STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP2392-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

COURTNEY E. SOBONYA,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON OCTOBER 23, 2013, AND THE ORDER DENYING POSTCONVICTION RELIEF FILED ON SEPTEMBER 24, 2014, IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS, PRESIDING.
WASHINGTON COUNTY CASE NO. 2013CF205

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUE

I. WHETHER A POST-SENTENCING REPORT SHOWING THAT THE CIRCUIT COURT'S ESPOUSED REASONS FOR DENYING EXPUNGEMENT ARE INCONSISTENT WITH EMPIRICAL EVIDENCE CONSTITUTES A NEW FACTOR WARRANTING SENTENCE MODIFICATION?

Sobonya raised this question in a Wis. Stat. § 809.30 postconviction motion. The circuit court denied her request for modification, and thus answered ***no***.

II. WHETHER THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION AT SENTENCING WHEN IT DENIED SOBONYA EXPUNGEMENT (1) ON A DETERRENCE THEORY, THE VIABILITY OF WHICH IS CONTRADICTED BY CURRENT EMPIRICAL EVIDENCE AND (2) BASED ON THE COURT'S CATEGORICAL EXCLUSION OF HEROIN CRIMES FROM EXPUNGEMENT, WHICH IS CONTRARY TO THE EXPUNGEMENT STATUTE, WIS. STAT. § 973.015?

Sobonya raised the first part of this question in a Wis. Stat. § 809.30 postconviction motion based on the court's comments at sentencing. The second part of the question derives from the court's postconviction explanation as to why modification was not warranted. The circuit court denied Sobonya's request for sentence modification, and thus answered ***no***.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Sobonya does not believe oral argument will be necessary in the instant appeal, as the briefs should sufficiently explicate the facts and law necessary for this Court to reach a decision. However, she would welcome it if the panel believes it would beneficial.

Sobonya does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent.

Thus, this case is likely not appropriate for publication and no such request is made.

STATEMENT OF THE CASE

This case is about expungement and whether the circuit court erred in not granting it to Courtney Sobonya.

In late November 2012, Sobonya was a back-seat passenger in a vehicle that was stopped by police. (R.1:2.) She was then twenty-three-years-old. (*See* R.1:1 (stating Sobonya's birthdate and date of offense).) She had no criminal record. (R.5:8; A. Ap. 10.) She had earlier moved to Wisconsin for college and studied for two years in Fond du Lac. (*Id.*) After leaving college, she worked continuously in the restaurant field, and she continued to be employed even after her November encounter with police. (*Id.*)

Somewhere in the midst of all that, Sobonya developed a drug problem. (*See* R.5:9, 11; A. Ap. 11, 13.) Her involvement with drugs was the result of a "really, really, bad period of [her] life. Everyone around [her] seemed to be [using drugs]," and she joined in. (R.5:12; A. Ap. 14.) Her friends watched as she "became extremely depressed, and they saw her spiral into using drugs." (R.5:11; A. Ap. 13.)

As a result of that addiction, when police searched the car in which she was riding that November, they found two marijuana pipes, some marijuana, and a variety of other drug-related paraphernalia. (R.1:2.) The most important piece of paraphernalia—as is relevant to the crime of Sobonya's conviction—was a tinfoil square found on the center console that later tested positive for heroin residue. (R.1:2-3.) Other than the tinfoil square, police found no evidence of heroin use. (*See id.*) In Sobonya's purse, police found medication for which she had no prescription and additional marijuana. (*Id.*)

After police searched the car and Sobonya's purse, she freely admitted to possessing her mother's Vicodin and some oxycodone. (*Id.*) She also self-reported that the hard candy in her purse actually contained THC. (*Id.*)

Sobonya was not arrested (*see* R.10:1 (listing no custody credit)), and thereafter voluntarily got involved in medical treatment for her drug use (R.5:9, 12; A. Ap. 11, 14). She saw a psychiatrist and a therapist who worked with her to confront her substance abuse, as well as some underlying anxiety issues. (R.5:9-10; A. Ap. 11-12.) She had no further encounters with the law.

Five-and-a-half months after being stopped by police, the Washington County District Attorney charged Sobonya with five drug-related offenses—three misdemeanors and two felonies. (R.1.) One felony was for her admitted possession of oxycodone. (*Id.*) The other was for possession of heroin, a charge which was derived entirely from the crime lab's identification of heroin residue on the tinfoil square. (*Id.*)

Sobonya was allowed to remain out-of-custody on a signature bond for the period of her prosecution. (R.2.) She was never taken into custody and consistently appeared at court as required. She resolved her case by a guilty plea to the heroin charge. (*See* R.8.) She had negotiated for the remaining four counts to be dismissed and read in at sentencing. (R.5:4; A. Ap. 6.) The parties mutually recommended probation, and the State did not oppose her request for expungement. (R.5:4, 8, 11; A. Ap. 6, 10, 13.)

The State's abbreviated sentencing argument "ask[ed] the court to adopt the recommendation," given that Sobonya had "[n]o prior record" and had "been in counseling." (R.5:8; A. Ap. 10.)

Sobonya's counsel highlighted Sobonya's "constant[]" work history, the de minimus amount of heroin she possessed, her voluntary involvement in drug treatment and AODA counseling, and her success with "random [drug] screens that she voluntarily ha[d] been engaging in since getting into treatment" while her criminal case was ongoing. (R.5:8-10; A. Ap. 10-12.) "Given all those factors," counsel argued that the court should "consider allowing [Sobonya] to come back before [it] at the completion of a successful term of probation . . . and request [expungement]." (R.5:11; A. Ap. 13.)

The circuit court "accepted the recommendation of the parties" and "place[d] [Sobonya] on probation for 24 months, two years." (R.5:13; A. Ap. 15.) However, the court denied Sobonya the opportunity to expunge her conviction. In its entirety, the court court's stated reason for denying expungement is as follows:

> There's been a request for special disposition under 973.015. In order to grant the special disposition of expungement or expunction, I have to determine that you would benefit and society would not be harmed by the special disposition.
>
> A number of years ago the legislature expanded the age of offender and the severity of offenses for which expunction could be granted. So I do consider those, the statutory requirement, the statutorily required factors here.
>
> You clearly would benefit by the special disposition; however, I am going to decline to exercise my discretion and grant the special disposition, because I find that society would be harmed. Heroin is such a dangerous, deadly drug, and it's being taken so frequently, by so many people, and so many people are being harmed by this drug, killed by this drug, that I think it's important to, as part of the sentencing, to send a message of deterrence to the community. And I think that message would be undermined by the special disposition here.
>
> So I am not going to order -- I am going to decline the invitation to order expungement of the conviction upon satisfactory completion of the sentence.

(R.5:14-15; A. Ap. 16-17.)

Following her conviction and with new counsel, Sobonya retained Michael Massoglia, the Vilas Associate Professor of Sociology and Director of the Center for Law, Society, and Justice at the University of Wisconsin, to provide her with a report analyzing the viability of the circuit court's stated reasons for denying Sobonya expungement. (*See* R.22:attached Ex. A.)

Professor Massoglia's subsequent report explained how current and historical research has shown that the severity of punishment is not an effective deterrent to

persons other than the one being sentenced. (R.22:attached Ex. A at 2-3.) Additionally, he detailed research showing that not granting Sobonya the opportunity for expungement was more likely to harm society than was granting it to her. (R.22:attached Ex. A at 5-11.) While that research was in existence at the time of Sobonya's sentencing, neither party argued it and the circuit court did not refer to it when espousing its sentencing rationale. (*See* R.5:8-15, A. Ap. 10-17.) To the contrary, the circuit court's stated reasons for denying Sobonya expungement are irreconcilable with the research summarized by Professor Massoglia. (*Compare* R.5:14-15; A. Ap. 16-17 *with* R.22:attached Ex. A at 2-3.)

After receiving Professor Massoglia's report, Sobonya moved the circuit court to modify her sentence. (R.22.) She argued both (1) that Professor Massoglia's report—and especially the research that it presented—was a new factor warranting modification and (2) that its contents demonstrated that denying expungement was the result of an erroneous exercise of discretion. (*Id.*) In light of the empirical evidence, she said, the circuit court could not justify its assertion that denying her expungement would deter the community. (*Id.*)

On either basis, Sobonya requested modification of her sentence to allow expungement upon successful completion of her probation. (*Id.*)

After briefing by the parties, the circuit court issued a decision denying Sobonya's motion.[1] (R.33; A. Ap. 19-31.) In an oral decision, the court first found that "the Massoglia report was not in existence at the time of sentencing" and that "the research on which [it] was based was in existence at the time but was unknowingly overlooked by the parties." (R.33:5; A. Ap. 23.) Based on those findings, the court concluded that "it is a new factor." (*Id.*) However, the court

[1] The circuit court initially denied Sobonya's motion on procedural grounds, concluding that it had not been decided within the sixty-day deadline set forth in Wis. Stat. (Rule) § 809.30(2)(i). (R.33:2-3; A. Ap. 20-21.) However, somehow unbeknownst to the circuit court (R.33:2; A. Ap. 20), Sobonya had successfully moved this Court to extend that deadline prior to the circuit court's denial of her postconviction motion on procedural grounds (R.28). Following Sobonya's motion to reconsider (R.31), the circuit court withdrew its procedural denial of her motion and decided it on the merits (R.33:2-3; A. Ap. 20-21).

also later concluded that "the report and the contents thereof is not a fact that is highly relevant to the imposition of sentence." (R.33:11, A. Ap. 29.) As will be discussed more fully below in argument, those two conclusions are not mutually sustainable.[2]

Nonetheless, when ultimately deciding that Sobonya was not entitled to modification, the circuit court explained that, while "the facts and arguments advanced by Professor Massoglia [are] interesting and thought provoking, [they] *are not sufficiently relevant* to justify modification of [Sobonya's] sentence to authorize expungement." (R.33:11; A. Ap. 29 (emphasis added).) In other words, the court relied on its measured relevance of the Massoglia report as the basis for denying modification. (*See id.*)

The circuit court did not specifically address Sobonya's second argument that it abused its discretion when, at sentencing, it asserted deterrence of others as justification for denying Sobonya expungement. However, the court explained that it would not modify Sobonya's sentence because heroin cases are so serious and the criminal justice system's resources for dealing with them so limited that expungement is not appropriate in cases involving it. (*See* R.5:8-10; A. Ap. 26-28.) Heroin is such a danger to society, explained the court, that expungement should not be used. (*Id.*) "[A] felony conviction for possession of a narcotic" is "part of the toolbox that [the court] ha[s]" to deal with the "intractable, pervasive problem" "of opiate abuse and opiate offenses in the criminal justice system." (R.5:10; A. Ap. 28.) Expungement would render that tool ineffective. (*See* R.5:8-10; A. Ap. 26-28).

Sobonya's postconviction motion was denied (R.35; A. Ap. 32), and she appealed (R.37).

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[2] The test for a new factor requires the defendant to prove both (1) the non-existence or unknowing overlooking of the potential new factor and (2) that the potential new factor is "highly relevant to the imposition of sentence." *State v. Harbor*, 2011 WI 28, ¶ 38, 333 Wis. 2d 53, 797 N.W.2d 828. Thus, a thing that is not highly relevant to the imposition of sentence cannot be a new factor, regardless of whether it meets the other prong of the test.

ARGUMENT

Sobonya makes two arguments below as to why modification is appropriate.

First, she addresses why Massoglia's report is a new factor warranting modification. She contends that the report satisfies the new factor test and justifies modification. She then explains how the circuit court applied the wrong legal standard when deciding that modification was not warranted.

Second, Sobonya argues that the circuit court erroneously exercised its discretion at sentencing when denying expungement because (1) the stated reasons for denial are contrary to current empirical evidence and (2) the categorical determination that heroin crimes are too serious to allow expungement is contrary to the expungement statutes' clear language.

She offers the following in support with additional facts stated where relevant to the argument.

I. THE EMPIRICAL EVIDENCE SUMMARIZED IN THE POST-SENTENCING REPORT IS A NEW FACTOR ENTITLING SOBONYA TO MODIFICATION OF HER SENTENCE INSOFAR AS IT SHOWS THAT THE CIRCUIT COURT'S REASONS FOR NOT GRANTING HER EXPUNGEMENT ARE UNTENABLE.

A. Rules Governing Sentence Modification Based on a New Factor and Standard of Review

The purpose of sentence modification "is the correction of unjust sentences." *State v. Harbor*, 2011 WI 28, ¶ 51, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant may be entitled to sentence modification if he or she can "demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *Id.* ¶ 38. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence,

it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975). It is not independently necessary for the alleged new factor to frustrate the purpose of the original sentence. *Harbor*, 2011 WI 28, ¶ 52 ("withdraw[ing] any language from [*State v.*] *Michels*[, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989),] and the cases following *Michels* that suggests" to the contrary).

Whenever a defendant asks for sentence modification based on a new factor, there are two parts to the analysis: the existence component and the justification component. *Harbor*, 2011 WI 28, ¶¶ 36-37. The existence component is itself divided into two subparts: (1) was the purported new factor not in existence or unknowingly overlooked by the parties at sentencing AND (2) was the purported new factor highly relevant to the imposition of sentence. *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73 . The second part of the new factor test—the justification component—has the court consider whether the new factor—if indeed one is recognized—warrants modification of a defendant's sentence. *Harbor*, 2011 WI 28, ¶ 37.

Consideration of the new factor analysis's two parts need not be done in order. *Id.* ¶ 38. Indeed, if a court can dispose of a new factor claim by finding either (1) that no new factor exists or (2) that modification is unwarranted, then it is not necessary for the court to engage in the additional inquiry. *Id.* However, for modification, a defendant must succeed on both prongs. *Id.* ¶ 36.

On review, the question of "[w]hether a fact or set of facts . . . constitutes a 'new factor' is a question of law" that appellate courts review "independently of the determinations rendered by the circuit court." *Id.* ¶ 33. "Whether that new factor justifies sentence modification" is reviewed "for erroneous exercise of discretion." *Id.* "A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." *King v. King*, 224 Wis.2d 235, 248, 590 N.W.2d 480, 485 (1999). Reversal for erroneous exercise is appropriate where the "circuit court applied the wrong legal standard or did not

ground its decision on a logical interpretation of the facts." *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147.

B. The Information set Forth in the Post-sentencing Report Constitutes a New Factor in the Instant Case.

First, it is undisputed that the information in Massoglia's report was "not known to the trial judge at the time of original sentencing" because "it was unknowingly overlooked by all of the parties." *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73. The postconviction court found as a matter of fact that the report itself was not in existence at sentencing and that the research that it explains was unknowingly overlooked by the parties. (R.33:5; A. Ap. 23.)

A review of the record shows that those findings are not clearly erroneous. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786 (postconviction court's factual findings are reviewed for clear error). The court made no mention at sentencing of the research detailed in Professor Massoglia's report, and it admitted during its oral ruling that it was "not aware of the specific studies cited" therein. (R.33:8; A. Ap. 26.) Additionally, neither the State nor Sobonya's attorney argued the current social science research to the court.

At sentencing, the State took no position, and thus made no argument regarding expungement. Sobonya's counsel argued for expungement based solely on her client's pre-sentencing behavior and desire to have a crime-free future. Counsel made no specific argument regarding how granting Sobonya expungement would avoid societal harm, and she certainly made no mention of the empirical evidence that is set forth in Professor Massoglia's report. The record thus demonstrates that all parties to the hearing—including the court—"unknowingly overlooked" the information presently set forth in Professor Massoglia's report. *See Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73.

Second, the information in the report is "highly relevant to the imposition of sentence." *Id.* At sentencing, the circuit court expressly denied Sobonya expungement because

it believed that so doing would deter the community from future crimes, and thereby prevent society from being harmed:

> I am going to decline to exercise my discretion and grant the special disposition, because I find that society would be harmed. Heroin is such a dangerous, deadly drug, and it's being taken so frequently, by so many people, and so many people are being harmed by this drug, killed by this drug, that *I think it's important to, as part of the sentencing, to send a message of deterrence to the community. And I think that message would be undermined by the special disposition here.*
>
> So I am not going to order -- I am going to decline the invitation to order expungement of the conviction upon satisfactory completion of the sentence.

(R.5:14-15; A. Ap. 16-18 (emphasis added).)

The sentencing court's clear language thus shows that the deterrent effect of denying Sobonya expungement was highly relevant to the sentence it imposed. The circuit court unequivocally stated at sentencing that it would not grant Sobonya expungement because, if it did, the intended "message of deterrence to the community . . . would be undermined" and "society would [thereby] be harmed." (*Id.*)

It is thus apparent from the sentencing hearing transcript that deterring the community at large from involvement with heroin was the circuit court's only reason for denying Sobonya expungement. The effectiveness of the circuit court's purported deterrent effect is thus not only highly relevant to the imposition of Sobonya's sentence, but is the entire purpose behind the imposition of that part of her sentence denying expungement.

The contents of Massoglia's report therefore go to the very heart of the sentencing court's espoused sentencing rationale: if the court was wrong and granting Sobonya expungement would actually not deter the community at large, then the circuit court's only stated reason for denying it would be unjustifiable. Massoglia's report is therefore highly relevant to the imposition of Sobonya's sentence because it applies to her case existing empirical evidence showing that

the community is unlikely to be deterred by denying her expungement and will not be harmed by granting it to her.

For all those reasons, Sobonya can satisfy both parts of the existence component, and the information contained in Professor Massoglia's report constitutes a new factor in the instant case. *See Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73. She urges this Court to reach the same conclusion.

The next component of the new factor test asks whether Massoglia's report justifies modification of Sobonya's sentence. On review, this Court must decide whether the circuit court erroneously exercised its discretion when denying Sobonya's requested modification in light of her identified new factor. She argues that it did.

C. The Circuit Court Applied the Wrong Legal Standard When Denying Sobonya's Request for Modification.

In the instant case, the circuit court erred in its application of the new factor analysis. It first concluded that Sobonya had satisfied the existence component solely because (1) "the Massoglia report was not in existence at the time of sentencing" and (2) "the research on which [it] was based was in existence at the time but was unknowingly overlooked by the parties." (R.33:5, A. Ap. 23). When deciding the existence component, the circuit court did not consider, as it should have, whether Massoglia's report and its contents were highly relevant to the imposition of Sobonya's sentence.

Instead, the circuit court analyzed the relevance of Massoglia's report when deciding the second component of the new factor analysis—the justification component:

> So it is a new factor, but that's not the end of the analysis. Is this new factor, the Massoglia research and the opinions contained therein, is that a fact that's highly relevant to the imposition of sentence, and does it justify sentence modification, in essence expungement? . . .
>
> I find that it is not -- the report and the contents thereof *is not a fact that is highly relevant to the imposition of sentence in*

> *this case*. Relevant, yes, but at the time of sentencing I was aware, as I said earlier, in general terms, of the arguments contained in the report, that harsh penalties don't necessarily have a deterrent effect, the positive effects of employment and good family on recidivism rates, and the other arguments that were advanced in the professor's paper.
>
> I think now, having read that paper, that the facts and arguments advanced by Professor Massoglia, while interesting and thought provoking, *are not sufficiently relevant to justify modification* of the Defendant's sentence to authorize expungement.

(R.33:5, 11; A. Ap. 23, 29 (emphasis added). The circuit court thus misapplied the new factor analysis when it used the measured relevance of Massoglia's report to decide the justification component, rather than the existence component. *See Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73 (whether new factor exists depends on relevance to imposed sentence). By that variance, the circuit court applied the wrong legal standard to ascertain whether modification was warranted, and therefore erroneously exercised its discretion. *See Canady*, 2000 WI App 87, ¶ 6.

Additionally, the circuit court erred when it denied Sobonya's postconviction motion because "one of the things [it] ha[d] to consider in deciding a request for expungement, is [is] this crime serious enough that the existence of it should not be expunged on successful completion of the sentence." (R.33:8; A. Ap. 26.)

Expungement is a statutory remedy. *See* Wis. Stat. § 973.015. The relevant statutory provision comprehensively sets forth what a court must consider when deciding whether to grant expungement. Wis. Stat. § 973.015(1m)(a). In relevant part, Section 973.015(1m)(a) reads, "[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*." (Emphasis added.) Nothing in the text of Section 973.015(1m)(a) requires a court to consider the seriousness of the offense when deciding whether expungement should be granted. *See id.* Indeed, the legislature has already spoken to the seriousness of the offense when it

limited the applicability of Section 973.015 to those offenses "for which the maximum period of imprisonment is 6 years or less." *See id.*

At the time of sentencing in the instant case, the circuit court recognized that the seriousness of the offenses eligible for expungement was preset by the legislature: "A number of years ago the legislature expanded the age of offender and *the severity of offenses for which expunction could be granted*." (R.5:14, A. Ap. 16 (emphasis added).)

Nonetheless, the circuit court explained that it would not modify Sobonya's sentence because heroin cases are so serious and the criminal justice system's resources for dealing with them so limited that expungement is not appropriate in such cases. (*See* R.33:8-10; A. Ap. 26-28.) The inherent severity of heroin cases is the danger to society posed by the drug, and thus expungement should not be used. *Id.* "[A] felony conviction for possession of a narcotic" is "part of the toolbox that [the court] ha[s]" to deal with the "intractable, pervasive problem" "of opiate abuse and opiate offenses in the criminal justice system." R.5:10. According to the court's reasoning, expungement in light of the severity of heroin offenses would render ineffective the tool of a felony conviction.

Insofar as the circuit court refused to grant Sobonya modification because it found her "crime serious enough *that the existence of it* should not be expunged on successful completion of the sentence," it applied a standard contrary to the legislature's clear intent, and thus the law. (R.33:8; A. Ap. 26 (emphasis added).) Section 973.015(1m)(a) has no exemption for heroin crimes. The mere "existence of [possession of heroin]" as a crime is not a basis on which to deny expungement to those who commit it. To the contrary, Section 973.015(1m)(a) applies to Sobonya's crime by virtue of the penalty associated with it. By excluding expungement as an option for Sobonya merely because her crime was a heroin offense, the circuit court acted in contradiction to the expungement statute, and thus erroneously exercised its discretion.

D. Modification is Warranted Because Sobonya Will Benefit From Expungement and Society Will not be Harmed.

As noted above, expungement is appropriate if the court finds that the defendant will benefit and society not be harmed. Wis. Stat. § 973.015(1m)(a). Sobonya can satisfy both criteria.

First, as the circuit court unequivocally concluded, Sobonya "clearly would benefit by the special disposition." (R.5:14; A. Ap. 16.) Sobonya would not be faced with the lifelong stigma of a publicly-accessible felony record. As detailed in Professor Massoglia's report, removal of that marker would improve Sobonya's ability to obtain employment, engage in relationships, and find housing.

Second, as Professor Massoglia explains, there is empirical evidence to show that society will actually be better off if Sobonya is given the opportunity for expungement. Research has shown that the "deterrent effect of harsh sentencing policies does not significantly improve community safety." (R.22:Attached Ex. A at 4.) Indeed, there is little "empirical support for such deterrence based correctional policies." (R.22:Attached Ex. A at 3.) Quite to the contrary, "[t]here is a wealth of research that suggests alternatives to severe punishments appear to hold far more promise for effectively dealing with non-violent drug offenders." (R.22:Attached Ex. A at 5.) "On this front, the evidence is overwhelming: granting a special disposition to Ms. Sobonya would not increase the risk to the public and, in fact, would contribute – in a statistically significant way – to making the community safer." (R.22:Attached Ex. A at 6.)

Professor Massoglia devotes a substantial part of his report to elucidate how granting expungement to Sobonya will benefit society and make the community safer. (R.22:Attached Ex. A 6-12.) The nuances of his argument stand alone, and will not be parroted here. Ultimately, though, Professor Massoglia concludes that

> the evidence overwhelmingly suggests that a special disposition would best serve both Ms. Sobonya and the public interest. Whether the specific impact be through civic engagement, work, or relationships the research

> shows that a special disposition would provide the best opportunity for Ms. Sobonya, to reintegrate and become a productive member of society.
>
> The research in the area demonstrates that a special disposition provides best policy approach for Ms. Sobonya individually and to protect society at large. In fact, the evidence is so overwhelming that a forthcoming report by the National Academy of Sciences – one that was endorsed by many members of the American Society of Criminology – stressed the benefits of policies that remove barriers to reintegration and restoring the rights of convicted offenders. Thus, the relevant research shows that the public interest and public safety are best served by lowering barriers to reintegration and granting Ms. Sobonya, a special disposition—expungement—upon the completion of her sentence.

(R.22:Attached Ex. A at 12-13.)

For all those reasons, the information contained in Professor Massoglia's report constitutes a new factor justifying the modification of Sobonya's sentence to entitle her to expungement upon the successful completion of her sentence. She asks this Court to so order.

However, if for any reason, this Court concludes that Professor Massoglia's report is not a new factor or does not warrant modification, Sobonya offers the following as an alternative.

II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION INSOFAR AS ITS STATED REASONS FOR DENYING EXPUNGEMENT CONSTITUTE AN APPLICATION OF THE WRONG LEGAL STANDARD AND AN ILLOGICAL INTERPRETATION OF THE FACTS.

"It is a well-settled principle of law that a circuit court exercises discretion at sentencing." *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197 (citing *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). "'[T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper

legal standards.'" *Id.* ¶ 19 (quoting *McCleary*, 49 Wis. 2d at 277). A circuit court erroneously exercises its discretion when it "applie[s] the wrong legal standard or d[oes] not ground its decision on a logical interpretation of the facts." *Canady*, 2000 WI App 87, ¶ 6.

The record in the instant case clearly shows that the circuit court expressly referred to the relevant statute—Wis. Stat. § 973.015—and then explained that, "[i]n order to grant the special disposition of expungement or expunction, I have to determine that you would benefit and society would not be harmed by the special disposition." (R.5:14; A. Ap. 16.)

Sobonya first challenges the circuit court's application of Wis. Stat. § 973.015. As was also explained above, the circuit court's postconviction rationalization of its sentencing decision demonstrates that it denied Sobonya expungement based on the categorical exclusion of that benefit from heroin cases. However, no such exclusion exists in the expungement statute. Instead, the legislature expressly included Sobonya's crime amongst those for which expungement is available. Thus, the circuit court applied the wrong legal standard when it denied expungement because of its opinion that heroin offenses are, by their very existence, so serious that expungement is not appropriate.

Second, Sobonya contests the "logical rationale" on which the court based its decision to deny her expungement. *Gallion*, 2004 WI 42, ¶ 19. As detailed above, the Court reached a conclusion that is contrary to current research and empirical evidence. As detailed in Professor Massoglia's report, it is untrue to say that society at large will be deterred from future criminal actions simply by denying Sobonya expungement. Similarly, it is untrue to say that society will be harmed by denying Sobonya expungement. Insofar as the premises from which the Court deduced its conclusion in the instant case were untrue, the Court's interpretation of the facts was illogical. As such, the court's decision to deny Sobonya expungement was based on an illogical interpretation of the facts. *Id.* It was therefore an erroneous exercise of discretion, and Sobonya should be entitled to modification as a remedy. *See id.*

Insofar as it both applied the wrong legal standard and did not logically interpret the facts, the circuit court erroneously exercised its discretion in denying expungement. As set forth above, expungement is appropriate in the instant case, and Sobonya is entitled to it. She asks this court to reach that same conclusion.

CONCLUSION

Courtney Sobonya is a first-time offender. In 2012, she was a twenty-three-year-old service industry employee who got caught up in a drug culture that resulted in the criminal charges at the heart of this appeal. She was a user, not a dealer. When confronted by police, Sobonya owned up and accepted responsibility for her crime, freely admitting that she possessed drugs illegally.

Since her encounter with police in 2012, Sobonya has not again had trouble with the law. She has never been revoked from bond or probation, even though she has been under such supervision since May 2013. Sobonya has been consistently employed and voluntary engaged in substance abuse treatment.

The circuit court recognized that Sobonya would benefit from expungement but denied it to her on a deterrence theory, expressly stating that denial of expungement would deter the community from drug use. As demonstrated by the uncontradicted social science research that Sobonya submitted to the court, the circuit court's stated basis for denial of expungement is untenable and cannot be sustained. Sobonya is likely to be more harmed by its denial and society will not be deterred because of it.

Furthermore, the circuit court's suggestion that Sobonya's crime is inherently so serious that expungement cannot be granted is inconsistent with the expungement statute. It is thus contrary to controlling law, and constitutes an abuse of the circuit court's discretion.

Sobonya is entitled to relief on either theory asserted herein. She asks this Court to so hold and to reverse the circuit court's decision denying her request for modification.

Dated this 29th day of December, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

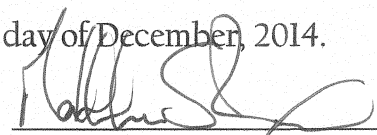
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 5,150 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 29th day of December, 2014.



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CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of December, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on December 29, 2014. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 29th day of December, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant