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STATE OF WISCONSIN
IN SUPREME COURT

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OF WISCONSIN**

—
No. 2013AP1163-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEARNEY W. HEMP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A WISCONSIN COURT OF
APPEALS' DECISION AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING A
PETITION FOR EXPUNCTION ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT THE
HONORABLE JEAN A. DiMOTTO, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF FACTS	2
SUPPLEMENTAL STATEMENT OF THE CASE	2
ARGUMENT	4
I. THE COURT OF APPEALS PROPERLY DECIDED THAT HEMP'S CONVICTION WAS NOT AUTOMATICALLY EXPUNGED UPON COMPLETION OF PROBATION.	4
A. Standard of Review.	4
B. Legal Principles.	4
C. Relevant Statute.....	5
D. The Court of Appeals Properly Affirmed the Conclusion That Hemp's Conviction Was Not Expunged.	6
II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT HEMP FAILED TO COMPLY WITH WIS. STAT. § 973.015(2).....	8
A. Standard of Review and Legal Principles.	8
B. Wisconsin Stat. § 973.015(2) Requires Action to Expunge a Criminal Conviction.	8
1. Statutory language.....	8

	Page
2. Context and placement.	10
3. Legislative history.	11
4. Other extrinsic sources.	12
5. Hemp failed to comply with Wis. Stat. § 973.015 by failing to forward the discharge certificate upon receipt to the court.	15
III. THE CIRCUIT COURT MUST EXERCISE ITS DISCRETION REGARDING EXPUNCTION AT SENTENCING.	18
A. Standard of Review and Legal Principles.	18
B. The Circuit Court Properly Exercised Its Discretion At Sentencing.	18
CONCLUSION.....	19

CASES

Dean v. United States, 556 U.S. 568 (2009).....	9
McQuestion v. Crawford, 2009 WI App 35, 316 Wis. 2d 494, 765 N.W.2d 822.....	13
RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 247 N.W.2d 171 (1976)	14
State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.....	4, 5, 9, 12
State ex rel. Thomas v. Schwarz, 2007 WI 57, 300 Wis. 2d 381, 732 N.W.2d 1	11
State v. Ebersold, 2007 WI App 232, 306 Wis. 2d 371, 742 N.W.2d 876.....	13
State v. Hemp, 2014 WI App 34, 353 Wis. 2d 146, 844 N.W.2d 421.....	3, 4, 10, 13, 14, 17, 18
State v. Leitner, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341	12, 16
State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811	4, 5, 7, 8, 10, 18
State v. Matasek, 2013 WI App 63, 348 Wis. 2d 243, 831 N.W.2d 450.....	14

	Page
Watson v. United States, 552 U.S. 74 (2007).....	9
Watton v. Hegerty, 2007 WI App 267, 306 Wis. 2d 542, 744 N.W.2d 619.....	13
Watton v. Hegerty, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369.....	13

WISCONSIN STATUTES

Wis. Stat. § 165.77(4) (2009-10)	11
Wis. Stat. § 758.18(1) (2009-10)	12
Wis. Stat. § 938.355(4m) (2009-10)	11
Wis. Stat. § 971.025 (2009-10)	12
Wis. Stat. § 973.015 (2009-10)	passim
Wis. Stat. § 973.015(1) (2009-10)	6, 7, 11
Wis. Stat. § 973.015(1)(a) (2009-10)	18
Wis. Stat. § 973.015(2) (2009-10)	passim
Wis. Stat. § 973.09 (2009-10)	10
Wis. Stat. § 973.09(5) (2009-10)	10, 16
Wis. Stat. § 973.09(5)(a)1 (2009-10)	10, 16
Wis. Stat. § 973.09(5)(c) (2009-10)	10, 16

OTHER STATUTES

20 Ill. Comp. Stat. 2630/5.2 (2014)	14
Alaska Stat. Ann. § 12.62.180 (West 2014)	14
Ariz. Rev. Stat. Ann. § 13-907 (2011).....	14
Del. Code Ann. tit. 11, §§ 4371-4377 (West 2014).....	14
Idaho Code Ann. § 20-525A (West 2012).....	14
Iowa Code Ann. § 123.46(6) (West 2011)	14
Ky. Rev. Stat. Ann. § 431.078 (West 2013).....	14
Mich. Comp. Laws Ann. § 780.621 (West 2011).....	14
Mo. Ann. Stat. § 610.140 (West 2014).....	14
N.C. Gen. Stat. Ann. § 15A-145.5 (West 2014).....	14
N.J. Stat. Ann. § 2C:52-7 (West 2014).....	14
Ohio Rev. Code Ann. § 2953.32 (West 2014).....	14
Or. Rev. Stat. Ann. § 137.225 (West 2014).....	14

OTHER WISCONSIN AUTHORITIES

67 Wis. Op. Atty. Gen. 301 (1978).....	14
2009 Wisconsin Act 28, §§ 3384-3386	5
2011 Wisconsin Act 268.....	5
2013 Wisconsin Act 362.....	5, 12
Laws of 1975, Ch. 39, § 711m.....	11

	Page
Sup. Ct. Order 98-01	12
SCR 72.06	7, 8
Wis. Admin. Code DOC § 328.16(2)(c)	10
Wis. II-Criminal SM-36 (2013)	18

OTHER AUTHORITIES

2B N. Singer & J. Singer, Sutherland Statutory Construction, § 55.3, (7th ed. 2012)	13
Krishnakumar, Anita S., Passive-Voice References in Statutory Interpretation, 76 Brook. L. Rev. 941, 944 (2011)	9
Webster's Third New International Dictionary (1993)	13

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted. The plaintiff-respondent, State of Wisconsin ("State"), is aware that oral argument has already been ordered in this case.

STATEMENT OF FACTS

On October 7, 2009, the defendant-appellant-petitioner, Kearney W. Hemp ("Hemp"), possessed a bag of marijuana, a box of sandwich bags, and another box containing suspected marijuana and a marijuana pipe (2:1). Officers believed that the amount of marijuana was consistent with intent to deliver, especially coupled with the box of plastic bags (2:1).

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Hemp with one count of possession of a controlled substance, THC, with intent to deliver (2:1). Hemp waived his right to a preliminary hearing (5), and pled guilty to the charge (9).¹

At sentencing, Hemp noted that he had no prior criminal convictions, that he cooperated with law enforcement, that he admitted his involvement from the beginning, and that he took full responsibility for his actions (30:8). He asked the court to place him on probation (30:9). Hemp also asked the circuit court to consider expunction under Wis. Stat. § 973.015² (30:12).

The circuit court sentenced Hemp to one year in the House of Correction, but stayed that sentence (30:19). The court placed Hemp on probation for 18 months with conditions (30:19-20). The court granted expunction upon successful completion of probation (30:22). The court entered a judgment of conviction (16).

The Department of Corrections ("DOC") discharged Hemp from probation on December 9, 2011 (20:2-3). On October 8, 2012, the State charged Hemp with possession of THC and possession of drug

¹The guilty plea transcript does not appear in the record, and Hemp's plea is not at issue in this appeal.

²All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

paraphernalia (23:1).³ On October 30, 2012, Hemp filed a petition to expunge the court record of conviction (17). Hemp failed to include the discharge certificate from the DOC (18). He provided his discharge certificate on December 18, 2012 (20).

The circuit court ordered a personal statement from Hemp explaining why the court should order expunction (21:2). The court knew about the new charges and expressed concern about ordering expunction in light of that behavior (21:1). Hemp filed a statement explaining that after his discharge from probation he believed he solved his drug and alcohol problems (22:1). He knew that he was wrong and he tried to change his behavior (22:1-5). The State responded to that statement and asserted that Hemp had the responsibility to forward the discharge certificate to the circuit court and needed to do so in a timely manner (23:2). The State argued that the circuit court should reject Hemp's request because he waited ten months to petition for expunction (23:2).

The circuit court denied Hemp's petition for expunction (24:2). The court agreed with the State (24:1). The court relied on the implied time limit in Wis. Stat. § 973.015 and Hemp's tardy petition to deny the petition (24:2). Hemp appealed (28).

The court of appeals agreed. *State v. Hemp*, 2014 WI App 34, ¶ 1, 353 Wis. 2d 146, 844 N.W.2d 421. The court concluded that Hemp needed to complete three steps to have his record expunged. *Id.* ¶ 9. The three steps are that: (1) he successfully completes his sentence; (2) the controlling authority issues a certificate of discharge; and (3) the certificate is forwarded to the circuit court. *Id.*

The court of appeals interpreted Wis. Stat. § 973.015 to require the defendant to forward the

³See *State of Wisconsin v. Kearney W. Hemp III*, Walworth Co. Case No. 2012CF446.

certificate of discharge to the circuit court within a reasonable time following the successful completion of his sentence. *Id.* ¶¶ 10-11. The court relied on the circuit court form created by the Judicial Conference, other statutes, and the circuit court's reasoning. *Id.* ¶ 12. The court of appeals held that Hemp failed to petition the circuit court in a timely manner and therefore, the circuit court properly denied his expunction petition. *Id.* ¶ 16.

Hemp filed a petition for review. This court granted that petition on June 12, 2014.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DECIDED THAT HEMP'S CONVICTION WAS NOT AUTOMATICALLY EXPUNGED UPON COMPLETION OF PROBATION.

A. Standard of Review.

Hemp claims that he earned expunction upon completion of his probation. Hemp's Brief at 5. This court must interpret Wis. Stat. § 973.015 to decide whether the expunction happens automatically. Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews independently but benefitting from the analysis of the circuit court and court of appeals. *State v. Matasek*, 2014 WI 27, ¶ 10, 353 Wis. 2d 601, 846 N.W.2d 811 (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 examines

the language of the statute. *Matasek*, 353 Wis. 2d 601, ¶ 12. The context and structure of the statutory language is important to meaning. *Id.* This court interprets words according to their common and approved usage, and interprets technical words and phrases according to their technical meaning. *Id.*

This court gives effect to each word in order to avoid surplusage, and to avoid absurd, unreasonable, or implausible results. *Id.* ¶¶ 12-13. It also considers the purpose of the statute, and avoids results that are clearly at odds with the legislature's purpose. *Id.* ¶ 13.

C. Relevant Statute.

Wisconsin Stat. § 973.015⁴ 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.

⁴This language reflects the amendment made by 2009 Wisconsin Act 28, §§ 3384-3386, because that act became law on June 29, 2009.

This language does not reflect the amendment made by 2011 Wisconsin Act 268 or 2013 Wisconsin Act 362. Those acts were enacted after Hemp's conviction.

(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 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 Conclusion That Hemp's Conviction Was Not Expunged.

The circuit court exercised its discretion at sentencing to make Hemp eligible for expunction under Wis. Stat. § 973.015(1). Hemp served his probation. When Hemp completed his probation, the court did not automatically expunge his conviction. Instead, the court examined § 973.015(2) to determine the mechanism for expunction. The circuit court properly decided to apply § 973.015(2) to the facts of this case.

The first step for expunction is to complete the sentence, but that is not where the expunction is carried out. The circuit court has the discretion to order expunction "upon successful completion of the sentence." Wis. Stat. § 973.015(1). That language implies that the expunction will happen automatically after the defendant completes the sentence. However, statutory language is not interpreted in a vacuum. The statute must be interpreted by examining the language of the statute as a whole. *Matasek*, 353 Wis. 2d 601, ¶ 12.

This court should read Wis. Stat. § 973.015(1) in conjunction with § 973.015(2). In § 973.015(2), the legislature articulated the mechanism for expunction when the court exercises its discretion by making a defendant eligible for expunction in § 973.015(1).

Upon completion of the sentence the detaining or probationary authority shall issue a certificate of discharge. Wis. Stat. § 973.015(2). That certificate shall be forwarded to the circuit court of record. *Id.* And the filing of the certificate shall have the effect of expunging the record. *Id.* When required by statute or court order to expunge the record, the clerk of court must act to physically expunge the record. SCR 72.06.

Hemp argues that earning expunction is different from the physical act of expunction. Hemp's Brief at 8-10. Hemp makes a distinction without meaning. The actual expunction of the record needs to happen before Hemp can be protected from the impact of his conviction. Because the statutorily required steps were not completed, his record has not been expunged. Hemp did not earn expunction under Wis. Stat. § 973.015(1), because he did not follow the procedure in § 973.015(2) to get his record expunged. Therefore, this court should conclude that Hemp did not have his record expunged upon successful completion of his probation.

II. THE COURT OF APPEALS
PROPERLY CONCLUDED THAT
HEMP FAILED TO COMPLY
WITH WIS. STAT. § 973.015(2).

A. Standard of Review and Legal
Principles.

Hemp claims that Wis. Stat. § 973.015(2) does not require him to take action upon completion of his probation. Hemp's Brief at 10. Again, this issue requires this court interpret § 973.015. Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews independently but benefitting from the analysis of the circuit court and court of appeals. *Matasek*, 353 Wis. 2d 601, ¶ 10. The State articulated the principles of statutory construction in Section I. B. of this brief.

B. Wisconsin Stat. § 973.015(2)
Requires Action to Expunge a
Criminal Conviction.

Wisconsin Stat. § 973.015(2) is ambiguous. When examining, the statutory language, its context and placement, the legislative history, and other extrinsic sources, it becomes clear that the correct procedure is that upon completion of his or her sentence the probationary or detaining authority issues a discharge certificate to the defendant, the defendant forwards the discharge certificate to the court of record with a petition for expunction, and the court issues an order granting that petition. If those steps are followed, then the clerk shall expunge the record. *See* SCR 72.06.

1. Statutory language.

The relevant sentence in Wis. Stat. § 973.015(2) reads: "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." The language of § 973.015(2) is ambiguous.

The legislature intentionally left the language vague by using the passive voice. The statute does not read: the detaining or probationary authority shall issue a discharge certificate *and* shall forward that certificate to the court of record. If the legislature wanted to require the detaining or probationary authority to forward the certificate, it would have chosen that language.

Instead, the legislature used the passive voice and created ambiguity as to how the certificate "shall be forwarded." A statute written in the passive voice leaves the identity of the relevant statutory actor indeterminate. Anita S. Krishnakumar, *Passive-Voice References in Statutory Interpretation*, 76 Brook. L. Rev. 941, 944 (2011). *See also Dean v. United States*, 556 U.S. 568, 572 (2009) (the passive voice focuses on an event that occurs without respect to a specific actor); *Watson v. United States*, 552 U.S. 74, 81 (2007) (the statute is limited by its generality and its passive voice).

Hemp correctly points out that neither the requirement that the defendant file a petition nor the requirement that he or she do so within a reasonable amount of time are contained within the plain language of Wis. Stat. § 973.015. Hemp's Brief at 13-14. However, a common sense reading of the statute compels the conclusion that the duty to forward the discharge certificate belongs to the defendant. After all, it is the defendant who seeks a benefit from the certificate of discharge in the form of the expunction of his record. Likewise, the statute does not specify when the certificate "shall be forwarded." Therefore, to interpret who the legislature intended to forward the certificate and when it must be forwarded, this court must look beyond the plain language of the statute. *See Kalal*, 271 Wis. 2d 633, ¶ 50.

2. Context and placement.

The context and structure of the statutory language is important to meaning. *Matasek*, 353 Wis. 2d 601, ¶ 12. Other statutes relating to expunction of records place the burden on filing the petition for expunction on the defendant. *See Hemp*, 353 Wis. 2d 146, ¶ 14.

The most instructive statute to determine legislative intent is contained within the sentencing chapter and is titled "Probation." Wis. Stat. § 973.09. The legislature placed obligations on DOC that must be completed after the period of probation ends. Wis. Stat. § 973.09(5). The DOC must issue a "certificate of discharge" to the defendant. Wis. Stat. § 973.09(5)(a)1. The DOC must "notify the court that placed the probationer on probation that the period of probation has expired." Wis. Stat. § 973.09(5)(c).⁵

The defendant is the only person who receives the certificate of discharge. The legislature chose the exact same term, "certificate of discharge," in Wis. Stat. § 973.015(2). Since DOC only forwards the "certificate of discharge" to the defendant, and since someone must forward the "certificate of discharge" to the court of record, the legislature intended to require the defendant to forward the "certificate of discharge" to the court of record.

The legislature could not have intended the DOC to forward the "certificate of discharge" to the court of record or it would not have created Wis. Stat. § 973.09(5)(c). The DOC only notifies the court, and the defendant must forward the official "certificate of discharge" to the court.

This conclusion is also supported by two other statutes that place the burden on the defendant to petition

⁵*See also* Wis. Admin. Code DOC § 328.16(2)(c) (requiring the department to notify the court that the probation has ended).

for expunction. For example, a defendant must petition for expunction of his DNA profile from the DNA database. Wis. Stat. § 165.77(4). Likewise, a juvenile must petition for expunction of a juvenile adjudication. Wis. Stat. § 938.355(4m).

The legislature articulated different procedures for expunction of adult convictions and juvenile adjudications. Wis. Stat §§ 973.015 and 938.355(4m). The court considers expunction of an adult conviction at sentencing. Wis. Stat. §. 973.015(1). In juvenile proceedings, the court does not consider expunction at sentencing, but instead a juvenile must petition for expunction after turning 17 years old. Wis. Stat. § 938.355(4m). Even though the procedures differ, the legislature did not intend to take the burden off the defendant and place it on the DOC for adult convictions. In both circumstances, the burden to petition for expunction must be placed on the defendant.

When the probation statute and expunction statute are read together, the only logical conclusion is that the legislature intended to require the defendant forward the "certificate of discharge" to the court. The other statutes that require the defendant to petition for expunction also indicate that the legislature expected the defendant to petition under Wis. Stat. § 973.015(2). The context and placement of the statute implies that the defendant has the duty to forward the discharge certificate upon completion of his or her sentence.

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. However, the legislative history of Wis. Stat. § 973.015 does not provide guidance about who the legislature intended to forward the certificate or when the certificate must be forwarded.

The legislature created Wis. Stat. § 973.015 in 1975. Laws of 1975, ch. 39, § 711m. The statute was enacted as a companion to the Youthful Offenders Act, Wis. Stat. ch. 54, which has been repealed. *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341. The legislature intended both statutes "to provide a break to young offenders who demonstrate the ability to comply with the law." *Id.* The relevant sentence in § 973.015(2) has remained unchanged since its passage. *See* Wis. Stat. § 973.015(2). The court revised the statute as recently as 2013 and left the relevant language intact. *See* 2013 Wisconsin Act 362.

4. Other extrinsic sources.

Courts can look to other extrinsic sources when a statute is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶¶ 50-51. A circuit court form, a treatise on statutory interpretation, and prior case law support the court of appeals' conclusion that the defendant must file the discharge certificate and must do so within a reasonable amount of time after completion of his or her sentence.

The most relevant extrinsic source is the Wisconsin Judicial Conference's Form CR-266 entitled "Petition to Expunge Court Record of Conviction." R-Ap. 102. Form CR-266 places the burden to petition for expunction squarely on the defendant. *Id.* This judicially created form provides support for the conclusion that the defendant has the burden to petition for expunction by forwarding the discharge certificate to the court of record.

In 1999, this court adopted rules for the creation and use of standard court forms in civil and criminal actions and proceedings in the circuit court. Sup. Ct. Order 98-01. The order also created Wis. Stat. § 971.025, which requires parties to use standard court forms adopted under § 758.18(1) commencing on the date the judicial conference adopts the form.

The form summary for Form CR-266 states that its purpose is "[t]o provide a standardized form for requesting expunction of the court record of an adult conviction." R-Ap. 101. The party seeking expunction completes the form. *See id.* Form CR-266 is an affidavit that directs the defendant to supply all pertinent information, including the circumstances of his conviction, the court's order "that the record be expunged upon completion of the sentence" (R-Ap. 102), and copies of the certificate of discharge. *Hemp*, 353 Wis. 2d 146, ¶ 13.

The form contains a check-box in front of item number six, which states, "The detaining or probationary authority has issued a certificate of discharge. A copy is attached." R-Ap. 102. This form places the burden to forward the discharge certificate on the defendant. This form is additional evidence that a defendant seeking expunction must petition the court. The DOC does not have the duty to petition the circuit court or file the discharge certificate with that court.

The statute is also silent about *when* the petitioner must forward the certificate of discharge to the circuit court. "If a statute imposes a duty but is silent as to when it is to be performed, a reasonable time is implied." 2B N. Singer & J. Singer, *Sutherland Statutory Construction*, § 55.3 at 457 (7th ed. 2012); *see also McQuestion v. Crawford*, 2009 WI App 35, ¶ 14, 316 Wis. 2d 494, 765 N.W.2d 822; *Watton v. Hegerty*, 2007 WI App 267, ¶ 36, 306 Wis. 2d 542, 744 N.W.2d 619, *rev'd on other grounds*, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369. As Sutherland recommends, this court should apply a "reasonable time" requirement.

When a word is not defined within the statute, this court may consult recognized dictionaries to ascertain common and accepted meanings of the term. *State v. Ebersold*, 2007 WI App 232, ¶ 9, 306 Wis. 2d 371, 742 N.W.2d 876. "Upon" is defined as "immediately following on: very soon after" or "on the occasion of: at the time of." *Hemp*, 353 Wis. 2d 146, ¶ 15 (citing

Webster's Third New International Dictionary 2518 (unabr.1993)). Webster's teaches that the legislature's choice of the phrase "[u]pon successful completion" signals a requirement of immediate action. Wis. Stat. § 973.015(2). Wisconsin Stat. § 973.015 requires a petitioner to forward his discharge certificate as soon as practicable. *Hemp*, 353 Wis. 2d 146, ¶ 15 (citing *RTE Corp. v. Maryland Cas. Co.*, 74 Wis. 2d 614, 627, 247 N.W.2d 171 (1976)).

The State conducted a survey of all 50 states' expunction statutes. No other state uses the same language that our legislature adopted in Wis. Stat. § 973.015. Many other states require defendants to petition for expunction. *See, e.g.*, Alaska Stat. Ann. § 12.62.180 (West 2014); Ariz. Rev. Stat. Ann. § 13-907 (2011); Del. Code Ann. tit. 11, §§ 4371-4377 (West 2014); Idaho Code Ann. § 20-525A (West 2012); 20 Ill. Comp. Stat. 2630/5.2 (2014); Iowa Code Ann. § 123.46(6) (West 2011); Ky. Rev. Stat. Ann. § 431.078 (West 2013); Mich. Comp. Laws Ann. § 780.621 (West 2011); Mo. Ann. Stat. § 610.140 (West 2014); N.J. Stat. Ann. § 2C:52-7 (West 2014); N.C. Gen. Stat. Ann. § 15A-145.5 (West 2014); Ohio Rev. Code Ann. § 2953.32 (West 2014); Or. Rev. Stat. Ann. § 137.225 (West 2014).

The court of appeals' dissent in this case concludes that the DOC has the burden to forward the certificate of discharge to the court based in part on its decision in *State v. Matasek*, 2013 WI App 63, ¶ 10, 348 Wis. 2d 243, 831 N.W.2d 450. *Hemp*, 353 Wis. 2d 146, ¶ 21 (Curley, P.J., dissenting). In *Matasek*, the court of appeals did conclude that Wis. Stat. § 973.015(2) required the detaining or probation authority, not the court, must take action upon completion of the sentence. 348 Wis. 2d 243, ¶ 10. The circuit court's and court of appeals' interpretation of § 973.015(2) do not conflict with the court of appeals' decision in *Matasek*. They agree that the DOC must take action upon completion of a defendant's sentence: it must issue a certificate of discharge. Wis. Stat. § 973.015(2). Wisconsin Stat. § 973.015(2) does not

require the DOC to forward that certificate of discharge to the circuit court.

Likewise, this interpretation does not conflict with 67 Wis. Op. Atty. Gen. 301 (1978). In that opinion, the Attorney General answered an unrelated question. The opinion does not offer instruction about the meaning of Wis. Stat. § 973.015(2). A district attorney asked the Attorney General the meaning of the word "expunged" in § 973.015. *Id.* at 1. The Attorney General concluded that "expunge" meant "to strike out, blot, obliterate, delete or cancel that part of the record which identifies it with the offender." *Id.* at 2. The circuit court's and court of appeals' interpretation do not conflict with this Attorney General opinion.

The circuit court form, statutory interpretation treatises, and prior case law all support the inference that defendants must forward the discharge certificate and must do so within a reasonable amount of time.

5. Hemp failed to comply with Wis. Stat. § 973.015 by failing to forward the discharge certificate upon receipt to the court.

Hemp failed to file his petition within a reasonable amount of time. The circuit court properly interpreted Wis. Stat. § 973.015 when it found Hemp's petition untimely. The court of appeals agreed that Hemp had the burden to file the petition and failed to do so in a timely manner. This court should affirm the court of appeals' and circuit court's decisions.

The DOC forwarded discharge certificate to Hemp on December 15, 2011 (20:2-3). However, Hemp did not file the certificate with the circuit court until December 18, 2012, a full year later (20:1). When he did

file them, he had already been charged with new offenses in Walworth County (21:1).

Hemp had the obligation to petition for expunction upon receipt of the discharge certificate. Hemp failed to file his expunction petition within a "reasonable time" in two respects. First, the twelve-month delay between the issuance of the discharge certificate and their forwarding to the circuit court was patently unreasonable. Hemp offered no explanation for it. Second, the twelve-month delay was unreasonable because of the change in Hemp's personal circumstances.

Expunction is a partial reprieve from the full consequences of a defendant's earlier criminal acts conditioned upon his subsequent good and lawful behavior. *Leitner*, 253 Wis. 2d 449, ¶ 38. Hemp waited until after he had committed and been charged with new crimes to seek expunction of his earlier conviction (24:1-2). Thus, the mitigation of the consequences of his earlier conviction was no longer appropriate. Yes, he fulfilled the conditions of his initial probation (20:2-3). But, in less than a year, he was back on the path of crime and drug abuse (22:1). With that change in his circumstances, expunction of Hemp's prior conviction ceased to be appropriate.

Hemp argues that because the DOC notified the circuit court that Hemp completed probation, his record should have been expunged upon receipt of that notice. Hemp's Brief at 15-16. The judgment roll for Hemp's case contains a notation from January 24, 2012, that states: "Notice of case status change[,] Probation/Extended Supervision status: () Revoked (X) Discharged[,] Effective date: 12-18-2011[,] Initials: AAC" (1:4). Hemp claims that with this notice, the circuit court had an obligation to expunge his record without his petition. Hemp's Brief at 16. The actual notice from DOC is not in the appellate record.

There is no reason to believe that the notice was in the form of the certificate of discharge. In examining Wis. Stat. § 973.09(5), the DOC must notify the court that imposed probation that the probationary period has ended. Wis. Stat. § 973.09(5)(c). The DOC must send the discharge certificate, not to the court, but to the defendant. Wis. Stat. § 973.09(5)(a)1. Therefore, it is reasonable to conclude that the notification the DOC sent to the circuit court was not the certificate of discharge. The circuit court must receive the discharge certificate in order to expunge the record. Wis. Stat. § 973.015(2). The circuit court did not receive the discharge certificate until December 18, 2012 (20:1).

The circuit court's receipt of notification that Hemp's probation ended is not enough to comply with the requirements of Wis. Stat. § 973.015(2). The court needed to receive the certificate of discharge. Wis. Stat. § 973.015(2). It did not receive those for almost a year. The court did not receive the certificate within a reasonable amount of time.

The circuit court concluded that Hemp's one-year delay in forwarding the discharge certificate was "tardy" (24:2). The circuit court emphasized the fact that Hemp waited until he had new criminal charges filed against him to pursue expunction of his prior conviction. It saw a significant connection between the time delay and the new charges: "Had the defendant applied for an expungement a year ago, his petition probably would have been granted. But now the circumstances are such that he is asking the court to ignore his recent behavior and to assist him in the defense of his new charges by ordering an expungement in this case" (21:1).

The court of appeals agreed. *Hemp*, 353 Wis. 2d 146, ¶ 1. The court of appeals interpreted Wis. Stat. § 973.015 to require the defendant to forward the certificate of discharge to the circuit court within a reasonable time following the successful completion of his sentence. *Id.* ¶¶ 10-11. The court of appeals held that

Hemp failed to petition the circuit court in a timely manner and therefore, the circuit court properly denied his expunction request. *Id.* ¶ 16. This court should affirm both the circuit court's and court of appeals' conclusions.

III. THE CIRCUIT COURT MUST EXERCISE ITS DISCRETION REGARDING EXPUNCTION AT SENTENCING.

A. Standard of Review and Legal Principles.

If a circuit court wants to exercise its discretion about expunction, that discretion must be exercised at the sentencing hearing. *Matasek*, 353 Wis. 2d 601, ¶ 45. If a defendant requests a court to consider expunction or if the court chooses to consider expunction on its own motion, the court must make that decision after a finding of guilt and decision on sentence occurs. Wis. JI-Criminal SM-36 (2013). The court must consider whether the person will benefit from expunction and society will not be harmed. Wis. Stat. § 973.015(1)(a).

B. The Circuit Court Properly Exercised Its Discretion At Sentencing.

The court decided at sentencing that it would expunge Hemp's conviction upon completion of his sentence (30:22). Hemp successfully completed his sentence (20:2-3). Had he filed a petition for expunction within a reasonable amount of time after that completion, the court would have been required to grant expunction. *See Matasek*, 353 Wis. 2d 601, ¶ 45. However, Hemp waited too long after receiving his discharge certificate, and therefore, the circuit court could deny his petition for failing to comply with the requirement in Wis. Stat. § 973.015(2) that the discharge certificate shall be forwarded to the court upon successful completion of the sentence.

The circuit court required Hemp to file a personal statement and response from the State (21:2). Hemp argues that by requiring this statement, the court exceeded the scope of its authority. Hemp's Brief at 17. He offers no citation for this claim. Form CR-267 contemplates the circuit court holding a hearing on expunction. R-Ap. 103. The court cannot exercise its discretion after sentencing, but it can gather information about whether a defendant successfully completed the sentence. *See* Wis. Stat. § 973.015(2). It can order a hearing on the petition or order additional information in written form. By ordering a statement from Hemp, the circuit court did not exceed its authority under Wis. Stat. § 973.015.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the court of appeals' decision and the circuit court's order denying expunction.

Dated this 31st day of July, 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 5,137 words.

Dated this 31st day of July, 2014.

CHRISTINE A. REMINGTON
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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.

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

Dated this 31st day of July, 2014.

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