STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order Denying Expunction Entered in the Walworth County Circuit Court, the Honorable Kristine E. Drettwan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

At sentencing, the circuit court ordered expunction under Wis. Stat. § 973.015(1m)(a)1. upon Ozuna's successful completion of his sentence.

> Whether a probationer must perfectly comply with his or her conditions of probation to meet the "successful completion of the sentence" requirement for expunction under Wis. Stat. § 973.015(1m)(a)1., as that phrase is defined by § 973.015(1m)(b).

By denying Ozuna expunction, the circuit court implicitly answered this question in the affirmative.

The court of appeals affirmed the denial of expunction. It held Ozuna did not satisfy the conditions of his probation due to an alleged violation of his no alcohol condition.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this Court.

STATEMENT OF THE CASE

The State charged 17-year-old Lazaro Ozuna with misdemeanor criminal damage to property and misdemeanor disorderly conduct. (1). Ozuna pled guilty to both charges. (13; 24:7-8; App. 101).

At sentencing, the Walworth County Circuit Court, the Honorable James L. Carlson presiding, agreed to the joint sentencing recommendation of the parties. (24:9-10; App. 106-07). The court imposed and stayed a 120-day jail sentence on count one and a concurrent 30-day sentence for count two, and ordered one year of probation. (24:2-3, 9-10; App. 106). The court imposed the following conditions of probation:

- Pay a $250 fine
- Pay court costs
- Pay supervision fees
- Submit DNA sample and pay DNA surcharges
- Complete AODA assessment and follow through with treatment recommendations
- Receive counseling as recommended by agent
- Not to possess weapons
- Not to possess or consume alcohol or illegal drugs and not to possess drug paraphernalia
- Immediately disclose any prescription for medication to agent
- No early termination of probation

(24:9-10; 13:1-2; App. 101-02, 106-07).[1]

[1] The circuit court initially ordered payment of $1,780.00 in restitution as a condition of probation; however, restitution was set at zero at a subsequent hearing. (13:1; 26:2-3).

The circuit court also agreed with the State's recommendation to order expunction under Wis. Stat. § 973.015 upon Ozuna's successful completion of his sentence. (24:3, 10; App. 107). The court stated: "I will allow expungement if there is no violation of probation, no law enforcement contacts rising to the level of probable cause of illegal conduct . . . ." (24:10; App. 107). One year later, the Department of Corrections (DOC) discharged Ozuna from probation. (14:1; App. 108). Shortly thereafter, on June 5, 2015, Ozuna's probation agent filed a DOC form titled "Verification of Satisfaction of Probation Conditions for Expungement" in the circuit court. (14; App. 108-10).

The Verification Form indicated that Ozuna "successfully completed . . . probation." (14:1; App. 108). However, the form also indicated that all court ordered conditions had not been met due to outstanding supervision fees, outstanding court-ordered financial obligations, and an alleged violation of the no alcohol condition. (14:1; App. 108). Ozuna's agent attached a balance inquiry to the Verification Form, which showed his outstanding balance as well as $700 in total payments made. (14:3; App. 110).

On June 12, 2015, the circuit court denied Ozuna expunction by writing "Expungement DENIED KED"[2] on the bottom of the Verification Form. (14:1; App. 108). Ozuna had no notice and no hearing was held.

The court of appeals affirmed the circuit court's denial of expunction holding that Ozuna did not successfully complete his sentence under Wis. Stat. § 973.015(1m)(b) because, according to the DOC, he failed to comply with the no alcohol condition of his probation. ***State v. Ozuna***, No. 2015AP1877-CR, unpublished slip op., ¶1 (Wis. Ct. App.

[2] KED are the initials of the Honorable Kristine E. Drettwan.

Apr. 13, 2016). (App. 111-16). The court of appeals reasoned that the expunction requirement—"satisfy the conditions of probation"—requires perfection stating: "Although applicable to horseshoes and hand grenades, 'close enough' does not appear to cut it." ***Id.***, ¶10. (App. 115).

On September 13, 2016, this Court granted Ozuna's petition for review.

ARGUMENT

I. Ozuna is Entitled to Expunction of His Misdemeanor Convictions Because a Probationer Need Not Perfectly Comply with the Conditions of Probation to Successfully Complete a Probationary Sentence under Wis. Stat. § 973.015(1m)(a)1. and (b).

A. Introduction.

In Wisconsin and across the United States, court records are easily accessed and searched by the general public at no cost. *See* James B. Jacobs, *The Eternal Criminal Record* 5 (2015). In Wisconsin, court records are available through the Wisconsin Court System Circuit Court Access, commonly known as CCAP, as public records under our open records law.[3] A simple search of CCAP or a similar court record database from another state reveals "various dockets, indexes, and case files created to facilitate the processing of criminal cases from the first court appearance through arraignment, pretrial motions, trial, and sentencing." Jacobs, *supra* at 68.

[3] Wisconsin Court System Circuit Court Access, *Access to the Public Records of the Wisconsin Circuit Courts*, https://wcca.wicourts.gov/index.xsl.

While open access to court records promotes the transparency of our judicial system, open access is not without consequences, especially to individuals with criminal records. Re-integration into society following a criminal conviction is frustrated by the availability of criminal records to employers and landlords, in particular. Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*, 31 Wm. Mitchell L. Rev. 1331, 1332-33 (2005). For example, in a classic study of legal stigma, researchers submitted résumés of applicants with varying criminal records and found employers less likely to consider applicants who had *any* prior contact with the criminal justice system. Richard D. Schwartz and Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 Soc. Probs. 133, 133-38 (1962). A more recent study aimed at assessing the hiring of individuals with criminal records in Milwaukee found "the ratio of callbacks for nonoffenders relative to offenders for whites was two to one, this same ratio for blacks is close to three to one." Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 Wis. L. Rev. 617, 642.

These findings are especially troubling considering that research into recidivism "consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime." *Id.* at 647. Chief Justice Earl Warren recognized these difficulties stating "[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities." ***Parker v. Ellis***, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) *overruled in part by* ***Carafas v. LaVallee***, 391 U.S. 234 (1968).

In 1975, to offer some relief from the harsh realities faced by Wisconsinites with criminal records, the Wisconsin

Legislature enacted a statute to allow expunction of misdemeanor convictions for individuals under the age of 21 upon successful completion of their sentence. Laws of 1975 ch. 39, § 711m.[4] The legislature set forth Wis. Stat. § 973.015 in the same act that created the Youthful Offenders Act and "[t]he Purpose of the Youthful Offenders Act was to shield qualified youthful offenders from some of the harsh consequences of criminal convictions." ***State v. Anderson***, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991); s*ee also* ***State v. Leitner***, 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341.

B. Standard of Review and Principles of Statutory Interpretation.

This case requires the court to interpret the current version of Wis. Stat. § 973.015 (2013-14) in accordance with its long-standing purpose to determine the meaning of an expunction requirement: "satisfied the conditions of probation."

Statutory interpretation presents a question of law that this Court reviews de novo. ***State v. Johnson***, 2009 WI 57, ¶22, 318 Wis. 2d 21, 767 N.W.2d 207. Statutory interpretation begins with the words of the statute and "[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Context and structure are also important to meaning. ***Id.***, ¶46. "Therefore, statutory language is

[4] In 2009, the legislature broadened Wis. Stat. § 973.015 by raising the age requirement to 25 and by allowing some felony convictions to qualify for expunction. *See* 2009 Wis. Act 75, §§3384-86.

interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***

Wisconsin courts will generally only consult extrinsic sources of statutory interpretation, such as legislative history, if the language of the statute is ambiguous. ***Id.***, ¶50. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47.

Finally, when faced with competing reasonable interpretations of a statute, a reviewing court must choose the interpretation that produces a constitutional result. ***Dane Cty. Dept. Human Servs. v. P.P.***, 2005 WI 32, ¶17, 279 Wis. 2d 169, 694 N.W.2d 344; ***Am. Family Mut. Ins. Co. v. Wis. Dept. of Rev.***, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional."); ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 526, 261 N.W.2d 434, (1978) ("Given a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality.").

C. Ozuna Meets Each Requirement for Successful Completion of Sentence under Wis. Stat. § 973.015(1m)(b); Therefore, He is Entitled to Expunction Under § 973.015(1m)(a)1.

Wisconsin Stat. § 973.015(1m)(a)1. lays out the requirements for expunction. It provides, in pertinent part:

> Subject to subd. 2. and except as provided in subd. 3., 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.

There is no dispute that Ozuna met the initial requirements for expunction. First, he was 17 years old at the time of the offenses. (1:1) Second, he pled guilty to both offenses. (24:7-8). Third, the maximum period of imprisonment for the offenses—a Class A and a Class B misdemeanor—falls well below the six year maximum. *See* Wis. Stat. § 939.51(3)(a)-(b) (indicating 9 months maximum imprisonment for a Class A misdemeanor and 90 days maximum imprisonment for a Class B misdemeanor). Finally, in accordance with ***State v. Matasek***, 2014 WI 27, ¶6, 353 Wis. 2d 601, 846 N.W.2d 811, the circuit court properly exercised its discretion at Ozuna's sentencing when it declared Ozuna eligible for expunction upon successful completion of his sentence. (24:10; App. 107).

What is at issue is whether Ozuna "successfully completed the sentence" as that phrase is defined in Wis. Stat. § 973.015(1m)(b), which provides, in full:

> 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.

In ***State v. Hemp***, 2014 WI 129, ¶¶16-17, 359 Wis. 2d 320, 856 N.W.2d 811, this Court recently interpreted this exact statutory language and held that a probationer's successful completion of probation automatically entitled him to expunction.[5] Specifically, the court held: "an individual defendant . . . who is on probation successfully completes probation if (1) he has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) he has satisfied all the conditions of probation."[6] ***Id.***, ¶22. The court continued: "If a probationer satisfies these three criteria, he has earned expungement, and is automatically entitled to expungement of the underlying charge." ***Id.***, ¶23. Here, Ozuna meets each requirement for expunction.

1. Ozuna was not convicted of a subsequent offense.

First, Ozuna was not convicted of a subsequent offense while on probation. The Verification Form submitted by Ozuna's agent lists an alleged citation for underage drinking. (14:1; App. 108). The record contains no further information about the alleged citation. Ozuna had no opportunity to challenge this assertion. However, even assuming for the

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[5] In ***Hemp***, this Court interpreted the 2009-10 version of Wis. Stat. § 973.015, which the legislature has subsequently amended in 2011, 2013, and 2015. As a result of 2013 amendment, the numbering of the applicable subsections has changed, but the statutory language has not. *See* 2013 Wis. Act 362.

[6] Wisconsin Stat. § 973.015(1m)(b) states: "satisfy *the* conditions of probation." ***Hemp*** used slightly different language stating this requirement as "satisfy *all* the conditions of probation." (emphases added).

purpose of argument that it is true, an underage drinking citation is not a conviction of a subsequent offense for the purposes of the expunction statute.

"Offense" is not defined in Wis. Stat. § 973.015 or Wis. Stat. § 967.02, which defines certain words and phrases used in Chapters 967 through 976. However, the common and accepted meaning of "offense" is a crime or criminal offense opposed to a civil forfeiture. For example, offense is commonly defined as "a transgression of law; a crime." *Offense*, *The American Heritage Dictionary* 1222 (5th ed. 2011).

Importantly, the term "offense" appears in § 973.015(1m)(a)1., which the court of appeals has determined refers to "law violations where detention (or probation) can be ordered upon conviction." ***State v. Frett***, 2014 WI App 127, ¶7, 359 Wis. 2d 246, 858 N.W.2d 397 (holding that expunction is not authorized for civil forfeitures). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . . ." ***Kalal***, 271 Wis. 2d 633, ¶46. Furthermore, "[w]hen the same term is used repeatedly in a single statutory section, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears." ***Coutts v. Wisconsin Ret. Bd.***, 209 Wis. 2d 655, 668–69, 562 N.W.2d 917 (1997). It would be unreasonable and counter to principles of statutory interpretation to construe "offense" in § 973.015(1m)(b) to include civil forfeitures while interpreting the same word in § 973.015(1m)(a)1. to exclude civil forfeitures.

Here, the alleged underage drinking citation would be punishable by a forfeiture of $500 or less. *See* Walworth County Municipal Code § 38-34(2) (adopting Wis. Stat. § 125.07 governing underage possession of alcohol). The legislature has determined that "[c]onduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12. Therefore, an alleged underage drinking citation is not a subsequent offense for the purposes of the expunction statute.

2. Ozuna's probation was not revoked.

There can be no dispute that Ozuna's probation was not revoked. Rather, he was successfully discharged from probation on May 27, 2015, as evidenced by the Verification Form his agent filed in the circuit court. (14:1; App. 108).

3. Ozuna satisfied the conditions of probation.

a. Ozuna's probation agent determined that he met all requirements, including the "satisfied the conditions of probation" requirement, thus effectuating automatic expunction under ***State v. Hemp***.

Wisconsin Stat. § 973.015(1m)(b) states, in part: "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 in expunging the record." (emphasis added). Here, Ozuna's agent determined that he had successfully completed probation and that he had successfully completed his sentence for the purpose of expunction. As a result of this determination, the agent filed the Verification

Form with the circuit court; therefore, expunction should have automatically occurred. The agent used the Verification Form, rather than a certificate of discharge, to communicate successful completion of probation because, as will be explained, the DOC does not issue certificates of discharge to misdemeanants.

In ***Hemp***, this Court recently examined the language of the expunction statute and held that the statutory language dictates a self-executing process. ***Hemp***, 359 Wis. 2d 320, ¶27. Meaning once proof of discharge is forwarded to the circuit court, "expungement is effectuated." ***Id.*** In so holding, this Court rejected the court of appeals' conclusion that a "certificate of discharge must be approved by the circuit court." ***Id.***, ¶36. Instead, once a circuit court has made an initial determination regarding expunction at sentencing under ***Matasek***, 353 Wis. 2d 601, ¶6, it plays no further role in the expunction process. ***Hemp***, 359 Wis. 2d 320, ¶27. This point is repeated throughout ***Hemp***. ***Id.***, ¶¶4, 15-16, 23-24, 25, 27, 33, 40, 43 (referring to the expunction process as self-executing or automatic).

Put differently, the expunction process set forth by the legislature, as detailed in ***Hemp***, places the decision-making responsibility of whether an offender has completed his or her probationary sentence for the purposes of expunction with the detaining or probationary authority rather than the circuit court.

Although ***Hemp*** and the language of § 973.015(1m)(b) refer to the forwarding of a certificate of discharge as the mechanism by which expunction automatically occurs, certificates of discharge are not issued for the completion of

probation for misdemeanor offenses.[7] *See* Wis. Stat. § 973.09(5)(b); Wis. Admin. Code DOC § 328.16(2). In accordance with § 973.09(5)(a)-(b) and administrative code, the DOC issues probationers a certificate of discharge for the completion of probation for felony charges and gives "Notice of Case Status Change" to individuals who successfully complete probation for misdemeanor offenses.[8] Accordingly, there is no certificate of discharge for Ozuna's agent to forward to the circuit court.[9] Regardless of the documentation issued, the DOC is required to notify the court of completion of the probationary period in all cases. Wis. Stat. § 973.09(5)(c).

Here, Ozuna's agent forwarded a DOC form titled "Verification of Satisfaction of Probation Conditions for Expungement" to the circuit court. (14; App. 108). The DOC Electronic Case Reference Manual explains that this form is used for offenders who have met the expunction requirements, while a form titled "Failure to Meet Criteria for Expungement" is used for offenders who have not met the

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[7] The defendant in ***Hemp*** was convicted of a felony drug offense and placed on probation; therefore, certificates of discharge were issued at the completion of sentence. ***State v. Hemp***, 2014 WI 129, ¶5, 359 Wis. 2d 320, 856 N.W.2d 811. (App. 120-21)

[8] *See* Wisconsin DOC Electronic Case Reference Manual, *Procedures Prior to Discharge: Case Closing*, § .02 Notification (2012), http://doc.helpdocsonline.com/case-closing/transition/status-change ("A copy of the Notice of Case Status Change should be forwarded to misdemeanant offenders upon discharge, as certificates are not issued for misdemeanants.").

[9] A prior statute required the DOC to issue certificates of discharge to all individuals who completed probation. *See* Wis. Stat. § 973.09(5) (1995-96) ("When the probationer has satisfied the conditions of his or her probation, the probationer shall be discharged and the department shall issue the probationer a certificate of final discharge, a copy of which shall be filed with the clerk.").

§ 973.015 requirements.[10] The fact that Ozuna's agent forwarded the Verification Form to the circuit court communicates her determination that Ozuna met the requirements for expunction.

Under the language of § 973.015 and ***Hemp***, this determination is not reviewable by the circuit court. The fact that Ozuna's probation agent noted additional information on this form is irrelevant because the agent's determination of successful completion of sentence (demonstrated by Ozuna's successful completion of probation and the forwarding of the Verification Form to the circuit court) automatically results in expunction.

b. The legislature chose to place the determination of successful completion of sentence with the supervising authority.

The statutory language does not illuminate a bright line between those probationers who satisfy the conditions of probation and those who do not; however, this is unproblematic. In enacting Wis. Stat. § 973.015, the legislature placed the determination of whether an individual has completed his or her sentence with the supervising authority rather than with the circuit court. Here, this discretionary determination rested with Ozuna's probation agent.

The legislature could have enacted a completely different expunction process and could have required circuit-

[10] Wisconsin DOC Electronic Case Reference Manual, *Procedures Prior to Discharge: Expungement*, § .04 Termination (effective 05/01/15), http://doc.helpdocsonline.com/case-closing/transition/status-change.

court review of DOC determinations. Indeed, the legislature did just that in the juvenile expunction statute, Wis. Stat. § 938.355(4m)(b), which states that "[t]he court shall expunge the court's record of the juvenile's adjudication . . . if the *court* determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order." (emphasis added). Had the legislature intended to have the circuit court review the defendant's performance on probation, it would have said so.

Instead, the legislature chose an expunction process that allows the probationary authority to assess compliance with the conditions of probation to make the determination. This Court cannot rewrite a new process of expunction into the statute. *See* ***State v. Martin***, 162 Wis. 2d 883, 907, 470 N.W.2d 900 (1991).

Furthermore, the legislature's decision to grant discretionary authority to the supervising authority is logical. Probation agents meet regularly with their clients often over long periods of time. This frequent contact provides a window into an individual probationer's struggles, successes, and efforts to comply with the conditions of probation. This ample information allows agents to determine whether an individual probationer has met the conditions of probation in a satisfactory or sufficient manner overall for the purposes of expunction.[11] In addition, the fluid nature of many conditions

[11] Discretionary determinations are frequently made by agents during the course of supervising offenders. For example, an agent's response to a violation of probation ranges from reviewing or altering the rules of supervision to recommending revocation. *See* Wis. Admin. Code DOC § 331.03(2)(b)-(c); *see also* ***State ex rel. Plotkin v. Dept. of Health and Soc. Servs.***, 63 Wis. 2d 535, 542, 217 N.W.2d 641 ("The discretion . . . whether to revoke probation rests within the sound discretion of the Department . . . .").

of probation—such as obtaining full time employment—require agents to assess an individual's efforts to become employed rather than just the end result of employment. The supervising agent is in a better position to monitor these types of conditions than the circuit court.

Here, Ozuna's agent determined that he completed his sentence for the purposes of expunction. Under the expunction process enacted by the legislature, the circuit court had no role to play in the process following Ozuna's sentencing. As a result, Ozuna's agent's determination of successful completion of sentence for expunction must stand.

In addition, while expunction under Wis. Stat. § 973.015 is highly beneficial to offenders, expunction cannot be considered a windfall to convicted individuals. In holding that § 973.015 applies to only court records, rather than other records such as those maintained by law enforcement agencies, this Court clarified that expunction does not "wipe away all information relating to an expunged record of a conviction or to shield a misdemeanant from all of the future consequences of the facts underlying a record of a conviction expunged under § 973.015." ***Leitner***, 253 Wis. 2d 449, ¶38. Instead, expunction authorizes the clerk of court to (1) "[r]emove any paper index and nonfinancial court record and place them in the case file," (2) "[e]lectronically remove any automated nonfinancial record, except the case number," and (3) "[s]eal the entire case file." SCR § 72.06(1)-(3). As a result, an expunged record cannot be viewed in person at the

clerk's office or online through CCAP.[12] An expunged record, however, is not destroyed until the minimum retention period for the case has passed. *See* SCR §§ 72.06(4); 72.02(1).

While an expunged conviction is not an accessible court record, which often benefits convicted individuals applying for housing and employment, it is still a conviction. An employer, school, or licensing agency who requests a background check through the DOJ's Crime Information Bureau will be informed of the conviction.[13]

c. The expunction statute does not require perfection.

Ozuna's probation agent properly determined that he met the "satisfied the conditions of probation" requirement for the purposes of expunction. Even assuming that the filing of the Verification Form did not result in automatic expunction, Ozuna is entitled to expunction because

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[12] This Court has identified other benefits of expunction: "An expunged record of conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement." ***State v. Leitner***, 2002 WI 77, ¶39, 253 Wis. 2d 449, 646 N.W.2d 341.

[13] The DOJ does not remove expunged convictions from the Wisconsin Criminal History Database because under Wis. Stat. § 165.84, removal of arrest information is allowed only when an individual has been either released without charges or cleared of the charges. *See* DOJ, Crime Information Bureau, *Removal of Arrest Information*, https://www.doj.state.wi.us/sites/default/files/expunge.pdf; *see also* Director of State Courts, Office of Court Operations, *Expunging Court Records* (April 2015), http://www.co.kenosha.wi.us/DocumentCenter/View/1108.

§ 973.015 expunction does not require perfect compliance with probationary conditions.

As previously indicated, Wis. Stat. § 973.015(1m)(b) states that the forwarding of the certificate of discharge to the circuit court effectuates expunction. Certificates of discharge are issued in felony cases "[w]hen the period of probation for a probationer has expired." Wis. Stat. § 973.09(5)(a). If a probationer in a felony case has no other pending supervisions (probation or parole for another case), a final certificate of discharge is also issued, which lists restored and unrestored civil rights. Wis. Stat. § 973.09(5)(a)2. A certificate of discharge gives no indication of any alleged violations the probationer may have had during the supervisory period. The legislature's decision to utilize DOC certificates of discharge as the mechanism to effectuate expunction indicates that perfect compliance with the conditions of probation is not required for § 973.015 expunction.

The language of Wis. Stat. § 973.015(1m)(b) requires a probationer to "satisf[y] the conditions of probation" to successfully complete his or her sentence. "Satisfy" is defined as: "To meet *or* be sufficient for (a requirement); conform to the requirements of (a standard, for example). *Satisfy*, *The American Heritage Dictionary* 1559 (5th ed. 2011) (emphasis added). Conditions of probation are typically thought of as probation requirements rather than standards, which makes the first part of the definition—"[t]o meet *or* be sufficient for—applicable. As this dictionary definition demonstrates there are two common, accepted, and ordinary meanings of "satisfy."

One reasonable interpretation, as the court of appeals advocated, is that "satisfy the conditions of probation"

requires a probationer to perfectly meet or comply with probation conditions. ***State v. Ozuna***, No. 2015AP1877-CR, unpublished slip op., ¶10 (Wis. Ct. App. Apr. 13, 2016) (App. 111-16). This interpretation views each probationary condition individually to determine if any violation of any single condition occurred.

An equally reasonable interpretation of the same phrase is that it requires a probationer to comply with the imposed conditions in a sufficient or satisfactory manner. This interpretation views probationary conditions in a more global sense to determine whether the probationer has performed sufficiently overall. Both interpretations are reasonable readings of the plain language of the statute.

Whether the legislature intended "satisfied the conditions of probation" to require a probationer to (1) perfectly meet or conform to the conditions of probation or (2) to comply with conditions in a sufficient or satisfactory manner is not entirely clear from the text of § 973.015 or the common, ordinary, and accepted meaning of "satisfy." When statutory language is ambiguous it is appropriate to consider extrinsic sources, such as legislative history, to determine meaning. ***Kalal***, 271 Wis. 2d 633, ¶50.

i. Legislative history indicates that perfection is not required for probationers to "satisfy the conditions of probation" for the purposes of § 973.015 expunction.

A review of the legislative history of § 973.015 reveals the legislature's intent that the "satisfied the conditions of probation" requirement does not require perfect compliance with conditions of probation.

As referenced previously, Wis. Stat. § 973.015 was first enacted in 1975 alongside the Youthful Offenders Act. Laws of 1975 ch. 39, §§ 429, 711m; *see* ***Anderson***, 160 Wis. 2d at 439-40. The "satisfied the conditions of probation" requirement at issue was added to the statute by 1983 Wis. Act 519. To illustrate this addition:

1975-76	"A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, such probation has not been revoked."
1983-84	"A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, on probation, the probation has not been revoked *and the probationer has satisfied the conditions of probation*."

The drafting file for 1983 Wis. Act 519 indicates that the legislature first considered a slightly different addition:

Proposed:	"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 <u>*or extended*</u> *and the probationer has satisfied the conditions of probation*."

The drafting file then contains analysis of the above proposed language with certain parts of the analysis struck out. The analysis reads: "Under this bill, in order to stay eligible for record expungement, a probationer must ~~not violate any~~ conditions of probation ~~and must not have his or her probation extended~~. (App. 117-18). "[A]lso satisfy the" is

noted next to the "conditions of probation" language, which remained in the above analysis. (App. 117-18). Subsequently, the drafter removed the "or extended" language, but kept the "satisfied the conditions of probation" language.

The notation and struck analysis in the drafting file indicates that the legislature did not agree that the phrase "satisfied the conditions of probation" required no violations of probationary conditions. Had the legislature meant to require no violations of probation for expunction it could have clearly said so. Instead, the struck language from the legislative reference bureau analysis indicates that "satisfied the conditions of probation" does not require perfection.

Also instructive here is the legislature's decision to strike the "or extended" language from the proposed 1983 amendment, which confirms the legislature's willingness to allow expunction for probationers whose probation is extended. Allowing expunction under § 973.015 for individuals whose probation has been extended further supports the conclusion that "satisfied the conditions of probation" does not require perfection because an extension indicates noncompliance with probation conditions. *See* Wis. Stat. § 973.09(3)(c)1.-2. (detailing the good cause requirement for a court to extend probation). Given that a court may extend probation if a condition is left unsatisfied at the conclusion of the probationary period, the legislature's willingness to allow expunction for probationers serving extended terms of probation supports the conclusion that "satisfied the conditions of probation" does not require perfect compliance with probationary conditions.

ii. Requiring perfection to "satisfy the conditions of probation" frustrates the legislative purpose of the expunction statute.

Holding that a probationer is not required to have perfect compliance with the conditions of probation to "satisfy the conditions of probation" under § 973.015(1m)(b) upholds the legislative purpose, as repeatedly recognized by this Court, of the expunction statute. "A cardinal rule in interpreting statutes is that an interpretation supporting the purpose of the statute is favored over an interpretation that will defeat the manifest objective of the statute." ***Leitner***, 253 Wis. 2d 449, ¶36.

"The legislative purpose of Wis. Stat. § 973.015 is 'to provide a break to young offenders who demonstrate the ability to comply with the law' and to 'provide[] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." ***Matasek***, 353 Wis. 2d 601, ¶42 (quoting ***Leitner***, 253 Wis. 2d 449, ¶38) (alteration in original).

In ***Hemp***, this Court further commented on the legislative purpose of § 973.015 by examining legislative efforts to broaden the availability of expunction:

> The subsequent amendments to § 973.015 show a consistent legislative effort to expand the availability of expungement to include a broader category of youthful offenders. This legislative effort is reflected in the language of the relevant statute, in that, originally, only those 21 years or younger who were found guilty of an offense for which the maximum penalty was one year or less in the county jail were eligible for expungement. Laws of 1975 ch. 39, § 711m. However, Wis. Stat. § 973.015 has since been amended to apply to those

> 25 years or younger who are found guilty of an offense for which the maximum period of imprisonment is six years or less. Wis. Stat. § 973.015(1)(a).
>
> Thus, Wisconsin's expunction statute indicates our legislature's willingness (as expressed by the plain language of the statute) to help young people who are convicted of crimes get back on their feet and contribute to society by providing them a fresh start, free from the burden of a criminal conviction. Through expungement, circuit court judges can, in appropriate circumstances, help not only the individual defendant, but also society at large.

Hemp, 359 Wis. 2d 320, ¶¶20-21.

The purpose of statutory construction is to "discern and give effect to the intent of the legislature . . . ." ***Kalal***, 271 Wis. 2d 633, ¶43. The purpose and intent of the expunction statute—to help youthful offenders and the public at large—and the legislature's willingness to broaden the availability of expunction would be undercut by requiring probationers to perfectly comply with the conditions of probation. This is because, considering the number of probationary conditions imposed by both courts and the DOC and the general characteristics of probationers, requiring absolute perfection with conditions of probation effectively removes the possibility of expunction for probationers.

Here, for example, the circuit court imposed 10 specific conditions of probation. These 10 conditions do not include additional rules and regulations imposed by the DOC under Wis. Stat. § 973.10(1). Although Ozuna's DOC imposed conditions are not part of the record, the Probation and Parole section of the DOC website lists 18 standard rules

of supervision.[14] For example, these requirements direct probationers to "[r]eport as directed for scheduled and unscheduled appointments" and "[o]btain approval from your agent prior to borrowing money or purchasing on credit."[15]

Requiring perfect compliance with conditions means that a probationer who misses a single meeting with his or her agent during a lengthy probationary term or who uses his or her credit card without prior agent permission is foreclosed from the benefits of expunction.

Requiring perfect compliance with probationary conditions is especially concerning considering the prevalence of substance abuse and addiction in the probation population as well as research into substance abuse treatment. In the first national study of the characteristics of probationers, the Bureau of Justice Statistics (BJS) found that 69.4% of probationers reported past drug use.[16] In 2014, the BJS estimated that 25% of adults on probation had committed a drug-related offense.[17] A commonly imposed condition of probation, as seen in this case, is completion of an Alcohol and Other Drug Abuse (AODA) assessment and treatment as recommended. Furthermore, probationary conditions often

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[14] Wisconsin Department of Corrections, Standard Rules of Supervision, *available at* http://doc.wi.gov/community-resources/Rules-of-Community-Supervision/standard-rules-of-supervision-english.

[15] Another source of generally appropriate conditions of probation is found in the American Bar Association Standards Relating to Probation, which lists numerous suggested conditions. *See* ***Huggett v. State***, 83 Wis. 2d 790, 796 & n.3, 266 N.W.2d 403 (1978).

[16] Christopher J. Mumola, *Substance Abuse and Treatment of Adults on Probation*, 1995, Bureau of Justice Statistics Special Report, 3, Table 2 (March 1998), https://www.bjs.gov/content/pub/pdf/satap95.pdf.

[17] Danielle Kaeble, et al., *Probation and Parole in the United States, 2014*, Bureau of Justice Statistics Bulletin, 5, Table 4 (November 2015), https://www.bjs.gov/content/pub/pdf/ppus14.pdf.

include drug testing.[18] Even when probationers are undergoing treatment, relapse is highly likely because "even high-quality substance abuse treatment programs suffer high relapse rates - by some sources ranging from 50% to 90%."[19] Relapse, however, does not signify that treatment has failed considering "[t]he modern view is that addiction is a chronic relapsing condition that must be managed over an extended period, not thought of as something treatment can 'cure' in the way that doctors can fix a broken bone."[20]

Considering the sheer number of conditions placed on a typical probationer, and the likelihood of relapse for a significant portion of those on probation, requiring perfection would effectively eliminate the possibility of expunction. When the legislature has continuously shown a willingness to expand the availability of expunction, it would be unreasonable for this Court to interpret the expunction statute in such a way that effectively writes it out of the statute books.

Finally, requiring perfection to "satisfy the conditions of probation" produces an absurd result considering that the only requirement for a non-probationer to complete his or her sentence is "the person has not been convicted of a subsequent offense." Wis. Stat. § 973.015(1m)(b). By interpreting "satisfy conditions of probation" to require perfection, a probationer's requirements for "completion of

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[18] *See supra* note 14; *see also* Leo Beletsky, et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose among Individuals Newly Released from Incarceration*, 7 Ne. U.L.J. 149, 202 (2015).

[19] Jonathan P. Caulkins, et al., *Estimating the Societal Burden of Substance Abuse*, in *Substance Abuse in Adolescents and Young Adults* 345, 360 (Donald E. Greydanus et al., eds., 2013).

[20] *Id.*

sentence" under § 973.015 become more onerous than the requirement the legislature placed on individuals sentenced to jail or prison. The legislature could not have intended that probationers, who presumably have committed less serious offenses than confined individuals, have more onerous requirements for expunction than individuals removed from the community. In sum, it is unreasonable to foreclose a probationer from expunction for missing a single appointment with his or her probation agent or for relapsing while in drug treatment all while holding incarcerated individuals to a lesser standard.

To summarize, under ***Hemp***, once Ozuna's agent forwarded the Verification Form to the circuit court expunction was effectuated. Additionally, the agent correctly determined that Ozuna successfully completed his sentence because "satisfied the conditions of probation" does not require perfection. This is the only reasonable interpretation of the requirement because it considers the role a certificate of discharge plays in the process of expunction, furthers the legislative purpose of § 973.015, avoids absurd results, and is in accord with the legislative history of the statute. Ozuna's position also avoids an unconstitutional interpretation of the statute, as explained next.

iii. Interpreting "satisfied the conditions of probation" to require sufficient or satisfactory compliance rather than perfection avoids unconstitutional interpretations.

(1) Requiring perfect compliance with probationary conditions violates equal protection because probationers who make good faith efforts to pay court-ordered costs, but who are unable to pay, are precluded from § 973.015 expunction.

Requiring that a probationer perfectly comply with the conditions of his or her probation under Wis. Stat. § 973.015 means that individuals who are unable to pay court-ordered or supervision costs will be unable to receive the benefits of expunction regardless of their efforts or ability to pay. This interpretation presents an equal protection violation.[21]

"The equal protection clause . . . 'is designed to assure that those who are similarly situated will be treated similarly.'" ***State v. Smith***, 2010 WI 16, ¶15, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting ***Treiber v. Knoll***, 135 Wis.2d 58, 68, 398 N.W.2d 756 (1987)). To demonstrate an equal protection violation "a party must demonstrate that the statute treats members of similarly situated classes differently." ***Blake v. Jossart***, 2016 WI 57, ¶30, 370 Wis. 2d 1, 884 N.W.2d 484. Under the rational basis test, applicable here, "a statute is unconstitutional if the legislature applied an irrational or arbitrary classification when enacting the provision." *See* ***id.***, ¶32.

Here, an interpretation requiring perfect compliance with the conditions of probation results in an equal protection violation. First, the court of appeals' interpretation of

[21] The United States Constitution and the Wisconsin Constitution provide the guarantee of equal protection. U.S. Const. Amend. XIV, § 1; Wis. Const. art. 1, § 1.

§ 973.015 divides similarly situated individuals—those initially deemed eligible for expunction by circuit courts—into two groups: (1) individuals who have the means to pay all costs and fees during the supervision period and (2) individuals, who attempt to pay, but cannot afford to do so during the supervision period.

Because there is no rational basis for granting expunction based on an individual probationer's wealth, an interpretation of the expunction statute requiring perfect compliance with probationary conditions results in an equal protection violation.[22] While the State has an interest in encouraging probationers to discharge fees and costs, preventing expunction from occurring based on a probationer's inability to pay does not further this purpose. Put differently, no amount of consequences will result in full payment for a probationer who lacks the ability to pay all costs during the supervision period.[23]

Furthermore, Ozuna's interpretation of "satisfied the conditions of probation" would not create a disincentive for probationers to pay court-ordered costs for several reasons. First, a probationer's refusal to make any attempt to satisfy monitory conditions of probation may result in revocation. *See* ***State v. Gerard***, 57 Wis. 2d 611, 621-23, 205 N.W.2d 374 (1973). Second, probation may be extended for failure to make "a good faith effort to discharge court-ordered payment obligations" or supervision fees. Wis. Stat. § 973.09(3)(a) &

[22] Ozuna raised this argument at the court of appeals; however, the State did not address it.

[23] To eliminate the possibility of expunction without any determination of an individual probationer's ability to pay runs counter to this Court's pronouncements on ability to pay findings in context of restitution and probation extension. *See* ***State v. Jackson***, 128 Wis. 2d 356, 363-68, 382 N.W.2d 429 (1986).

(3)(c)1. Finally, when a probationer is discharged from probation with unpaid restitution, surcharges, or supervision fees those fees are not forgiven, instead the court "shall" issue a civil judgment for the unpaid amounts.[24] Wis. Stat. § 973.09(b)-(bm).

In essence, an interpretation of § 973.015, which requires perfect compliance with probation conditions results in a penalty based on poverty, which is not rationally related to the State's interest that probationers pay court-ordered costs and other fees. By interpreting "satisfied the conditions of probation" to mean satisfactory or sufficient compliance with the conditions as determined by the supervising authority, this Court can avoid this untenable and potentially unconstitutional result.[25] "Given a choice of reasonable interpretations of a statute, this [C]ourt must select the construction which results in constitutionality." ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978).

This interpretation is also consistent with this Court's recent decision in ***Hemp***. Although this Court stated "Hemp satisfied all the conditions of probation and paid all his supervision fees," ***Hemp*** did not hold that had the defendant failed to pay all supervision fees he would not have had his record expunged. *See* ***Hemp***, 359 Wis. 2d 320, ¶24.

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[24] Ozuna's judgment of conviction states: "If probation is revoked or discharged with outstanding financial obligations, a civil judgment may be entered against the defendant . . . . Collections may include income assignment." (13:1; App. 102).

[25] The court of appeals did not address Ozuna's failure to pay costs, holding instead that his alleged underage drinking citation alone meant he failed to "satisfy the conditions of his probation" for the purposes of expunction. ***State v. Ozuna***, unpublished slip op., ¶8 n.3 (Ct. App. April 13, 2016).

Moreover, the record in ***Hemp*** indicates that Hemp did not pay all supervision fees prior to discharge, but that payment was completed at some point after successful completion of probation. (App. 119-122). Hemp's final certificate of discharge stated "[t]his discharge does not forgive your current (tentative) balance of unpaid supervision fees, in the amount of [$]40.00. . . . This balance is (tentative) as a result of delayed supervision fee charges still to be posted." Appendix for Brief of Petitioner at 30, ***State v. Hemp***, 359 Wis. 2d 320. (App. 121). Although Hemp apparently paid all supervision fees *after* he was discharged from probation, at the time his final certificate of discharge automatically triggered expunction he owed at least $40.00 in supervision fees. ***Id.*** (App. 119-22)

> (2) Overturning the agent's determination of successful completion of sentence for the purposes of § 973.015 expunction without giving a defendant notice and an opportunity to be heard results in a procedural due process violation.

Here, the circuit court overturned the probation agent's determination of successful completion of sentence without giving Ozuna notice or an opportunity to be heard. If this Court disagrees with Ozuna's interpretation of § 973.015 and determines that the Verification Form filed in the circuit court did not automatically expunge his court record then the Due Process Clause[26] affords him a right to notice and an opportunity to be heard.

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[26] The United States Constitution and the Wisconsin Constitution both prohibit the government from depriving an individual of life, liberty, or property without due process of law. U.S. Const.

By reviewing the Verification Form and denying expunction, the circuit court not only contravened this Court's pronouncement in ***Hemp***—"[t]he only point in time at which a circuit court may make an expungement decision is at the sentencing hearing,"[27]—but also deprived Ozuna his constitutional right to procedural due process.

Procedural due process "addresses the fairness of the manner in which a governmental action is implemented." ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶18 n.14, 277 Wis. 2d 378, 690 N.W.2d 849. Notice and an opportunity to be heard generally will satisfy procedural due process requirements. *See* ***Strykowski***, 81 Wis. 2d at 512 (citing ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972).

This Court employs a two-part test to determine whether a violation of procedural due process has taken place. ***Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund***, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849. "First, we examine whether the person has established that a constitutionally protected property or liberty interest is at issue. Second, we consider whether the procedures attendant with the deprivation of the interest were sufficient." ***Id.*** (internal citations omitted).

Amend. XIV, § 1; Wis. Const. art. 1, § 1. The due process protections in our federal and state constitutions are "substantially equivalent." ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶18, 277 Wis. 2d 378, 690 N.W.2d 849.

[27] ***Hemp***, 359 Wis. 2d 320, ¶40 (citing ***Matasek***, 353 Wis. 2d 601, ¶45).

In ***Wisconsin v. Constantineau***, 400 U.S. 433, 437, (1971), the United States Supreme Court stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In ***Paul v. Davis***, 424 U.S. 693, 708-09 (1976), the Court further clarified that reputation alone is not a protected liberty interest. Rather, as the court of appeals has explained, "a person's reputation is protected by procedural due process only when damage to the reputation is accompanied by the alteration or elimination of a right or status previously recognized under state law." ***Stipetich v. Grosshans***, 2000 WI App 100, ¶24, 235 Wis. 2d 69, 612 N.W.2d 346 (citing ***Paul***, 424 U.S. at 707-11).

For example, the damage to reputation in ***Constantineau*** occurred as the result of a Wisconsin law, which allowed the posting of notice to prohibit certain individuals from purchasing alcohol. ***Constantineau***, 400 U.S. at 434 n.2 & 436. The Court held that the posting law so stigmatized the defendant that procedural due process requirements were required prior to the posting. ***Id.*** at 436.

In ***Paul***, the Court explained that the stigma caused by the "posting" in ***Constantineau*** alone was not what triggered procedural due process rights, but rather procedural due process rights were required because of the removal of "a right previously held under state law"—the right to purchase alcohol—in combination with the stigma caused by the posting law. ***Paul***, 424 U.S. at 708-09.

Wisconsin Stat. § 973.015 grants a conditional right of expunction to individuals who meet the statutory requirements. The court of appeals has held that the juvenile expunction statute, Wis. Stat. § 938.355(4m), "confers a substantive right for a juvenile." ***In the Interest of J.C.***,

216 Wis. 2d 12, 14, 573 N.W.2d 564 (Ct. App. 1997). Expunction under Wis. Stat. § 973.015 does the same—it creates a substantive right under state law.

As a result, once the circuit court ordered that Ozuna's record be expunged upon successful completion of his sentence and his agent forwarded the Verification Form confirming successful completion of sentence, his right to expunction under state law cannot be taken away without due process of law. In addition to the removal of a right previously held under state law, the circuit court's denial of expunction also results in harm to Ozuna—his criminal record and the stigma associated with it remains public information easily accessed on the CCAP website.

The fact that an individual has no inherent right to expunction or the fact that Ozuna exposed himself to consequences by pleading guilty to the underlying offenses does not change this result. This is because an application of procedural due processes rights is not governed by a distinction between "rights" and "privileges." *See* ***Bd. of Regents v. Roth***, 408 U.S. 564, 571 (1972).

For example, there is no right to probation yet "basic requirements of due process and fairness require that the department provide a limited hearing to allow petitioners to be confronted with their probation violation and to be heard if they so desire." ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 545, 547, 185 N.W.2d 306 (1971). "After one has gained the conditional freedom of a probationer or parolee, whether by action of court, parole board, or statute, the state cannot summarily revoke such status without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions of his probation or parole." ***Id.*** at 548. Similarly, in ***Goldberg v. Kelly***,

397 U.S. 254, 262, 264 (1970), the United States Supreme Court refused to rely on the argument "that public assistance benefits are 'a privilege and not a right'" and held that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."

The same reasoning applies to § 973.015 expunction in that once the circuit court has ordered expunction at sentencing and the supervising authority has notified the court of successful completion of sentence, the circuit court cannot deny expunction without procedural due process protections such as notice and an opportunity to be heard.[28]

Having established that a constitutionally protected liberty interest is at issue, the court must next "consider whether the procedures attendant with the deprivation of the interest were sufficient." ***Aicher ex rel. LaBarge***, 237 Wis. 2d 99, ¶80. If a procedure was in place it would be appropriate to apply the three-part balancing test set forth in ***Eldridge***, 424 U.S. at 335. This balancing test considers:

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[28] Other jurisdictions have recognized due process rights in the expunction context. *See* ***Carlacci v. Mazaleski***, 798 A.2d 186, 190 (Pa. 2002) ("[T]here exists a [due process] right to petition for expungement of a [Protection from Abuse Act] record where the petitioner seeks to protect his reputation."); ***Key v. State***, 48 N.E.3d 333, 340 (Ind. Ct. App. 2015) (observing that state law "grants the petitioner a due process right to a hearing when the prosecutor objects to the expungement petition"); ***Heine v. Tex. Dept. Public Safety***, 92 S.W.3d 642, 650 (Tex. Ct. App. 2002) (requiring that a defendant be given the opportunity to be heard at an expunction hearing); ***Ohio v. Saltzer***, 471 N.E.2d 872, 873 (Ohio Ct. App. 1984) (holding defendant was denied due process by failure to hold expunction hearing as required by state law).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

Here, however, there are no procedures in place for this Court to review. Instead, the circuit court simply wrote "Expungement DENIED" across the bottom of the Verification Form. Ozuna had no notice and no opportunity to be heard as to the alleged shortcoming noted on this form. When there are no procedures in place it is impossible for procedures to be "attendant with the deprivation of the interest." *See* ***Aicher ex rel. LaBarge***, 237 Wis. 2d 99, ¶80.

This Court, however, can avoid any constitutional violations by upholding the agent's determination that Ozuna successfully completed his sentence for the purposes of § 973.015 expunction and by clarifying that the "satisfied the conditions of probation" requirement in § 973.015(1m)(b) requires sufficient or satisfactory compliance rather than perfection.

CONCLUSION

For the reasons stated above, Lazaro Ozuna requests that this Court reverse the decision of the court of appeals and remand to the circuit court with instructions to expunge Ozuna's record.

Dated this 27th day of October, 2016.

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 8,835 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 27th day of October, 2016.

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CERTIFICATION AS TO APPENDIX

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 § 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.

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