Suchocki*, 208 Wis. 2d at 515, *abrogated on other grounds by Tiepelman*, 291 Wis. 2d 179.

CONCLUSION

The court of appeals' decision holding that the circuit court had the inherent authority to destroy the PSI report must be overturned, and the circuit court's order sealing without destroying the PSI report must be reinstated.

As developed above, such an authority would be contrary to this court's exercise of superintending and inherent authority in the area of retention and destruction of court documents by its adoption of SCR 72. This court granted circuit courts the power to destroy papers in felony case files—but only after "all papers" have been retained for 50 years after entry of judgment, or for 75 years in the case of Class A felonies. SCR 72.01(15). Where this court has exercised the court system's inherent authority to act in the field of document retention and destruction by adopting SCR 72 pursuant to its superintending powers, the circuit court lacked the power to enter an order that was contrary to SCR 72.

Moreover, the circuit court lacks the inherent authority to destroy the PSI report because such a power is not "essential to the existence or the orderly functioning of" the court, *In Interest of E.C.*, 130 Wis. 2d at 387.

Specifically, the circuit court lacks the inherent authority to destroy the PSI report to prevent its use by the DOC because the PSI statute specifically authorizes DOC and other authorized parties to access and use the PSI report for specified purposes. Wis. Stat. § 972.15(4), (5) and (6). Additionally, courts lack the power to alter PSI reports for purposes related to DOC administration, *Bush*, 185 Wis. 2d 722-24, and DOC's use of the PSI report is not a matter that concerns the circuit court's existence and functioning.

The circuit court also lacks the inherent authority to destroy the PSI report to prevent "confusion" and "misuse" of the first PSI report at a resentencing. There is

no real chance that a resentencing court would confuse the two PSI reports in this case because they are sealed in separate, clearly-marked envelopes, and Judge Gundrum's order is affixed to the outside of the envelope containing the first PSI report. More importantly, a resentencing court could consider Melton's admission contained in the first PSI report to conduct constituting an uncharged child sex offense. Thus, use of the first PSI report at resentencing would not constitute "misuse" of the report.

For these reasons, and others developed in this brief, the State respectfully asks this court to overturn the court of appeals' decision and reinstate the circuit court's order.

Dated this 14th day of December, 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 10,519 words.

Dated this 14th day of December, 2012.

_____
Jacob J. Wittwer
Assistant Attorney General

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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).

I further certify that:

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 14th day of December, 2012.

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Jacob J. Wittwer
Assistant Attorney General