STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2300-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RACHEL M. HELMBRECHT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POSTCONVICTION RELIEF,
BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE CLARE L. FIORENZA,
CIRCUIT JUDGE, PRESIDING

STATE OF WISCONSIN'S BRIEF-IN-CHIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument. The relevant facts appear straightforward, and the briefs fully address the issue on appeal.

The State requests publication to make clear the process a circuit court must follow at sentencing in deciding whether to expunge a criminal record under Wis. Stat. § 973.015(1m)(a)1. (2013-14). While a recent, published decision of this court—*State v. Sobonya*[1]—compels rejection of Helmbrecht's overall position on appeal, further appellate explanation appears warranted.

RELEVANT STATUTE

Section 973.015(1m)(a)1. provides in pertinent part that:

> [W]hen 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.

ISSUE PRESENTED FOR REVIEW

Section 973.015(1m)(a)1. required the circuit court to make two factual findings at sentencing before it could exercise its discretion to expunge Helmbrecht's criminal record:

- Helmbrecht would benefit from expungement.
- Society would suffer no harm from expungement.

The court denied her request for expungement because it couldn't find that society would suffer no harm (32:3-4; 52:49). Is that determination clearly erroneous?

The State's description of the issue presented for review differs significantly from Helmbrecht's. That's because she misinterprets § 973.015 (1m)(a)1., as explained below.

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[1] 2015 WI App 86, ¶ 8, 365 Wis. 2d 559, 872 N.W.2d 134.

Helmbrecht's opening brief presents relevant procedural facts. The State will present additional facts as necessary.

ARGUMENT

Before it could exercise its discretion at sentencing to grant or deny Helmbrecht's request for expungement under § 973.015(1m)(a)1., the circuit court had to find, as fact, that expungement would benefit Helmbrecht and would cause no harm to society. Because the court couldn't find that society would suffer no harm from expungement—and because that determination isn't clearly erroneous—the court properly denied her request.

Helmbrecht requested expungement of her criminal record at her sentencing for possession of methamphetamine (20:1; 24). The circuit court said "no." It found she would benefit from expungement, but society wouldn't:

> THE COURT: With respect to expungement – Okay. I did – I have considered this, and I cannot make the finding that society would not be harmed. Clearly, your client would benefit, but I cannot make that – that finding, at this time. I respectfully deny the request for expungement. I have considered the request.

(52:49).

Helmbrecht and the State disagree over whether, at sentencing, a circuit court must consider benefit to the defendant and lack of harm to society as factors bearing on its exercise of discretion, or whether the court must make findings of fact with respect to both benefit and harm before it exercises its discretion to order or deny expungement.

Helmbrecht believes the circuit court must consider them as factors bearing on its exercise of discretion. *See* Helmbrecht's Br. at 10 ("[T]he expungement statute sets forth specific factors for a court to consider when exercising that discretion."). She believes *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 should guide

the court's discretionary decision-making. *See id.* at 8-11. And she asks this court to reverse the circuit court's denial of expungement and remand the case so that court may "exercise its discretion on the question of expungement eligibility in the proper manner[.]" *Id.* at 14.

Helmbrecht misinterprets the expungement statute.

This is the proper interpretation: § 973.015(1m)(a)1. requires a circuit court to make two factual findings at sentencing before it may exercise its discretion to order or deny expungement:

- The defendant will benefit from expungement.
- Society will suffer no harm from expungement.

Only if—and only after—the court makes both affirmative findings may it exercise its discretion to order or deny expungement.

This interpretation is true to the principles of law governing statutory construction and interpretation. That process begins by examining the statutory language, and ends if its meaning is plain. *State v. Iverson*, 2015 WI 101, ¶ 20, 365 Wis. 2d 302, 871 N.W.2d 661.

The meaning of § 973.015(1m)(a)1. is plain. If a person satisfies the age requirements and stands convicted of a specified offense, the circuit court may expunge the record if the court finds the person will benefit from expungement, and society will suffer no harm.

In § 973.015(1m)(a)1., the legislature's use of the term "may" submits the issue of expungement to the court's discretion, but only if it makes the predicate factual findings. *Cf. Verhaagh v. LIRC*, 204 Wis. 2d 154, 160, 554 N.W.2d 679 (Ct. App. 1996) ("The use of the term 'may' [in a worker's compensation statute] clearly submits the issue of default orders to the LIRC's discretion.").

These factual findings—benefit to the defendant and lack of societal harm—serve as conditions precedent to the circuit court's

exercise of discretion. They aren't part of that exercise of discretion. They're findings of fact the court must make before it can exercise its discretion to order or deny expungement.

Sobonya confirms the correctness of this interpretation.

Like Helmbrecht, Sobonya requested expungement. The circuit court refused to order it, believing it would undermine the deterrent effect of the sentence. Sobonya later offered postconviction expert opinion testimony as a new factor relevant to the court's decision on expungement. 365 Wis. 2d 559, ¶ 1.

In discussing the legitimacy of deterrence as a sentencing objective, this court correctly identified the role played by the two statutory factors contained in § 973.015(1m)(a)1.:

> Deterrence to others has been recognized as a legitimate objective for a trial court to consider and articulate as part of its sentencing decision, *see State v. Gallion*, 2004 WI 42 ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197, especially given that the legislature requires that the court find that 'society will not be harmed' by the expungement of a criminal record before exercising its discretion under Wis. Stat. § 973.015(1m)(a)(1)[.]

Sobonya, 365 Wis. 2d 559, ¶ 8.

Sobonya settles the disagreement between Helmbrecht and the State over the interpretation of § 973.015(1m)(a)1. The State has it right. If the circuit court finds the necessary facts, only then does it exercise its discretion.

This court must follow *Sobonya*. "[T]he court of appeals may not overrule, modify, or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

And while the circuit court didn't specifically rely on this analysis in denying Helmbrecht's request for expungement, see 32:2-4, this court should rely on it and affirm the lower court's decision. "An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985).

Here, the circuit court denied Helmbrecht's request for expungement because it couldn't find that society would suffer no harm from expungement (32:3-4; 52:49).

Is that finding clearly erroneous?

No, it isn't.

A circuit court's stated inability to find a required fact is, itself, a finding of fact. It's a finding that a particular fact doesn't exist. This court will uphold that finding unless it's clearly erroneous, that is, against the great weight and clear preponderance of the evidence. *See* Wis. Stat. (Rule) § 805.17(2); *see also State v. Vaughn*, 2012 WI App 129, ¶ 12, 344 Wis. 2d 764, 823 N.W.2d 543; *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748.

In its postconviction order (32), the circuit court carefully explained why it was unable to find, as a matter of fact, that society wouldn't suffer any harm from expungement:

- At arrest, Helmbrecht possessed three drugs—23 Clonazepam pills, a small amount of marijuana, and 1.2 grams of methamphetamine—and lied to police about having a prescription for the pills (32:3).

- She "cavalierly" told police "You can't bash [methamphetamine] until you tried it" (32:3).

- She had been convicted of possessing the methamphetamine, and the other potential drug offenses read in (32:3-4).

- She had a drug-related offense as a juvenile offender (32:4).

- She had been a long-term, steady methamphetamine user (32:4).

- In light of her medical training, her drug use was "disconcerting" (32:4).

- She brought her methamphetamine into Milwaukee County from a different county, thereby exacerbating the danger to local residents (32:4).

The circuit court found that "society has a compelling and overriding interest in not only deterring people from using this drug but also in punishing people who bring this drug into this county, which historically has not seen a significant methamphetamine problem" (32:4). The court also found that "those interests would be compromised if this matter were expunged, and therefore, the court finds now, as it did at the time of sentencing, that society would be harmed if this conviction did not remain on the defendant's record" (32:4).

The circuit court worried about the impact expungement would have on deterrence and punishment. That's a legitimate consideration. In *State v. Matasek*, 2014 WI 27, ¶ 9, 353 Wis. 2d 601, 846 N.W.2d 811, the circuit court also determined that expunging Matasek's drug conviction would in fact harm society by depreciating the seriousness of the offense, and so reduce its value as a general or specific deterrent:

> The next part is would society be harmed. Yeah, they would in my opinion. Because it would, in society's eyes, in this defendant's eyes, it would unduly depreciate the seriousness of what he's done. It wouldn't reflect delivering two pounds of marijuana. It would send a contrary message to this defendant. It would send a contrary message to

> society. And it would fail to put them on notice of what he's done here.

See also United States v. Brown, 381 U.S. 437, 458 (1965) ("Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive").

Other reasons why society would in fact suffer harm from expungement of Helmbrecht's criminal record find full support in the facts of this case.

Expungement curtails society's "strong public interest in maintaining accurate and undoctored records." *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004). "Society has an interest in maintaining criminal histories for purposes of investigating future crimes and protecting the community from integrating dangerous or dishonest people into homes and businesses." J. Geffen & S. Letze, Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—*State v. Schultz*, 31 Wm. Mitchell L. Rev. 1331, 1341 (2005) (footnote and citation omitted).

Regrettably, the circuit court had no reason to believe at sentencing that Helmbrecht had become fully rehabilitated. There had been no lengthy period of crime-free rectitude.

That hasn't changed. Helmbrecht's judgment of conviction is fairly fresh—less than two years old—and the record indicates she's had at least one relapse into methamphetamine use since her sentencing (24; 26).

Potential employers, lenders, property managers, and others are sometimes averse to a person's criminal past and the possibility of future criminality. Rightly so:

> Although this court rejoices along with the angels of God for every sinner that repents, to say that an applicant's honest character [as reflected in his prior criminal history] is irrelevant to an employer's hiring decision is ludicrous. In fact, it is doubtful that any one personality trait is more important to an employer than the honesty of the prospective employee.

> It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness.

EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752-53 (S.D. Fla. 1989). "[S]ociety has an interest in maintaining criminal histories for purposes of future crime investigations and in order to make hiring, rental, and other decisions about individuals. Statutes and cases reflect the tension between these interests." Deborah K. McKnight, Information Brief: Expungement of Criminal Records, Report for the Minnesota House of Representatives, 2, available at http://www.house.leg.state.mn.us/hrd/pubs/expgrecs.pdf (last visited Mar. 11, 2016).

Helmbrecht has trained as a Certified Nursing Assistant (20:5). She sought leniency at sentencing to permit her to continue in this field (52:28). Certified Nursing Assistants normally provide hands-on patient care, and may administer medications. *See* http://www.allnursingschools.com/nursing-careers/certified-nursing-assistant/job-description/ (lasted viewed March 11, 2016).

After reviewing Helmbrecht's unexpunged record in this matter, a potential employer—particularly in the health care field—could reasonably decide not to risk hiring a long-term methamphetamine user who lied to police, who rationalized her use of the drug ("You can't bash [methamphetamine] until you tried it"), who made recreational use of the prescription drug Clonazepam, and who once again used methamphetamine shortly after conviction and sentencing.

"An employer's inability to learn about a job applicant's past misdeeds prevents managers from taking precautions to minimize potential business risks." Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret*, 41 Wash. U. J. Urb. & Contemp. L. 3, 9 (1992). Expungement of Helmbrecht's record could deprive a potential employer—and other members of society—of important information. It could lead to the employer making an ill-informed, costly hiring decision—whether

the price is paid in drug-related poor performance or absenteeism, termination of employment, or potential lawsuits brought in tort by third parties under a theory of vicarious liability. "An employer has a common sense need for job applicant information because an employer bears the ultimate risk of an employee's damage. . . . Employers also have a legitimate interest in knowing about expunged offenses involving drug and alcohol abuse." *Id.* at 4, 10.

The circuit court plainly believed the benefits of expungement ran to Helmbrecht, but at society's expense. That finding finds ample support in the record, and she gives this court no good reason to go behind it.

Positive findings on the two statutory criteria—benefit to the defendant and lack of harm to society—allow a circuit court to exercise its discretion at sentencing and decide whether to grant expungement. Here, the court found Helmbrecht failed to satisfy the second criteria. That finding isn't clearly erroneous. This court should so hold.

And that holding should end this court's work. Any discussion of whether *Gallion* should apply to a circuit court's eventual exercise of discretion in deciding the expungement issue must wait for a case where the court made the requisite factual findings and actually exercised its discretion in ordering or denying expungement. Here, it would constitute an impermissible advisory opinion. "[W]e do not give advisory opinions." *Brown v. LaChance*, 165 Wis. 2d 52, 58, 477 N.W.2d 296, 299 (Ct. App. 1991).

If this court disagrees—if it believes Helmbrecht's case presents a proper opportunity to decide *Gallion*'s applicability to expungement decisions—then the State requests the opportunity to file a short supplemental brief on that issue.

CONCLUSION

A circuit court may exercise its discretion under § 973.015(1m)(a)1. and order or deny expungement if—but only if—it makes two predicate findings of fact. Helmbrecht's court made one finding, but not the other. No reason exists to overturn that decision.

This court should affirm Helmbrecht's judgment of conviction and the order denying her motion for postconviction relief.

Dated at Madison, Wisconsin, this 4th day of April, 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 2,358 words.

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Gregory M. Weber
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of April, 2016.

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Gregory M. Weber
Assistant Attorney General