STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP1582-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW J. MATASEK,

Defendant-Appellant-Petitioner.

ON REVIEW OF A WISCONSIN COURT OF APPEALS DECISION AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

STATEMENT OF FACTS

Defendant-Appellant-Petitioner Andrew J. Matasek's ("Matasek") statement of facts is sufficient to frame the issue for review. The plaintiff-respondent State of Wisconsin ("State") will address any disputes or

include any additional relevant information where appropriate.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DECIDED THAT THE CIRCUIT COURT COULD NOT WITHHOLD JUDGMENT ON EXPUNCTION UNTIL AFTER MATASEK COMPLETED PROBATION.

A. Standard of Review.

Matasek claims that a circuit court can exercise its discretion and withhold its decision on expunction until after he serves his probation. Matasek's Brief at 4. This court must interpret Wis. Stat. § 973.015[1] to decide whether it allows a delay of the expunction decision. Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews *de novo*. *State v. Moran*, 2005 WI 115, ¶ 26, 284 Wis. 2d 24, 700 N.W.2d 884 (citation omitted).

B. Legal Principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This court begins by examining the language of the statute. *Id.* ¶ 45. If the meaning is plain, then this court ordinarily stops its inquiry. *Id.* The context and structure of the statutory language is important to meaning. *Id.* ¶ 46.

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47. Extrinsic sources of statutory

[1]All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

interpretation can be consulted if the statute is ambiguous. *Id.* ¶ 51.

A plain meaning analysis may look at statutory context and structure. *State v. Soto*, 2012 WI 93, ¶ 20, 343 Wis. 2d 43, 817 N.W.2d 848. The context including language and structure of surrounding or closely related statutes is often highly instructive in determining a term's meaning. *Id.* The purposes underlying a statute are also useful in ascertaining a statute's meaning. *Id.*

C. Relevant Statute.

Wisconsin Stat. § 973.015[2] states:

> **(1) (a)** Subject to par. (b) and except as provided in par. (c), when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).
>
> **(b)** The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d), and the person was under the age of 18 when he or she committed it.
>
> **(c)** No court may order that a record of a conviction for any of the following be expunged:
>
> **1.** A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony

[2]This language reflects the amendment made by 2009 Wisconsin Act 28, §§ 3384-3386. That language was effective on June 29, 2009.

> offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095.
>
> **2.** A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 (1) (a).
>
> **(2)** A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

Wis. Stat. § 973.015.

D. The Court of Appeals Properly Affirmed the Circuit Court's Conclusion That It Must Make Its Expunction Decision At Sentencing.

Wisconsin Stat. § 973.015 requires circuit courts to consider expunction when asked by the defendant or the defendant's counsel. The circuit court must decide at the sentencing hearing whether the defendant's record will be expunged upon completion of his or her sentence. The circuit court cannot delay that decision until after completion of the defendant's sentence.

Matasek argues that the statute when read in context allows a court to delay its decision on expunction until after a defendant successfully completes probation. Matasek's Brief at 8-10. Matasek argues that the legislature intended to grant circuit courts discretion, including the discretion to make the expunction decision

after sentencing. *Id.* at 8-10. Further, Matasek argues that the purpose of the expunction statute would be undermined if the court cannot decide on expunction after he serves probation. *Id.* at 10-11. Matasek argues, for the first time in this court, that he was never sentenced because he received probation, and probation is not a sentence. Matasek's Brief at 12-14.

Matasek frames his arguments as an application of the language of the statute, but his argument is actually one of policy. He seems to believe that it would be better policy to allow circuit courts to make the decision after probation. His argument must fail. The legislature articulated a clear policy contrary to the one Matasek seeks. The circuit court must make its expunction decision at the sentencing hearing.

1. Statutory Language.

The language of the statute states that the decision must be made at sentencing. The statute reads in relevant part: "[T]he court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." Wis. Stat. § 973.015(1)(a). The statute refers to the generic sentencing process, not to a definition of "sentence" that would exclude probation. The court must decide at the sentencing hearing whether to make the defendant eligible for a special disposition.

Matasek seems to want the statute to read: The court may order at the time of sentencing or at the end of the probationary period that the record be expunged. The legislature did not include that language. This court should refuse to read it into the text of the statute. Likewise, Matasek's argument could be that the statute should read: The court may order that the record be expunged. This court should also reject this reading of the statute.

Matasek's reading runs contrary to this court's goal to strive where possible "to give reasonable effect to every word, in order to avoid surplusage." *See Kalal*, 271 Wis. 2d 633, ¶ 46. By including the phrase "at the time of sentencing" the legislature intended the court make the decision at the time of sentencing. To read the statute any other way would make that phrase surplusage.

The circuit court was obviously frustrated by the text of the statute. It stated that it had contacted a state representative to get the statute changed (33:32). The court wanted to make the expunction determination after the period of probation (33:32). However, the court concluded that the statute as written did not allow that delay (33:32). The court felt the language was unambiguous and stated that it could not read it any other way than what the words mean (33:33).

The court of appeals agreed. It held that to read the statute to allow the court to "order expunction at the time of sentencing or after successful completion of the defendant's sentence" would require courts to add words to the statutory text. *State v. Matasek*, 2013 WI App 63, ¶ 9, 348 Wis. 2d 243, 831 N.W.2d 450. Likewise, the court correctly noted that the legislature could have omitted the phrase "at the time of sentencing," but to accept Matasek's interpretation would render those words surplusage. *Id.* The court of appeals and circuit court correctly interpreted the statute. The decision must be made at sentencing.

Matasek also asserts that the purpose of shielding youthful offenders from some of the harsh consequences of criminal conviction is undermined if a court is not allowed to delay its decision. Matasek's Brief at 14. Matasek may believe that staying the decision is better policy, but the legislature disagrees. The statute requires the decision to be made "at the time of sentencing" and absent a statute allowing for a delay that the decision may not be delayed.

Matasek argues the term "at sentencing" can be ambiguous. This court has held that probation is not a sentence. *State v. Horn*, 226 Wis. 2d 637, 647, 594 N.W.2d 772 (1999). The court of appeals has stated that, "If anything is clear it is that the word 'sentence' is not; the word is colored by the light with which is it viewed." *State v. Swiams*, 2004 WI App 217, ¶ 16, 277 Wis. 2d 400, 690 N.W.2d 452. The word "sentence" can mean a sentence actually imposed by the court or refer to the more generic sentencing process. *State v. Mentzel*, 218 Wis. 2d 734, 739, 581 N.W.2d 581 (Ct. App. 1998). The word sentence has conflicting meanings in Wisconsin law. *Swiams*, 277 Wis. 2d 400, ¶ 16. This court applies "the meaning that is most congruent with 'the purpose of the particular statute under consideration.'" *Id.*

Therefore, to interpret what the legislature meant by the term "at sentencing" this court must look beyond the plain language of the statute. *See Kalal*, 271 Wis. 2d 633, ¶ 50. In the context of this case, this court must determine whether the phrase "at the time of sentencing" applies to sentencing hearing when the court imposes a sentence of imprisonment or if it also applies to sentencing hearings where the court orders probation.

2. Context and Placement.

Matasek correctly states that this court must look at the context of a statute in relation to other related statutes. Matasek's Brief at 7-8. The context and placement of Wis. Stat. § 973.015 require courts to make the expunction decision at the sentencing hearing.

The placement of the statute is indicative of the legislative intent behind passing it. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (Statutes should be interpreted in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results). The statute is included in the Wis. Stat. ch. 973, which is entitled "Sentencing." By placing it in that chapter, the legislature intended it apply at sentencing and that the

term "sentencing" refer to the generic sentencing procedure and not the specific meaning of "sentence" that excludes probation.

Another similar statute also lends help in interpreting Wis. Stat. § 973.015. The legislature articulated a different method for expunction for juveniles. *See* Wis. Stat. § 938.355(4m). Under that method, a juvenile may petition the court for expunction after the person turns 17 and "the court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her disposition order and that the juvenile will benefit from, and society will not be harmed by, the expungement." *Id.* This seems similar to the method Matasek thinks applies under Wis. Stat. § 973.015. The fact that the legislature chose to articulate this procedure in Wis. Stat. § 938.355(4m) lends further support to the conclusion that it intended a different procedure in Wis. Stat. § 973.015.

Matasek argues that the circuit court is in a better position to make the expunction decision after probation. Matasek's Brief at 11. There are many other items that the circuit courts must address at sentencing including: fines (Wis. Stat. § 973.05), costs, fees, and surcharges (Wis. Stat. § 973.06), conditions of extended supervision (Wis. Stat. § 973.01(5)), eligibility for the challenge incarceration program ("CIP") (Wis. Stat. § 973.01(3m)), and eligibility for the earned release program ("ERP") (Wis. Stat. § 973.01(3g)).

An argument could be made that each of these decisions could be made at a later date. Each will not be in effect immediately. The court would have more relevant information after the defendant serves at least a portion of his or her sentence. Yet in each case, the legislature chose to require court to make the decision at the time of sentencing, not later. Reading the expunction statute to apply only at the sentencing hearing is consistent with Wis. Stat. ch. 973 as a whole. The context and

placement of the statute support the interpretation that the court must decide at the sentencing hearing.

3. Legislative History.

Legislative history can provide some guidance in interpreting the statutes. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 40, 300 Wis. 2d 381, 732 N.W.2d 1. The legislative history of Wis. Stat. § 973.015 also supports the interpretation that the expunction decision must be made at the sentencing hearing.

The legislature created Wis. Stat. § 973.015 in 1975 as part of that year's budget bill. Laws of 1975, ch. 39, § 711m. The original statute read in part, "[T]he court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." *Id.* The language Matasek asks this court to interpret has remained unchanged since its passage. *See* Wis. Stat. § 973.015(1)(a). The court revised the statute as recently as 2011 and left the relevant language intact. *See* 2011 Wisconsin Act 268, § 9.

While this statute was enacted 39 years ago and we may never know the exact legislative intent, we do know about the national discussion of expunction around that time. Prior to the 1950s, the only mechanism for restoration or rights and reputation after conviction was an executive pardon. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 764 (2011). In 1956, the National Conference on Parole called for laws empowering a sentencing court to be able to expunge the record of conviction through an order at the time of discharge from a sentence. *Id.* at 765-66. The concept of expunction developed in the 1940s related to juvenile offenders who were considered easier to rehabilitate than adults. *Id.* at 766.

In 1962, the National Council on Crime and Delinquency proposed a model statute to give the sentencing court discretionary authority to annul adult convictions. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1710 (2003). In 1962, the Model Penal Code rejected the idea of expunction in favor of making the sentencing court responsible for certifying that the defendant paid his debt to society. Love, *supra*, 54 How. L.J. at 767. The Model Penal Code proposed allowing courts to relieve the defendant of the disqualifications and disabilities after he or she served the sentence and to vacate the conviction after certifying that the defendant led a law abiding life for some period of time. *Id.* Over the next 20 years, some states enacted expunction statutes following the National Council on Crime and Delinquency approach while others adopted a more transparent set-aside approach of the Model Penal Code. *Id.* at 767-68.

Wisconsin was one of the states that went the route of expunction. *See* Laws of 1975, ch. 39, § 711m. By choosing the expunction method over the Model Penal Code method, the Wisconsin Legislature made the decision to grant discretion to the sentencing court to expunge certain convictions. The legislature did not choose the method of examining the defendant's circumstances after he served the sentence for criminal convictions. This choice supports the interpretation that the court must decide at sentencing whether a defendant will have his conviction expunged.

Matasek asserts that the legislature intended to grant circuit courts "wide discretion with regard to expungement." Matasek's Brief at 9. However, Matasek's analysis fails to require the conclusion that the legislature intended unlimited discretion.

The legislative history of Wis. Stat. § 973.015 lends support for the conclusion that the legislature intended to require circuit courts make the decision about

expunction at the sentencing hearing. The legislature did not choose the Model Penal Code route of allowing the decision to be made later. The circuit court must make the decision at the sentencing hearing.

4. Other Extrinsic Sources.

Courts can also look to other extrinsic sources when a statute is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶ 51. Prior case law, the jury instructions, and pending legislation support the conclusion that the circuit court must decide on expunction at the sentencing hearing.

In the court of appeals' decision in *State v. Meinhardt*, 2012 WI App 82, 343 Wis. 2d 588, 819 N.W.2d 347, the court assumed that the expunction decision would be made at sentencing. The defendant was convicted in 2008 when he was 24 years old. *Id.* ¶ 1. While he was on probation, the legislature amended Wis. Stat. § 973.015 to apply to defendants under the age of 25 rather than 21 as previously written. *Id.* The defendant sought consideration for expunction after completing his probation period arguing that he would have been a candidate for expunction if he had committed his crime two years later. *Id.* ¶ 2. The circuit court denied the request concluding that it did not have the authority to expunge the defendant's conviction under the amended statute. *Id.*

The court of appeals affirmed the circuit court's decision concluding that the statute cannot be applied retroactively. *Meinhardt*, 343 Wis. 2d 588, ¶ 5. In Matasek's appeal, the question is not one of retroactive applicability. However, the court's reasoning indicates that the court assumed that the decision about expunction could not come at the time the defendant completed probation, but instead must be made at the sentencing hearing.

The jury instruction committee also concludes that the expunction decision must be made at the sentencing hearing. *See* Wis. JI-Criminal SM-36 (2010). The instruction discusses what a sentencing court should state on the record when it has been asked to consider a special disposition under Wis. Stat. § 973.015. *Id.* It does not leave open an option to defer the decision under after the probationary period. The only options for the sentencing court articulated in the instruction are to order a special disposition or reject the special disposition at the sentencing hearing. *Id.* This instruction supports the conclusion that the expunction decision must be made at the sentencing hearing.

The State is aware of a pending bill relating to Wis. Stat. § 973.015. *See* 2013 Assembly Bill 524. This Bill, introduced November 22, 2013, would amend Wis. Stat. § 973.015(1)(a) and create § 973.015(1)(bg). *Id.* at 1. It would change current law regarding expunction of delinquency adjudications. *Id.* at 2. The Legislative Reference Bureau's analysis states that under current law, "the court may order, at the time the person is sentenced, that the record of the offense be expunged when the person successfully completes his or her sentence imposed for the offense." *Id.* at 1. This proposed bill indicates the decision on expunction must be made at the sentencing hearing.

Case law also supports the view that the term "sentencing" refers to the generic sentencing process and not to a specific meaning of sentence that excludes probation. In *Mentzel*, the court of appeals examined whether a person on probation was "in custody under sentence of a court" and entitled to seek relief under Wis. Stat. § 974.06. 218 Wis. 2d at 737-44. The court found that Wis. Stat. § 974.06 was ambiguous for two reasons: that the circuit court may withhold sentence suggests that a sentencing may not have occurred and that the case law was not uniform as to whether a probation disposition in a criminal case represents a sentence. *Id.* at 739-40. The court concluded that the phrase "in custody under sentence

of a court" did not keep people serving probation from pursuing postconviction relief under Wis. Stat. § 974.06. *Id.* at 743-44.

In *State v. Booth*, 142 Wis. 2d 232, 418 N.W.2d 20 (Ct. App. 1987), the court of appeals also examined whether probation is a "sentence." The defendant in *Booth* claimed that the standard that applied to his plea withdrawal motion was the pre-sentencing fair and just standard because he received probation. *Id.* at 234. The court concluded that imposition of probation constitutes sentencing for the purpose of determining which standard applies to a plea withdrawal motion. *Id.* at 235.

Mentzel and *Booth* are both examples of times when a reference to "sentence" includes situations where a defendant had been placed on probation. As those courts decided in those cases, this court should hold that "sentence" refers to the generic sentencing process and encompassed situations when a court places a defendant on probation.

Matasek relies on *Horn* for his argument that he was never sentenced. Matasek's Brief at 12-13. In *Horn*, 226 Wis. 2d at 639-40, this court examined whether the statute requiring the administrative, rather than judicial, revocation of probation violated the separation of powers doctrine. This court cited *Prue v. State*, 63 Wis. 2d 109, 114-16, 216 N.W.2d 43 (1974), for the proposition that probation is not a sentence, but concluded that it was closely related to sentencing. *Horn*, 226 Wis. 2d at 647. This court held that "whether a sentencing is imposed and stayed, or withheld, the circuit court fully exercises its constitutional function to impose a criminal disposition." *Id.* at 649. The court found no violation to separation of powers from the requirement that the revocation be done in the executive branch rather than the judicial branch. *Id.* at 653.

The court in *Horn* only addressed whether probation revocation violated the separation of powers

doctrine. *See Horn*, 226 Wis. 2d at 639-53. In fact, the court held that, "Whether a convicted defendant is sentence to prison or the circuit court imposes probation, '[t]he adversary system has terminated[.]'" *Id.* at 650. The same reasoning applies to Matasek. He received probation. The adversary system has terminated. He was "at sentencing" under the meaning of Wis. Stat. § 973.015.

The case law, jury instructions, and pending bill all support the inference that courts must decide at sentencing whether a conviction might be expunged. The expunction decision must be made at the sentencing hearing even when the circuit court imposes probation. Matasek was sentenced within the meaning of Wis. Stat. § 973.015.

5. Sentencing Policy.

The legislature's purposeful shift in sentencing policy to give more power to sentencing courts and more finality to sentences supports the court of appeals' interpretation of Wis. Stat. § 973.015. Since passage of Wis. Stat. § 973.015, the legislature has changed its sentencing policy to move away from mid-course correction and second chances by granting the sentencing court exclusive control over the sentence. The current policy on sentencing is relevant to this court as it interprets the statutory provision because the legislature retained the language as recently as 2011 when it revised this statutory section. *See* 2011 Wisconsin Act 268, § 9.

The legislature moved control to the sentencing courts by removing the option of parole. Therefore, there is no reason to believe that the legislative intention to have the decision on expunction made at the sentencing hearing has been altered in the almost 40 years since the original Wis. Stat. § 973.015 passed.

Matasek notes that the court must determine whether the defendant will benefit from expunction and society will not be harmed. Matasek's Brief at 9. He argues that the legislature, therefore, must have

contemplated the court exercising its discretion after probation ends. *Id.* at 10. Matasek asserts that the circuit court is in a better position to make this determination after the probationary period ends. *Id.* at 11.

Matasek's argument ignores current legislative sentencing policy. The legislature disfavors that sort of mid-course correction and granting of second changes. If the legislature felt that after the probationary period ended was the best time to make the expunction determination, then it would not have included the language: "at the time of sentencing." Matasek's reading of the statute conflicts with this purposeful policy shift. This result should be avoided.

Prior to 2000, an inmate was eligible for parole where the parole board could consider the inmate's rehabilitation. Michael B. Brennan, *The Pendulum Swings: No More Early Release*, Wisconsin Lawyer, September, 2011 at 4. In 2000, truth-in-sentencing eliminated parole for new offenders. *Id.* This signaled a legislative intent to move away from the mid-sentence evaluation and place almost all the discretion in the hands of the circuit court.

The legislature did allow some opportunities for early release with Wis. Stat. § 973.195 allowing a petition for sentence adjustment, the earned release program, among others. Brennan, *supra*, at 6-7. However in 2011, the legislature passed 2011 Wisconsin Act 38, and early release largely ended. *Id.* at 7, 60. With the passage of 2011 Wisconsin Act 38, the legislature again returned the decision about when an inmate is released to the sentencing court. *Id.* at 61.

The circuit court must make a decision about expunction at the sentencing hearing rather than allowing for a mid-course correction or second look. This is consistent with the legislature's current sentencing policy.

6. The Statute Requires the Circuit Court to Make a Decision Regarding Expungement at Sentencing, and Not After Probation Ends.

The decision about whether a conviction can be expunged must be made by the circuit court at the time of the sentencing hearing. Wisconsin Stat. § 973.015 allows the circuit court discretion over whether it will allow expunction by stating that the court "may order" the record be expunged at the end of the sentence. However, the statute does not contemplate the court making that decision at any time other than at the sentencing hearing. The term "at sentencing" refers to the generic sentencing process and not to a specific definition of sentence that excludes probation.

The context and placement of the statute supports this interpretation. This interpretation is consistent with the other items that a circuit court must address at sentencing including fines, fees, surcharges, conditions of extended supervision, and eligibility for the ERP and the CIP. This language is consistent with the legislative history, the case law, the jury instruction, and the legislative policy behind truth-in-sentencing.

There might be circumstances where a second look or mid-course correction might be appropriate. Defendants retain the option of challenging the circuit court's sentencing discretion under Wis. Stat. §§ 809.30 or 973.19. If a new factor justifying sentence modification arises, a defendant may move for sentence modification on that ground at any time. *See State v. Scaccio,* 2000 WI App 265, ¶ 13, 240 Wis. 2d 95, 622 N.W.2d 449. Simply because a circuit court must make the decision about expunction at the time of sentencing, does not eliminate a defendant's right to challenge his sentence, including the expunction decision.

A postconviction motion is likewise the remedy for the defendants who were sentenced by circuit court's that erroneously interpreted Wis. Stat. § 973.015. In its amicus brief in support of Matasek's petition for review, the State Public Defender asks whether defendants who were told to move for expunction after completing their sentence are still able to make such a motion. Amicus Brief at 5. Those defendants would be able to move for sentence modification based on a new factor. "Erroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was highly relevant to the imposed sentence and was relied upon by the trial court." *State v. Norton*, 2001 WI App 245, ¶ 9, 248 Wis. 2d 162, 635 N.W.2d 656. In cases where the circuit court erroneously believed it could delay its decision on expunction until after the defendant served his or her sentence, the court relied on erroneous information at sentencing. Therefore, those defendants would be able to seek relief in sentence modifications based on a new factor.

The State Public Defender implies that circuit court's might need to "brace themselves for motions for sentence modification . . . ." Amicus Brief at 6. However, in cases where the court erroneously thought it could delay its decision, it would have anticipated either a petition for expunction or a hearing on expunction. Instead of the expected expunction petition or expunction hearing, the court would receive a sentence modification motion. The amount of work for the circuit court will not substantially increase with this court's clarification that the expunction decision must be made at sentencing. Likewise, the circuit courts' intention to consider expunction would be realized.

The circuit court properly concluded that it could not stay its decision on whether to make Matasek eligible for expunction. The court of appeals concluded that Wis. Stat. § 973.015 requires the circuit court to make its decision about expunction at the time of the sentencing hearing. *Matasek*, 348 Wis. 2d 243, ¶ 1. This court

should affirm the court of appeals' and circuit court's decisions.

II. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN REFUSING TO ORDER MATASEK'S CONVICTION EXPUNGED UPON COMPLETION OF PROBATION.

A. Standard of Review.

The word "may" in Wis. Stat. § 973.015 grants the circuit court discretion to determine whether to grant expunction upon successful completion of the sentence. *See In Interest of Cesar G.*, 2004 WI 61, ¶ 12, 272 Wis. 2d 22, 682 N.W.2d 1; *see also Matasek*, 348 Wis. 2d 243, ¶ 9. There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *State v. Gallion*, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)

B. Legal Principles.

To be eligible for expunction an offender must be under 25 at the time the offense was committed. Wis. Stat. § 973.015(1)(a). The offense is eligible for expunction if it is a misdemeanor. Wis. JI-Criminal SM-36. The offense may be a class H or class I felony if the person has not previously been convicted of a felony, and the felony is not a violent offense. *Id.*

At sentencing, the circuit court may order the record be expunged upon successful completion of the sentence if the court determined the person will benefit and society will not be harmed by expunction. Wis. Stat. § 973.015(1)(a). By including the word "may" the legislature granted the circuit court discretion to refuse to order expunction even if the criteria of Wis. Stat. § 973.015 are satisfied.

C. The Circuit Court Properly Exercised Its Discretion In Refusing to Expunge Matasek's Conviction.

Matasek does not challenge the circuit court's sentencing discretion. However, in its amicus brief in support of Matasek's petition for review, the State Public Defender asserts that circuit courts do not know whether the factors a circuit court must consider at sentencing are the same or different from the factors the court is required to consider for its expunction decision. Amicus Brief at 5. It also asks whether the circuit court must set forth a rational and explainable basis for its expunction decision. *Id.* In this case, the circuit court properly exercised its sentencing discretion in concluding that Matasek would not be eligible for expunction after his probation.

The statute articulates that courts are required to consider two factors in making an expunction decision: whether the person will benefit and whether society will be harmed. Wis. Stat. § 973.015(1)(a). The circuit court considered both factors. The court found that Matasek could "absolutely" benefit from expunction (33:33). However, the court found that society would be harmed (33:33). The court found that it would unduly depreciate the seriousness of delivering two pounds of marijuana and send the message to society that it is not a serious crime (33:33-34). The court felt it would fail to put society on notice that it is a serious offense (33:34). The court could not find that society would not be harmed (33:34).

The circuit court properly exercised its discretion in making the expunction decision. It weighed the factors and discussed each on the record. It found that society would be harmed if it made the decision to allow expunction of Matasek's conviction. The court's finding was not clearly erroneous.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the court of appeals' decision and Matasek's judgment of conviction.

Dated this 13th day of January, 2014.

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 5,538 words.

Dated this 13th day of January, 2014.

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Christine A. Remington
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).

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.

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Dated this 13th day of January, 2014.

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