STATE OF WISCONSIN
IN SUPREME COURT

No. 2013AP1163-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KEARNEY W. HEMP,
Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT ONE, AFFIRMING THE JUDGMENT AND ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JEAN A. DIMOTTO, PRESIDING

NON-PARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC

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Legal Action of Wisconsin (LAW) is Wisconsin's largest provider of free civil legal services. We offer our experience representing over 2,000 clients struggling to overcome criminal record barriers to employment and housing. We submit this brief to urge the Court to consider the purpose of Wis. Stat. 973.015 and the young offenders the statute was designed to protect in deciding this important case.

INTRODUCTION

As of 2010, 65 million Americans were estimated to have some kind of criminal record.[1] Recently, public attention has focused on the indirect costs of becoming entangled in the criminal justice system—costs that have been especially high in poor communities and, particularly, poor communities of color.[2]

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[1] Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks*, 3(2011) http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1)

[2] *See, generally,*. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*,160 U. Pa. L. Rev. 1789 (2012) (UC Davis Legal Studies Research Paper No. 308, (http://ssrn.com/abstract=2072736); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 467-68 (2010) and David J. Norman, Note, *Stymied by the Stigma of A Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 Quinnipiac L. Rev. 985, 986 (2013).

These indirect costs are the result of several intersecting historical trends. First is the increase in mandatory discrimination against individuals with criminal records. By late 2012, the ABA had identified over 38,000 statutes that impose collateral consequences on people convicted of crimes.[3] These statutes create barriers to housing, education, and voting. Over half of these laws involve the denial of employment opportunities.[4] Legislatively-created collateral consequences for past criminal activity are particularly troubling because such consequences are often imposed on ex-offenders long after they have ceased any criminal activity.[5]

Second, access to criminal record information has dramatically increased through private data vendors and state-run databases providing records information easily, cheaply, and almost universally. A minor offense history that decades ago might have languished in the practical obscurity of an old court file is now a virtually inescapable part of an individual's public history.

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[3] *ABA National Inventory of Criminal Consequences*, ABA Criminal Justice Section, http://www.abacollateralconsequences.org

[4] Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII In Discrimination Against Persons with Criminal Record,* 12 Seattle J. for Soc. Just. 109, 112 (2013).

[5] *See* Chin *supra* note 2.

The significance of these historical changes is reflected in national hiring practices data. In 2010, the Society for Human Resources Management ("SHRM") reported that 92% of its members perform criminal background checks.[6] A record of a non-violent felony would be "very influential" or "somewhat influential" in deciding whether to extend a job offer to an applicant, according to 98% of survey respondents.[7] Seventy-three percent indicated that a non-violent misdemeanor would be "somewhat influential" or "very influential" in a decision not to extend a job offer.[8]

Given these trends, it is not surprising that federally-funded legal services programs like LAW have seen an increase in requests to help manage the long-term effects of conviction records. Over the past decade, LAW has provided advice, brief service, and representation to over 2,300 individuals with criminal record concerns. Some of those clients sought help in effecting an ordered expungement. Because those clients had completed their sentences, they were not eligible for representation through the State Public Defender. None had money to pay a private attorney.

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[6]Society for Human Resource Management, *Background Checking: Conducting Criminal Background Checks,* (2010) http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx

[7] *Id.* at 5.

[8] *Id.*

A typical expungement client contacts LAW after completing his sentence, often years later. Most report a belief their offenses were expunged automatically, only discovering their mistake when they were informed by employers or landlords that the record was not expunged.

Because there is no simple way to track ordered and completed expungements through WCCA, there is no way to accurately measure how many ordered expungements remain incomplete–despite a defendant successfully completing his sentence. But our own data, and anecdotal evidence derived from community partners, training sessions, and public presentations, suggest that a significant number of ordered expungements are not completed until years after discharge or never completed at all. It is tragic when a young offender successfully completes a sentence and is still denied the benefit of the bargain that is expungement.

This Court's decision in *Matesak* provides much needed certainty about when trial courts make an expungement decision. LAW submits this brief to underscore the importance of not adding new uncertainty by affirming the Court of Appeals' decision.

ARGUMENT

The purpose of Wis. Stat. 973.015 is to provide "a break to young offenders who demonstrate the ability to comply with the law" by shielding them from "some of the

harsh consequences of criminal convictions." *State v. Leitner*, 2002 WI 77, ¶¶ 37-38, 253 Wis. 2d 449, 646 N.W.2d 341. That purpose was confirmed by the 2009 amendments to the statute, which expanded eligibility for expungement by increasing the age limit and making some felonies expungeable. Any interpretation of the statute must take into account this goal and the legislature's clear commitment to broadening the social impact of expungement.

I. Expungement Is Ordered at Sentencing and Earned When the Sentence Is Successfully Completed

Wisconsin Stat. 973.015 states that a court may order "at the time of sentencing" that "the record be expunged upon successful completion of the sentence." This Court recently confirmed "if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." *State v. Matasek*, 2014 WI 27, ¶ 45, 353 Wis.2d 601, 846 N.W.2d 811. Under Wis. Stat. 973.015, the expungement decision must be made at sentencing and expungement is earned by successful completion of the sentence.

The statute does not explicitly authorize the court to revisit, add new requirements or reverse the expungement decision after the young person has successfully completed the sentence. Wis. Stat. 973.015. A court concerned with monitoring a young offender's progress towards

expungement could order that the offender appear before the court prior to his discharge. But neither Wis. Stat. 973.015 nor *Matasek* suggest that a court can reverse an expungement order after a sentence is successfully completed.

Yet that is just what happened in *Hemp*. The circuit court ordered expungement at sentencing. Hemp successfully completed his sentence and was discharged from probation. Under Wis. Stat. 973.015, Hemp had earned his expungement. But when Hemp requested expungement, the court denied it, claiming the request was untimely—effectively adding a post-discharge condition. The Court of Appeals affirmed, adding post-discharge conditions that an individual provide the court with his discharge certificate and petition for expungement. *State v. Hemp*, 2014 WI App 34, ¶¶1,12-16, 353 Wis.2d 146, 844 N.W.2d 421.

In *Matasek*, this Court cautioned that uncertainty about whether the circuit court will expunge the record may create a less meaningful incentive for offenders. 353 Wis. 2d 601, ¶43. The decision in *Hemp* creates uncertainty both by imposing procedures that a defendant could not know, *Hemp* 353 Wis. 2d 146, ¶26 (*Curley, J. dissenting)*, and by authorizing courts to "revoke" an expungement order after an offender has successfully completed his sentence. If *Hemp* stands, it will thus weaken the incentive for young offenders to desist from crime and obey the rules.

II. Wis. Stat. 973.015 Does Not Put the Burden of Effecting Expungement on the Young Offender

The plain language of Wis. Stat. 973.015 does not require the discharged offender to do any of the things identified by the lower courts as implicit requirements for expungement. Wisconsin Stat. 973.015 only requires the proper authority to provide notice to the court "upon successful completion of the sentence." That notice "shall have the effect of expunging the record."

A. The Detaining or Probationary Authority – Not the Young Offender – Shall Forward the Certificate of Discharge to the Court

Under Wis. Stat. 973.015, detaining or probationary authorities have an unambiguous duty to issue a certificate of discharge upon successful completion of a sentence.

> [T]he 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(2) (2009-2010). There is similarly no ambiguity, despite the passive

construction "shall forward," about who is required to provide notice to the court.

The word "also" means "in addition," and its appearance in Wis. Stat. 973.015 means that the detaining authority must forward the discharge certificate to **both** the court **and** the department. AM. HERITAGE COLLEGE DICTIONARY, 3RD ED. (1993). If the detaining or probationary authority did not have to forward the discharge certificate to the court, there would be no need to use "also" in describing the detaining authority's responsibility to forward the discharge certificate to the department. *Matasek*, 353 Wis. 2d 601, ¶ 18. ("We are to assume that the legislature used all the words in the statute for a reason.").

The history of Wis. Stat. 973.09(5) supports this construction. Under Wis. Stat. 973.09(5), the department is required to issue discharge certificates to felony probationers, and is required to "notify" the court when a period of probation has expired. At one point, the department was required to issue discharge certificates to all probationers, and it accomplished notice by filing the discharge certificate with the court. Wis. Stat. 973.09(5) (1995-1996).

It would be absurd to require the probationer to forward a copy of a discharge certificate to the court, when the department is already required to file that notice with the same court under Wis. Stat. 973.09(5).

See, e.g., State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶46, 271 Wis.2d 633, N.W.2d 110 (Statutes should be interpreted together in order to avoid absurd results).

When the legislature changed Wis. Stat. 973.09(5) so that the department did not need to issue a discharge certificate to every probationer, it still obligated the department to notify the court of discharge in every case – and it did *not* change the language in Wis. Stat. 973.015 to shift any obligation from the department to the defendant. Thus, the responsibility to forward the required notice to the court remains unchanged: it is, and has always been, the responsibility of the detaining or probationary authority.

B. The Legislature Did Not Place a Burden on the Young Offender to Petition for Expungement

Had the legislature wanted the discharged young offender to petition for expungement, it would have said so. In other related statutes, the legislature is clear when it conditions expungement on the offender's actions.

Wisconsin's juvenile expungement statute explicitly requires a juvenile's "petition" for expungement: "A juvenile who has been adjudged

delinquent...may, on attaining 17 years of age, petition the court to expunge the court's record of the juvenile's adjudication." Wis. Stat. 938.355(4m)(a). Wisconsin's DNA expungement statute similarly requires that the "person" whose DNA data is in the database submit a "written request." Wis. Stat. 165.77(4), (4)(a).[9]

When the legislature wants to make a written request the trigger for accomplishing expungement, it makes that requirement explicit. The legislature had every opportunity to add such a requirement while amending the statute in 2009. The legislature elected not to do so.

C. An Attorney General's Opinion Recognizes that Wis. Stat. 973.015 Does Not Require a Petition for Expungement

According to a 1978 Attorney General Opinion, the discharge certificate operates as "notice" to the clerk to strike references to the defendant from the record:

> In subsec. (1) of sec. 973.015, Stats., the court may order expunction at the time of sentencing on the condition of successful completion of the sentence...I am of the opinion

[9] *See also* Wis. Stat. 301.45(7)(c)-(d).

> that the phrase "which shall have the effect of expunging the record" in subsec. (2) *must be construed to mean that the filing of a certificate of discharge will give notice to the clerk of courts* to physically strike from the record all references to the name and identity of the defendant.

67 Wis. Op. Att'y Gen. 301 (1978) (OAG 90-78) (emphasis added).

This Opinion is a long-standing one, and the legislature has not rejected it in subsequent amendments to Wis. Stat. 973.015. Thus, it should be given significant weight. *Staples v. Glinke,* 142 Wis.2d 19, 28, 416 N.W.2d 920 (Ct. App. 1987).

III. Wis. Stat. 973.015 Does Not Impose a Deadline on the Young Offender to Petition for Expungement

Wisconsin Stat. 973.015 is devoid of any language imposing deadlines on the discharged offender. Courts cannot, by judicial construction, read into statutes provisions not found there. *Pearson v. School Dist. No. 8*, 144 Wis. 620, 623, 129 N.W. 940 (1911); *Matasek*, 353 Wis. 2d 601, ¶20.

Moreover, constructing out of whole cloth a time limit on young offenders to navigate the court and

correctional systems would lead to absurd results. Under *Hemp*, the young misdemeanant offender must now locate the right person in the Department of Corrections ("DOC") to obtain a discharge certificate, a document the DOC no longer issues to all discharged offenders. Wis. Stat. 973.09(5)(b). If and when a misdemeanant finally obtains a discharge certificate, the offender may still be told that he did not file his discharge certificate within a "reasonable time." *Hemp*, 353 Wis. 2d 146, ¶¶15-16 (statute "implies immediacy;" a year is too long).

The Court of Appeals also placed great emphasis on the defendant's request being untimely because of his purported motivation. In *Matasek*, this Court confirmed that expungement must be ordered at sentencing. The Court of Appeals, however, would give the lower court the opportunity to re-evaluate the offender's request based on when and why the discharge papers were submitted. In *Hemp*, filing discharge papers only a year and 2 days after issuance of the certificate was deemed untimely because Hemp had pending charges and thus, a "bad" motive in requesting expungement.

The decision creates greater uncertainty. If Hemp had not been facing new charges, but had been turned down for a job, would his request have been timely? If Hemp is acquitted of the new charges,

would the dismissal of those charges make any new request for expungement timely? If instead of criminal charges, Hemp faced a civil forfeiture or tort claim, would that have rendered his request untimely?

The Legislature did not set deadlines for the young offender to obtain the necessary paperwork from state agencies, and it certainly did not invite the court to examine the defendant's motivations in seeking entry of an expungement order.

IV. Young Offenders Do Not Understand That They Have Obligations Beyond Successfully Completing Their Sentence

The implicit requirements for expungement found by the lower courts are invisible to the young offender and so inconsistent with the statutory language that the Attorney General's Office, Division of Community Corrections ("DCC") and Director of State Courts Office have not seen them.

The DCC's Operations Manual provides a standardized approach to supervising offenders, and is a training and reference guide for agents. It says:

> Within ten days following the discharge date, ***the agent shall forward*** information to the court indicating whether or not the offender has successfully completed probation ... Upon

> notification of discharge, the court will expunge the record. The agent should encourage the offender to follow up with the Clerk of Court in the county of conviction in order to ensure that the record has been expunged.[10]

The Manual does not instruct agents to tell offenders to petition the court, forward a discharge certificate or request expungement within a particular time. A probation agent, following best practices, will only "encourage" the offender to "follow up" to ensure the record has been expunged. That young offender will be surprised when he later learns his record will not be expunged because he failed to file a form.

The Director of State Courts Office 2012 brochure says the detaining or probationary authority sends the discharge certificate to the court:

> **My Record Was Supposed To Be Expunged But It Is Still On the WCCA website. Why?**
>
> A criminal case may be expunged when the sentence has been successfully completed and the detaining or probationary authority has submitted a certificate of discharge. The detaining or probationary authority is the agency

[10] *Division of Community Corrections Operations Manual* 01.01.02, 6.26.01--.05. (Oct. 21, 2013), http://doc.wi.gov/Community-Resources/Probation-Parole/dcc-operations-manual (Introduction and Ch. 6 - Supervision).

> that supervised you during your sentence, usually the probation office.
>
> Check with the clerk of court in the county where you were convicted to see if a certificate of discharge was filed in your case. If no certificate was filed with the court, you will have to contact the detaining or probationary authority to determine whether they can issue that certificate.[11]

Finally, Court Form CR-266 (the expungement petition) does not indicate that the discharged offender must petition within a certain time. Court Form CR-267 lists many possible reasons for denying the petition. None of them are that the discharged offender did not timely file a petition.

CONCLUSION

Wis. Stat. 973.015 must be interpreted in line with its purpose—to shield young offenders from some of the harsh consequences of convictions. If it stands, the Court of Appeals decision will subvert that purpose

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[11] Director of State Courts Office, *Expunging Court Records: Helpful Information and Frequently Asked Questions*, (Oct. 2012). This brochure or language from it is available at multiple internet sources, including: http://www.co.kenosha.wi.us/documentcenter/view/1108; http://wilawlibrary.gov/topics/justice/crimlaw/pardons.php (under "Guides").

by preventing some young offenders from benefitting from the expungements they have earned.

For the reasons set out here, this amicus respectfully urges the Court to reverse the lower court's decision and decide that an expungement is earned upon successful completion of the sentence, the discharging or probationary agency must timely forward the discharge certificate, and adding procedural hurdles for the young offender is contrary to the plain language and purpose of Wis. Stat. 973.015.

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FORM AND LENGTH CERTIFICATION
AND
CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § 809.12(12)

I hereby certify that the foregoing brief conforms to the rules contained in Wis. Stat. § 809.19 (7), (8)(b), (8)(c)2, and (8)(d), for a non-party brief produced with a proportional serif font. The length of this brief is 2,982 words (maximum is 3,000).

Per Wis. Stat. § 809.19 (12), the text of the electronic copy of this brief is identical to the text of the paper copy filed with the Court.

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.

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CERTIFICATE OF SERVICE

Erica Sweitzer-Beckman herein certifies that she is employed by Legal Action of Wisconsin, which is located at 31 South Mills St., Madison, WI 53715; that on the 11th day of August, 2014, she hand-delivered 22 copies of the Brief of *Amicus Curiae* Legal Action of Wisconsin, in the above-entitled case, to the Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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