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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2019 AP 1272

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW

JORDAN ALEXANDER LICKES,
Respondent-Appellant

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ISSUES PRESENTED FOR REVIEW

Jordan Lickes seeks review of three issues, each of which concern the following language from Wisconsin's expungement statute:

> [T]he 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. . . .
>
> 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the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation.

WIS. STAT. § 973.015(1m)(a)1 & (b).

1. Does the expungement statute's requirement that a probationer have "satisfied the conditions of probation" also mean that the probationer must perfectly comply at all times with each and every rule of probation set by the probation agent?

The circuit court answered no. The court of appeals answered yes.

2. When a circuit court chooses to hold a hearing and exercise discretion to determine whether a probationer who violated a rule set by his agent has nevertheless "satisfied the conditions of probation" so as to qualify for expungement, should the appellate court review the circuit court's decision for an erroneous exercise of discretion?

The court of appeals answered no.

3. When a circuit court makes factual findings concerning whether a probationer violated a condition of probation rendering him ineligible for expungement, must the appellate court uphold the finding in the absence of clear error?

The court of appeals answered no.

STATEMENT OF REASONS FOR GRANTING REVIEW

This case presents three questions of law concerning Wisconsin's expungement statute. In particular, this case concerns expungement after probation, a topic that this Court has twice taken up in recent years. *See State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20; *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811. This petition does not seek to have the Court reconsider its decision in *Ozuna*. Rather, the Court's review is needed to clarify the law on a matter of statewide importance and to correct the court of appeals' erroneous interpretation of the expungement statute as its applies to rules imposed by a probation agent. *See* WIS. STAT. § 809.62(1r)(c)2 & (d).

This Court has explained that the expungement statute "indicates our legislature's willingness . . . to help young people who are convicted of crimes get back on their feet and contribute to society by providing them a fresh start, free from the burden of a criminal conviction." *Hemp*, 2014 WI 129, ¶ 21. Amendments to the statute reflect the legislature's "effort to expand the availability of expungement to include a broader category of youthful offenders." *Id.* ¶ 19.

The decision below narrows the availability of expungement and runs directly contrary to both the

language and the legislative purpose of the statute. The court of appeals interpreted the expungement statute to premise expungement upon full compliance with any and all rules established by a probation agent and to strip the circuit court of its fact-finding role and of any discretion to determine whether a violation warrants denial of expungement. In reversing the circuit court's expungement order, the court of appeals not only deemed expungement unavailable to a young man whom the circuit court thought deserving of expungement—a young man with a single mark on his probation record who, in the years since completing probation, has held a steady job and has not reoffended—it also made expungement unavailable statewide to any probationer with a single technical violation of any agent's rule while on probation, regardless of the sentencing court's factual findings and determination as to whether the probationer's actions while on probation render expungement inappropriate.

Here are just a handful of the 18 standard rules of supervision set by the Department of Corrections (in addition to the individualized rules that agents are encouraged to set for each probationer):

- Avoid all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or your rehabilitation.
- Report all arrests or police contact to your agent within 72 hours.
- Inform your agent of your whereabouts and activities as he/she directs.
- Obtain approval from your agent prior to changing residence or employment. In case of an emergency, notify your agent of the change within 72 hours.

- Pay court ordered obligations and monthly supervision fees as directed by your agent per Wisconsin Statutes, and Wisconsin Administrative Code; and comply with any department and/or vendor procedures regarding payment of fees.
- Report as directed for scheduled and unscheduled appointments.
- Comply with any court ordered conditions and/or additional rules established by your agent. The additional rules established by your agent may be modified at any time as appropriate.[1]

These rules are tougher than they first appear when one considers the circumstances that many probationers find themselves in—limited job prospects, unstable housing, a lack of familial support, and reliance on public transportation—that make it all the more difficult for them to comply perfectly with each and every rule. For example, there is the woman who misses a meeting with her agent because her car breaks down; the man who forgets to tell his agent about the police officer who said hi to him on the street; the woman who was laid off from her job and couldn't pay her monthly supervision fee as a result. Each of these individuals violated a standard rule of probation and, according to the court of appeals, ought to be barred forever from obtaining expungement. Circumstances such as these are why probation agents do not demand perfect compliance from day one. They work closely with their probationers to help them attain compliance, and when a probationer makes a mistake, the agent exercises discretion to determine whether that mistake can be ignored or is deserving of some response, be it an alternative to revocation (ATR) or revocation.

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[1] Department of Corrections, *Standard Rules of Community Supervision*, https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/SupervisionRules.aspx.

And when a probationer eligible for expungement is discharged from supervision, the agent again exercises discretion when notifying the court about the probationer's performance. The court then has a chance to determine whether, in fact, a rule or condition was violated and to exercise discretion to determine whether a rule violation was serious enough to demand the denial of expungement. The decision below removes these layers of discretion and instead mandates the automatic denial of expungement upon a single alleged violation of any agent-established rule, regardless of whether the agent thought that violation significant enough to warrant revocation—or even an entry in the probationer's file—and regardless whether the court thought that the violation actually occurred or was significant enough to warrant the denial of expungement.

Some 2,000 individuals' records are expunged each year in Wisconsin, and that number likely represents only a small portion of the cases *eligible* for expungement each year.[2] Unless this Court weighs in, the decision below will require sentencing courts to deny expungement to each individual who violates any rule without regard to the circumstances surrounding the violation. Left untouched, the decision below will deny expungement to untold numbers of young men and women who have demonstrated the ability to comply with the law but have not perfectly complied with each and every rule set by their probation agents.

The decision below also runs contrary to a long line of decisions in this Court holding that circuit courts' factual findings must be upheld on appeal unless they are clearly erroneous. *See, e.g., Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶ 34, 319 Wis. 2d 1, 768 N.W.2d

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[2] *See* WPRI, *Problems with Wisconsin's Expungement Law*, http://www.badgerinstitute.org/BI-Files/Reports/ExpungementstoryMay2017.pdf (2017).

615. The court of appeals ignored the sentencing court's finding that Lickes did not violate a court-ordered condition of probation and *sua sponte* made its own factual finding that Lickes did violate a court-ordered condition. *See* App. 10. Publication of the lower court's decision will create new confusion on the basic procedure that sentencing courts must follow when determining whether expungement can be completed and on the appellate courts' procedure for reviewing these determinations.

This Court should grant review to resolve the novel questions of law concerning expungement after probation, questions that will recur statewide until this Court clarifies the law. *See* WIS. STAT. § 809.62(1r)(c). This Court should also take review because the court of appeals' decision is in conflict with the opinions of this Court. *See* § 809.62(1r)(d).

STATEMENT OF THE CASE

Nature of the Case. This is an appeal of an expungement order entered in Green County Circuit Court by the Honorable James R. Beer following Jordan Lickes's successful completion of probation. The court of appeals reversed the circuit court, holding that the circuit court lacked discretion to order expungement because Lickes violated a rule established by his probation agent.

Procedural Status and Relevant Facts. The material facts are undisputed and are accurately recounted in the court of appeals' decision, save one. At sentencing, the circuit court ordered that upon successful completion of his three-year term of probation, three of Jordan Lickes's convictions would be expunged.

The probation agent completed and submitted two forms indicating that Lickes successfully completed probation. The first form, submitted in 2016, indicated that Lickes had successfully completed two years of probation, the maximum term authorized by statute for counts 1 and 3. The agent noted on the 2016 form that Lickes had not yet met all court-ordered conditions of probation, as he was continuing to participate in sex offender treatment, which was a court-ordered condition of all three counts, and which he was expected to complete in January 2017, when his third year of probation would come to an end. The second form, submitted in 2018, indicated that Lickes had successfully completed all three years of probation and that all court ordered conditions had been met.

Lickes subsequently requested expungement of his record. The State opposed expungement. It pointed to a document filed with the court by Lickes's probation agent on October 6, 2015, as part of an ATR. There, the 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.[3] App. 25. The agent requested, and the court ordered, 45 days of conditional jail time as an alternative to revocation. 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." App. 26. 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. App. 29.

The circuit court held two hearings on the issue of expungement. At the first hearing, the State suggested that Lickes violated a court-ordered condition of probation on counts 1 and 3 because he had not completed sex offender treatment within the two-year maximum probationary term for those counts, but it conceded that Lickes had completed sex offender treatment by July 16, 2018. App. 35–36. The circuit court explained that it had ordered sex offender treatment as a condition of probation "as to the 3rd Count [i.e., count 2] as long as probation was put on," that is, that it would have been impossible for Lickes to complete treatment by the two-year mark because he was required to participate in treatment for the entire three-year term of probation. App. 39–40. Therefore, the court found that Lickes had successfully completed that condition and all other court-ordered conditions of probation that had

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[3] These alleged violations were based on the results of a polygraph test that Lickes submitted to at the direction of his agent, pursuant to the court-ordered condition that he comply with all polygraph testing. App. 37. Lickes later explained to the circuit court that the polygraph concerned suspected consensual sexual contact between himself and an adult woman whom he was dating. App. 43–45. The circuit court summarized the apparent basis for the ATR as follows: "the test said that he had had sex with somebody without calling his agent first and getting permission, and . . . he said, that isn't true." App. 46. As the circuit court noted, the polygraph results would have been inadmissible in court because of their unreliable nature. *See* App. 37–46.

been ordered by the court on all three counts, and it counts 1 and 3 expunged. App. 49.

At the second hearing, the circuit court concluded that *Ozuna* "does not appear to be such a strict rigid ruling that it's one that the Court must absolutely follow in all regards, because it doesn't deal with this situation." App. 64. In other words, *Ozuna* still left room for the circuit court to elect to exercise its discretion when it comes to a violation of an agent-established rule. The circuit court noted that "Lickes did break a rule" that had been established by the agent during probation, but that "it was not deemed serious by the Department." App. 63. It noted that it was "in the best interest of the people of the State of Wisconsin" to expand, rather than constrict, the availability of expungement. App. 64. As a result, it exercised its discretion to "grant the expungement as requested." *Id.*

The State appealed. The court of appeals held that the expungement statute's requirement that the probationer satisfy "the conditions of probation" also unambiguously requires perfect compliance with all rules established by the probation agent. App. 11–16. It also held that where, as here, the record shows a violation of probation rules, the circuit court cannot exercise any discretion to expunge the probationer's record; expungement must automatically be denied. App. 16–18. As a result, the court of appeals reversed the circuit court's order granting expungement on all three counts.

The court of appeals had no reason to address expungement on counts 1 and 3 separately, but it did so anyway. *See* App. 9–10, 15 n.6. It found that because Lickes was still participating in and had not yet completed sex offender treatment when he reached the two-year mark on his term of probation—the statutory maximum term on counts 1 and 3—he did not satisfy a court-ordered condition of probation on those counts

and was forever ineligible for expungement as a result. In so doing, the court of appeals ignored the circuit court's factual finding that Lickes was required to continue treatment until the end of his three-year term of probation and therefore did not violate a condition when he had not completed treatment by the two-year mark.

ARGUMENT

A. CIRCUIT COURTS NEED TO KNOW WHETHER "CONDITIONS OF PROBATION" INCLUDES RULES SET BY THE PROBATION AGENT.

The first issue presented for review is one of statutory interpretation. The expungement statute provides for expungement "upon the successful completion of the sentence." WIS. STAT. § 973.015(1m)(a)1. A probationer must fulfill three requirements to successfully complete the sentence for purposes of earning expungement: (1) no conviction for a subsequent offense; (2) no revocation of probation; and (3) satisfaction of "the conditions of probation." § 973.015(1m)(b).

The court of appeals was asked to determine whether a probationer who violates a rule set by the probation agent has nonetheless "satisfied the conditions of probation." In other words, does the statutory phrase "conditions of probation" mean just that—the conditions set by the sentencing court—or does it also include the rules of probation set by the probation agent?

This question was one of first impression for the court of appeals not because it is a particularly unique factual situation—to the contrary, among the thousands of individuals whose records are expunged each year, a significant portion of them likely have been placed on probation and committed some violation of the rules established by their probation agents. Rather, this question was one of first impression because it grew out of *Ozuna*'s holding that "a person's statutory entitlement

to expungement depends not on whether the court receives a particular notice from the DOC, but on whether the probationer meets all of the statutory criteria for the 'successful completion of the sentence.'" 2017 WI 64, ¶ 14 (quoting § 973.015(1m)(b)). In light of that holding, the lower courts are now understandably in need of guidance on when a probationer meets the statutory criteria.

In the opinion below, the court of appeals provided that guidance, holding that "the phrase 'conditions of probation in the expungement statute includes DOC probation rules." App. 12; *see also* App. 11-16. In so holding, the court of appeals has premised expungement upon absolute perfection by every probationer. This holding runs contrary to the purpose of the expungement statute: "to help young people who are convicted of crimes get back on their feet and contribute to society." *Hemp*, 2014 WI 129, ¶ 21. By reading the word "rules" into the expungement statute, the court of appeals has drastically narrowed the availability of expungement.

The court of appeals' interpretation of the expungement statute is just plain wrong. The statute says "conditions," not rules. The surrounding statutes indicate that the legislature knows the difference between conditions and rules. *See, e.g.*, WIS. STAT. § 973.10(1) (referring to "conditions set by the court" and "rules and regulations established by the department"). To the extent that there is any ambiguity, reading in "rules" to the statute runs contrary to the legislative purpose and to the rule of lenity.

The court of appeals' holding also runs contrary to the main purpose of probation: to rehabilitate the probationer. *See, e.g., State v. Sepulveda*, 119 Wis. 2d 546, 561, 350 N.W.2d 96 (1984). Probationers are not expected to comply perfectly with every rule, every time—especially rules that would be difficult for even the most

law-abiding citizen to follow. The goal is for them to learn from their mistakes and to learn new behaviors and responses. Thus, agents generally do not revoke probation unless serious, continuing violations indicate that the probationer "is not adjusting properly and cannot be counted on to avoid antisocial activity." *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972). Yet the decision below bars expungement automatically upon a violation of a rule. Thus, after a single rule violation, the promise of expungement ceases to act as an incentive for the probationer to complete probation successfully. *Cf. State v. Matasek*, 2014 WI 27, ¶¶ 42–43, 353 Wis. 2d 601, 846 N.W.3d 811.

If not corrected, the court of appeals' erroneous interpretation of the expungement statute will greatly reduce the number of rehabilitated individuals whose records are expunged, contrary to the legislature's purpose in enacting and amending the expungement statute. This Court's guidance is needed on this issue of statewide importance.

B. CIRCUIT COURTS NEED TO KNOW WHETHER THEY CAN ELECT TO EXERCISE DISCRETION TO DETERMINE WHETHER A PROBATIONER HAS SATISFIED THE CONDITIONS OF PROBATION DESPITE VIOLATING A RULE.

The second issue presented for review concerns the ability of sentencing courts to exercise the discretion granted by the expungement statute. The statute allows sentencing courts to order a record expunged "if the court determines the person will benefit and society will not be harmed by this disposition." § 973.015(1m)(a)1. This is a balancing test, similar in structure to § 904.04(2), that necessarily requires both fact finding and the exercise of discretion. The statute imposes several additional requirements, among them, that the court make its initial decision about expungement at the time of sentencing, *see Matasek*, 2014 WI 27, and that the

expungement be granted only upon the individual's successful completion of the sentence, *see Ozuna*, 2017 WI 64.

The circuit court here abided by these requirements: It decided at the time of sentencing to order expungement, and it held a hearing after Lickes completed his sentence to determine whether he did so successfully. It considered Lickes's performance while on probation. It found that Lickes did not violate any condition ordered by the court. And it determined that despite the rule violation, Lickes nevertheless satisfied the conditions of probation and that it was in the interest of society to grant him expungement.

The court of appeals was asked to determine how to review the circuit court's exercise of discretion. Again, this was a question of first impression not because of a unique factual scenario but because this Court's recent holdings in *Hemp* and *Ozuna* had resulted in confusion among the lower courts. *Hemp* had been read to require automatic expungement upon the successful completion of a sentence. 2014 WI 129, ¶¶ 23, 27, 36. And *Ozuna* had been read to allow circuit courts to deny expungement without further inquiry when the defendant has indisputably violated a court-ordered condition of probation. 2017 WI 64, ¶ 14. But *Ozuna* did not consider violations of probation rules, rules that have never been reviewed, much less ordered, by a court. Lower courts have been left to wonder, then, whether discretion can or should be exercised when it comes to rule violations.

The court of appeals took a hardline approach to the issue, holding that when "the record indisputably shows that [the probationer] violated DOC probation rules," circuit courts are "without discretion." App. 17. Expungement must be automatically denied. "Said otherwise, the legislature could have left this decision to the circuit court's discretion but, instead, it has established clear objective standards that leave no room

for the court's exercise of discretion at that stage of the process." App. 17–18.

That last sentence itself demonstrates the error of the court of appeals' holding: the standard listed in the expungement statute requiring satisfaction of the conditions of probation is anything but clear and objective. Does one missed appointment with a probation agent mean that the conditions of probation have not been satisfied? What if the appointment was missed because a child had to be taken to the hospital? Or because the probationer's bus broke down? What about a single late payment of the monthly supervision fee? What if the payment was late because the probationer was the victim of a robbery? Or because the probationer was laid off? It would be unreasonable to automatically deny expungement based solely on such technical rule violations, but that's what the decision below requires of every circuit court across the state.

One might reasonably argue that the probation agent would have the discretion to ignore rule violations such as the example above. That's true. But the decision below requires the sentencing court to deny expungement whenever the record reflects a rule violation—whether it's the agent, the prosecutor, the victim, or another third party who brings the violation to the court's attention. The decision below deprives sentencing courts of the discretion bestowed upon them by the expungement statute and instead gives discretionary power solely to third parties whose decisions are unreviewable on appeal. And it encourages agents to ignore violations that they would otherwise report so as not to destroy a promising probationer's changes of obtaining expungement.

And despite the lack of appellate review of those third parties' decisions to force the denial of expungement, the decision below will likely create more work for the courts. Probationers will be forced to defend their

entitlement to expungement by arguing the factual basis for each alleged rule violation. They will have no reason to accept an ATR, and they will challenge every attempt at revocation. They will demand an evidentiary hearing upon application for expungement at the completion of probation, and they will appeal every denial of expungement. With so much riding on each alleged violation of a rule or condition, it would be unreasonable to do anything less.

At the risk of sounding like a broken record, thousands of individuals are eligible for expungement every year. A significant portion of them likely completed probation, and a significant portion of those individuals likely avoided revocation or even an ATR but nevertheless technically violated a rule of probation. This scenario is far from unique. To the contrary, it repeats itself day in and day out in circuit courts across the state. The court of appeals could have issued a fact-specific opinion in this case focused on whether the circuit court erred in its exercise of discretion, but it didn't. It issued a state-wide edict requiring circuit courts to automatically deny expungement to any probationer who violates any rule or condition of probation.

If not corrected, the court of appeals' refusal to allow circuit courts to exercise discretion will greatly reduce the number of individuals whose records are expunged, contrary to the legislature's purpose in enacting and amending the expungement statute. Again, this Court's guidance is needed on this issue of statewide importance.

C. THE COURT OF APPEALS FAILED TO REVIEW THE CIRCUIT COURT'S FACTUAL FINDINGS FOR CLEAR ERROR, CONTRARY TO THIS COURT'S PRECEDENT.

The final issue presented for review concerns the standard of review applicable to circuit courts' factual findings on appeal. This is far from a novel issue. The law

is well-established: factual findings are reviewed for clear error. *See, e.g., Phelps*, 2009 WI 74, ¶ 34 ("We uphold a circuit court's findings of fact unless they are clearly erroneous.").

The court of appeals ignored the established standard of review, however, and substituted its own factual finding for that of the circuit court. Where the circuit court found that Lickes did not violate a court-ordered condition of probation by completing sex offender treatment in three years, rather than two, the court of appeals *sua sponte* made its own factual finding that the court-ordered condition required completion of treatment within two years and that therefore Lickes did violate a court-ordered condition. *See* App. 10.

The decision below is in conflict with this Court's controlling precedent. And although not every mistake by an appellate court is deserving of the Supreme Court's review, this mistake is. Given the many questions that remain concerning the procedure to be followed by circuit courts when determining whether expungement may be completed after a probationer is discharged from supervision, this Court's guidance is needed—especially because the Court in *Ozuna* declined "to set forth the procedures a court is to follow when such factual matters are disputed." 2017 WI 64, ¶ 14 n9.

Publication of the lower court's decision will create new confusion on when circuit courts factual findings are entitled to deference. This Court's guidance is needed on this issue of statewide importance.

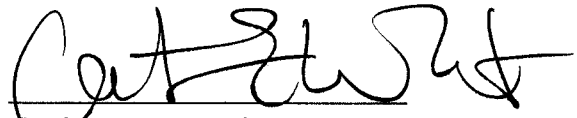
CONCLUSION

For these reasons, Jordan Alexander Lickes respectfully requests that this Court grant the petition for review, reverse the court of appeals' mandate, and affirm the judgment of the Green County Circuit Court expunging Mr. Lickes's record.

Dated at Madison, Wisconsin, September 17, 2020.

Respectfully submitted,

JORDAN ALEXANDER LICKES,
Respondent-Appellant



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CERTIFICATION

I certify that this petition conforms with the rules contained in WIS. STAT. § 809.62(4) for a petition for review produced using proportional serif font. The length of this petition is 4,467 words. *See* WIS. STAT. § 809.19(8)(d).

Catherine E. White

CERTIFICATE OF COMPLIANCE WITH RULE 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of WIS. STAT. §§ 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review 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 petition for review filed with the court and served on the opposing party.

Catherine E. White

APPENDIX CERTIFICATION

I certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with WIS. STAT. § 809.62(2)(f) and that contains, at a minimum, (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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.

Catherine E. White

CERTIFICATE OF COMPLIANCE WITH RULE 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. §§ 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on the opposing party.

Catherine E. White