SUPREME COURT OF WISCONSIN
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

AMENDED NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC.

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Legal Action of Wisconsin (LAW) is Wisconsin's largest provider of free civil legal services to low-income citizens. In the past decades, LAW has increasingly represented clients not only in the traditional areas of poverty law, but also in matters directly affecting employability. For LAW's clients, the most important civil legal barrier to employment is the collateral consequences associated with criminal records. Under state law, the most important relief from these consequences ex-offenders can receive is through expungement.

Because LAW believes the Court of Appeals' decision undermines the legislature's intent in enacting and expanding our expungement law, LAW urges this Court to reverse that decision and make it clear that, under Wis. Stat. 973.015, (1) successful completion of a sentence does not require perfect compliance with all probationary conditions at all times and that (2) the probationary authority has the ultimate authority, at the time of discharge, to determine whether a sentence has been successfully completed.

INTRODUCTION

As of 2010, 65 million Americans had some kind of criminal record.[1] The immediate cost of a criminal conviction has long been recognized. But we have only recently begun to recognize, and track, the indirect, long-term costs of criminal records, costs that are especially high in poor communities of color.[2]

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

[2] *See, generally,* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction,*160 U. Pa. L. Rev. 1789 (2012); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity,* 85

New concern with these indirect costs reflects several historical trends. First, the increase in mandatory discrimination against individuals with criminal records. The American Bar Association (ABA) has identified over 38,000 statutes and regulations that impose collateral consequences on people convicted of crimes.[3] Over half of these laws deny employment opportunities.[4] These laws often cause special harm to low-income communities because they impose employment barriers on offenders long after they have ceased criminal activity.[5] Access to criminal record information has also dramatically increased. Private data vendors and state-run databases now provide records information easily, cheaply, and almost universally. An offense history that once would have languished in the practical obscurity of an old court file, has now become a permanent and highly stigmatizing [6]part of an individual's public history.

Given these trends, it is not surprising that LAW has seen an increase in requests to help effectuate ordered expungements. Because these potential clients had completed their sentences, they were not eligible for a state-funded attorney. None had money to pay a private attorney.

N.Y.U. L. Rev. 457, 467-68 (2010) and David J. Norman, Note, *Stymied by the Stigma of A Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 Quinnipiac L. Rev. 985, 986 (2013).

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

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

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

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

In the past, a typical expungement client contacted LAW long after completing his or her sentence. Most reported a belief that their offenses had already been expunged, only discovering their mistake when an employer or landlord reported seeing it. These clients were victims of a system whose procedural requirements were radically unclear.

Two recent decisions by this Court helped remedy that problem, providing clarity to attorneys, courts, and defendants. *See State v. Matasek*, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 618, 846 N.W.2d 811, 820 (holding that circuit courts must order expungements "at the sentencing proceeding"); *see also State v. Hemp*, 2014 WI 129, ¶ 40, 359 Wis. 2d 320, 344–45, 856 N.W.2d 811, 823 (holding that a " circuit court cannot amend its expungement order… once the detaining or probationary authority forwards the certificate of discharge, expungement is effectuated.").

If the Court of Appeals' decision stands, it will reintroduce uncertainty into the expungement process and place new burdens on courts and probationary authorities. It will also make expungements more difficult to complete, undermining the legislature's clear intent that expungement be more widely available to a broader range of youthful defendants.

ARGUMENT

The purpose of Wis. Stat. 973.015 is to provide "a break to young offenders who demonstrate the ability to comply with the law" by shielding them from "some of the harsh consequences of criminal convictions." *State v. Leitner*, 2002 WI 77, ¶¶ 37-38, 253 Wis. 2d 449, 646 N.W.2d 341. Any interpretation of Wis. Stat. 973.015 must be consistent with this goal and

with the legislature's intent, manifested in the 2009 revisions to the statute, to expand the impact of expungement. Because the Court of Appeals' interpretation of the statute is inconsistent with those goals, it must be rejected.

I. OZUNA SUCCESSFULLY COMPLETED HIS SENTENCE FOR THE PURPOSES OF WIS. STAT. 973.015 (1M)(A)1.

The Court of Appeals held that Ozuna did not successfully complete his sentence because he did not "satisfy all conditions of probation." *State v. Ozuna*, 2016 WI App 41, ¶ 6, 369 Wis. 2d 224, 880 N.W.2d 183. The opinion summarily rejected Ozuna's argument that "satisfy" does not mean perfect performance, ("Although applicable to horseshoes and hand grenades, "close enough" does not appear to cut it"), 2016 WI App 41 at ¶ 10, asserting, without analysis, that Warr's interpretation has no "support in the statutory language." *Id.* The Court of Appeals is wrong.

a. The plain meaning of "satisfied the conditions of probation" is not perfect performance in every respect at every moment.

"Satisfied" does not mean perfectly performed in every respect. If it does, probationers who have been timely discharged, demonstrated rehabilitation, and convinced the probationary authority they have successfully completed their sentences must be denied expungement if they ever failed, even temporarily, to perfectly carry out a condition of probation. (Res. Br. at 6, 7).

This interpretation is not supported by the language or the structure of the statute. Wisconsin Stat. 973.015(1m)(b) defines "successful completion" of a sentence in three ways. The first two are negative: (1) no defendant successfully completes a sentence if he/she has a "subsequent conviction"; and (2) no

probationer successfully completes a sentence if revoked. The State argues the third requirement is also negative: no defendant successfully completes a sentence if he/she fails to perfectly fulfill any ordered condition of probation.

This interpretation violates basic canons of statutory construction. Revocation, by definition, requires violation of a condition of probation. *State rel. Warren v. Schwarz*, 211 Wis.2d 710, 724, 566 N.W.2d 173 (Ct.App.1997) ("[v]iolation of a condition is both a necessary and a sufficient ground for the revocation of probation."). Conviction for a "subsequent offense" similarly involves violating a probation condition—generally expressed as "no new law violations." If the State is correct that any failure to perfectly satisfy a probationary condition equals failure to "successfully" complete a sentence, the first two parts of the statutory definition are superfluous. Interpretations that render words or phrases in the statute superfluous must be avoided. *See, e.g., Moustakis v. State of Wisconsin Dep't of Justice*, 2016 WI 42, ¶ 17, 368 Wis. 2d 677, 685, 880 N.W.2d 142, 146, *citing Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis.2d 92, 673 N.W.2d 676.

As Ozuna argues, the State's interpretation cannot be reconciled with other subsections of the statute. (Reply Br. at 3). Wisconsin Stat. 973.015 specifies that expungement is effectuated when certificates of discharge are forwarded to the circuit court. That statutorily created mechanism reflects the legislature's judgment that the probationary authority is the appropriate authority to determine: 1) whether a defendant was convicted of a subsequent offense; 2) whether the defendant was revoked; and 3) whether the defendant "satisfied the conditions" of probation. Nothing in the record suggests certificates of discharge were different in

1975, when Wis. Stat. 973.015 was enacted, than they are today. Certificates are not extended summaries of activities. If the legislature intended trial courts to review the conclusions of the detaining or probationary authority, the legislature would have created a procedure that made such review possible.

After 1975, the DOC began using new forms to notify trial courts that misdemeanants have completed their sentences. Therefore, courts may get information they did not get in certificates of discharge. But that change in practice does not justify interpreting Wis. Stat. 973.015 as requiring something not contemplated by the original legislation.[7]

The structure of Wis. Stat. 973.015 and the context it creates strongly support the conclusion that the plain meaning of "satisfied the conditions of probation" is that a probationer complied well enough with ordered conditions to allow DOC to find performance satisfactory.

b. The extrinsic evidence and Supreme Court precedent support Ozuna's construction of the statute.

Hemp held that "the detaining or 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*

[7] The first Attorney General Opinion construing Wis. Stat. 973.015 interpreted "which shall have the effect of expunging the record' as "mean[ing] that the filing of a certificate of discharge *will give notice to the clerk of courts* to physically strike from the record all references to the name and identity of the defendant." 67 Wis. Op. Att'y Gen. 301, 1978. Though not precedential authority, the opinion supports Ozuna's position because a party knowledgeable about the legislative history described effecting an expungement as a process not involving the court.

point the process of expungement is self-executing." *State v. Hemp,* 2014 WI 129, ¶ 25, 359 Wis. 2d 320, 336, 856 N.W.2d 811, 818 (emphasis added). Under *Hemp*, the probationary authority is the ultimate authority, at discharge, on whether a sentence is successfully completed.

This reading of the statute is eminently rational. Probation agents must maintain regular contact with probationers— monitoring employment, housing and finances.[10] The procedure created by Wis. Stat. 973.015 reflects our legislature's understanding and approval of that reality.

The State's rule of perfection would have the absurd result of transforming a simple, self-executing process into a complex, burdensome mess**.** Under that rule, probation agents who believe clients are making good faith efforts to comply with a condition will have to request modification of the problematic condition. Courts will then have to conduct hearings where agents will have to provide testimony to justify modification. This process might be repeated multiple times, burdening the entire system.

The State suggests its proposed rule increases incentives to comply with conditions. (Res. Br. at 10). Realistically, the rule is far more likely to punish individuals for predictable forms of imperfect performance. Judges commonly order probationers to work full-time—a condition notoriously difficult to satisfy. Youthful offenders often lack the education and work history necessary to obtain full-time employment. Worse, recent criminal convictions substantially decrease employability. The ABA's collateral consequences catalogue evidences the extent of state-mandated discrimination against offenders. Private employer discrimination exacerbates the problem. Most employers indicate they would "probably"

or "definitely" deny a job to an applicant with a criminal record.[8] If expungement requires perfect compliance, probationers who can't work full-time, in spite of real effort, will be denied the expungement that is supposed to provide relief from exactly the kind of consequences they struggle with on probation.

The State dismisses the negative consequences of its extreme construction of Wis. Stat. 973.015 because "a defendant who wants expunction" can "reject probation" in favor of incarceration. (Res. Br. at 11- 12). The argument is absurd. We know that even short term incarceration has negative psychological effects.[9] We also know that the intent of Wis. Stat. 973.015 is to limit the long-term effects of criminal conviction, not to add psycho-social damage to the negative effects. The State's argument also ignores basic sentencing principals. A sentence should impose the "minimum amount of custody or confinement … consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis.2d 263, 275, 182 N.W.2d 512 (1971). Youthful offenders cannot be asked to choose incarceration to improve their chances of completing an expungement.

This Court should reject the State's interpretation of Wis. Stat. 973.015 either because it is contrary to the statute's plain language or because extrinsic evidence supports Ozuna's interpretation.

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[8] Holzer, Harry J., Steven Raphael, and Michael A. Stoll, "Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers," *The Journal of Law and Economics* 49.2 (2006): 451, 453–454.

[9] Mika'il DeVeaux "The Trauma of the Incarceration Experience" Harvard Civil Rights- Civil Liberties Law Review Vol. 48 pp 258.

II. IF CIRCUIT COURTS CAN "OVERRULE" THE PROBATIONARY AUTHORITY'S DETERMINATION A SENTENCE WAS SUCCESSFULLY COMPLETED, DUE PROCESS REQUIRES NOTICE AND THE OPPORTUNITY TO BE HEARD ON THAT QUESTION.

The Fourteenth Amendment protects liberty interests created by the Constitution and those created by state law. *see Vitek v. Jones*, 445 U.S. 480, 488 (1980) (The Supreme Court has "repeatedly held *that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the fourteenth amendment*.")(emphasis added) and 445 U.S. 480, 488, (1980); *see also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) and *Staples v. Young*, 149 Wis. 2d 80, 84, 438 N.W.2d 567, 569 (1989).

Although the doctrine of state-created liberty interests developed in debates over the right to good-time credits, it applies to any law that creates a liberty interest "by establishing 'substantive predicates' to govern official decision-making, ... [and] ... by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 109 (1989).

Defendants like Ozuna have a state-created liberty interest in their ordered expungements. Once a trial court orders expungement, the outcome is "mandated" "upon a finding that the relevant criteria have been met." Wis. Stat. 973.015(1m)(b) ("A person has successfully completed the sentence if the person *has not been convicted of a subsequent offense. 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 … which *shall have the effect of expunging the record*.).

Wisconsin Stat. 973.015 employs the mandates that create a protected interest for Due Process purposes. Once a defendant with an expungement order satisfies fixed criteria (no revocation, no subsequent offense, satisfies conditions of probation), a certificate must be issued and expungement must be effected.

A defendant's interest in a completed expungement implicates liberty in the broad Fourteenth Amendment sense. An individual with an "expunged conviction" has a different status than an individual with an unexpunged conviction in future interactions with the criminal justice system. An expunged conviction record cannot be considered at a subsequent sentencing; cannot be used for impeachment at trial under 906.09(1); and is not available for repeater sentence enhancement. *See, e.g.*,2014 WI 129, ¶ 19, 359 Wis. 2d 320, 856 N.W.2d 811.

For the purposes of occupational licensure, an expunged conviction often eliminates legal disqualifications. More generally, "expungement offers young offenders a fresh start….allowing [them] to "present themselves to the world—including future employers—unmarked by past wrongdoing." *Hemp,* 353 Wis.2d 146, ¶ 17, 844 N.W.2d 421.

Because expungement implicates the liberty associated with "starting" afresh in the criminal justice system and the liberty associated with occupational/associational choice, an individual cannot be deprived of an ordered expungement without due process. *See Goldberg v. Kelly* 397 U.S. 254, 265 (1970). The State is correct that due process is flexible, and that *predeprivation hearings* are not always necessary. (Res. Br. at 26).

But some kind of process is necessary and the State ignores that requirement.

If the State is correct that a circuit court can reject the probationary authority's decision without fact-finding, evidence or argument, the only check on arbitrary deprivation is the possibility of winning, years later, on appeal. The State cites no precedent suggesting that this "protection" satisfies due process because there is none.

Under *Matthews v. Eldridge,* some form of pre-deprivation process is required. The first *Matthews* factor, the private interest in an earned expungement, is profound for reasons this Court recognized in *Hemp* and *Matesek***.** *See*, e.g., 2014 WI 129, ¶ 20; 2014 WI 27, ¶ 42. The second factor, the risk of an erroneous deprivation and the probable value of additional procedural safeguards, weighs heavily on the side of a hearing. Under the procedure set up by Wis. Stat. 973.015, the circuit court will have only the document submitted by the authority on which to base its decision. Given the limits of those forms, erroneous deprivations are likely. Notice and a meaningful opportunity to present evidence would reduce the risk of error.

The third factor, the government interest in less procedure, is minimal. The government wants successful probationers to get expungements and, as the State admits, the probationary authority is in the best position to assess a defendant's behavior and performance on probation. (Res. Br. at 13). The added cost to the government of a hearing on difficult cases would be minimal--courts are used to conducting limited scope hearings.

LAW agrees with Ozuna that a proper construction of Wis. Stat.

973.015 would make it unnecessary to decide the due process question. But if this Court affirms the Court of Appeals, it must determine how much process is required to protect Ozuna's state-created liberty interest.

CONCLUSION

For the reasons argued here and in Ozuna's briefs, this Court should reverse the Court of Appeals.

Dated this 3rd day of January 2017

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CERTIFICATION OF FORM/LENGTH

Kori L. Ashley, herein certifies that the motion meets the form and length requirements of Wis. Stat § 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,981 words.

CERTIFICATION OF COMPLIANCE WITH WIS. STAT § 809.19(12)

Kori L. Ashley herein certifies the following:

I have submitting an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that the 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 parties.

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CERTIFICATION OF SERVICE

Kori Ashley, herein certifies that she is employed by Legal Action of Wisconsin, which is located at 230 W. Wells St, Milwaukee, WI 53203, that on the 3rd day of January, 2017, 23 copies of Legal Action's Amended Non Party Brief was hand delivered to the Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688. Kori Ashley further certifies that she deposited in the U.S. Mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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