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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019 AP 1272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

Appeal from Order Expunging Convictions,
Honorable James R. Beer Presiding,
Green County Circuit Court Case No. 2012 CF 64

JORDAN A. LICKES,
Defendant-Respondent

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At sentencing, the circuit court found Jordan Lickes eligible for expungement conditioned upon the successful completion of probation. At the end of the court-ordered term of probation, the Department of Corrections notified the court that Lickes had successfully completed probation, including satisfying all conditions of probation. As a result, the circuit court expunged Lickes's convictions under WIS. STAT. § 973.015(1m). Did the circuit court err?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue raised in this appeal can be fully addressed by briefing, but if the Court has questions, Jordan Lickes welcomes the opportunity for oral argument. The decision of the Court should be published if the matter is decided by three judges, as is this Court's practice.

STATEMENT OF THE CASE

Nature of the Case. The State appeals an expungement order entered in Green County Circuit Court by the Honorable James R. Beer following Jordan Lickes's successful completion of probation.

Procedural Status and Relevant Facts. On April 17, 2012, Jordan Lickes, who had recently turned 19, had sex with a 16-year-old girl he knew from school. Criminal charges resulted, and on July 9, 2013, pursuant to a plea agreement negotiated with then-Green County District Attorney Gary Luhman, Lickes entered pleas of guilty and no contest to fourth-degree sexual assault, contrary to WIS. STAT. § 940.225(3m); sexual intercourse with a child age 16 or older, contrary to WIS. STAT. § 948.09; disorderly conduct, contrary to WIS. STAT. § 947.01(1); and exposing genitals or pubic area, contrary to WIS. STAT. § 948.10(1).

The Green County Circuit Court, the Honorable James R. Beer presiding, sentenced Lickes on January 23, 2014, to a three-year term of probation and a concurrent 90-day jail sentence.[1] The court announced the following 10 "terms and conditions of probation":

1. "[Y]ou will first submit a DNA sample."

2. "You will have no contact with the victim[] or her family."

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[1] Because WIS. STAT. § 973.09(2)(a)1m and 2 limited the maximum term of probation on counts 1 and 3 to two years, the circuit court achieved this sentence by sentencing on each count as follows: for count 1, sentence withheld in favor of two years' probation; for count 2, 90 days' jail; for count 3, sentence withheld in favor of two years' probation; for count 4, one-year sentence of confinement imposed and stayed in favor of three years' probation.

3. "You will pay any cost of restitution."

4. "You will pay your court costs and Department of Corrections supervision fees."

5. "You will maintain absolute sobriety during the periods [of] your probation [and] you will not purchase, possess or consume alcoholic beverages or controlled substances [unless] prescribed by a physician, and then only according to the physician's order."

6. "You will not enter into any establishments who sells alcoholic beverages except for grocery stores and gas stations, then only in the areas that do not sell alcoholic beverages."

7. "You will obtain and maintain full-time employment or part-time employment if you are enrolled in school."

8. "You will enter into, participate and successfully complete sex offender treatment."

9. "[Y]ou will comply with the Wisconsin Sex Offender Registry."

10. "You will comply with any polygraph testing."

R. 90:5–6.

The circuit court ordered that upon successful completion of probation, Lickes's convictions on counts 1, 3, and 4 would be expunged. R. 90:2, 4, 6.

On August 31, 2016, Lickes's probation agent completed a Verification of Satisfaction of Probation Conditions for Expungement form indicating that Lickes had "successfully completed his[] probation" on counts 1 and

3, as the maximum term of probation authorized by statute for those counts had ended in January. R. 61:1. The agent also noted that Lickes had not yet met all court ordered conditions of probation, as he was "still currently participating in sex offender treatment and is expected to complete in January 2017." R. 61:1. This form was filed with the circuit court on September 6, 2016.

On January 23, 2017, Lickes completed the three-year term of probation ordered by the circuit court. On July 16, 2018, his probation agent and supervisor completed a Certificate of Discharge and Satisfaction of Probation Conditions for Expungement form indicating that Lickes "has successfully completed his[] probation" and that "[a]ll court ordered conditions have been met." R. 67:1. This form was filed with the circuit court on July 16, 2018.

Lickes subsequently requested expungement of his record. R. 68:1. The State, now represented by Green County's new district attorney, Craig Nolan, opposed expungement. R. 76. In support of its opposition, the State pointed to a document filed with the court on October 6, 2015. On the front of the document, Lickes's probation agent alleged that Lickes had "violated his probation" by having unapproved sexual contact, giving his agent false information, and being terminated from sex offender treatment. R. 57:1. The agent requested, as an alternative to revocation, that the court impose 45 days of conditional jail time. At the bottom of the front page, Judge James R. Beer signed an order requiring Lickes to serve 45 days in jail "as a condition of probation." R. 57:1. On the back of the document, Lickes signed a statement admitting "that I violated the rules and conditions of probation as described on the front." R. 57:2. The State argued that this document established that Lickes had "violated the rules of his probation" and that he was therefore "not entitled to expungement" under *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20. R. 76:3.

The circuit court held a hearing on the issue on March 15, 2019. At the hearing, the State conceded that Lickes had completed sex offender treatment by July 16, 2018, and therefore had successfully completed that condition and all other conditions of probation. R. 91:4. The circuit court noted the delay in action on expungement of counts 1 and 3—for which Lickes had technically completed probation back in January 2016—and found that, "had it been acted upon . . . on a timely basis, [Lickes] probably would have been expunged at that point in time." R. 91:3, 15–17. As a result, it ordered counts 1 and 3 expunged. R. 91:17. It ordered the parties to submit supplemental briefing on count 4.

On May 7, 2019, the circuit court held another hearing on the issue. It reiterated that it had ordered the expungement of counts 1 and 3 "because they were prior to the change in the [la]w" that *Ozuna* represented. R. 92:2. It then turned its attention to count 4. It found that "Lickes did break a rule" during probation. R. 92:7. It concluded that because Lickes broke a "rule," rather than a "condition," *Ozuna* did not govern the outcome. R. 92:8. It noted that a broad swath of Wisconsin's community supports expanding, rather than narrowing, the availability of expungement —as represented by the bipartisan support for Assembly Bill 33, the dissent in *Ozuna*, and the fact that "[t]he state [was] the one that recommended the expungement" of Lickes's convictions in the first place. R. 92:7–8. Thus, the court "decline[d] to expand" *Ozuna*'s holding, and it instead ordered expungement of count 4. R. 92:8.

The State's appeal followed.

ARGUMENT

The State, in appealing the circuit court's expungement order, demands perfection from every probationer. But perfection is not the goal of probation. The goal is for probationers to learn from their mistakes and to learn new behaviors and responses, not to comply perfectly with each condition and rule from day one. Probation and other forms of community supervision place significant restrictions on offenders, rules that would be difficult for even the most law-abiding citizen to follow. One must report to the agent when and where directed; obtain advance approval before moving, changing jobs, operating a motor vehicle, or crossing state lines; report all contact with the police within 72 hours; and "[a]void all conduct which is not in the best interest of the public welfare," among other things. WIS. ADMIN. CODE DOC 328.04(3).

The probation agent is charged with imposing these rules and supervising the offender's compliance with them. She is afforded broad discretion in doing so because it is expected that the offender will not comply perfectly with every rule, every time. Generally, the agent will not revoke probation unless serious, continuing violations indicate that the offender "is not adjusting properly and cannot be counted on to avoid antisocial activity." *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

Under the State's interpretation of the expungement statute, a probationer would not successfully complete probation if he is five minutes late to a meeting with his agent; if he can't find a job until the second week of his probationary term; or if he forgets to tell his agent about speaking with the police officer who helped get his neighbor's cat out of the tree. But the legislature did not intend to premise the denial of expungement on such minor rule violations.

Here, Lickes substantially abided by the conditions, rules, and terms of his probation. His probation was not revoked. His probation agent determined that he completed his probationary term successfully, notwithstanding a one-time rule violation. The court and the State had assured Lickes that, upon his successful completion of probation, his record would be expunged so that his career prospects would not be forever hurt by his youthful mistakes. But now, the State attempts to retract that promise. This appeal may pose interesting academic questions of statutory interpretation, but those questions should not overshadow what is at the heart of this case: a young man who has done his best to learn from his mistakes and repay his debt to society, and who now wants nothing more than to move on with his life.

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This appeal concerns WIS. STAT. § 973.015(1m) (2016) and two recent Wisconsin Supreme Court opinions interpreting it: *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811, and *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

The relevant statute, § 973.015(1m)(a), provides that in certain circumstances, a circuit court "may order at the time of sentencing that the record be expunged upon successful completion of the sentence." § 973.015(1m)(b) defines successful completion of a sentence: "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."

In *Hemp*, a unanimous Court explained that once the sentencing court has ordered a record eligible for expungement under § 973.015(1m)(a), upon the defendant's successful completion of his sentence, the plain language of § 973.015(1m)(b) requires the detaining

or probationary authority to issue a certificate of discharge and forward it to the court, at which point expungement occurs automatically. 2014 WI 129, ¶¶ 23, 27, 36.[2]

Three years later in *Ozuna*, the Supreme Court reaffirmed *Hemp* and addressed how to proceed when the certificate of discharge "informs the circuit court that the probationer violated the court-ordered conditions of probation." 2017 WI 64, ¶ 16. A majority of the justices concluded that when the circuit court receives such a certificate and the probationer does not contest that he violated a condition of probation, "it is proper for the circuit court to deny expungement." *Id.* ¶ 14.

This appeal presents the precise scenario confronted by the Supreme Court in *Hemp*: the DOC forwarded to the court a certificate of discharge indicating that Lickes had satisfied all conditions of probation and successfully completed probation. Thus, *Hemp* dictates the required outcome: automatic expungement. The State, wishing to undo the expungement, attempts to shoehorn the facts of Lickes's case into *Ozuna*, and it then attempts to expand *Ozuna*'s ruling. The circuit court correctly concluded that *Ozuna* is not applicable here and that, even if it were, the circuit court had discretion to order expungement. Thus, this Court has no authority to disturb the circuit court's ruling.

[2] § 973.015 has been renumbered since the Court's opinion in *Hemp* was issued, but the portions of the statute relevant to this case have not been substantively amended.

A. UNDER *HEMP*, § 973.015(1M) REQUIRED THE CIRCUIT COURT TO EXPUNGE LICKES'S CONVICTIONS UPON RECEIPT OF NOTIFICATION THAT HE SATISFIED ALL CONDITIONS OF PROBATION.

The construction and application of § 973.015 to undisputed facts present questions of law, which this court reviews de novo. *Ozuna*, 2017 WI 64, ¶ 9; *Hemp*, 2014 WI 129, ¶ 12. Here, it is undisputed that at the time of sentencing, Lickes was eligible for expungement of counts 1, 3, and 4 under § 973.015(1m) and the circuit court ordered expungement upon successful completion of Lickes's sentence. It is also undisputed that the circuit court received a certificate of discharge from the DOC indicating that Lickes had successfully completed probation and met all court-ordered conditions of probation. The sole issue on appeal is whether Lickes "successfully completed the sentence" such that expungement is now required by § 973.015(1m). In addressing this issue, this Court need not begin with a blank slate, as *Hemp* provides a recent, thorough, and binding analysis of the statute under circumstances materially indistinguishable from the case at hand.

In *Hemp*, the Milwaukee County Circuit Court imposed and stayed a sentence of one year of incarceration on defendant Kearney Hemp and placed him on 18 months of probation with 30 days of conditional jail time. 2014 WI 129, ¶ 5. The court imposed three conditions of probation: psychological treatment, absolute sobriety, and community service. *Id.* It found Hemp eligible for expungement conditioned upon the successful completion of probation. *Id.* Two years later, the DOC issued a certificate of discharge indicating that Hemp "satisfied said probation." *Id.* ¶ 6. Years later, facing subsequent charges, Hemp petitioned the circuit court for expungement. *Id.* ¶ 7. The circuit court denied his petition based on his "tardy action." *Id.* ¶ 8. Hemp appealed.

A unanimous Supreme Court reversed the denial of expungement. The Court confirmed that § 973.015(1m) says what it means and means what it says: "[A]n individual defendant like Hemp who is on probation successfully completes probation if (1) he has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) he has satisfied all the conditions of probation. These (and these alone) are the only requirements . . . . If a probationer satisfies these three criteria, he has earned expungement, and is automatically entitled to expungement of the underlying charge." *Id.* ¶¶ 22–23. The Court also confirmed that the statute "places no burden on the individual defendant to forward his certificate of discharge to the court of record." *Id.* ¶ 25. Rather, the statute requires the "detaining or probationary authority" to issue a certificate of discharge upon the successful completion of the defendant's sentence and forward the certificate to the court of record as a matter of course. *Id.* ¶ 27. "[A]t that point the process of expungement is self-executing." *Id.* ¶ 25.

Applying § 973.015(1m) to the facts of Hemp's case, the Court concluded that the circuit court had no authority to deny Hemp expungement. *Id.* ¶ 40. The probationary authority forwarded the certificate of discharge indicating that Hemp had satisfied probation. Upon the circuit court's receipt of that certificate, the expungement process was completed and expungement should have been effectuated. *Id.* ¶ 38.

The facts of this case mirror the facts of *Hemp*. At sentencing, the circuit court ordered Lickes's convictions eligible for expungement upon successful completion of probation. The probationary authority issued a certificate of discharge stating that Lickes successfully completed his probation and met all court-ordered conditions of probation. (R. 67:1.). It forwarded this certificate to the circuit court. At that point,

"expungement [was] effectuated." *Hemp*, 2014 WI 129, ¶ 32.[3]

B. *OZUNA* DOES NOT CONTROL BECAUSE LICKES'S CERTIFICATE OF DISCHARGE CLEARLY INDICATES THAT HE SATISFIED ALL CONDITIONS OF PROBATION.

The State argues that *Ozuna*, not *Hemp*, controls the outcome of this appeal. But the facts of *Ozuna* differ

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[3] As the circuit court noted, this was the state of the law at the time that the court received the certificate of discharge related to counts 1 and 3, as *Ozuna* was not decided until June 2017. When the circuit court ordered the expungement of counts 1 and 3 "because they were prior to the change in the [la]w" that *Ozuna* represented, R. 92:2, it was presumably referring to the due process restrictions on the retroactive application of judicial interpretations of criminal statutes. The retroactive application of the unforeseeable enlargement of a criminal statute violates due process. *State ex rel. Parker v. Fiedler*, 180 Wis. 2d 438, 463, 509 N.W. 2d 440 (Ct. App. 1993), *reversed on other grounds by State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 517 N.W.2d 449 (1994); *see also State v. Picotte*, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381 (applying a new rule of criminal law prospectively, rather than retroactively, because "for the state to assure a man that he had become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest" (quoting *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928) (Learned Hand, J.)).

The circuit court ultimately concluded that *Ozuna* does not control in this case. If this Court were to disagree with the circuit court, the Due Process Clause would require that *Ozuna* be applied prospectively only. And because *Ozuna* was not issued until after Lickes was charged, pleaded guilty, and was sentenced—and, for that matter, until after he violated the rules of probation—a prospective application of *Ozuna* would not affect Lickes's case all. *See Parker*, 180 Wis. 2d at 462 (noting that the *ex post facto* doctrine bars the imposition of "a greater punishment for a crime than that which existed *at the time the crime was committed*" (emphasis added)).

materially from the facts of this case, rendering it inapplicable here.

1. Ozuna *reaffirmed* Hemp *and announced a new rule for cases in which the DOC form does not clearly indicate that the probationer satisfied all conditions of probation.*

In *Ozuna*, the Walworth County Circuit Court imposed a stayed sentence of 120 days' incarceration on the defendant, Lazaro Ozuna, and placed him on a 12-month term of probation. 2017 WI 64, ¶ 4. The court imposed conditions of probation, including absolute sobriety. *Id.* It found Ozuna eligible for expungement under § 973.015 "if there is no violation of probation." *Id.* ¶ 5. One year later, the DOC issued a Verification of Satisfaction of Probation Conditions of Expungement form[4] indicating that Ozuna "has successfully completed his[] probation" but also indicating that "[a]ll court ordered conditions have *not* been met," explaining that Ozuna "failed to comply with the no alcohol condition." *Id.* ¶ 6. The circuit court subsequently entered an order denying expungement of Ozuna's record. *Id.* ¶ 7. Ozuna appealed.

The Wisconsin Supreme Court began its analysis by reaffirming *Hemp*:

> If the circuit court determines that the defendant is eligible for expungement under Wis. Stat. § 973.015(1m)(a), "the plain language of the statute indicates that once the defendant successfully completes his sentence, he has earned, and is automatically entitled to, expungement." The statute provides a three-part definition

[4] In 2017, the DOC revised its standard "Verification" form and retitled it "Certificate of Discharge and Satisfaction of Probation Conditions for Expungement." Both are versions of the same form, DOC-2678.

> of what it means to "successfully complete the sentence" for purposes of earning expungement . . . . "If a probationer satisfies these three criteria, he has earned expungement, and is automatically entitled to expungement of the underlying charge." . . . [He] has no duty to notify the court of that fact; that duty rests with DOC as the probationary authority.

Id. ¶¶ 12 & 14 n.8 (citations and footnote omitted) (quoting *Hemp*, 2014 WI 129, ¶ 23).

The Court confirmed that where, as in *Hemp*, "the record clearly indicates [that the probationer] successfully completed probation," § 973.015 provides for a "self-executing" expungement process. *Id.* ¶¶ 14, 16 (quoting *Hemp*, 2014 WI 129, ¶¶ 24–25). But, the Court explained, "*Hemp* does not control a case where DOC informs the circuit court that the probationer violated the court-ordered conditions of probation. In such a case, . . . the probationer has no entitlement to expungement and the self-executing process we described in *Hemp* does not occur." *Id.* ¶ 16.

Applying its analysis to the facts of the case before it, the Court noted, "Here, there was never any dispute about the underlying facts in the record. DOC submitted a form to the court which showed that Ozuna had violated one of the court-ordered conditions of his probation. On the form, the probation agent checked a box marked 'All court ordered conditions have *not* been met.'" *Id.* ¶ 18. It concluded, "Based on this clear violation of one of the court-ordered conditions of probation, Ozuna did not satisfy the conditions of probation. Therefore, the circuit court properly denied expungement of Ozuna's record." *Id.* ¶ 19.

The Court made clear that its conclusion was "not in conflict with [its] holding in *Hemp*." *Id.* ¶ 15. It reiterated

that *Hemp* controls when the DOC certificate of discharge clearly indicates that all of the statutory requirements for the successful completion of probation have been met, but that *Ozuna* controls when the form contains contradictory information:

> Although we held in *Hemp* that a court has no discretion to deny expungement if a probationer "successfully completed probation *and* his probationary authority forwarded his certificate to the court of record," there was no dispute in *Hemp* that the probationer had, in fact, met the statutory requirements for the successful completion of probation, including satisfying all the conditions of probation. Nothing in *Hemp* dictates that the mere receipt of a form from DOC stating that the probationer "successfully completed" probation automatically entitles the probationer to expungement where, as here, the very same form contains a contradictory determination by DOC that the probationer violated one of the court-ordered conditions of probation.

Id. ¶ 20 (citations omitted) (quoting *Hemp*, 2014 WI 129, ¶ 41).

The State cherry-picks language from the *Ozuna* opinion that it claims represents a broader holding, requiring denial of expungement whenever the probationer in fact violates a condition of probation, regardless of what the certificate of discharge says. In particular, it cites *Ozuna*'s statements that "a person's statutory entitlement to expungement depends not on whether the court receives a particular notice from DOC, but on whether the probationer meets all of the statutory criteria" and that "the simple fact that DOC forwards a certificate of discharge or other form to the circuit court does not, by

itself, establish an entitlement to expungement." State's Br. at 8–9 (quoting *Ozuna*, 2017 WI 64, ¶¶ 14, 17). The State's reading of this language is inconsistent with the explicit holding in *Ozuna*, which reaffirms the validity of *Hemp*. When read in context, these statements are better interpreted as explaining that receipt of a certificate of discharge *form*, on its own, does not prompt the self-executing expungement process—it is the *content* of the form that matters. And regardless, when read as the State suggests, these statements are dicta, as the case before the Court in *Ozuna* concerned a certificate of discharge that indicated the probationer had violated a condition of probation.

2. Ozuna *does not control Lickes's case.*

As explained above, *Ozuna* held that *Hemp* requires a self-executing expungement procedure *except when* "DOC informs the circuit court that the probationer violated the court-ordered conditions of probation." *Ozuna*, 2017 WI 64, ¶ 16. Here, just as in *Hemp*, the DOC issued a certificate of discharge clearly indicating that Lickes satisfied all court-ordered conditions and successfully completed probation. R. 67:1. So *Hemp* controls, and the circuit court correctly expunged Lickes's record.

The State argues that *Ozuna* requires the circuit court to disregard the facial validity of Lickes's certificate of discharge and delve into the record of his probation to determine whether he had, in fact, satisfied all conditions of probation. But such a rule would contradict *Hemp*'s holding, as affirmed by *Ozuna*: when the probationary authority forwards the certificate of discharge to the court of record clearly indicating that the defendant successfully completed probation, as the statute defines the term, the expungement process is "self-executing." *Ozuna*, 2017 WI 64, ¶¶ 14–16 (citing *Hemp*, 2014 WI 129, ¶¶ 24, 25, 33 n.11).

Were this Court to hold that the circuit court was obliged to ignore the clear language of the certificate of discharge and instead conduct independent fact-finding as to Lickes's conduct on probation, the expungement process would *never* be self-executing, as circuit courts would be required to examine the record each time the DOC forwarded a certificate of discharge, regardless of what information the certificate relayed. Such a holding would directly contradict *Hemp* and *Ozuna*, both of which require automatic expungement upon receipt of a certificate of discharge indicating successful completion of the defendant's sentence.

To briefly summarize, Lickes's case is just like *Hemp*. Thus, *Hemp* controls. *Ozuna* merely serves to confirm this.

C. EVEN IF *OZUNA* REQUIRED THE CIRCUIT COURT TO INDEPENDENTLY DETERMINE WHETHER LICKES QUALIFIED FOR EXPUNGEMENT, THE CIRCUIT COURT DID SO.

The State argues that *Ozuna* controls this case and requires the circuit court to inquire into whether Lickes actually satisfied all the conditions of probation. As explained in Part B, this is not the case, as *Ozuna* controls only cases "where DOC informs the circuit court that the probationer violated the court-ordered conditions of probation." 2017 WI 64, ¶ 16. But even if *Ozuna* did control here, its requirements would have been fulfilled, as the circuit court held a hearing, inquired into the record, found that Lickes did not violate a condition of probation, and properly exercised its discretion to grant expungement.

1. Ozuna *requires circuit courts to review the record when the DOC's notification does not clearly indicate that the probationer satisfied all conditions of probation.*

In *Ozuna*, "there was never any dispute about the underlying facts in the record." 2017 WI 64, ¶ 18. Ozuna never contested that he violated a condition of probation. *See id.* ¶ 14 n.9. The Supreme Court explained that "[t]his case is therefore not the proper vehicle in which to set forth the procedures a court is to follow when such factual matters are disputed." *Id.* It noted only its "confidence in the ability of our circuit courts to resolve such matters fairly." *Id.* Later on, in addressing Ozuna's due process argument, the Court explained that the Due Process Clause did not require a hearing in Ozuna's case because he did not "challenge the underlying facts." *Id.* ¶¶25–26. Thus, *Ozuna* contemplates that some sort of review procedure is required when there is a dispute as to whether the probationer violated a condition of probation.

Given *Ozuna*'s directive to "resolve such matters fairly," and given that the initial decision to deem a defendant eligible for expungement is reviewed for an erroneous exercise of discretion, *see State v. Helmbrecht*, 2017 WI App 5, ¶ 8, 373 Wis. 2d 203, 891 N.W.2d 412, it seems reasonable to apply the same standard of review here.[5] "A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision." *Id.* ¶ 8 (quoting *State v. Thiel*, 2012 WI App 48, ¶ 6, 340 Wis. 2d 654, 813

[5] This standard of review is further supported by the fact that in *Ozuna*, the Court did not reject the suggestion that denial-of-expungement procedures should mirror the procedures required for revocation, *see* 2017 WI 64, ¶¶ 24–25, which are also reviewed for an erroneous exercise of discretion. *See, e.g., State v. Brown*, 2006 WI 131, ¶ 20, 298 Wis. 2d 37, 725 N.W.2d 262 (explaining that revocation of extended supervision is reviewed "to determine if there has been an erroneous exercise of discretion").

N.W.2d 709). "The analysis starts with the presumption that the court has acted reasonably . . . ." *Id.* ¶ 11.

Here, the circuit court held a hearing, as required by the Due Process Clause. It identified the proper legal standard, it found facts—specifically, it found that Lickes violated a rule of probation—and it then resolved the matter fairly. Thus, even if automatic expungement were not required in this case, the procedure followed by the circuit court satisfied the Due Process Clause and *Ozuna*, and the resulting expungement order may not be reversed.

2. *The circuit court correctly determined that § 973.015(1m)(b) requires full compliance with the conditions of probation, not rules.*

The State contends that the circuit court erred when it determined that a probationer has "satisfied the conditions of probation" under § 973.015(1m)(b) even if he has violated a *rule* of probation. It relies on rules of statutory interpretation to support its contention. The circuit court got it right, and the State has it wrong, for the reasons explained below.

"Statutory interpretation begins with the language of the statute . . . . Statutory language is examined within the context in which it is used. . . . [S]tatutes are interpreted to avoid surplusage, giving effect to each word. 'Moreover, words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose.'" *Hemp*, 2014 WI 129, ¶ 13 (quoting *State v. Matasek*, 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811).

Here, the plain language of § 973.015 states that a probationer has successfully completed their sentence if, among other things, they have "satisfied the *conditions* of probation." § 973.015(1m)(b) (emphasis added). It makes no mention of rules. The State argues that Lickes's

interpretation "improperly adds language to the expungement statute," State's Br. at 9, but in fact, it is the State's interpretation that reads additional words—*"and rules and regulations"*—into the statute.

The State attempts to rely on § 973.10(1) to support its interpretation. That subsection provides:

> Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers, parolees and persons on extended supervision.

The State argues that § 973.10(1) "shows that the expungement statute's use of the phrase 'conditions of probation' includes DOC probation rules," State's Br. at 10, but in fact, the opposite is true. § 973.10(1) makes clear that the legislature knows the difference between "conditions set by the court" and "rules and regulations established by the department." When it wants to refer to rules, it does so. The omission of "rules and regulations" from § 973.015(1m)(b) indicates that the legislature intended to refer only to conditions imposed by the court, not rules and regulations established by the DOC. *Outagamie County v. Town of Greenville*, 2000 WI App 65, ¶ 9, 233 Wis. 2d 566, 608 N.W.2d 414. And to read "conditions" within § 973.10(1) as including rules would render the words "rules and regulations established by the department" within that subsection mere surplusage.

The State turns next to § 973.10(2) for support. This subsection provides,

> If a probationer violates the conditions of probation, the department of corrections may initiate a [revocation] proceeding . . . .

The State implies that courts have interpreted the phrase "conditions of probation" within § 973.10(2) to include rules and regulations. But none of the cases it cites stands for this proposition.

- *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 242 N.W.2d 244 (1976), does not cite § 973.10 or any other statute within Chapter 973 at all.

- *State ex rel. Rodriguez v. Department of Health & Social Services*, 133 Wis. 2d 47, 393 N.W.2d 105 (Ct. App. 1986), does not cite § 973.10(2) —rather, it quotes § 973.10(1), which, as discussed above, explicitly includes "rules and regulations."

- *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), discusses § 973.10(2) but mentions only the statute's application to violations of conditions; it says nothing of rules or regulations.

- *State ex rel. Rupinski v. Smith*, 2007 WI App 4, 297 Wis. 2d 749, 728 N.W.2d 1, does not cite § 973.10 at all.

This Court need not definitively interpret § 973.10 here; Lickes merely notes that that section does not support the State's argument concerning the interpretation of "conditions" within § 973.015(1m)(b).

And to the extent that a violation of a rule or regulation can result in revocation of probation, as the State argues it can, that fact also militates in favor of reading "conditions of probation" to mean just that—conditions.

§ 973.015(1m)(b) lists three requirements for expungement: (1) no new convictions; (2) no revocation; and (3) satisfaction of the conditions of probation. As the *Ozuna* Court noted, revocation and satisfaction of the conditions of probation are two separate concepts. *See Ozuna*, 2017 WI 64, ¶ 13. A probationer could violate a condition of probation without being revoked; likewise, a probationer could be revoked—on a rule violation—without violating a condition of probation. If "conditions of probation" is interpreted to include rules and regulations, it would render the no-revocation requirement superfluous, as the only way probation can be revoked is as a result of a violation of the conditions, regulations, or rules. The statute should be interpreted to avoid such surplusage.

In sum, the plain language of § 973.015(1m)(b), whether read on its own or within the context of related statutes, unambiguously indicates that the legislature intended expungement to require a probationer to satisfy all court-ordered conditions of probation; the requirement does not extend to rules and regulations imposed by the DOC. To the extent this Court has any doubt about the legislature's intent, the rule of lenity requires this Court to resolve its doubt in Lickes's favor. *See State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400 ("The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, 'a court should apply toe rule of lenity and interpret the statute in favor of the accused.'" (quoting *State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700)).

3. *The circuit court did not abuse its discretion when it reviewed the record and determined that expungement was appropriate.*

Were this Court to determine that § 973.015(1m)(b) could require compliance with rules of probation, the circuit court's expungement order should nevertheless be affirmed. Even if *some* rule violations might support

denial of expungement in *some* cases, a bright-line rule prohibiting expungement upon proof of violation of even the most minor rule would run contrary to the legislative purpose of the expungement statute.

"The overarching legislative purpose of the expungement statute is to provide 'a break to young offenders who demonstrate the ability to comply with the law.'" *Ozuna*, 2017 WI 64, ¶ 11 (quoting *Hemp*, 2014 WI 129, ¶ 20). The statute "indicates our legislature's willingness (as expressed by the plain language of the statute) to help young people who are convicted of crimes get back on their feet and contribute to society by providing them with a fresh start, free from the burden of a criminal conviction." *Hemp*, 2014 WI 129, ¶ 21. "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.* ¶ 20.

In the face of this clear legislative intent to allow for expungement, it would be unreasonable to require denial of expungement based on violation of even the most minor of rules. Should this Court expand the statute to require compliance with rules, it must at the very least allow circuit courts discretion to determine which rule violations warrant denial of expungement.

Here, the circuit court properly exercised its discretion. It kept in mind its "duty to make sure that justice is performed." R. 91:8. It recognized that although "Mr. Lickes did break a rule, . . . it was not deemed serious by the Department." R. 92:7. It noted "the new bipartisan bill [representing a further legislative effort to] expand expungement [because] too many people have lost the ability to maintain their own homes, their household, their families because of a record which could have been expunged." R. 92:7. It noted that this bill has broad support and is "in the best interest of the people of the State of Wisconsin." R. 92:8. And it noted

that at the time of sentencing, "[t]he State did not think this was a crime that needed to have permanency. The state [was] the one that recommended the expungement. [It] felt that that was necessary and an appropriate thing when Mr. Lickes was a young man." R. 92:8. With these factors in mind, the circuit court exercised discretion to expunge Lickes's record. In doing so, it did not abuse its discretion, and therefore this Court should affirm its order.

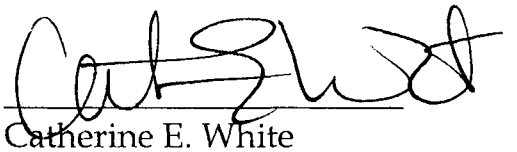
CONCLUSION

For these reasons, Jordan Alexander Lickes now respectfully requests that this Court **AFFIRM** the judgment of the Green County Circuit Court.

Dated at Madison, Wisconsin, November 11, 2019.

Respectfully submitted,

JORDAN A. LICKES,
Defendant-Respondent



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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 6,099 words. *See* WIS. STAT. § 809.19(8)(c)1.

Catherine E. White

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I hereby certify that:

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Catherine E. White