STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP1163-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEARNEY W. HEMP,

Defendant-Appellant-Petitioner.

STATE PUBLIC DEFENDER'S NON-PARTY BRIEF AND APPENDIX

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INTRODUCTION

In a split decision, the court of appeals has stretched Wis. Stat. §973.015(2), far beyond its plain language to correct a perceived injustice in this one case. The State Public Defender believes Kearney Hemp earned and should receive expungement of the conviction at issue. However, this Court's decision will apply not just to Mr. Hemp but to thousands of young people who have made a mistake (perhaps more than one), completed their sentences, and are trying to move forward with their lives. Due to the employment and housing discrimination that Legal Action of Wisconsin's amicus brief so vividly describes, this isn't easy to do. The legislature enacted §973.015 to minimize these lifelong consequences of a criminal conviction for certain youthful offenders. ***State v. Matasek***, 2014 WI 27, ¶42, 353 Wis. 2d 601, 846 N.W.2d 811.

With the plain language and undisputed purpose of §973.015(2) as guides, this Court should hold that where a court has granted expungement, and a person has successfully completed his sentence, the detaining or probationary authority must issue a certificate of discharge and forward it to the court. The forwarding of the certificate serves to notify the court to expunge the person's record. As for timing, the detaining or probationary authority must forward a certificate upon successful completion of the sentence. If the authority fails to do so, then the person may ask the court to expunge his record. There is no deadline for making this request.

The State Public Defender cannot appoint counsel to represent someone seeking expungement under §973.015.

However, its staff attorneys and private bar appointees negotiate for expungement during plea bargaining and advocate for it at sentencing. Young people who have earned expungement often call their former public defenders to ask why their records have not been expunged and what to do about the problem. The SPD thus has a stake in how this Court interprets §973.015(2) and urges adherence to the plain language.

ARGUMENT

Section 973.015(2) provides:

> 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the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation.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 authority 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.

(Emphasis supplied.) This case places the italicized sentence under a microscope. The SPD examines each disputed clause in turn and offers a simple, "plain language" reading of the sentence and subsection (2).

I. Section 973.015(2) Does Not Require the Filing of a "Petition" for Expunction in the Circuit Court.

Given the court of appeals' decision and the State's position, it is necessary to start with the word that is missing from the subsection at issue. Section 973.015(2) does not require anyone to file a petition or motion with the circuit court. And basic canons of statutory construction preclude courts from reading words into a statute. ***State Dep't of Corrections v. Schwarz***, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 (courts should not read words into a statute to achieve a certain meaning).

The statute's plain language indicates that what triggers expunction is the forwarding of "a certificate of discharge" to the court of record. Consider the phrase "shall have the effect." It appears throughout Wisconsin's statutes and indicates that one event automatically triggers another or one document is treated the same as another. *See e.g.* §938.999(4)(b) (the interstate commission "shall promulgate rules . . . which rules *shall have the effect* of statutory law"; §196.50(2)(b) (a telecommunications certificate, franchise, license or permit in effect on September 1, 1994 "*shall have the effect* of a certificate of authority"); §111.70(4)(b) (a decision by the employment relations commission "*shall have the effect* of an order issued under s. 111.07"; §75.521(8) (a default judgment on a tax lien "*shall have the effect* of the issuance of a tax deed or deeds and of judgment to bar former owners and quiet title thereon"; §71.75(7) (the department's failure to act on a claim for tax refund or credit "*shall have the effect* of allowing the claim and the department shall certify the refund or credit").

A Wisconsin Attorney General opinion confirms this interpretation:

> Subsection (2) provides that the filing of the certificate of discharge '*shall have the effect* of expunging the record.' One reading of subsec. (2) could be that no physical act of striking or obliterating the name and identity of the defendant is required. The mere filing of the certificate of discharge, by operation of law, expunges the record. Such an interpretation, however, renders the statute unreasonable and absurd in light of the common meaning of 'expunge.' Therefore, considering the statute as a whole, I am of the opinion 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. Atty. Gen. 301 (1978). (Emphasis supplied).

A well-reasoned attorney general's opinion is persuasive authority on the meaning of a statute. "[A] statutory interpretation by the attorney general is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general's opinion." ***Schill v. Wisconsin Rapids School Dist.***, 2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177. Section 973.015(2) has been amended many times since 1975, but the legislature has never inserted a "petition" requirement into it.

In fact, the legislature recently enacted 2013 Act 362 §§ 48 to 50 (effective April 25, 2014), which adds (2m) to §973.015. Section 973.015(2m) provides that a court "may, *upon the motion* of the person" order that the record of a violation of §944.30 be expunged if certain conditions are met. To this day, subsection (2), which governs Mr. Hemp's case, says nothing about filing a petition or motion to initiate the expungement process. The point is, when the legislature

wanted to require a person to petition or move for expungement, it knew which words to use.

So what is the source of this alleged "petition" requirement? The State contends that because two other expungement statutes require the filing of a petition, §973.015(2) must too. (State's Brief at 11) (citing §938.355(4m) and §165.77(4)). But when this Court compared the adult expungement statute to the juvenile expungement statute in ***Matasek***, ¶21, it held that if the legislature had wanted to accomplish the same result with both statutes, it would have used the same language. The legislature clearly left language like the defendant "may petition the court to expunge the court's record" (found in §938.355(4m)) or a person "may request expungement" of DNA (found in §165.77(4)) out of §973.015(2). This omission shows an intent to accomplish something different.

Next, the State infers a "petition" requirement from the fact that the Judicial Conference created a Form CR-266, "Petition to Expunge Court Record of Conviction." (App.101). The Judicial Conference is statutorily required to develop "standard court forms" for use in circuit courts. *See* Wis. Stat. §758.18(1). But the creation of the form does not mean that §973.015(2) imposes a petition requirement. Rather, CR-266 indicates an effort to standardize the format of a person-initiated request for expungement. A person may initiate expungement when the detaining or probationary authority has neglected to file a certificate of discharge. *See* Argument III below.

Despite the existence of CR-266 (adopted in 2011), most person-initiated requests for expungement are simple letters to the court, and they are granted or denied based upon what they allege and prove and not upon their form or label.

This makes sense because most people seeking expungement are acting pro se. Neither a trial nor an appellate court may deny a pro se pleading based upon its label rather than its allegations. ***Bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983).

II. "Upon Successful Completion of the Sentence" Is a Prepositional Phrase Conveying When the Detaining or Probationary Authority Must Issue a Certificate of Discharge.

The SPD agrees with the State's definition of "upon." It is a prepositional phrase that means "immediately following on: very soon after" or "on the occasion of: at the time of." (State's Brief at 13-14); ***Hemp***, 353 Wis. 2d 146, ¶15. "Upon successful completion of the sentence" modifies the clause: "the probationary or detaining authority shall issue a certificate of discharge." By skipping over this mandate to get to the clause "which shall be forwarded to the court of record," the State misses the larger point. Every Wisconsin detaining or probationary authority must certify that an offender has successfully completed his sentence at the time he completes it. This step generates the confirmation the court clerk's office needs to expunge the court record.

Though detaining and probationary authorities are statutorily required to issue a "certificate of discharge" to an offender who successfully completes his sentence, actual practice is more complicated. For example, §973.09(5)(a) requires the DOC to issue a document called "a certificate of discharge" to a felon who is discharged from probation. But a misdemeanant discharged off probation receives a "notification," most likely in the form of a "Verification of Satisfaction of Probation Conditions for Expungement." *See* Wis. Stat. §973.09(5)(b). (App.102-103). Section 973.09 does

not address what the DOC issues to a person who has completed a bifurcated sentence of confinement and extended supervision. And it is unclear what other detaining authorities—like county jails or houses of correction—do when a person has completed a sentence in one of those facilities. Section 973.015(2) mandates that they issue some sort of discharge certificate. ***State v. Sprosty***, 227 Wis. 2d 316, 324, 595 N.W.2d 692 (1999)(citations omitted)(the word "shall" is presumed mandatory).

The DOC issued a certificate of discharge to Mr. Hemp. Nevertheless, the Court's decision in this case should triple underscore §973.015(2)'s mandate: where a court has ordered expunction under §973.015(1), and the defendant has successfully completed his sentence, the detaining or probationary authority *shall issue a certificate of discharge.* This mandate is essential to an efficient operation of §973.015(2).

III. The Clause "Which Shall Be Forwarded" Permits—But Does Not Require—the Person Who Has Earned Expungement to Forward a Certificate of Discharge to the Court of Record.

So who initiates the expungement process? The SPD agrees with Mr. Hemp and Legal Action of Wisconsin that the burden falls on the "detaining authority or probationary authority." After all, they are the entities responsible for certifying that an offender has successfully completed his sentence. They are the only *actors* mentioned anywhere in §973.015(2). And the DOC (one of many detaining authorities), for example, is already required to notify the court when: a person has completed probation for felonies and misdemeanors (§973.09(5)(c)), a person has completed the earned release program so that the court may modify the

person's sentence (Wis. Admin Code § DOC 302.05(3)(c)), a person has completed the challenge incarceration program so that the court may modify his sentence (Wis. Admin Code § DOC 302.045(3m)), and so forth. The canons of statutory construction suggest that such authorities are also the actors required to "forward the certificate of discharge to the court of record." *See* Legal Action of Wisconsin's Brief at 7-10.

Common sense also suggests that this is the correct reading. Government entities "forward" documents to each other, but people don't "forward" documents to courts. They file pleadings, petitions or motions—words that the legislature not only left out of §973.015(2) but declined to insert when it repeatedly amended the statute.

Nevertheless, the State and the court of appeals argue that §973.015(2) does not explicitly say "the probationary or detaining authority shall forward a certificate of discharge" to the court of record. The statute reads: "the detaining authority or probationary authority shall issue a certificate of discharge *which shall be forwarded to the court of record*." Why?

Courts "presume that the legislature 'carefully and precisely' chooses statutory language to express a desired meaning." ***State v. Hemp***, 2014 WI App 34, ¶15, 353 Wis. 2d 146, 844 N.W.2d 421. Use of the passive voice focuses on the event that must occur, not the actor. ***Dean v. United States,*** 556 U.S. 568, 572 (2009). Had the legislature used the active voice—"the detaining or probationary authority shall forward a certificate of discharge to the court of record"—it would suggest that only those authorities could initiate expungement. By using the passive voice, the legislature ensured that if the probationary or detaining authority neglects to forward a certificate, or if it gets lost in the mail or

in a stack of papers at the courthouse, then the person who earned expungement may take matters into his own hands.

A brochure about §973.015 prepared by Wisconsin's Director of State Courts supports the SPD's interpretation. Under the heading "My Record Was Supposed to Be Expunged But It Is Still On the WCCA Website. Why?" the Director of State Courts tells the reader:

> 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* . . .
>
> 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.

(App.105)(emphasis supplied). Clearly, the Director of State Courts expects the detaining or probationary authority to file a certificate of discharge with the court. But if the detaining or probationary authority did not do so, the person can still act. The same brochure tells people where they can find forms to request expungement.

IV. Section 973.015(2) Does Not Impose a Deadline for Obtaining Expungement, and Imposing One Would Violate the Purpose of the Statute.

The court of appeals and the State agree that the plain language of §973.015(2) does not hint at any deadline for obtaining expungement. Yet they both conclude that the legislature intended that "a defendant seeking expungement must petition the circuit court within a reasonable time

following the issuance of a certificate of discharge." ***Hemp***, ¶15; State's Brief at 17-18. Waiting 1 year and 2 days is too long.

What really irks the court of appeals and the State is not that Mr. Hemp waited too long, it is that he committed a new crime after he successfully completed his sentence. Expungement of the first offense could yield a lighter sentence in the second case. That's a short-sighted reason for grafting a brand new 1-year deadline onto the statute.

First, as both Mr. Hemp and Legal Action of Wisconsin have argued, this Court cannot add requirements to a statute. ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶49, 293 Wis. 2d 668, 721 N.W.2d 127 (courts will not superimpose requirements not expressed by the legislature onto a statute).

Second, it is illogical to assume that by omitting a deadline the legislature actually intended to impose a "reasonable" deadline. Under a "plain language" interpretation of the statute, the omission of a deadline would indicate that the legislature intended no deadline.

Third, the absence of a deadline serves the purpose of the statute—to give young people who have made mistakes a break with the hope that they can become productive members of society. People often don't realize that their records were never expunged until they apply for, and are denied, employment or housing. Depending on their circumstances, that might not occur for years after they have successfully completed their sentences. Upon completing his sentence, a 19 year old might live at home for 2 years to complete his education before applying for a job and an apartment. Upon completing her sentence, a 25 year old might move herself and her toddler to a long-term substance

abuse treatment facility before seeking a job or housing. The deadline that the court of appeals and the State have devised to penalize Mr. Hemp would also penalize the very people the legislature intended to help when it enacted the statute.

V. The Plain Language Interpretation of §973.015(2) Yields the Most Efficient Expungement Process.

This court should read §973.015(2) as requiring the detaining or probationary authority to issue a certificate of discharge and forward it to the court upon the successful completion of a sentence. If that process breaks down, then the person who earned expungement may rectify matters by applying to the court. This interpretation adds no new words or requirements to the statute. It keeps the burden of notifying the court on the authorities who are in constant communication with the court. And it avoids penalizing the very people the legislature intended to help for failing to comply with petition and deadline requirements that are invisible to the naked eye.

To simplify expungement further, this Court could, under SCR 70.153, direct the Judicial Conference to develop a uniform "certificate of discharge" for probationary and detaining authorities to use when notifying courts that a person who was granted expungement has successfully completed his sentence. See e.g. DOC form at App.103. That would, as the Attorney General opined in 1978, "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. Atty. Gen. 301 (1978). The statute would work as the legislature intended.

CONCLUSION

For the reasons stated above, the State Public Defender respectfully requests that the Wisconsin Supreme Court reverse the court of appeals decision.

Dated this 29th day of August, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,989 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 29th day of August, 2014.

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