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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000866-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIAMOND J. ARBERRY,

Defendant-Appellant-Petitioner.

On Review from a Decision of the Court of Appeals
Affirming a Judgment of Conviction and an Order Denying a
Postconviction Motion Requesting Expungement
Entered in the Fond du Lac County Circuit Court, the
Honorable Peter L. Grimm, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. When the parties and the court overlook a defendant's eligibility for expungement at her sentencing hearing, can she present her eligibility as a "new factor?" If not, should courts be required to consider expungement for eligible defendants at sentencing?

The circuit court interpreted this court's opinion in ***Matasek*** to mean that eligibility for expungement could only be decided at the sentencing hearing, thus, it was barred from making such a determination at a postconviction hearing.

The court of appeals affirmed, holding that the circuit court's decision followed ***Matasek***. In addition to holding ***Matasek*** barred Ms. Arberry's claim, the court of appeals was critical of whether Ms. Arberry provided sufficient factual support for her claim that the parties overlooked expungement, making it a new factor. Lastly, the court of appeals stated the circuit court had no duty to discuss expungement at sentencing unless requested to do so.

2. Did the circuit court err in its exercise of discretion when it denied expungement eligibility based on reasons that would apply to any case?

After denying Ms. Arberry's motion, the court stated that even if it would have considered expungement it would have denied eligibility. The court gave reasons for denying expungement that would have applied to any case such as, "convictions have consequences and they are of public record so that the public can protect themselves." (49:7).

The court of appeals did not address this issue because it decided that the circuit court could not make an eligibility finding at a postconviction hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, both oral argument and publication are warranted.

GOVERNING STATUTE

973.015 Special disposition.

(1m) (a) 1. Subject to subd. 2. and except as provided in subd. 3., when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).

2. The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d) or (3), and the person was under the age of 18 when he or she committed it.

3. No court may order that a record of a conviction for any of the following be expunged:

a. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048

(2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095.

b. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 (1) (a).

(b) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

…

(3) A special disposition under this section is not a basis for a claim under s. 775.05.

STATEMENT OF THE CASE

On August 27, 2015, Ms. Arberry pled no contest to one count of retail theft as party to a crime contrary to Wis. Stat. § 943.50(1m)(d), a Class I felony, and one count of attempted misdemeanor retail theft as party to a crime and as a repeater, contrary to Wis. Stat. § 943.50(1m)(b), a Class A misdemeanor. (25; App. 104-108).

The court accepted Ms. Arberry's pleas and proceeded directly to sentencing. On the first count, the court sentenced Ms. Arberry to one year of initial confinement followed by two years of extended supervision. On the second count, the

court imposed and stayed a prison sentence and ordered that Ms. Arberry be placed on probation for two years, consecutive to the prison term. (48:24). Neither the parties nor the court discussed or addressed expungement.

Ms. Arberry filed a postconviction motion asking the court to grant her eligibility for expungement. (29). The court held a hearing on the motion (49) and denied Ms. Arberry's request for expungement eligibility. (37). Ms. Arberry appealed. (39). The court of appeals affirmed. ***State v. Arberry***, 2017 WI App 26, ¶5, 375 Wis. 2d 179, 895 N.W.2d 100. (App. 103). This court granted Ms. Arberry's petition for review.

STATEMENT OF FACTS

The charges in this case arose from an incident that occurred on May 13, 2015, not long before Ms. Arberry, then 18 years old, was set to graduate from high school. (48:15). On that day, Ms. Arberry's older sister and her sister's friend, Lyeshia Kittler, asked her if she wanted to go for a ride. (2:3). The three young women rode in Ms. Kittler's car and eventually made their way to Forest Mall in Fond du Lac, Wisconsin.

There, an employee of the Buckle Store saw three women trying to place merchandise in a purse in order to leave without paying for it. Police responded, confronted the women, and searched Ms. Kittler's vehicle where they found additional merchandise from retail stores in Green Bay and Oshkosh, Wisconsin. (2:3).

The state charged Ms. Arberry with five crimes in Fond du Lac County Case Number 15CF294. (2). Three of the charges alleged that Ms. Arberry was party to the crime of

theft or attempted theft. (2). The state noted at the preliminary hearing that it was "not alleged that [Ms. Arberry] fully participated as a sole actor." (46:7).

The parties reached a plea agreement and the case proceeded to sentencing. Both the defense and the state recommended county jail time as well as probation. (48:12). The state explained that it was not requesting a prison sentence because the offense was not drug-related and the items recovered were purses and clothing. (48:12). The state noted that this was not Ms. Arberry's first criminal conviction.

The defense explained that Ms. Arberry was a high school senior at the time of the offense. (48:15). Despite her youth, Ms. Arberry had a strong work history and had worked at McDonald's, Fed Ex, and done temp work. (48:13). Most recently, she had been a healthcare assistant at a nursing home. (48:13).

During her senior year, Ms. Arberry became pregnant. She returned to school just two weeks after giving birth in order to stay on track with her schoolwork and to work toward graduating with her class. (48:13). At the time of the offenses, Ms. Arberry did not have money to pay the $95 fee required to obtain a cap and gown for her graduation ceremony. Therefore, the defense argued that although not planned, Ms. Arberry's crime was economically motivated. (48:15).

At sentencing, the court acknowledged Ms. Arberry's youth and impulsivity, but was also concerned about her repeater status and the fact that items were taken from more than one store. (48:21-22). The court declined to impose a jail sentence, citing concerns that, given the other sentences she was serving, she would "hopscotch" to various county jails.

(48:23). Ultimately, the court imposed a prison sentence noting, "I don't want to bury her in prison at all, but I want to give her the tools and abilities for long-term success and outcomes." (48:24).

The parties did not discuss whether Ms. Arberry should be made eligible for expungement. Ms. Arberry filed a postconviction motion seeking a determination that her record could be expunged upon the successful completion of her sentences. (29). Ms. Arberry argued that the parties overlooked making the eligibility determination at the time of sentencing. Ms. Arberry's postconviction motion suggested that this may have been because of the recent clarification by the Wisconsin Supreme Court in ***State v. Matasek***[1] that a determination of eligibility for expungement is to be made at the time of sentencing.

The court denied the motion and stated the following:

> All Right. Thank you. The Court appreciates that the extent of the question has now been interrupted (sic) and ruled upon. While there are various efforts to amend the statute or propose new language to amend the statute, that doesn't seem to be going very far in the Legislature. And I have taken an interest in that but the Court nonetheless is constrained by the statute. It does require the matter to be granted at the time of the sentencing.If somebody would have asked me about it, I would have said, well, no, she's not getting expungement. Granted, no one brought it up. I don't think as a judge, I have to say no when no one has asked me to say no or asked me to grant it. So I think technically the motion is barred by the case law that's been rendered.

[1] ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811.

> And my second ruling would be that, on the merits, even if I were to consider or think about it – and I can be honest and I can tell you that if you would have asked me at sentencing, I would have said no. And I'm also going to say no today for the reason that convictions have consequences and they are of public record so that the public can protect themselves. The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or trade or employment or otherwise.
>
> We have laws that prevent discrimination for these convictions. And I'm all for rehabilitation and people paying their debts back to society. And I know many employers who hire people with records. So I think the merits of the motion as addressed nonetheless with the statute and the case law, I would in my discretion deny the motion on the merits. This also I think is blocked or barred per the statute and the case law that has interpreted the statute. So either way, it's the same result. Motion denied.

(49:6-8; App. 114-116).

The court of appeals affirmed. It was not convinced that the issue of expungement was overlooked and determined that ***Matasek*** meant that the circuit court was barred from determining expungement eligibility at a postconviction hearing. ***Arberry***, 2017 WI App 26, ¶4-5. (App. 102-103) It further concluded that it is not a mandatory duty of the court to consider expungement at sentencing. ***Id.,*** ¶4.

ARGUMENT

I. When the Parties and the Court Overlooked Expungement at Her Sentencing Hearing, Ms. Arberry Should Have Had an Opportunity to Bring the Issue before the Court, Either through a Sentence Modification Motion Based on a New Factor, or Because Courts Should be Required to Address Expungement at Sentencing Whenever a Defendant Is Eligible.

A. Introduction and Summary of Argument.

In Wisconsin, young defendants convicted of less serious crimes are eligible to have their records expunged upon successful completion of their sentences. Wis. Stat. § 973.015. There are three specific statutory requirements a defendant needs to meet in order to be eligible. First, a defendant must be under the age of 25 at the time of the commission of the offense. Wis. Stat. § 973.015 (1m)(a)1. Second, the defendant must have been found guilty of a crime that carries a maximum penalty of six years or less. Wis. Stat. § 973.015 (1m)(a)1. Third, if the defendant is convicted of a Class H or I felony, they must not have been convicted of a prior felony or have committed a violent offense. Wis. Stat. § 973.015 (1m)(a)3a&b.

For this limited class of eligible defendants, the benefits of expungement are significant. Wisconsin Statute § 973.015, the "expungement statute," allows circuit courts to "shield youthful offenders from some of the harsh consequences of criminal convictions," ***State v. Leitner***, 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341, citing ***State v. Anderson***, 160 Wis. 2d 435, 440, 446 N.W.2d 681 (Ct. App. 1991), by expunging the record of their conviction. "Expungement offers young offenders a fresh start without

the burden of a criminal record and a chance at becoming law-abiding and productive members of the community. Expungement allows individual defendants a chance to move past the barriers that can be created by a criminal record by giving them an 'incentive to rehabilitate,' which, in turn, 'promotes the public's safety.'" ***State v. Hemp***, 2014 WI 129, ¶19, 359 Wis. 2d 320, 856 N.W.2d 811.

In ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811, this court resolved the issue of when a circuit court must exercise its discretion regarding whether a defendant is eligible for expungement, noting that some counties had been handling it differently than others. ***Id.***, ¶5. In doing so, this court interpreted the following portion of the expungement statute:

> …when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines that the person will benefit and society will not be harmed by this disposition…

Wis. Stat. §973.015(1m)(a)1.

In ***Matasek***, this court held that a decision on whether or not to grant expungement must be made at the time of sentencing rather than upon completion of the sentence. This court agreed that there were policy reasons for permitting the circuit court to decide whether to grant expungement after the offender completes his or her sentence rather than at the time of sentencing. 353 Wis. 2d 601, ¶41. However, this court held that the plain language of the statute requires that "if a

circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." ***Id.***, ¶45.

This case asks this court to determine if Ms. Arberry can bring a motion for sentence modification, arguing that her eligibility is a "new factor." This question should be answered "yes" because this statute does not limit itself to the original sentencing hearing and issues that are required to be resolved at sentencing may still be addressed in motions for sentence modification.

Further, if this court does not allow Ms. Arberry to raise this issue as a "new factor," this court should rule that circuit courts are required to consider expungement for eligible defendants in order to ensure that eligible defendants have the opportunity to have a court consider whether an eligible defendant's record can be expunged.

Finally, this case asks this court to determine whether the court properly exercised its discretion in denying expungement. This court should conclude that the circuit court erred in its exercise of discretion when it did not apply the law to the facts of Ms. Arberry's case and instead provided a reason that would be used to deny expungement in any case, in effect creating a personal sentencing policy contrary to law.

B. Ms. Arberry met her burden to show that her eligibility for expungement is a new factor because it was unknowingly overlooked and highly relevant to her sentence.

Ms. Arberry's eligibility for expungement is a new factor that warrants modification of her sentence.

Circuit courts have inherent authority to modify criminal sentences. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). The power is exercised "to prevent the continuation of unjust sentences." ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524. With a few exceptions, a court may modify a sentence and rectify an unjust sentence only if the defendant proves a new factor.[2] A new factor is defined as:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828, *quoting* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If the defendant establishes a new factor, the court must determine, in its exercise of discretion, whether modification of the sentence is warranted. ***Harbor***, 333 Wis. 2d 53, ¶37.

Whether information presented by the defendant constitutes a new factor is a question of law reviewed independently by this court. ***Id***., ¶33. But whether a new factor justifies sentence modification is a matter within the circuit court's discretion. ***Id***.

Here, because the circuit court did not believe it could rule on expungement at a postconviction hearing, it did not

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[2] A court may also modify a sentence to correct a legal error or because the sentence is unduly harsh or unconscionable. ***State v. Stenklyft***, 2005 WI 71, ¶¶60 & 115, 281 Wis. 2d 484, 697 N.W.2d 769. However, [i]f there are cases that overturn a sentence" on the latter ground "they are few and far between." ***Id***. at ¶115.

make an explicit ruling about whether or not Ms. Arberry's eligibility for expungement was unknowingly overlooked at her sentencing hearing. The record shows that it was.

Both the transcripts of the plea and sentencing hearing, as well as the postconviction motion, demonstrate that the parties and the court overlooked Ms. Arberry's eligibility for expungement. It was not part of the plea agreement. (48:4). Neither party mentioned expungement while arguing for the joint sentencing recommendation. (48:11-17). Nor did the court make any mention of Ms. Arberry's eligibility for expungement when it discussed the rationale for the sentence it imposed. (48:20-25).

In fact, Ms. Arberry does meet the statutory criteria to be eligible for expungement. Ms. Arberry was convicted of a Class I felony and a Class A Misdemeanor, both offenses that carry a maximum penalty of less than six years of imprisonment. Ms. Arberry was under 25 at the time of the offense. Ms. Arberry's date of birth is September 21, 1996. (25:App. 101). Ms. Arberry was convicted of a felony in this case, but had not been convicted of a felony in any previous case. (48:8, 14). Therefore, it is clear that Ms. Arberry was in fact eligible for expungement. *See* Wis. Stat. § 973.015(1)(a).

At the postconviction hearing, while the state argued against expungement, it did not argue that Ms. Arberry's eligibility had ever been brought up or considered. The court was even more clear in acknowledging that expungement was not considered when it stated, "*If* somebody would have asked me about it, I would have said, well, no, she's not getting expungement. Granted, *no one brought it up. I didn't bring it up*." (49:7 (emphasis added)). These facts of record establish that Ms. Arberry's eligibility for expungement was unknowingly overlooked.

In ***State v. Ralph***, 156 Wis.2d 433, 546 N.W.2d 657, (1990), the prosecutor informed the circuit court about the sentencing recommendations he was making for Mr. Ralph's accomplices at the time of Mr. Ralph's sentencing. However, neither party informed the court that one of Mr. Ralph's accomplices had previously been imprisoned. This information was presented to the court in the form of a "new factor" motion for sentence modification. The court of appeals concluded that the accomplice's "prior jail term is a new factor. No party mentioned that factor at the sentencing hearing. All parties unknowingly overlooked that factor." ***Id.***, 438. This was so because even though the fact that the accomplice had been previously imprisoned was in existence at the time of sentencing and the parties could have discovered that fact, the parties overlooked it. So, in ***Ralph*** it was deemed sufficient to show that a fact that was in existence at the time of sentencing was not brought up at sentencing in order to prove it was a new factor.

In ***State v. Boyden***, 2012 WI App 38, 340 Wis. 2d 155, 814 N.W.2d 505, the defendant brought a new factor motion arguing that his assistance to federal law enforcement justified the modification of his sentence. There, the circuit court, with the same judge presiding over the postconviction motion hearing as the sentencing, stated that although it was not mentioned on the record, "everybody knew Boyden was cooperating with federal authorities." ***Id.***, ¶10. The state also clarified that it was aware of Boyden's assistance, but did not consider it relevant to his state case. ***Id.*** Because the circuit court made clear that it was aware of the assistance, the court of appeals concluded that it was not a new factor.

In Ms. Arberry's case, the same judge presided over both the sentencing and postconviction motion hearings. Unlike in ***Boyden***, no party argued that it actually had been

aware of Ms. Arberry's eligibility for expungement. Just the opposite, the circuit court stated that it had not been asked about it and did not bring it up. (49:7).

Thus, Ms. Arberry's case is like ***Ralph*** in that failure of any party to mention a fact in existence is sufficient to show the fact was unknowingly overlooked. Her case is unlike ***Boyden*** in that no party alleged that her eligibility had actually been considered even if it had not been stated on the record. Ms. Arberry met her burden to show that her eligibility for expungement was unknowingly overlooked.

Ms. Arberry's eligibility for expungement also meets the next portion of the new factor definition because it is highly relevant to her sentence. The court acknowledged her young age, which is relevant to her eligibility for expungement. (48:22). The court also explained that the sentence it imposed would allow Ms. Arberry to engage in "assessments of her future and goals." (48:23).

Expungement is highly relevant to these objectives because Ms. Arberry's future and goals would benefit from not having these offenses readily accessible on CCAP. It would also provide an incentive for her to successfully complete her sentence, enabling a brighter future. Finally the court stated, "I want to give her the tools and abilities for long-term success and outcomes." (48:23-24). Expungement would help to enable a successful outcome and long-term success for Ms. Arberry because it would allow her to "present [herself] to the world – including future employers-unmarked by past wrongdoing." ***State v. Hemp***, 2014 WI 129, ¶19, 359 Wis. 2d 320, 856 N.W.2d 811. Thus, expungement was highly relevant to Ms. Arberry's sentence.

The circuit court should have determined that Ms. Arberry's eligibility for expungement was a new factor

and then moved onto the second prong of the test. If a new factor is present, the court exercises its discretion to determine whether sentence modification is warranted. ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. The circuit court's exercise of discretion is addressed below in Part II of the argument section.

C. ***Matasek*** does not bar appellate review of sentences.

The circuit court ruled that it could not grant Ms. Arberry eligibility for expungement because the case law interpreting the expungement statute requires "the matter to be granted at the time of sentencing." (49:7; App. 112).

While it is correct that this court recently clarified in ***Matasek*** that expungement is to be addressed at the time of sentencing, this case does not bar Ms. Arberry from raising the issue in a motion for sentence modification. In ***Matasek***, the court placed Mr. Matasek on probation and defense counsel requested that the court delay its decision on whether or not to grant expungement until Mr. Matasek had successfully completed his probationary term. 2014 WI 27, ¶8. The circuit court discussed the benefits of having a defendant return to court after a number of years, having completed his or her sentence, so that the court could evaluate his or her progress and determine eligibility for expungement at that point. ***Id.***, ¶9. Nonetheless, the court concluded that the language in the expungement statute prevented it from waiting until the sentence was complete. Specifically, the statute reads in part: "A circuit court may order at the time of sentencing the expunction of a record upon the offender's successful completion of a sentence." Wis. Stat. § 973.015(1)(a).

Ms. Arberry's request for a finding of eligibility for expungement is not in conflict with ***Matasek***. Ms. Arberry is not attempting to revisit an expungement decision after having completed her sentence nor is she asking the court to delay its decision until she has done so. Rather, she acknowledges that the proper time for the circuit court to make this determination is at sentencing. However, if expungement eligibility is overlooked at the original sentencing hearing, the proper vehicle to allow the court to exercise its discretion is through a motion for sentence modification.

In fact, this was the remedy the state advocated for when this scenario was presented in ***Matasek***. In ***Matasek***, the court acknowledged that some counties had been making expungement decisions at the time of sentencing while others had been delaying the decision until the completion of the sentence. 2014 WI 27, ¶5. The defense raised concerns about defendants who had been sentenced in counties believing the circuit court could defer its decision on expungement. ***Id.*** The state responded that those defendants would have the right "after this decision to challenge his sentence, including the circuit court's expunction decision."

Therefore, while the state was arguing for a holding in ***Matasek*** that stated expungement must be considered at sentencing and not after the completion of the sentence, it still acknowledged that the expungement decision could be considered as part of an appeal. In its brief, the state made it even more clear, stating that defendants may move for sentence modification under 809.30 or 973.19 and that "[s]imply because a circuit court must make the decision about expunction at the time of sentencing, does not eliminate a defendant's right to challenge his sentence, including the

expunction decision." State's Br. 16, ***Matasek***, 353 Wis. 2d 601 (No. 2012AP1582-CR).[3]

The state's argument in ***Matasek*** directly contradicts the position the circuit court took here. The circuit court is not barred from considering its expungement decision when it was overlooked at the time of sentencing and brought before the court in a motion for sentence modification.

If the circuit court's logic were correct, then numerous other items that the court is required to address at sentencing such as fines, conditions of supervision, and eligibility for ERP or CIP could not be addressed or amended on appeal. In reality, these items are routinely addressed in motions for sentence modification.

For instance, the statute governing eligibility for ERP states that "*When imposing a bifurcated sentence*…the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program…" Wis. Stat. § 973.01(3g) (emphasis added). This statute makes ERP eligibility something that the court must consider at the time of sentencing. This does not, however, mean it cannot be addressed after sentencing when it has been overlooked. In fact, the circuit courts even provide a form, CR-263, allowing defendants to petition the court after sentencing to declare them eligible for the program.[4]

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[3]Available at: https://acefiling.wicourts.gov/documents/show_ any_ doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2012AP001582&p%5bdocId%5d=106881&p%5beventSeqNo%5d=55&p%5bsectionNo%5d=1

[4] Available at: https://www.wicourts.gov/formdisplay/CR-263.pdf?formNumber=CR263&formType=Form&formatId=2&language=en

Although it is possible that a motion requesting ERP eligibility may be raised as a challenge to the court's exercise of discretion, rather than as a new factor motion, it does not change the fact that the statute states that ERP eligibility is to be considered "when imposing a bifurcated sentence" and this language does not make it immune to review on appeal.

In this case, Ms. Arberry's eligibility for expungement was overlooked at sentencing. It was not addressed by the defense, the state, or the court. (48). Nor did any of the parties explain that it had been considered and rejected at the postconviction hearing. (49; App. 106-115). Thus it is appropriate for review on direct appeal. *See* ***State v. Harbor,*** 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (stating a new factor for sentence modification purposes can be facts highly relevant to the sentence, in existence at the time of the sentence, but "unknowingly overlooked by all of the parties").

Therefore, this court should reverse the court of appeals decision and order denying the postconviction motion and remand the case so that the circuit court can exercise its discretion and determine whether Ms. Arberry is eligible for expungement.

D. If the fact of eligibility for expungement may not be raised as a new factor, this court should require circuit courts to address expungement at the time of sentencing in order to effectuate the purpose of the expungement statute.

In this case, Ms. Arberry asked the circuit court to exercise its discretion regarding her eligibility for expungement after her eligibility was unknowingly overlooked by the parties and the court. Both the circuit court and the court of appeals read ***Matasek*** to mean that

expungement cannot be considered in a postconviction motion. Both courts also believed that there was no obligation for the court to consider expungement unless it was requested. The court of appeals stated, "consideration of expungement is not a mandatory duty of the court at sentencing." ***State v. Arberry***, 2017 WI App 26, ¶4, 375 N.W.2d 179, 895 N.W.2d 100. While the circuit court stated, "I don't think as a judge, I have to say no when no one has asked me to say no or asked me to grant it." (49:7).

However, if this court prohibits defendants from having an opportunity to have the court consider expungement by raising overlooked eligibility as a new factor, it should use its supervisory authority to ensure courts consider expungement at the time of sentencing.

"Article VII, Section 3 of the Wisconsin Constitution expressly confers upon this court superintending and administrative authority over all state courts."[5] ***In re Jerrell C.J.***, 2005 WI 105, ¶40, 283 Wis. 2d 145, 699 N.W.2d 110. This authority is "unlimited in extent" and "indefinite in character." ***Id.*** *(*citing ***State v. Jennings****,* 2002 WI 44, ¶13, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting ***State ex rel. Fourth National Bank of Philadelphia v. Johnson***, 103 Wis. 591, 611, 79 N.W. 1081 (1899)).

This court has described Article VII, Section 3 as establishing "'a duty of the supreme court to exercise… administrative authority to promote the efficient and effective operation of the state's court system.'" ***In re Jerrell C.J.***, 2005 WI 105, ¶41 (citing ***Jennings***, 2002 WI 44, ¶14). Whether this court chooses to exercise its supervisory

[5] Article VII, Section 3, subsection 1 of the Wisconsin Constitution states: "The supreme court shall have superintending and administrative authority over all courts."

authority is a matter of "judicial policy rather than one relating to the power of this court." ***Id.*** (quoting ***In re Phelan***, 225 Wis. 314, 320, 274 N.W. 411 (1937)).

Here, it would be good judicial policy to require courts to consider expungement on the record for any eligible defendant being sentenced. Doing so would effectuate the purpose of the expungement statute.

The legislature's purpose in enacting the expungement statute was to both "provide a break to young offenders who demonstrate the ability to comply with the law" and also 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. Hemp***, 2014 WI 129, ¶20, 359 Wis. 2d 320, 856, N.W.2d 811. Subsequently, the legislature has amended the expungement statute to include those who are 25 years or younger, instead of 21 years of younger. ***Id.*** In addition, the legislature increased the maximum penalty that could apply to an offense and still be eligible for expungement, from one year to a maximum period of imprisonment of six years or less. ***Id.*** "The subsequent amendments to § 973.015 show a consistent legislative effort to expand the availability of expungement to include a broader category of youthful offenders." ***Id.***

Requiring courts to consider expungement for eligible offenders is consistent with the legislative purpose of ensuring that expungement is available in appropriate cases. If courts were required to address expungement as part of their sentencing duties, it would be harder for cases to slip through the cracks without having expungement considered when defendants are eligible for it. This is consistent with the

expansion of the availability of expungement and the legislature's desire to shield young offenders from harsh consequences in appropriate cases.

This would not be burdensome for trial courts. In order to determine if someone is eligible for expungement under the statute, a trial court will only need to know the defendants age at the time of the commission of the offense, the maximum penalty for the crime or crimes the person is convicted of, and if the person is being convicted of a felony, whether they have a prior felony conviction.

These are all facts that the trial court would need to be aware of in order to exercise its discretion regardless of whether it was required to consider expungement. Indeed, a "defendant's age" and whether the defendant has a "past record of criminal offenses" are factors that this court has recognized as being properly considered at sentencing. ***Harris v. State***, 75 Wis. 2d 513, 250 N.W.2d 7, (1977).

Requiring courts to address expungement for eligible defendants will help to promote the "efficient and effective operation of the state's court system." ***In re Jerrell C.J.***, 2005 WI 105, ¶41 (citing ***Jennings***, 2002 WI 44, ¶14). It is efficient to have court's address expungement at sentencing because they will already be considering the information they need to determine if a defendant is eligible. Requiring consideration of expungement will also create a record, which will help to avoid expungement claims on appeal, further promoting efficiency in the court system.

Requiring courts to address expungement at sentencing is also consistent with the language of the expungement statute. The statute reads, in relevant part, "…the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence…" Wis. Stat.

973.015(1)(a)1. While the legislature uses the word "may" to show that courts have the choice to grant or deny expungement to individual defendants, it does not use "may" regarding whether or not courts are required to consider expungement. Thus, a rule from this court would further the purpose of the statute and not conflict with the language of the statute.

This court has previously required circuit courts to make certain considerations on the record at sentencing, even when no statute required the court to do so. For example, it is a longstanding requirement that circuit courts should consider probation as a first alternative at sentencing. ***State v. Gallion***, 2004 WI 42, ¶25, 270 Wis. 2d 535, 678 N.W.2d 197. This standard provides that courts should impose probation unless the circuit court finds that: "(i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciated the seriousness of the offense if a sentence of probation were imposed." ***Id.***

This court adopted this standard in 1972 in ***Bastian v. State,*** 54 Wis. 2d 240, 247-248, 194 N.W.2d 687 (1972), based on the American Bar Association Standards. Years later, in ***State v. Gallion,*** 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197, this court reaffirmed that a sentencing pronouncement should include an on the record explanation if probation is rejected. This court adopted that rule because it was good policy. No statute required circuit courts to make this consideration at sentencing, but this court set out the requirement. Here, this court would not be creating a requirement with no statutory basis, but rather, the rule would help to implement an existing statute in an efficient and effective manner.

Although the above decision did not expressly rely upon this court's supervisory power, it makes clear that this court can regulate what circuit courts must consider at a sentencing hearing. Of course, the expungement statute still leaves the decision of whether or not to grant expungement to the discretion of the circuit court. But requiring courts to consider expungement on the record for defendants who meet the eligibility requirements is good policy that promotes the efficient and effective administration of justice while also effectuating the intent of the expungement statute.

II. The Circuit Court's Denial of Expungement Was Not a Proper Exercise of Discretion Because the Reasoning Could Be Applied to Any Case.

The plain language of the expungement statute reflects that when considering expungement, a circuit court must determine whether the person will benefit and whether society will not be harmed by expungement. Wis. Stat. § 973.015(1m)(a)1. This language requires the court to consider the two factors and make a discretionary decision regarding eligibility for expungement.

While deference is given to a circuit court's exercise of discretion, the exercise of discretion "contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." *See* ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). When the circuit court creates a record of exercising its discretion, that record "must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." See ***id.*** at 281.

A circuit court must do more than state the "magic words." ***State v. Gallion***, 2004 WI 42, ¶37, 270 Wis. 2d 535, 678 N.W.2d 197.

In ***State v. Helmbrecht***, 2017 WI App 5, ¶11, 373 Wis. 2d 203, 891 N.W.2d 412, the court of appeals clarified that with regard to the expungement decision, a circuit court exercises its discretion by applying the facts of the case to the two factors, 1) whether the person will benefit from expungement and 2) whether society will be harmed by expungement, set out in in the expungement statute. The sentencing court must set out the facts it considered and the rationale for its decision. ***Id***., ¶12. It is not sufficient to "simply state whether a defendant will benefit from expungement and that society will not be harmed." ***Id.***

During the circuit court's ruling at the postconviction motion, it stated that even if it did not believe it was barred from considering expungement, it still would not grant Ms. Arberry eligibility for expungement. The court stated the following in denying eligibility for expungement:

> And my second ruling would be that, on the merits, even if I were to consider or think about it – and I can be honest and I can tell you that if you would have asked me at sentencing, I would have said no. And I'm also going to say no today for the reason that convictions have consequences and they are of public record so that the public can protect themselves. The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or trade or employment or otherwise.

> We have laws that prevent discrimination for these convictions. And I'm all for rehabilitation and people paying their debts back to society. And I know many employers who hire people with records. So I think the merits of the motion as addressed nonetheless with the statute and the case law, I would in my discretion deny the motion on the merits.

(49:6-8; App. 114-116).

This reasoning does not reflect an exercise of discretion that is based on the facts of the record. While the statement "convictions have consequences and they are of public record so the public can protect themselves" (49:7; App. 115) makes reference to the public, it does not demonstrate a process of reasoning that applies the facts of Ms. Arberry's case to the factor that society will not be harmed by the expungement statute. The court discusses no facts specific to Ms. Arberry. The court does not explain why or how society would be harmed if her record in this case was expunged.

Nor did the court discuss whether Ms. Arberry would benefit from eligibility for expungement. The court did not discuss Ms. Arberry's young age and potential for employment given her work history, especially in light of the need to support her young daughter. Nor did the court explain that the opportunity for expungement could provide an incentive for her to complete her sentences successfully, specifically, the "rehabilitation and opportunities for self-improvement and self-treatment classes in Taycheedah" (48:24) that the court hoped she would have.

In fact, the circuit court's reasoning in this case could be recited in response to any request for expungement. The court of appeals has previously rejected such one-size-fits-all

reasoning. In ***State v. Cherry***, decided prior to January 1, 2014, when a circuit court exercised its discretion in deciding whether to impose the DNA surcharge in most felony cases, the court stated that the statute authorizing DNA surcharges "clearly contemplates the exercise of discretion by the trial court. 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393.

The court concluded that to properly exercise its discretion, the court must do something more than "stating that it is imposing the DNA surcharge because it can," and instead must "consider any and all factors pertinent to the case before it" and "set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶¶9-10. Importantly, the ***Cherry*** court rejected the rationale that the DNA surcharge was being imposed to support the costs of the DNA databank because "[t]o reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning." ***Id.***, ¶10.

Like the rationale used to justify the imposition of the surcharge in ***Cherry***, the reasoning set forth for denying eligibility for expungement in this case could apply in any case. It could always be stated that "convictions have consequences." Even the statement "The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or trade or employment or otherwise" while more lengthy is no less generalized. It does not discuss any facts relevant to Ms. Arberry.

To the extent that the court's statements are simply statements evincing a general policy of not granting expungement, that too is not a proper exercise of discretion. Trial courts may not have preconceived policies that are closed to individual mitigating factors. ***State v. Ogden***, 199 Wis. 2d 566, 572, 544 N.W.2d 574 (1996). In ***Ogden***, the trial court denied the defendant's request to grant Huber release for child care, stating it never granted Huber privileges for child care unless it was absolutely necessary. The court of appeals reversed, noting that "one 'unreasonable and unjustifiable basis' for a sentence is a trial judge's employment of a preconceived policy of sentencing that 'is closed to individual mitigating factors.'" (citing ***State v. Martin***, 100 Wis.2d 326, 327, 302 N.W.2d 58 (Ct. App. 1981)). The court found that an inflexible preconceived policy is "unacceptable." ***State v. Ogden***, 199 Wis.2d at 571.

So too is the rationale used here. This court should reverse and remand the case so that the court can consider the individual facts of Ms. Arberry's case and the two factors set out in the expungement statute in order to exercise its discretion regarding her eligibility for expungement.

CONCLUSION

Ms. Arberry respectfully requests that the court reverse and remand so that the circuit court can exercise its discretion regarding expungement.

Dated this 17th day of July, 2017.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,796 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 17th day of July, 2017.

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CERTIFICATION AS TO APPENDIX

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

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

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

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