STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP866-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIAMOND J. ARBERRY,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A COURT OF APPEALS DECISION AFFIRMING A JUDGMENT OF CONVICTION AND A DECISION DENYING POSTCONVICTION RELIEF ENTERED IN THE FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE PETER L. GRIMM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED

1. Can a defendant seek eligibility for expungement pursuant to a motion for sentence modification based on a new factor?

The circuit court answered no.

The court of appeals answered no.

2. In the alternative, did the circuit court properly exercise its discretion by refusing to grant Diamond J. Arberry eligibility for expungement of her conviction after her sentence?

The circuit court did not address this question.

The court of appeals did not address this question.

INTRODUCTION

Under the controlling statute and existing case law, a circuit court must decide whether to make a defendant eligible for expungement at sentencing, not after. Accordingly, this Court should conclude that a defendant cannot first seek eligibility for expungement in a new-factor sentence modification motion, because that would undermine the Legislature's intent in allowing a court to address expungement only at sentencing.

Moreover, a new-factor sentence modification motion is not a fit for a request for expungement. To prove a new factor, a defendant must show that the parties overlooked a fact or set of facts highly relevant to his sentence. Since the circuit court is not required to discuss expungement eligibility in every case, its failure to discuss it on the record does not mean that the parties all overlooked it at sentencing. Moreover, whether a court makes a defendant eligible for expungement is not a fact or set of facts highly relevant to a sentence; rather, it is a discretionary decision that the court makes at

sentencing. Therefore, the circuit court and court of appeals reached the proper conclusion that Arberry cannot use a new-factor motion to obtain a finding of eligibility for expungement.

Finally, the circuit court properly exercised its discretion in denying Arberry eligibility for expungement because it concluded that society would be harmed if it made the decision to allow expungement of Arberry's conviction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On May 13, 2015, Arberry went to a store called the Buckle with two other women. (R. 2:3.) Arberry and the other two women tried to put merchandise into a purse and to leave the store without paying for the merchandise. (R. 2:3.) After arresting Arberry, officers found merchandise stolen from other retail stores in the car the women drove to the store. (R. 2:3.)

The State charged Arberry with two counts of theft, one count of attempted theft, and two counts of resisting or obstructing an officer. (R. 2:1–2.) All charges were issued as a repeat offender, and the theft and attempted charges were charged as party to the crime. (R. 2:1–2.)

Arberry agreed to plead no contest to one of the retail theft and the attempted retail theft charges. (R. 48:4.) The State agreed to dismiss the other count of retail theft outright, but the two charges of resisting or obstructing an officer were dismissed and read-in. (R. 48:4.) The parties agreed to make

a joint recommendation for 12 months in jail for the theft and probation for the attempted theft. (R. 48:4.)

At sentencing, the State noted that Arberry had a record of prior retail thefts, having been convicted of three retail thefts in 2013 and 2014. (R. 48:11.) In 2014, Arberry was also convicted of obstructing an officer and bail jumping. (R. 48:11.) The State asserted that with her prior record, it might have recommended prison, but believed prison was not necessary. (R. 48:12.)

Arberry's attorney explained that Arberry was only 18 years old and was the youngest of the three women involved with the theft at the Buckle. (R. 48:12–13.) Arberry had a baby in February, and graduated from high school a few months later. (R. 48:13.) She had a long work history and had a job at the time of the theft. (R. 48:13.) Arberry's attorney explained that the theft was economically motivated. (R. 48:14–15.)

The circuit court noted that Arberry went on a crime spree taking merchandise from multiple stores in multiple counties. (R. 48:21.) The court knew that Arberry had fled when officers asked her to stop and that, when stopped, Arberry gave a fake name and date of birth. (R. 48:21.) The court found the fact that Arberry was on probation at the time was an aggravating factor. (R. 48:21.) The court believed that Arberry had not learned from her past mistakes. (R. 48:21.) The court thought that the risk to the public was "sky high" and that Arberry will continue stealing when she is released. (R. 48:22.)

The court rejected probation given Arberry's past failures while serving probation. (R. 48:22–23.) The court sentenced Arberry to one year of initial confinement and two years of extended supervision for count one. (R. 48:24.) It

ordered probation for count two for two years and ran that probation consecutive to the prison sentence. (R. 48:24.)

Arberry filed a postconviction motion seeking to have her record expunged. (R. 29.) She asserted that the parties overlooked expungement at sentencing and therefore, it constituted a new factor. (R. 29:3.)

The circuit court held a hearing and denied the motion. (R. 49:8.) The court concluded that it could not consider expungement unless it did so at sentencing. (R. 49:7.) The court said if the parties had asked for expungement at sentencing, it would have denied that request because convictions have consequences and the community has a right to know who commits crimes. (R. 49:7–8.)

Arberry appealed, and the court of appeals affirmed the circuit court's order. *State v. Arberry*, 2017 WI App 26, ¶ 5, 375 Wis. 2d 179, 895 N.W.2d 100. The court of appeals concluded that there was no indication that the circuit court, the State, or Arberry's attorney overlooked expungement. *Id.* ¶ 4. The court agreed that the circuit court cannot consider expungement after Arberry's sentencing hearing. *Id.* ¶ 5.

Arberry petitioned for review. On June 12, 2017, this Court granted review.

STANDARD OF REVIEW

Arberry sought sentence modification based on a new factor. Whether a new factor exists presents a question of law that this Court reviews independently. *State v. Scaccio*, 2000 WI App 265, ¶ 13, 240 Wis. 2d 95, 622 N.W.2d 449. Even if proven, a new factor does not automatically entitle the defendant to sentence modification. *State v. Harbor*, 2011 WI 28, ¶ 37, 333 Wis. 2d 53, 797 N.W.2d 828.

There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences

are afforded the presumption that the circuit court acted reasonably. *State v. Gallion*, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197.

ARGUMENT

I. This Court should hold that a defendant cannot seek eligibility for expungement through a motion for sentence modification.

Eligibility for expungement cannot be a new factor that entitles a defendant to sentence modification. Simply because the court did not address expungement does not mean that it was overlooked by the court and all parties at sentencing. Eligibility for expungement is not a fact or set of facts highly relevant to a sentence, but it is instead a discretionary determination that the circuit court makes at sentencing. Thus, a defendant's eligibility for expungement cannot meet the definition of a new factor.

To allow defendants to use a sentence modification motion for this purpose would run contrary to the legislative intent of Wis. Stat. § 973.015. Moreover, the burden should remain with the defendant to raise the issue of expungement at sentencing, rather than impose a new obligation on the circuit court.

Therefore, the circuit court properly denied Arberry's motion. The court of appeals reached the proper conclusion when it affirmed the circuit court's decision. This Court should also affirm.

A. A circuit court can consider whether the defendant should be afforded the opportunity for expungement only at sentencing.

For a defendant to be eligible for expungement, he or she must pass two hurdles: he or she must satisfy statutory eligibility requirements, and the court must exercise its discretion and declare him or her eligible for expungement. To be statutorily eligible for expungement, an offender must be under 25 at the time the offense was committed. Wis. Stat. § 973.015(1m)(a)1.[1] The offense may be a class H or class I felony if the person has not previously been convicted of a felony, and the felony is not a violent offense. Wis. JI-Criminal SM-36 (2013).

If a defendant meets these statutory criteria, he or she may ask the circuit court, in its discretion, to "order at the time of sentencing that the record be expunged upon successful completion of the sentence." Wis. Stat. § 973.015(1m)(a)1. The circuit court may grant eligibility for expungement at sentencing when it determines that the defendant will benefit and society will not be harmed by it. *Id.*

The Legislature did not require the circuit court to consider expungement automatically whenever a defendant meets the statutory criteria. But when a circuit court choses to address eligibility for expungement, the court must make the decision at the sentencing hearing. *State v. Matasek*, 2014 WI 27, ¶ 44, 353 Wis. 2d 601, 846 N.W.2d 811.

The circuit court needs to consider eligibility for expungement at sentencing to create a meaningful incentive for the offender to avoid reoffending. *Matasek*, 353 Wis. 2d

[1] On February 21, 2017, a group of legislators introduced 2017 Senate Bill 53. If passed, that bill would significantly amend Wis. Stat. § 973.015. It has not passed as of this filing.

601, ¶ 43. Wisconsin Stat. § 973.015 does not authorize circuit courts to take a wait-and-see approach. *State v. Hemp*, 2014 WI 129, ¶ 42, 359 Wis. 2d 320, 856 N.W.2d 811.

B. A court's silence on eligibility for expungement at sentencing can never be a new factor justifying sentence modification.

A defendant cannot make an end run around section 973.015 and *Matasek*'s requirements that a court may only consider expungement eligibility at sentence by doing what Arberry did here, i.e., filing a new-factor motion for sentence modification based on the court's silence on eligibility for expungement. Attempting to apply the law governing new factor claims to the facts here demonstrates that eligibility for expungement can never be a new factor.

A new factor is a fact or set of facts highly relevant to the sentence, but not known by the circuit court at the 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." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

1. A court's silence on eligibility for expungement at sentencing alone cannot show that all the parties overlooked it.

Only a small group of offenders are eligible for expungement. The Legislature chose not to require circuit courts to discuss expungement in every situation where a defendant meets the statutory criteria. Instead, circuit courts have discretion about whether to even discuss expungement at sentencing. And the court may consider and reject expungement without discussing it on the record. Therefore, silence alone is insufficient to demonstrate that the parties

and court unknowingly overlooked eligibility for expungement.

Here, the court did not discuss eligibility for expungement. But that, without more, is not evidence that the court and parties overlooked it. As the court of appeals said, "There is no indication that the [circuit] court, much less the prosecutor, or even Arberry's counsel, overlooked expungement." *Arberry*, 375 Wis. 2d 179, ¶ 4.

A court's mere silence on eligibility for expungement can occur for any number of reasons that have nothing to do with anyone unknowingly overlooking it. The silence could exist where the court recognized that the defendant was statutorily eligible, it considered whether to order him or her eligible, and it decided against ordering eligibility, but did not discuss it on the record because neither party so requested. Likewise, the silence could exist if the State could have considered whether to recommend it and decided not to, therefore never raising it at sentencing. It could exist when the State and defendant discussed expungement and agreed not to make the request as part of the joint sentencing recommendation. Moreover, it could exist where the defendant agreed to not seek eligibility at sentencing because he or she agreed not to as part of the plea agreement or sentencing strategy.

Arberry argues that her eligibility for expungement was overlooked simply because it was not discussed at sentencing. (Arberry's Br. 12–13.) But if the parties want to ensure that the court considers eligibility for expungement, they must ask that it do so at sentencing. *See* Wis. Stat. § 973.015(1m). And while the circuit court may sua sponte raise the issue of eligibility for expungement, it is not required to consider it at sentencing in every case where the defendant is statutorily eligible. *See* Wis. Stat. § 973.015(1m).

Moreover, Arberry could have asked the court to deem her eligible for expungement, but she did not. Most likely, the court did not discuss expungement at sentencing because the parties and court recognized that Arberry presented a high risk to reoffend and was not a good candidate for it. (R. 48:22.) Arberry fails to show that her eligibility for expungement was overlooked by all parties at sentencing.

2. Whether a defendant should be eligible for expungement can never be a fact or set of facts highly relevant to a sentence.

Whether a circuit court grants or denies eligibility for expungement can never be a fact highly relevant to a defendant's sentence, because it is a discretionary decision, not a fact. *See Rosado*, 70 Wis. 2d at 288.

To meet the criteria for sentence modification, a defendant must point to a fact or set of facts not known to the court at sentencing. A fact is "a piece of information presented as having objective reality." *See Fact*, https://www.merriam-webster.com/dictionary/fact (last visited August 31, 2017).

A judicial determination on eligibility for expungement is not a fact. Expungement of a record is defined as, "The removal of a conviction (esp. for a first offense) from a person's criminal record." *Expungement of Record*, Black's Law Dictionary (10th ed. 2014). It is different from other cases where courts have found a new factor justified sentence modification.

For example, in *State v. Ralph*, 156 Wis. 2d 433, 435–36, 456 N.W.2d 657 (Ct. App. 1990), the fact that justified sentence modification was that the circuit court did not know that one of Ralph's codefendant's had a prior record, when Ralph did not. *Id.* The codefendant's prior record is a piece of information with an objective reality.

Likewise, in *State v. Boyden*, 2012 WI App 38, ¶ 7, 340 Wis. 2d 155, 814 N.W.2d 505, the court found that the defendant's prior assistance to federal law enforcement was a fact that justified sentence modification. Whether Boyden provided assistance is either true or false and is a fact.

Other situations where the courts have identified new factors include: the untreatable nature of an inmate's mental condition, *State v. Sepulveda*, 119 Wis. 2d 546, 560–61, 350 N.W.2d 96 (1984); a potential conflict of interest of the mental health professional who conducted the psychological assessment of a convicted defendant for the sentencing court, *State v. Stafford*, 2003 WI App 138, ¶17, 265 Wis. 2d 886, 667 N.W.2d 370; and a convicted defendant's post-sentencing voluntary submission to revocation of his parole based on erroneous advice from his probation agent, *State v. Norton*, 2001 WI App 245, ¶16, 248 Wis. 2d 162, 635 N.W.2d 656.

Arberry cannot identify any such fact or set of facts. Arberry's so-called fact—that she was statutorily eligible for expungement—does not involve "pieces of information" like a defendant's prior record or a defendant's assistance to law enforcement, because actual eligibility for expungement requires circuit court's discretionary decision whether to make a defendant eligible for expungement. That discretionary decision is just that—a decision. It is not a fact.

Moreover, even if statutory eligibility for expungement could be a fact, here, it is not highly relevant to Arberry's sentence. The circuit court considered Arberry's risk to the public to be "sky high." (R. 48:22.) The court considered it aggravating that Arberry obstructed the police after she was caught stealing and that she was on probation when she committed these crimes. (R. 48:21–22.) The court believed that when she finished her sentence, Arberry would continue to reoffend. (R. 48:23.)

In other words, the court recognized that Arberry is not the type of defendant that the Legislature wanted to protect from the harsh consequences of a criminal conviction. This was not her first time committing a crime. She committed multiple retail thefts across multiple counties. She was on probation. She presented a high risk to the public safety.

Arberry argues that eligibility for expungement was highly relevant because it would likely benefit Arberry's future changes of success. (Arberry's Br. 14.) But that reasoning could apply to any defendant who satisfies the statutory criteria. Moreover, Arberry necessarily ignores the facts that make her a poor candidate for expungement eligibility, i.e., her prior record and rapid reoffense here. In all, eligibility for expungement, here, is not highly relevant to a court's sentence. Therefore, a new factor sentence modification motion is not available to defendants seeking this relief for the first time postconviction.

3. To allow defendants to use sentence modification motions for this purpose would undermine the intent and purpose behind Wis. Stat. § 973.015.

Using a new-factor sentence modification motion in this circumstance is not just a bad fit with the new factor standard. To allow a defendant to argue that eligibility for expungement is a new factor entitling him or her to sentence modification would create a huge loophole counter to the legislative policy reasons behind the enactment of Wis. Stat. § 973.015.

The Legislature allows the circuit courts to "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." Wis. Stat. § 973.015(1m)(a)1. It requires courts to make the

decision about expungement at the sentencing hearing. *Matasek*, 353 Wis. 2d 601, ¶ 44. And it does not authorize circuit courts to take a wait-and-see approach. *Hemp*, 359 Wis. 2d 320, ¶ 42.

Generally, defendants who are granted the option of expungement serve relatively short sentences by virtue of the fact that they satisfy the statutory criteria in the first place, i.e., they are young offenders who have committed low-level felonies. Given the amount of time that passes from the filing of a postconviction motion until a decision, Arberry's claim would essentially allow courts to consider expungement after a defendant serves a sentence. That is contrary to the legislative purpose of the expungement statute. The statute reads: "[T]he court may order at the time of sentencing that the record be expunged." Wis. Stat. § 973.015(1m)(a)1. It does not read: The court may order at the time of sentencing *or postconviction* that the record be expunged. This Court should refuse to read that text into the statute.

Indeed, this Court refused to do so in *Matasek*. *Matasek*, 353 Wis. 2d 601, ¶ 20. Rather, this Court wrote that the statute's requirement that a court determine expungement eligibility at sentencing "is not contrary to the purpose of the statute and does not produce an unreasonable or absurd result." *Id.* ¶ 42. The legislative purpose—to shield some youthful offenders from some of the harsh consequences of criminal convictions—can be met by requiring courts to make a decision on expungement at sentencing. *Id.* ¶ 43. The court can create a meaningful incentive for the offender to avoid reoffending. *Id.* If an offender is uncertain about his or her eligibility for expungement, that uncertainty might provide a weaker incentive to successfully complete the sentence. *Id.*

Arberry's reading also runs contrary to this Court's goal to strive where possible "to give reasonable effect to every word, in order to avoid surplusage." *See State ex rel. Kalal v.*

Circuit Court for Dane Cty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. By including the phrase "at the time of sentencing" the Legislature intended to require the circuit court make the decision at sentencing. To read the statute any other way would make that phrase surplusage.

Arberry asserts that this Court's decision in *Matasek* did not bar her sentence modification motion. (Arberry's Br. 15.) Arberry cites the State's brief in *Matasek* as support for this argument. (Arberry's Br. 16–17.) Arberry mischaracterizes the State's argument.

Before the *Matasek* decision, some circuit courts in Wisconsin delayed expungement eligibility decisions until after the defendant completed his or her sentence. In *Matasek*, the State argued that that practice was contrary to the statute, and the supreme court agreed. The State also argued that, in those cases where the circuit court erroneously interpreted the law, defendants could bring sentence modification motions on the grounds that the circuit court considered inaccurate information at sentencing. *See* State's Br. 17, *Matasek*, 353 Wis. 2d 601 (No. 2012AP1582-CR).[2] The State's argument was limited to cases where the record showed that the circuit court erroneously believed it could delay its decision on expungement, not situations like Arberry's where the court was silent regarding expungement.

Arberry also asserts that the circuit court can consider expungement eligibility in a postconviction motion because it can consider CIP or ERP eligibility in postconviction motions. (Arberry's Br. 17–18.) But eligibility for expungement is different from CIP and ERP. By statute, the circuit court must

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[2] 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.

consider both CIP and ERP eligibility at sentencing. *See* Wis. Stat. § 973.01(3g), (3m). Therefore, a defendant can challenge the court's failure to comply with a mandatory duty through a postconviction motion. In contrast, consideration of expungement is not a mandatory duty, nor should it be, as explained below.

4. The defendant, not the circuit court, has an obligation to raise the question of expungement at sentencing.

A defendant cannot fail to raise expungement at sentencing while hoping to obtain it through a sentence modification motion. When a defendant wants the circuit court to make her eligible for expungement, she must ask for it at the sentencing hearing. Wis. JI-Criminal SM-36. Then the defendant retains the option of challenging the circuit court's failure to order expungement eligibility as an erroneous exercise of its sentencing discretion through a postconviction motion under Wis. Stat. §§ 809.30 or 973.19.

But that postconviction process is available when the defendant requested it at sentencing. It is not appropriate for defendant to wait to raise the issue postconviction. If a defendant is uncertain whether the circuit court will expunge the conviction, the uncertainty might provide a weaker incentive for the defendant to complete his or her sentence successfully. *Matasek*, 353 Wis. 2d 601, ¶ 43. To allow defendants to stay silent on expungement at sentencing only to bring it up in a postconviction motion would run contrary to the language and legislative purpose of Wis. Stat. § 973.015. *See Matasek*, 353 Wis. 2d 601, ¶ 44.

Arberry asks this Court to create a rule requiring a circuit court to consider expungement eligibility every time the defendant meets the statutory requirements by age,

crime, and prior record. (Arberry's Br. 18–19.) This Court should refuse the invitation.

This Court has superintending and administrative authority over all state courts. Wis. Const. art. VII, § 3. While that superintending authority is unquestionably broad and flexible, this Court will not invoke it lightly. *State v. Jerrell C.J.*, 2005 WI 105, ¶ 41, 283 Wis. 2d 145, 699 N.W.2d 110.

Arberry does not present a compelling argument for this Court to invoke its authority. Under the statute and *Matasek*, the burden has been on the defendant to raise expungement at sentencing, not after. That makes sense. The defendant benefits most from a finding of eligibility for expungement.

Additionally, Arberry's request would effectively add language to the statute that the Legislature did not include. The Legislature could have chosen to require that the circuit court consider expungement eligibility every time a defendant was statutorily eligible. The Legislature wrote that when certain criteria are met "the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence." Wis. Stat. § 973.015(1m)(a)1. It could have written that the court *must consider* expungement eligibility at sentencing. It did not add those words to the text of the statute. This Court should refuse to act as a superlegislature by reading additional language into the statute and creating an additional obligation that the Legislature did not intend.

Arberry compares requiring a circuit court to consider expungement on the record at sentencing to the requirement that the court consider probation as a first alternative at sentencing. (Arberry's Br. 22.) To be sure, this Court used its superintending authority in *Bastian v. State*, 54 Wis. 2d 240, 247–48, 194 N.W.2d 687 (1972), to require circuit courts to

consider probation first. But unlike here, where the Legislature used permissive language in the statute, the court in *Bastian* was presented with a situation where the Legislature had not offered any guidance about whether or when a circuit court must consider probation.

This Court imposed the requirement to consider probation first in the absence of legislative guidance on the issue. Here, the Legislature has provided guidance about the circuit court's obligations at sentencing regarding eligibility for expungement. This Court should not add additional requirements the Legislature did not include. Instead, it should interpret the statute as written to allow a circuit court to consider whether to consider expungement eligibility within the process of exercising its sentencing discretion.

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At sentencing, Arberry failed to ask the circuit court to make her eligible for expungement. The eligibility for expungement cannot be a new factor justifying sentence modification. It can never be a fact or set of facts highly relevant to her sentence. To allow defendants who fail to seek eligibility for expungement at sentencing to use this mechanism would be contrary to the policy and purpose of Wis. Stat. § 973.015. Moreover, the burden must remain with the defendant to request expungement at sentencing—not postconviction. This Court should affirm the circuit court's and court of appeals' decisions that defendants may not first seek eligibility for expungement through a new-factor sentence modification motion.

II. If Arberry did properly raise her claim in a new-factor motion, this Court should conclude that the circuit court properly exercised its discretion in ruling that she was not eligible for expungement.

A. The circuit court has discretion whether to grant a defendant the right to have a conviction expunged.

When a defendant requests expungement, the circuit court shall determine whether the defendant is eligible for expungement. Wis. JI-Criminal SM-36. If the court rejects expungement, it should state on the record that it considered expungement and state the reasons for rejecting it. *Id.*

Expungement grants an alternative to the sentencing procedures. *Hemp*, 359 Wis. 2d 320, ¶ 18. The expungement statute intends "'to provide a break to young offenders who demonstrate the ability to comply with the law' by successfully completing and being discharged from their sentences." *Id.* (citation omitted).

At sentencing, the circuit court may order an offender's record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by expungement. Wis. Stat. § 973.015(1m)(a)1. By including the word "may," the Legislature granted the circuit court discretion to refuse to order expungement, even if the criteria of Wis. Stat. § 973.015 are otherwise satisfied. *See In re Cesar G.*, 2004 WI 61, ¶ 12, 272 Wis. 2d 22, 682 N.W.2d 1.

There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *Gallion*, 270 Wis. 2d 535, ¶ 18.

B. The circuit court properly exercised its discretion in refusing to grant Arberry eligibility for expungement.

Arberry challenges the circuit court's sentencing discretion on the grounds that its decision denying expungement eligibility was not sufficiently specific to the facts of her case. (Arberry's Br. 24–25.) If it reaches this issue, this Court should affirm the circuit court's exercise of discretion in denying Arberry eligibility for expungement when it concluded that society would be harmed if the record of her conviction is expunged.

At the postconviction hearing, the circuit court said that "convictions have consequences" and that "they are [part] of [the] public record so that the public can protect themselves." (R. 49:7.) The court held that "[t]he public has the right to know who commits what crimes so 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." (R. 49:7–8.)

The circuit court stated its reasons for denying expungement on the record. *See* Wis. JI-Criminal SM-36. It articulated that the public had a right to know about Arberry's crimes and that she must face the consequences of her crimes. (R. 49:7–8.) The court properly exercised its discretion.

Arberry argues that the statements about the potential harm to society are insufficient because the court did not specifically apply its explanation to the facts in her case. (Arberry's Br. 25.) But the context for the circuit court's statement introduced its discussion of the facts of Arberry's crimes and her prior record. As noted above, in sentencing Arberry, the circuit court considered Arberry's risk to the public to be "sky high." (R. 48:22.) The court considered it

aggravating that Arberry obstructed the police after she was caught stealing and that she was on probation when she committed these crimes. (R. 48:21–22.) The court believed that when she finished her sentence, Arberry would continue to reoffend. (R. 48:23.)

Hence, in context, the circuit court stated that convictions are part of the public record so that the public can protect itself. (R. 49:7.) The court made these comments during its discussion of whether Arberry's convictions should be expunged. (R. 49:7–8.) While the court did not explicitly link the comments to Arberry, the context of the discussion makes it clear that the court applied its reasoning to Arberry's case.

Arberry also asserts that the circuit court did not properly exercise its discretion because it did not discuss whether she would benefit from expungement. (Arberry's Br. 25.) The court is not required to consider whether Arberry would benefit from expungement. To grant a defendant eligibility for expungement, a court must find that the defendant will benefit and that society will not be harmed. Wis. Stat. § 973.015(1m)(a)1. Here, since the circuit court concluded that society would be harmed, it did not need to address whether Arberry would benefit. For a circuit court to grant eligibility for expungement, both criteria need to be met. Arberry's claim fails.

Arberry compares her case to *State v. Cherry*, 2008 WI App 80, ¶ 8, 312 Wis. 2d 203, 752 N.W.2d 393, where the circuit court imposed a surcharge even though Cherry had previously paid the same surcharge because it "is appropriate per charge." (Arberry's Br. 26.) The court of appeals rejected that explanation and required the circuit court to consider any and all factors pertinent to the case before it. *Cherry*, 312 Wis. 2d 203, ¶ 9. But *Cherry* does not help Arberry. Here, the circuit court denied eligibility for expungement because it

concluded that the public had a right to know about the crimes and that Arberry must face the consequence of having the conviction on her record. Unlike the circuit court in *Cherry*, the circuit court here did not simply deny expungement without considering the facts of Arberry's case.

Finally, Arberry relies upon *State v. Ogden*, 199 Wis. 2d 566, 544 N.W.2d 574 (1996). (Arberry's Br. 27.) In *Ogden*, the circuit court refused to grant the defendant Huber privileges because it "never granted Huber privileges for child care unless it was 'absolutely necessary.'" *Ogden*, 199 Wis. 2d at 569. This Court reversed and concluded that the circuit court erroneously exercised its discretion because it made its decision "*before* Ogden made her request." *Id.* at 572. Arberry argues that the court here used an "inflexible preconceived policy" that the *Ogden* court called "unacceptable." (Arberry's Br. 27.)

Ogden is factually distinguishable. Here, the circuit court did not deny Arberry expungement because it made its decision without considering the facts of her case. Instead, the court made its decision by applying the facts of Arberry's crimes and her prior record to conclude that the public would be harmed and Arberry needed to face the consequences of her actions. (R. 49:7–8.)

The circuit court properly exercised its discretion in denying Arberry eligibility for expungement. It concluded that society would be harmed if it made the decision to allow expungement of Arberry's conviction. If this Court reaches this question, it should affirm the circuit court's exercise of discretion.

CONCLUSION

The State respectfully requests that this Court affirm the court of appeals decision affirming Arberry's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 12th day of September, 2017.

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 5,548 words.

Dated this 12th day of September, 2017.

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CHRISTINE A. REMINGTON
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 12th day of September, 2017.

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