STATE OF WISCONSIN

IN SUPREME COURT

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 OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Because Lazaro Ozuna violated his no-alcohol condition of probation, did the circuit court properly deny him expunction under Wis. Stat. § 973.015?

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

The court of appeals answered this question in the affirmative.

2. Did the circuit court's denial of expunction comport with procedural due process?

The circuit court did not address this issue.

The court of appeals did not resolve this issue because Ozuna did not adequately develop it on appeal.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests oral argument and publication.

STATEMENT OF THE CASE

In November 2013, the State charged Ozuna with criminal damage to property and disorderly conduct for damaging an automobile's windshield and hood during an argument in a parking lot. (1:2-3.) At a combined plea and sentencing hearing in May 2014, Ozuna pled guilty to both charges and was convicted. (13; 24:8.) The circuit court said that it "will allow expungement if there is no violation of probation." (24:10.) One of Ozuna's conditions of probation was not to consume or possess alcohol. (24:10.)

In June 2015, Ozuna's probation agent filed with the circuit court a form titled "Verification of Satisfaction of Probation Conditions for Expungement." (14.) Although a box was checked in front of an item that read "[t]he offender has successfully completed his/her probation," a box was also checked in front of an item that read "[a]ll court ordered conditions have **not** been met." (14:1.) The form stated that Ozuna owed $250 in supervision fees and that he "[f]ailed to comply with the no alcohol condition." (14:1.) It explained that police had cited Ozuna for underage drinking at a hotel when he blew a .102 during a preliminary breath test (PBT). (14:1.) At the bottom of the form, the circuit court wrote, "Expungement DENIED." (14:1.)

Ozuna appealed the denial of expunction to the court of appeals. (18.) The court of appeals affirmed, concluding that the circuit court properly denied expunction because the relevant statute, Wis. Stat. § 973.015, required a defendant to satisfy all conditions of probation to earn expunction. *State v. Ozuna*, Case No. 2015AP1877-CR (A-App. 111-12, ¶ 1).

ARGUMENT

This Court should hold that the circuit court properly denied Ozuna expunction because he violated his no-alcohol condition of probation. This Court should further hold that the circuit court's denial of expunction did not violate Ozuna's due process rights. This Court need not and should not determine whether Ozuna's equal protection rights would be violated if he were denied expunction due to his failure to pay all required supervision fees.

I. Based on the plain language of the expunction statute, the circuit court properly denied Ozuna expunction.

Ozuna presents three alternative statutory arguments for why the circuit court erroneously denied him expunction. (Ozuna Br. 11-26.) This Court should reject all three arguments and hold that (1) Ozuna was not entitled to expunction because he violated his no-alcohol condition of probation; (2) the circuit court had authority to determine whether Ozuna successfully completed his sentence such that he was entitled to expunction; and (3) because Ozuna did not successfully complete his sentence, his probation agent's discharge form did not entitle him to expunction.

A. Controlling legal principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the statute's language. *Id.* ¶ 45 (quoted source omitted). Courts interpret statutory language "reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46 (citations omitted).

"Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* ¶ 46 (citations omitted). "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47 (citations omitted). A court may use legislative history to confirm, but not to contradict, a statute's plain meaning. *Id.* ¶ 51.

"The interpretation and application of a statute are questions of law that [this Court] review[s] de novo while benefitting from the analyses of the court of appeals and circuit court." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 24, 339 Wis. 2d 125, 810 N.W.2d 465 (*Heritage Farms II*) (citation omitted).

B. Because Ozuna violated one of his conditions of probation by consuming alcohol, he was not entitled to expunction.

The expunction statute unambiguously requires a probationer to satisfy all conditions of probation to earn expunction. This conclusion would hold true even if the expunction statute were ambiguous. Because Ozuna violated the no-alcohol condition of probation, he did not satisfy all conditions of probation and thus is not entitled to expunction.

1. The expunction statute unambiguously provides that a defendant is not entitled to expunction if he violates a condition of probation.

If a circuit court grants conditional expunction to a defendant at sentencing, the defendant is entitled to expunction if he successfully completes his sentence. *State v. Hemp*, 2014 WI 129, ¶ 23, 359 Wis. 2d 320, 856 N.W.2d 811. "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." Wis. Stat. § 973.015(1m)(b). As this Court recently interpreted that statute in *Hemp*, "an individual defendant like Hemp 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*." *Hemp*, 359 Wis. 2d 320, ¶ 22 (emphasis added).

This Court's recent interpretation of the expunction statute in *Hemp* is consistent with the Legislature's purpose behind the statute. "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.'" *State v. Matasek*, 2014 WI 27, ¶ 42, 353 Wis. 2d 601, 846 N.W.2d 811 (alteration in *Matasek*) (quoting *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341). This statute gives certain offenders a second chance to become law-abiding and creates an incentive for them to rehabilitate, which benefits society. *Hemp*, 359 Wis. 2d 320, ¶ 19 (citation omitted).

Allowing a defendant to receive expunction even though he violated a condition of probation would run counter to the expunction statute's purpose. This conclusion is especially true in cases where the defendant violated a condition of probation by breaking the law. Here, the circuit court gave Ozuna a second chance when, at sentencing, it granted him expunction conditioned upon his successful completion of probation. (24:10.) Ozuna spurned that second chance by subsequently consuming alcohol underage in violation of a condition of probation. (14.) Underage consumption of alcohol is illegal. Wis. Stat. § 125.07(4). Ozuna's underage drinking shows that he did not rehabilitate himself by becoming law-abiding. Allowing Ozuna to receive expunction would reduce young offenders'

incentive to comply with their conditions of probation and rehabilitate themselves.

Reasonably well-informed persons would view the expunction statute as requiring a person to satisfy all conditions of probation. A word's potential ambiguity can be clarified by looking at its context and surrounding language. *State v. Johnson*, 171 Wis. 2d 175, 181, 491 N.W.2d 110 (Ct. App. 1992). The expunction statute has three requirements for successfully completing a sentence: "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." Wis. Stat. § 973.015(1m)(b). Even if "the conditions of probation," standing alone, is ambiguous, the surrounding language clarifies what it means. Based on the statute's plain language, a person does *not* successfully complete his sentence if he is convicted of even one subsequent offense or if his probation gets revoked even once. The third requirement has a similar meaning: a person does not successfully complete his sentence if he violates even one condition of probation.

Ozuna argues that the expunction statute does not require a probationer to satisfy all conditions of probation but instead "requires a probationer to comply with the imposed conditions in a sufficient or satisfactory manner." (Ozuna Br. 19.) He views the statute as looking at the "probationary conditions in a more global sense to determine whether the probationer has performed sufficiently overall." (*Id.*) The gist of his argument is that a probationer is entitled to probation if he satisfies most (or perhaps at least some) of his conditions of probation. (*Id.* at 17-26.)

Ozuna's proffered interpretation is incredibly vague and would make the expunction statute unworkable in probation cases. Ozuna does not clearly explain whether his proffered view looks at the number of a defendant's probation violations, their seriousness, or both. For example, if, as Ozuna argues, a single incident of underage drinking is insufficient to render him ineligible for expunction, what about two incidents of underage drinking? Five incidents? Ten? What would be less "satisfactory"—consuming five alcoholic drinks on one occasion or consuming one alcoholic drink on each of five occasions? Could Ozuna properly be denied expunction if his PBT results had been .2 or .3 instead of .102? What if Ozuna had ingested heroin once while on probation instead of consuming alcohol? Not only does Ozuna fail to any provide guidance for answering these and similar questions, but he fails to even acknowledge that his proposed view of the expunction statute would create these difficulties.

In short, this Court should reaffirm what it said just two terms ago: the expunction statute's third requirement for successful completion of a sentence requires a probationer to satisfy "all the conditions of probation." *Hemp*, 359 Wis. 2d 320, ¶ 22.

2. Even if the expunction statute is ambiguous, its legislative history does not help Ozuna.

Because the expunction statute unambiguously requires a probationer to satisfy all conditions of probation, this Court need not consider the statute's legislative history. In any event, the legislative history does not alter this view of the statute.

In 1983, the Legislature added the following italicized language to the expunction statute: "A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, ~~such~~ the probation has not been revoked *and the probationer has satisfied the conditions of probation*." 1983 Wisconsin Act 519, § 1. Ozuna notes that the Legislature did not pass a bill that would have added the following italicized language: "'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 *or extended and the probationer has satisfied the conditions of probation*.'" (Ozuna Br. 20.)

Ozuna argues that this legislative history shows that the Legislature intended to allow defendants to receive expunction even if they violated some conditions of probation. (*Id.* at 21.) His reasoning is that an extension of probation "indicates noncompliance with probation conditions" and that the Legislature, by not passing the bill with the words "or extended," signaled its intent to allow defendants to receive expunction even if their probation was extended. (*Id.*)

Ozuna's argument is not persuasive. An extension of probation does not necessarily suggest noncompliance with probation conditions. A circuit court may, in its discretion, extend probation if there is cause to do so. *State v. Jackson*, 128 Wis. 2d 356, 365, 382 N.W.2d 429 (1986).

Further, regardless of whether an extension of probation indicates noncompliance with probation conditions, Ozuna's resort to legislative history is still unpersuasive. When the Legislature removes particular language from a bill, it does not necessarily signal that it

intends to enact the opposite of that language. *See Richland Sch. Dist. v. Dep't of Indus., Labor, & Human Relations, Equal Rights Div.*, 174 Wis. 2d 878, 896 n.8, 498 N.W.2d 826 (1993). Rather, sometimes it is "equally likely and reasonable" that the Legislature removes language because it is unnecessary. *See id.* Here, the Legislature likely removed the phrase "or extended" because it was unnecessary. If a defendant's probation is extended due to a violation of a probation condition, then the words "or extended" would be redundant with the requirement that a defendant "satisfy the conditions of probation." It is also likely that the Legislature wanted defendants to be able to earn expunction if their probation was extended for reasons *other than* violations of probation conditions. By not passing a bill with the words "or extended," the Legislature did not signal its intent to allow expunction for defendants who violated conditions of probation.

In short, this legislative history does not undermine this Court's pronouncement in *Hemp* that the expunction statute requires a defendant to satisfy all conditions of probation.

3. Ozuna's concerns with the expunction statute are misplaced and do not justify holding, contrary to *Hemp*, that the statute does not require defendants to satisfy all conditions of probation.

Ozuna offers several concerns with the view that the expunction statute requires a probationer to satisfy all conditions of probation. (Ozuna Br. 23-25.) His first concern is that this view would "effectively remove[] the possibility of expunction for probationers." (*Id.* at 23.) To support that assertion, Ozuna states that a probationer could be denied

expunction for a relatively minor infraction, such as missing a single meeting with a probation agent. (Ozuna Br. 24.)

That concern is misplaced. The Legislature wisely chose to require probationers to satisfy all conditions of probation to earn expunction. This bright-line rule provides guidance to probationers as to what is expected of them and it maximizes their incentive for rehabilitating. Further, *Ozuna's* view of the expunction statute would be unfair to probationers. He argues repeatedly that a probation agent has unreviewable discretion to determine whether a probationer has sufficiently earned expunction. (*Id.* at 12, 14-16.) Accordingly, under Ozuna's view, the expunction statute does nothing to prevent a probation agent from determining that a probationer is not entitled to expunction because he missed one meeting—or even because the probationer arrived to a meeting one minute late. A probationer under those circumstances would have no recourse because, according to Ozuna, a circuit court may not review the probation agent's expunction decision. Probationers are better off with the expunction statute's bright-line rule requiring them to satisfy all conditions of probation than they would be with Ozuna's nonexistent standard that leaves their expunction up to the whim of their probation agents.

Ozuna relies on various statistics in arguing that probationers would not be able to receive expunction if they were required to satisfy all conditions of probation. (*Id.* at 24-25.) For example, he notes that almost 70% of probationers had reported *past* drug use and that an estimated 25% of probationers in 2014 had committed a drug crime. (*Id.* at 24.) He then asserts that high rates of probationers relapse when undergoing drug treatment. (*Id.* at 25.)

Those statistics are unhelpful and do not support Ozuna's conclusion that people cannot possibly satisfy all conditions of probation. One shortcoming is that Ozuna has not explained the rate at which probationers are ordered to undergo drug treatment. A source that he cites states that "[f]or individuals who are placed on community supervision *because of charges involving substance use*, submission to drug testing is often a condition of probation or parole."[1] Ozuna, however, provides no statistics on how many probationers have been sentenced for a drug-related offense or have drug-use problems. To be clear, Ozuna's 70% figure does not mean that 70% of people used drugs while on probation. One 1995 study that he cites states that only 31.8% of people on probation had used any drug *the month before* their offense.[2] These statistics do not even come close to proving that people would never be able to earn expunction if they were required to satisfy all conditions of probation.

Further, there is an easy solution for a defendant who wants expunction and shares Ozuna's concerns about failing probation: reject probation. A defendant has a statutory right to reject probation at sentencing or at any time during the probationary period. *State v. McCready*, 2000 WI App 68, ¶ 6, 234 Wis. 2d 110, 608 N.W.2d 762. "A grant of a

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[1] Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam, & Alyssa Tochka, *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) (emphasis added).

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

probationer's request to end probation is not a judicial revocation . . . ." *Id.* ¶ 1. Accordingly, even though the expunction statute provides that a defendant is not entitled to expunction if his or her probation is revoked, a defendant would still be able to earn expunction if a circuit court terminated probation at his or her request.

Ozuna's final concern is that requiring a defendant to satisfy all conditions of probation would make it more difficult for a probationer than a prisoner to successfully complete a sentence. (Ozuna Br. 25-26.) That concern does not justify abrogating this Court's decision in *Hemp*. Indeed, the expunction statute itself mandates that probationers satisfy more requirements than prisoners. The statute has three requirements for successfully completing a sentence and thus earning expunction. *See* Wis. Stat. § 973.015(1m)(b). Only the last two requirements apply to probationers. *See id.* Even under Ozuna's view that the expunction statute merely requires a probationer to satisfy the conditions of probation in an "overall" sense (Ozuna Br. 19), a probationer still must satisfy two statutory requirements that do not apply to a prisoner.

Further, there are good reasons for why the expunction statute imposes more requirements on probationers than prisoners. "[T]here is a significant distinction between the status and freedom enjoyed by one on probation or parole and one confined in a penal institution." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 548, 185 N.W.2d 306 (1971). Conditions of community supervision are the price defendants pay in return for their conditional freedom from confinement. *See Ashford v. Div. of Hearings & Appeals*, 177 Wis. 2d 34, 44-45, 501 N.W.2d 824 (Ct. App. 1993).

In short, Ozuna is not entitled to expunction because he violated the no-alcohol condition of probation.[3]

C. A circuit court may determine whether a defendant has successfully completed his sentence such that he is entitled to expunction.

The analysis above shows why the circuit court reached the right conclusion when it denied Ozuna expunction. The issue now becomes whether the circuit court was allowed to determine whether Ozuna was entitled to expunction. It was allowed to do so.

As Ozuna notes, a probation agent is in the best position to observe a defendant's conduct. (Ozuna Br. 15-16.) However, interpretation and application of a statute are legal questions that a court reviews de novo. *Heritage Farms II*, 339 Wis. 2d 125, ¶ 24 (citation omitted). Accordingly, although a circuit court may defer to a probation agent's observations and factual inferences regarding a probationer's conduct, a circuit court may independently review a probation agent's determination as to whether a defendant is legally entitled to expunction.

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[3] The State concedes that Ozuna met the second statutory requirement for earning expunction because his probation was not revoked. The record is unclear as to whether Ozuna met the first requirement. Ozuna's probation discharge form left *unchecked* a box in front of an item that read, "The offender has not been convicted of a subsequent offense." (14:1.) The State concedes that Ozuna was not *convicted* of underage drinking. Accordingly, this Court need not resolve Ozuna's argument that underage drinking is not an "offense" within the meaning of the expunction statute. (*See* Ozuna Br. 10.) But, the record is unclear as to whether Ozuna was convicted of an offense besides underage drinking while on probation.

Here, the circuit court apparently deferred to the probation agent's factual assertion that Ozuna had been cited for underage drinking and independently reviewed whether Ozuna was legally entitled to expunction. (*See* 14:1.)

Those dual standards apply in similar contexts. For example, in determining whether a traffic stop was lawful, a court defers to the factual observations and reasonable inferences drawn by a police officer in light of the officer's training and experience. *See State v. Drexler*, 199 Wis. 2d 128, 134, 544 N.W.2d 903 (Ct. App. 1995). However, a court still reviews de novo whether the facts meet the legal standard for a valid stop. *Id.* at 133 (citation omitted).

Further, probation agents do not have unreviewable discretion in other contexts. For example, a court may review a probation agent's allegedly arbitrary enforcement of a probation condition. *See State v. Miller*, 175 Wis. 2d 204, 212, 499 N.W.2d 215 (Ct. App. 1993). Similarly, a probation agent may not unilaterally revoke a defendant's probation but instead must petition the Department of Administration to do so. *See* Wis. Stat. § 973.10(2).

Serious due process concerns would result if this Court adopted Ozuna's position that probation agents have unreviewable discretion to make expunction determinations. A court has "a duty to construe a statute to avoid [a] *potential* constitutional violation." *Plumbers Local No. 75 v. Coughlin*, 166 Wis. 2d 971, 994, 481 N.W.2d 297 (Ct. App. 1992) (citation omitted). To avoid serious due process concerns, courts have interpreted statutes as allowing for judicial review of executive actions that affect statutory or constitutional rights. *E.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681-82 n.12 (1986). In *Bowen*, for example, the Supreme Court rejected the government's

"extreme position" that judicial review was unavailable for substantial statutory and constitutional challenges to the government's administration of the Medicare Part B program. *Id.* Here, similarly, this Court should reject Ozuna's extreme contention that courts may not review probation agents' expunction determinations.

Ozuna's analogy between expunction denial and probation revocation highlights these due process concerns. (*See* Ozuna Br. 33.) Probationers have a due process right to a hearing before their probation may be revoked. *State ex rel. Johnson*, 50 Wis. 2d at 547-48. Probationers may file a certiorari action to seek judicial review of an administrative revocation decision. *Id.* at 549-50. A certiorari action is adequate to satisfy due process. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 54, 235 Wis. 2d 610, 612 N.W.2d 59 (citing *State ex rel. Johnson*, 50 Wis. 2d at 549-50). Here, however, Ozuna argues that a court may not review a probation agent's determination as to whether a probationer is entitled to expunction. (Ozuna Br. 12, 14-16.) Further, Ozuna does not contend that a probationer may challenge the probation agent's expunction decision before a neutral decision-maker in an administrative hearing. If a defendant has a liberty or property interest in expunction, then the unavailability of judicial review of a probation agent's expunction determination would likely violate due process.

Not only would judicial review protect defendants' due process rights, but it would also help to protect their right to expunction. As Ozuna points out, a probation agent files in circuit court one of two probation discharge forms, depending on whether the agent thinks that the defendant successfully completed probation. (*Id.* at 13-14.) Probation agents might make erroneous legal conclusions or factual mistakes in deciding which form to file, or they may

inadvertently file the wrong type of form. Judicial review will *benefit* defendants in cases where probation agents mistakenly determine that the defendants have not earned expunction. A determination of entitlement to expunction is too important to be left in the hands of probation agents alone.

Ozuna notes that the juvenile expunction statute, Wis. Stat. § 938.355(4m)(b), states that a court shall grant a juvenile's petition for expunction "'if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order.'" (*Id.* at 15.) Ozuna argues that the absence of clear language to that effect in Wis. Stat. § 973.015 shows that the Legislature did not intend for judicial review in cases under this statute. (*Id.*)

Ozuna's argument is unpersuasive. It is true that, "where a statute with respect to one subject contains a given provision, the omission of such provision *from a similar statute* concerning a related subject is significant in showing that a different intention existed." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 22, 316 Wis. 2d 47, 762 N.W.2d 652 (*Heritage Farms I*) (quotation marks and quoted source omitted). However, that canon of statutory construction is inapplicable if the similarity between two statutes is questionable. *Id.* ¶ 23. Further, canons of statutory construction are "not rules of law." *State v. Popenhagen*, 2008 WI 55, ¶ 42, 309 Wis. 2d 601, 749 N.W.2d 611.

Here, §§ 938.355 and 973.015 are not similar. Under § 938.355 a person may petition a circuit court to expunge a juvenile adjudication, and the court then decides whether to expunge the record. Wis. Stat. § 938.355(4m)(b). When

ruling on a juvenile petition for expunction, a court must determine whether expunction would benefit the offender or harm society. *Id.* § 938.355(4m)(a). By contrast, § 973.015 is located in an entirely different chapter, applies to criminal convictions, and has a two-stage procedure for expunction. Under this statute, a circuit court may grant conditional expunction of a criminal conviction at sentencing. *See id.* § 973.015(1m)(a)1. At that time, the court determines whether expunction would benefit the defendant or harm society. *Id.* The defendant automatically earns expunction by successfully completing the sentence and need not petition for expunction. *Hemp*, 359 Wis. 2d 320, ¶¶ 23, 32-34. Because of those differences, § 973.015, unlike § 938.355, does not state that courts may determine the appropriateness of expunction when reviewing expunction petitions. Because these two statutes are not similar, the juvenile expunction statute has no bearing on this case. Further, the inapplicable juvenile expunction statute does not trump the serious due process concerns that stem from Ozuna's view of § 973.015.

In short, this Court should hold that a circuit court may independently determine whether a probationer has successfully completed a sentence such that he is entitled to expunction.

D. Because Ozuna did not successfully complete his sentence, his probation agent's discharge form did not entitle him to expunction.

Ozuna's probation agent sent a discharge form to the circuit court that suggested that Ozuna had successfully completed his sentence. (14.) However, Ozuna did not successfully complete his sentence, as explained above.

Accordingly, the circuit court's receipt of this form did not entitle Ozuna to expunction.

This conclusion is based on the plain language of the expunction statute, which provides: "*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." Wis. Stat. § 973.015(1m)(b) (emphasis added).

This Court in *Hemp* repeatedly noted that successful completion of a sentence is a prerequisite to earning expunction. For example, this Court stated that "[i]f a circuit court finds an individual defendant eligible for expungement and conditions expungement upon the successful completion of the sentence, then the plain language of the statute indicates that once the defendant *successfully completes* his sentence, he has earned, and is automatically entitled to, expungement." *Hemp*, 359 Wis. 2d 320, ¶ 23 (emphasis added). Similarly, the "probationary authority must forward the certificate of discharge to the court of record upon the individual defendant's *successful completion* of his sentence and at that point the process of expungement is self-executing." *Id.* ¶ 25 (emphasis added). Throughout its *Hemp* opinion, this Court tied a probationer's entitlement to expunction to his or her *successful* completion of his or her sentence. *E.g., id.* ¶¶ 15, 16, 24, 27, 40, 43.

Ozuna argues that the self-executing process of expunction shows that he was entitled to expunction once the circuit court received his discharge form. (Ozuna Br. 12.) That argument is mistaken because this self-executing process occurs after a defendant *successfully* completes his sentence.

Ozuna similarly argues that the self-executing process of expunction shows that a circuit court may not review a probation agent's decision as to whether a defendant is entitled to expunction. (*Id.*) This argument has the same problem. In *Hemp*, this Court held that "[o]nce Hemp *successfully completed* probation the circuit court did not have the discretion to refuse to expunge Hemp's record." *Hemp*, 359 Wis. 2d 320, ¶ 39 (emphasis added). A circuit court may not "reverse its decision to find an individual eligible for expungement conditioned upon the successful completion of the sentence." *Id.* ¶ 24 (citation omitted). Ozuna's argument thus begs the question: Who decides whether he successfully completed his sentence? For the reasons explained above, a circuit court may independently review a probation agent's expunction determination.

Ozuna, unlike Hemp, did not successfully complete his sentence because he violated the no-alcohol condition of probation. Unlike in *Hemp*, the circuit court here did not second-guess its decision conditionally granting expunction. It followed that decision by denying expunction when Ozuna did not satisfy the conditions for receiving expunction.

In sum, because Ozuna did not successfully complete probation, he was not automatically entitled to expunction when the circuit court received his probation discharge form.

II. The circuit court did not deprive Ozuna of procedural due process when it denied him expunction.

The circuit court did not violate Ozuna's due process rights when it denied him expunction.

A. Controlling legal principles.

"The Fourteenth Amendment to the United States Constitution provides in part: 'nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .'" *Casteel v. McCaughtry*, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993) (alteration in *Casteel*). "'In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.'" *Id.* at 579 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)) (quotation marks omitted).

To establish a procedural due process violation, a litigant must show that (1) he had a protected life, liberty, or property interest, and (2) the State deprived him of that interest without due process of law. *Brown v. State Dep't of Children & Families*, 2012 WI App 61, ¶ 31, 341 Wis. 2d 449, 819 N.W.2d 827 (citation omitted). A court may dispose of a procedural due process claim under either step without reaching the other one. *See Adams v. Northland Equip. Co.*, 2014 WI 79, ¶ 67, 356 Wis. 2d 529, 850 N.W.2d 272; *Jones v. Dane Cty.*, 195 Wis. 2d 892, 914, 918-19, 537 N.W.2d 74 (Ct. App. 1995). A court reviews alleged violations of due process de novo. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 6, 234 Wis. 2d 335, 610 N.W.2d 129 (citation omitted).

B. In denying Ozuna expunction, the circuit court did not deprive him of a liberty or property interest.

Ozuna's procedural due process claim fails under the first step because he has not shown that he was deprived of a liberty or property interest.

1. Ozuna does not have a liberty interest in expunction.

"Reputation by itself is neither liberty nor property within the meaning of the due process clause of the fourteenth amendment." *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986) (*Weber II*) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)). "[R]eputation can only rise to the level of a constitutionally protected interest when some more tangible interest accompanies the loss of reputation." *State v. Hazen*, 198 Wis. 2d 554, 561, 543 N.W.2d 503 (Ct. App. 1995) (citing *Paul*, 424 U.S. at 701). The Supreme Court in *Paul* mentioned employment as an example of a tangible interest. *Paul*, 424 U.S. at 701.

Here, Ozuna's interest in his reputation is inadequate to establish that he has a liberty interest in expunction. A juvenile offender in *Hazen*, for example, argued that two particular Wisconsin statutes violated procedural due process by placing him in adult criminal court and thus revealing his identity to the public without a hearing. *Hazen*, 198 Wis. 2d at 556, 558. The court of appeals held that Hazen's interest in protecting his reputation by keeping his criminal proceedings confidential was insufficient to establish a liberty interest. *Id.* at 560-61.[4] Here, similarly, Ozuna's interest in confidentiality of his criminal record is insufficient to establish a liberty interest. Ozuna has not shown that he suffered tangible harm, such as loss of an

[4] The court of appeals also applied a test from *Hewitt v. Helms*, 459 U.S. 460 (1983), when determining whether Hazen had a liberty or property interest. *State v. Hazen*, 198 Wis. 2d 554, 560-61, 543 N.W.2d 503 (Ct. App. 1995). The court expressed "grave doubts" that the *Hewitt* test is still good law. *Id.* at 560. Here, this Court should decline to address *Hewitt* because Ozuna has not relied on it.

employment opportunity, because his convictions were not expunged.

Ozuna seems to argue that he had a liberty interest in expunction because the denial of expunction altered his rights under state law. (Ozuna Br. 32-34.) A litigant can prove that state action impacted a liberty interest in reputation by showing that (1) the state action damaged his reputation and (2) this reputational damage has resulted in tangible harm such that a right or status that he previously possessed under state law has been altered or eliminated. *Teague v. Van Hollen*, 2016 WI App 20, ¶ 65, 367 Wis. 2d 547, 877 N.W.2d 379. "'The mere possibility of remote or speculative future injury or invasion of rights will not suffice'" to establish a liberty interest in reputation. *Weber v. City of Cedarburg*, 125 Wis. 2d 22, 30, 370 N.W.2d 791 (Ct. App. 1985) (*Weber I*) (quoting *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981)), *aff'd*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986). Ozuna offers nothing more than a speculative assertion that the denial of expunction "results in harm to [him]" due to the stigma associated with criminal convictions. (Ozuna Br. 33.)

Further, when the circuit court denied Ozuna expunction, it did not alter or eliminate any right or status under state law that he previously possessed. There is no indication in the record that Ozuna received any benefits of expunction before the circuit court determined that he was not entitled to expunction. Moreover, as explained above, Ozuna was not entitled to expunction because he did not satisfy all conditions of probation. His argument that his legal rights were altered hinges on his incorrect view that he was automatically entitled to expunction when the circuit court received his probation discharge form. (*Id.*)

Ozuna cites *In Interest of J.C.*, 216 Wis. 2d 12, 14, 573 N.W.2d 564 (Ct. App. 1997), for the proposition that the *juvenile* expunction statute confers a substantive right for a juvenile. (Ozuna Br. 32-33.) That case is inapposite. There was no due process issue in that case. Rather, when the court of appeals characterized juvenile expunction as a substantive right, it was concluding that the juvenile expunction statute was not remedial and thus did not have retroactive application. *In Interest of J.C.*, 216 Wis. 2d at 14. That case is further distinguishable because the juvenile expunction statute is very different than the expunction statute at issue here, as explained above.

Ozuna's analogy to probation does not help him establish a liberty interest in expunction. (*See* Ozuna Br. 33.) A probationer has a liberty interest in probation, that is, freedom from physical confinement. *See Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *State ex rel. Johnson*, 50 Wis. 2d at 547-48. Expunction does not equate with freedom from imprisonment.

Ozuna's string citations to out-of-state cases in a footnote do not help him, either. (*See* Ozuna Br. 34 n.28.) Ozuna has not explained whether or how Wisconsin's expunction process is similar to the expunction processes in those other states. Further, those cases are distinguishable on their facts. In *Carlacci v. Mazaleski*, 798 A.2d 186, 190 (Pa. 2002), the Pennsylvania Supreme Court held that a person has a right under the state constitution to petition a court to expunge the record of a dismissed Protection From Abuse Act proceeding. That case does not help Ozuna because he is not alleging that he was denied an opportunity to petition for expunction.

In another case cited by Ozuna, a Texas appellate court held that a trial court should have allowed the defendant to personally participate at a hearing on his petition for expunction, instead of allowing only the State and the Department of Public Safety to participate at the hearing. *Heine v. Texas Dep't of Pub. Safety*, 92 S.W.3d 642, 649-50 (Tex. App. 2002). Although the defendant alleged a due process violation, the court seemed to rely solely on a Texas statute in holding that the defendant had a right to be present at the hearing. *Id.* at 649. Here, unlike in *Heine*, Ozuna never petitioned for expunction and the circuit court did not hold an *ex parte* expunction hearing.

In the other two cases cited by Ozuna, appellate courts held that a hearing on a defendant's petition for expunction was mandatory under a state statute. *Key v. State*, 48 N.E.3d 333, 340 (Ind. Ct. App. 2015); *State v. Saltzer*, 471 N.E.2d 872, 873 (Ohio Ct. App. 1984). Although the defendant in *Saltzer* alleged a due process violation, the appellate court merely held that a hearing was statutorily required. *Saltzer*, 471 N.E.2d at 873. In *Key*, the appellate court stated in passing that the statute "grants the petitioner a due process right to a hearing when the prosecutor objects to the expungement petition." *Key*, 48 N.E.3d at 340. The courts in those cases did not engage in any due process analysis. Further, in contrast to those cases, Ozuna did not petition for expunction, and no Wisconsin statute entitles him to a hearing to determine whether he earned expunction.

In short, Ozuna does not have a liberty interest in expunction.

2. Ozuna does not have a property interest in expunction.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). Property interests are not created by the Constitution but rather by independent sources, such as state law. *Stipetich v. Grosshans*, 2000 WI App 100, ¶ 24, 235 Wis. 2d 69, 612 N.W.2d 346 (quoting *Roth*, 408 U.S. at 577). "However, 'federal constitutional law determines whether that [substantive property] interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.'" *Arneson v. Jezwinski*, 225 Wis. 2d 371, 386, 592 N.W.2d 606 (1999) (alteration in *Arneson*) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

Under U.S. Supreme Court precedent, a person has a legitimate claim of entitlement to a statutory benefit that he is already receiving. *See Schmidt v. State*, 68 Wis. 2d 512, 518-19, 228 N.W.2d 751 (1975). Thus, such a person has a due process right to establish his entitlement to continued receipt of the benefit. *Id.* However, the same is not true of a person who is attempting to establish his entitlement in the first instance, not having previously received the benefit. *Id.* at 519-20.

Here, Ozuna does not have a property interest in expunction because there is no indication that his convictions were expunged before the circuit court determined that he was not entitled to expunction. Ozuna does not argue otherwise.

In short, Ozuna's procedural due process claim fails because he does not have a liberty or property interest in expunction.

C. Even if Ozuna has a liberty or property interest in expunction, the judicial process provided him with all the process that he was due.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 48, 244 Wis. 2d 333, 627 N.W.2d 866 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "This opportunity to be heard 'must be at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Kelly*, 397 U.S. at 267) (quotation marks omitted). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* ¶ 49 (alteration in *Milwaukee Dist. Council 48*) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

"The requirement of procedural due process is met if a state provides adequate post-deprivation remedies." *Brown*, 341 Wis. 2d 449, ¶ 32 (citing *Thorp*, 235 Wis. 2d 610, ¶ 53). "A state post-deprivation remedy is considered adequate unless it can readily be characterized as inadequate to the point that it is meaningless or nonexistent and thus, in no way can be said to provide the due process relief guaranteed under the fourteenth amendment." *Id.* (quotations marks and quoted sources omitted).

Courts use a three-part test to determine the adequacy of available procedures:

> "'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.'"

Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005) (quoting *Eldridge*, 424 U.S. at 335). A court must balance the first factor against the other two. *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299, 305, 483 N.W.2d 295 (Ct. App. 1992).

Here, Wisconsin law provides adequate due process protections for a defendant who thinks that he was wrongly denied expunction under Wis. Stat. § 973.015. Ozuna seems to argue that he was entitled to a hearing before the circuit court denied him expunction. (Ozuna Br. 34-35.) The first *Eldridge* factor, however, does not require a pre-deprivation hearing in expunction cases. This factor considers the nature and weight of the private interest and the duration of any potentially wrongful deprivation. *See Mackey v. Montrym*, 443 U.S. 1, 12 (1979). A defendant has a substantial interest in expunction because it gives certain young offenders a second chance. *See Hemp*, 359 Wis. 2d 320, ¶¶ 18-21. Expunction also provides defendants with advantages in subsequent cases. *Leitner*, 253 Wis. 2d 449, ¶ 39. However, its importance is not weighty enough to require a pre-deprivation hearing.

Supreme Court case law supports this conclusion. For example, in *Kelly*, the Supreme Court held that a welfare recipient had a due process right to an evidentiary hearing *before* his welfare benefits were terminated. *Kelly*, 397 U.S.

at 264. The Supreme Court emphasized that because a recipient relies on welfare to obtain such essentials as food and shelter, "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* By contrast, because disability payments are not based upon financial need, the private interest in such payments does not require a pre-termination evidentiary hearing. *Eldridge*, 424 U.S. at 340-43. The Supreme Court has also held that although people have a substantial property interest in an issued driver's license, due process does not require a hearing before the government may revoke a person's driver's license. *Montrym*, 443 U.S. at 11-12; *Dixon v. Love*, 431 U.S. 105, 113-15 (1977).

Under those principles, a defendant's private interest in expunction does not mandate a pre-deprivation hearing. A person does not rely on expunction for survival. Further, in this case, there is no indication that Ozuna received any benefits of expunction before the circuit court determined that he was not entitled to expunction. Accordingly, Ozuna's personal interest in expunction is weaker than the private interests in benefits that were actually revoked in *Eldridge*, *Montrym*, and *Love*—none of which required a pre-deprivation hearing.

The second *Eldridge* factor heavily supports the conclusion that the judicial review procedures available to Ozuna provided him with all the process that he was due. To be clear, due process is satisfied if adequate procedures are *available*, regardless of whether a person is successful in obtaining relief by using those procedures. *Jones*, 195 Wis. 2d at 918-19. Further, a person may not claim that he was denied due process if he did not use the procedures

available under state law for seeking relief. *See Thorp*, 235 Wis. 2d 610, ¶ 56.

Ozuna had procedures available to challenge his expunction denial. A defendant may file a postconviction motion in circuit court. Wis. Stat. §§ (Rule) 809.30(2)(h), 974.02. A circuit court must hold a hearing if a defendant makes a legally sufficient postconviction motion or if the credibility of the motion's allegations is questionable. *State v. Allen*, 2004 WI 106, ¶ 12 & n.6, 274 Wis. 2d 568, 682 N.W.2d 433. As of right, a defendant may appeal a circuit court's final judgment or final order to the court of appeals. Wis. Stat. § 808.03(1). A defendant may petition this Court for review. *Id.* § (Rule) 809.62. "Remand is the appropriate course of action '[w]hen an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute.'" *State v. Kleser*, 2010 WI 88, ¶ 123, 328 Wis. 2d 42, 786 N.W.2d 144 (alteration in *Kleser*) (quoting *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155 (1980)). Thus, to be entitled to a remand for a hearing, "an appellant must allege sufficient material facts that, if true, would entitle him or her to relief." *State v. Maloney*, 2006 WI 15, ¶ 18, 288 Wis. 2d 551, 709 N.W.2d 436. Ozuna has not acknowledged these available procedures or explained how they were inadequate.

Wisconsin courts have held that similar available procedures provided adequate due process protections. For example, the availability of a certiorari action in circuit court to challenge a zoning decision is an adequate post-deprivation remedy. *Thorp*, 235 Wis. 2d 610, ¶ 54. So, too, is the opportunity to seek judicial review of an administrative license revocation. *See Brown*, 341 Wis. 2d 449, ¶ 34. Indeed, in *Brown*, the court of appeals emphasized that Brown took advantage of her available remedies by seeking circuit court

review of an administrative decision and ultimately appealing to the court of appeals. *Id.*

Ozuna took advantage of some of those procedures by appealing the circuit court's expunction denial to the court of appeals and obtaining discretionary review in this Court. Although the circuit court did not hold an evidentiary hearing, Ozuna is to blame because he did not file a postconviction motion.[5] The circuit court likely would have been required to hold an evidentiary hearing had Ozuna alleged in a postconviction motion that he did not violate any conditions of probation. He made no such allegation, and the court of appeals noted that Ozuna did not dispute that he consumed alcohol while on probation. *Ozuna*, Case No. 2015AP1877-CR (A-App. 115, ¶ 9). The risk of an erroneous deprivation of a liberty or property interest is especially low where, as here, the person does not dispute the factual basis for the deprivation. *See Montrym*, 443 U.S. at 14-15.

Wisconsin law provided Ozuna with adequate judicial procedures for contesting the factual basis of his expunction denial. He simply decided not to use all of those procedures. Those available procedures minimized the risk that he was erroneously denied expunction.

Further, Ozuna has not explained why due process required any additional safeguards. He has not even explained what kind of additional safeguards should have

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[5] A "person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stat. § (Rule) 809.30(2)(h); *see also id.* § 974.02(2). Accordingly, it appears that Ozuna was required to file a postconviction motion in circuit court before filing a notice of appeal.

been available to him. He seems to argue that he should have received a pre-deprivation hearing. (Ozuna Br. 34-35.) However, there is no reason to think that an evidentiary hearing would have been more accurate had it been held before, rather than after, the circuit court denied him expunction. This conclusion is especially true where, as here, the person does not dispute the factual basis for the deprivation. *See Love*, 431 U.S. at 113-14.

The third *Eldridge* factor also heavily supports the conclusion that Ozuna received all the process that he was due. The cost of providing a hearing weighs against concluding that due process requires a hearing. *See Eldridge*, 424 U.S. at 347. Wisconsin's postconviction pleading requirements preserve scarce judicial resources by eliminating unnecessary evidentiary hearings when no material facts are in dispute or when the defendant would not be entitled to relief even if his allegations were true. *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999). Here, an evidentiary hearing would have been pointless because no material facts were in dispute.

In short, Ozuna's due process claim fails because he had no liberty or property interest in expunction and because adequate procedures for challenging his expunction denial were available to him.[6]

[6] The remedy for a procedural due process violation is a remand for an adequate hearing. *See, e.g.*, *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 557, 185 N.W.2d 306 (1971). Accordingly, if this Court concludes that Ozuna's procedural due process rights were violated, it should remand the matter to the circuit court to conduct a hearing.

III. This Court should decline to resolve Ozuna's equal protection claim.

Ozuna's probation discharge form noted that he violated two conditions of probation: he consumed alcohol and he had a $250 balance of unpaid supervision fees. (14:1.) Ozuna argues that denying him expunction based on his inability to pay those fees would violate his equal protection rights. (Ozuna Br. 27-30.)

This Court should decline to resolve that equal protection claim for several reasons. First, as the court of appeals concluded, resolution of this issue is unnecessary because Ozuna's alcohol consumption by itself rendered him ineligible for expunction. *Ozuna*, Case No. 2015AP1877-CR (A-App. 114, ¶ 8 n.3). Second, Ozuna did not raise this equal protection claim before the circuit court. An appellate court generally does not address a claim on appeal that was not presented to the circuit court in a postconviction motion. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78 & n.3, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). Finally, the record is inadequate to resolve this claim because it does not establish whether Ozuna is able to pay his outstanding supervision fees. A defendant has the burden of proving at an evidentiary hearing that he is unable to pay a fee and that a statute is unconstitutional as applied to him because it requires him to pay the fee. *See State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 296, 201 N.W.2d 778 (1972); *In re Attorney Fees in State v. Helsper*, 2006 WI App 243, ¶¶ 23-24 & n.5, 297 Wis. 2d 377, 724 N.W.2d 414. If this Court concludes that Ozuna's non-entitlement to expunction hinges on his failure to pay his supervision fees, Ozuna at most would be entitled to a remand for an evidentiary hearing to pursue his equal protection claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 16th day of November, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8580 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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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 16th day of November, 2016.

_____
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