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COURT OF APPEALS

STATE OF WISCONSIN
SUPREME COURT
Case No. 2019 AP 1272

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JORDAN ALEXANDER LICKES,
Defendant-Respondent-Petitioner.

**NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC., IN
SUPPORT OF DEFENDANT-RESPONDENT-PETITIONER'S PETITION
FOR REVIEW**

LEGAL ACTION OF WISCONSIN, INC.
700 West State Street - MATC
Milwaukee WI 53233
Phone: (414) 297-6931
Email: scl@legalaction.org
Susan Lund, SBN: 1087904
Sheila Sullivan, SBN: 1052545
Julie Leary, SBN: 1113385
Jessie Long, SBN 1104518

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BACKGROUND

Over the past four decades, the nation has experienced an epidemic of mass incarceration; during that period, Wisconsin's prison population has increased by a staggering seven hundred percent.¹ The unsurprising result of this epidemic is an explosion in the number of Americans with criminal records. By 2012, over 100 million offenders were listed in state criminal history repositories throughout the nation.² By 2018, in Wisconsin, an estimated 1.4 million people had criminal records.³

Racial disparities in the criminal legal system are a problem in every state.⁴ Wisconsin's racial disparities are especially disturbing. Wisconsin incarcerates people of color at far higher rates than white people—and at rates of disparity above

¹See Mary Prosser & Shannon Toole, *How Did We Get Here? Wisconsin's Mass & Disparate Incarceration*, Wis. Law., Apr. 2018, <https://www.wisbar.org/NEWSPUBLICATIONS/WISCONSINLAWYER/Pages/Article.aspx?Volume=91&Issue=4&ArticleID=26275#a>.

² U.S. Dep't of Just., Bureau of Just. Stats., *Survey of State Criminal History Information Systems*, 2012. <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

³ Joe Peterangelo, LaLinda Xiong & Rob Henken, *A Fresh Start: Wisconsin's Atypical Expungement Law and Opinions for Reform*, WI Pol'y F., (June 2018), https://wispolicyforum.org/wp-content/uploads/2018/06/FreshStart_FullReport.pdf.

⁴ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, Washington, D.C.: The Sentencing Project, April 2018, ("African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys.").

the national average.⁵ Racial disparities in incarceration are driven both by unequal access to resources and unequal treatment at all the pivotal decision points before and after conviction, including setting and enforcing conditions of supervision.⁶ It is thus not surprising that Black individuals in Wisconsin are stopped, arrested, convicted, and imprisoned for technical

⁵ Prosser & Toole, *supra*. (“Wisconsin incarcerates non-white persons at far higher rates than whites and at rates of disparity far above the national average. The percent of African-American males admitted to Wisconsin prisons has decreased since 2000 (from 48 percent to 37 percent of total admissions), but African-American males still comprise 43 percent of the total male prison population. Prison admissions of Native Americans increased over the same period and were more than 5 percent of admissions in 2016. African-Americans and Native Americans make up 6.6 percent and 1.1 percent of the Wisconsin population, respectively.”))

⁶ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, *supra*, (“Absent meaningful efforts to address societal segregation and disproportionate levels of poverty, U.S. criminal justice policies have cast a dragnet targeting African Americans.”); *see also* Sarah K. S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, *Demography* 54, 1795–1818 (2017), (“Variation in punishment rates by state is attributable to differences in economics, crime rates, demographics, politics, and sentencing laws. State incarceration rates vary partly because of differences in criminal justice processing, including exposure to police surveillance, rates of conviction, and sentencing patterns. States vary widely in the use of imprisonment versus community supervision.” (internal citations omitted)); Jesse Jannetta, et al., *Examining Racial and Ethnic Disparities in Probation Revocation*, Urban Inst., (2014), (A 2014 study by the Urban Institute found that probation revocation was between 18% to 39% higher for African Americans than whites. The Urban Institute attributes some of this disparity to the probationer’s risk assessment score and criminal history but notes that a significant portion of this racial disparity is unexplained.); Michelle S. Phelps, *Mass Probation and Inequality*, 2 *ASC Division on Corrections & Sentencing Handbook Series* 43 (2018), (In addition to racial bias, probation policy and funding contribute to racial disparities. Low-income probationers, who are disproportionately people of color are more likely to be classified as “high-risk” and face stricter supervision requirements. Failure to meet certain probation obligations, like reporting to areas with little to no public transportation, difficulty maintaining employment, or paying fines, indicates financial struggle but can still be viewed as a probation violation); and Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, Washington, D.C.: The Sentencing Project, 2015.

probation rule violations at rates significantly higher than white individuals.⁷

Racial disparities are also reflected in rates of access to expungement. In Wisconsin, Black people access expungement at disproportionately lower rates than white people.⁸ Income disparity, highly correlated with race, explains part of this disparity.⁹ If the expungement process invites further scrutiny of supervision performance, even fewer individuals will access expungement, and the disparities are likely to increase.

⁷ See Elliot Hughes, *Black People were 8 Times More Likely to be Pulled Over by Milwaukee Police in 2019 than White People, New Report Says*, Milwaukee J. Sentinel, Sept. 23, 2020, <https://www.jsonline.com/story/news/2020/09/23/black-people-8-times-more-likely-pulled-over-milwaukee-police-in-2019/3505904001/> (“Black people were eight times more likely to be pulled over and seven times more likely to be frisked by police compared with white people.... Black people were four times as likely to be subjected to a field interview, the report said”); see also *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU Res. Rep., Apr. 20, 2020, <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform> (“Black people are 4.2 times more likely than white people to be arrested for marijuana possession in Wisconsin, despite comparable national marijuana usage rates”). See also Jarred Williams, et al., *The Wisconsin Community Corrections Story*, Columbia U.: Justice Lab, Jan. 2019, (Discussing probation as a contributor, rather than an alternative, to mass incarceration due to extensive and often arbitrarily enforced rules leading to high levels of technical violations. Although Black people are “disproportionately supervised and disproportionately reincarcerated for supervision violations” at a national level, “Wisconsin rates of supervision and reincarceration for Black people are also higher than these already-inflated national numbers.”).

⁸ *Problems with Wisconsin’s Expungement Law*, Black Robes and Blue Collars: How to Let Wisconsin’s Judges Help Job-Seekers and Employers, WPRI Report, May 2017 at 3, 9, (Statewide, 23% of expungement eligible cases are for Black defendants, but only 10% of expungements granted are for Black defendants; 63% of expungement eligible cases are for white defendants and 79% of expungements granted are for white defendants).

⁹ *Wisconsin’s Extreme Racial Disparity*, Center on Wisconsin Strategy, Jan. 2017, at 1, (According to a 2017 report, “The median white household has annual income of just over \$58,200 in Wisconsin. The median African American household annual income of about \$29,200 is about half the white level... Only two states – Minnesota and Louisiana – post greater black/white inequality in household income.”).

Despite any flaws in the existing expungement law, Wis. Stat. § 973.015,¹⁰ remains an important door for youthful adults seeking escape from the most harmful lifelong effects of a criminal conviction, particularly for young people of color.¹¹ Sadly, that door will be slammed shut for many of those young people if this Court does not review, and ultimately reverse, the decision in *State v. Lickes*. (Lickes' 9/18/20 Appendix to Petition for Review App. 1-22).

ARGUMENT

I. This Court should grant Lickes' Petition for Review because it presents a novel question, the resolution of which will have a statewide impact.

This Court should grant Lickes' Petition for Review to clarify whether the requirement that probationers "satisf[y] conditions of probation" includes a requirement that they perfectly satisfy all "DOC-imposed conditions in the form of rules of probation." (Lickes' App. 11-12 at ¶¶ 23, 26). This is a novel

¹⁰ All references in this brief are to 2017-2018 statutes unless otherwise noted.

¹¹ Meyli Chapin, et al., *A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County*, Stanford U.: Undergraduate Public Policy Senior Practicum, (2014), (Having one's record expunged greatly increases the chances of being hired because it prevents a potential employer from seeing the criminal record of a job applicant. Expunging records helps improve economic productivity and increases tax revenue. Individuals granted expungement see over \$6,000 annual income increase).

question of law and its resolution will have a statewide impact.

See Wis. Stat. § 809.62(1r)(c)2.

Each year, Wisconsin courts effectuate ordered expungements in about 2,000 criminal cases.¹² Between January 1, 2010 and April 14, 2017, 10,000 cases involving 21,000 different counts/charges, were expunged from individual defendants' records.¹³ Based on Legal Action of Wisconsin's experience, these completed expungements represent only a portion of the cases in which expungement was ordered. Expungement orders remain incomplete because of court requirements to petition for expungement, inadequate documentation, or inability of the petitioner to timely pay fees. By that point in a case, many petitioners are unrepresented.

The door to expungement in Wisconsin is not open wide.¹⁴ If it stands, the decision in *State v. Lickes* will narrow access to a thin crack, particularly for justice-involved youth of color and

¹² *Problems with Wisconsin's Expungement Law*, *supra* at 5.

¹³ *Id.*

¹⁴ *A Fresh Start: Wisconsin's Atypical Expungement Law and Opinions for Reform*, *supra*, at 3. ("Our review found no other state where judges are required to make expungement decisions at sentencing (rather than after sentence completion) or where closed cases (those that already have been decided) are not eligible for expungement. In addition, Wisconsin is among a handful of states that limit expungement eligibility only to young offenders (under age 25) and that do not expunge cases that end in acquittals or dismissed charges. Overall, Wisconsin appears to have a stricter expungement law than all of its neighboring states except Iowa.").

probationers struggling with mental health, cognitive limitations, and substance abuse.¹⁵

Left unreviewed, *Lickes* will also impact circuit courts across the state. Circuit courts will have to grapple with the unanswered questions created by *Lickes* and *Ozuna* regarding burdens of proof, documentation, hearsay, and due process. (*Lickes*' App. 1-22); *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

Lickes could have other long-term effects on circuit courts. In making initial expungement decisions, circuit court judges can weigh the impact of court-ordered conditions of probation in the

¹⁵ From as early as 1925, students of criminal justice recognized that environmental factors had a strong impact on whether probation and parole were effective. *See, e.g.*, Helen Leland Witmer, *Some Factors in Success or Failure on Parole*, 18 Am. Inst. Crim. L. & Criminology 384, 385 (1927-1928). In that year, the Wisconsin State Board of Control requested that the Sociology Department of the University of Wisconsin investigate the state's probation and parole system. *Id.* at 384. That report identified such factors as family ties (labeled as "marital conditions" in the report), substance abuse, geographic location (identified as "place of residence before commitment" and "type of community to which they were paroled," but which ultimately broke down into "urban" versus "rural"), and monthly income as having an impact on a person's success or failure on parole. *Id.* at 387-395. More recent studies have recognized that imposing blanket conditions for things like attending substance abuse classes—even when the offense at issue was not a drug or alcohol related case—can impact probationers ability to keep and find work, setting up multiple ways for probationers to "fail" to fulfill all rules of probation. *See, e.g.*, *When Does It End? Probation System Traps Some for Decades*, Dallas Observer (June 25, 2019), <https://www.dallasobserver.com/news/probation-system-traps-some-for-decades-11685068>. Reformers have argued that the proliferation of supervisory rules often disproportionately harms low-level offenders—most likely to have ordered expungements. *See, e.g.*, Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, *Topics in Community Corrections* (2004), (concluding that intense correctional interventions can increase the failure rates of low-risk offenders).

context of an individual defendant's situation and determine whether compliance with those conditions is an appropriate pre-condition for expungement. Will courts feel comfortable conditioning an expungement on arbitrary rules created by the DOC that are not reviewed by a judge?

The Department of Corrections will also be affected if the *Lickes* decision stands. Agents will have to reconsider how rules they have traditionally used flexibly—to accommodate those struggling with poverty, homelessness, addiction, and/or mental illness—will impact a probationer's chances of successfully completing a sentence. Agents who believe a probationer deserves expungement will be troubled by how to best document minor rule violations. Particularly where a probationer has not willfully violated rules, agents will be concerned about the record they create, knowing it could determine whether a probationer successfully completes their sentence.

For these reasons, this Court should grant Lickes' Petition and provide clear direction to the circuit courts, DOC agents, and

young people who are doing their best to succeed in a world where too many doors are closed by their conviction records.¹⁶

II. Alternatively, the Court should grant Lickes' Petition to clarify the procedure for effectuating an expungement—a legal question likely to recur unless resolved by this Court.

A decision by this Court would clarify the obligations of all parties and avoid the further litigation that *Lickes* would appear to have made inevitable. Circuit courts will continue to struggle with what remains of the “self-executing” model of expungement announced in *Hemp*, an important question of law, unless the Court resolves that question definitively in this case. Wis. Stat. § 809.62(1r)(c)3.

Before 2017, expungement jurisprudence in Wisconsin followed a relatively straightforward path. In *State v. Leitner*, the Court identified the primary purpose of Wisconsin's expungement law—to provide “a break to young offenders who demonstrate the ability to comply with the law,” protecting them from some of the devastating collateral consequences of criminal convictions. 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 471, 646 N.W.2d 341, 352. In

¹⁶ According to the University of Wisconsin-Milwaukee Employment and Training Institute, the largest issue Milwaukee men must overcome in employment searches is existence of a criminal record—the second is lack of a valid driver's license. John Pawasarat, *Issues Related to Wisconsin “Failure to Pay” Driver's License Suspensions*, Employment and Training Institute (2014), 1.

2014, *State v. Matasek* established that Wis. Stat. § 973.015 requires a circuit court to exercise its discretion to order an expungement at the time of sentencing. 2014 WI 27, ¶45, 353 Wis. 2d 601, 846 N.W.2d 811. Later that year, *State v. Hemp* clarified that once a circuit court has ordered expungement, that expungement is “effectuated” through a “self-executing process” upon the delivery of paperwork from the DOC. 2014 WI 129, ¶¶ 23-27, 359 Wis. 2d 320, 334–37, 856 N.W.2d 811, 818–19. At that point, the process of ordering and completing expungements in Wisconsin seemed settled, clear, and straightforward.

In 2017, that clarity began to blur. *State v. Ozuna* held that petitioners must “satisf[y] all conditions of probation” in order to have their expungement effectuated but limited its discussion to court-ordered conditions of probation. 2017 WI 64, ¶ 25. The conclusion that satisfaction under Wis. Stat. § 973.015(1m)(b) required that there be no documentation of error in the court record meant that the “self-executing process” described in *Hemp* would sometimes not be self-executing. *Ozuna*, 2017 WI 64, ¶ 29; *Hemp* 2014 WI 129, ¶ 25. *Ozuna* recognized, but did not fully address, the potential tension between its holding and *Hemp*, observing in a footnote that factual disputes would be resolved by the circuit courts. *Ozuna*, 2017 WI 64, ¶ 14, n.9.

This year's Court of Appeals decision in *State v. Lickes* goes further, raising questions about the viability of the entire procedural framework established through *Hemp* and *Matesak*. Lickes received a 2018 certificate of discharge indicating that he had successfully completed probation and that all court conditions had been met. (Lickes' App. 4 at ¶ 8). The District Attorney objected to the expungement being completed and the circuit court held several hearings and ordered supplemental briefing on the matter. (Lickes' App. 4-5 ¶¶ 9-12). The circuit court "declined to extend *Ozuna*'s holding" and completed Lickes' expungement on counts 1, 3, and 4. (Lickes' App. 6 ¶ 12).

The Court of Appeals reversed, concluding that the phrase "satisf[y] conditions of probation" included satisfying all "DOC-imposed conditions in the form of rules of probation." (Lickes' App. 11-12 ¶¶ 23, 26). The Court of Appeals concluded there was no conflict between *Hemp*, *Ozuna*, and its decision because, "[t]o the extent that *Hemp* could have left any doubt about the relationship between the certificate of discharge and the self-executing expungement process, *Ozuna* conclusively resolved the issue." (Lickes' App. 21 ¶ 46). Citing *Ozuna*, the Court of Appeals explained: "the simple fact that DOC forwards a certificate of discharge or other form to the circuit court does not

... establish an entitlement to expungement if the record demonstrates that the probationer has not met the prerequisites under Wis. Stat. § 973.015(1m)(b).” (*Lickes’ App. 22 ¶ 46*). If *Lickes* is correct, *Ozuna* silently overruled *Hemp*.

After *Hemp*, *Ozuna*, and *Lickes’* construction of *Ozuna*, circuit courts have no way of knowing what level of record review they will be expected or allowed to engage in for contested hearings. That level of uncertainty inevitably leads to uneven application of the law across the state, at great cost to the court system and to the justice-involved adults seeking the benefits of expungement.

A decision by this Court would clarify the obligations of all parties and avoid the further litigation that *Lickes* appears to have made inevitable.

CONCLUSION

For the reasons argued above and in *Lickes’* Petition, this Court should grant *Lickes’* Petition for Review.

Dated this 1st day of October, 2020.

Electronically signed by:

s/ Susan C. Lund

Susan Lund, SBN: 1087904

Sheila Sullivan, SBN: 1052545

Julie Leary, SBN: 1113385

Jessie Long, SBN 1104518

LEGAL ACTION OF WISCONSIN, INC.
700 West State Street - MATC
Milwaukee WI 53233
Phone: (414) 297-6931
Email: scl@legalaction.org

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,906 words.

Dated this 1st day of October, 2020.

Legal Action of Wisconsin, Inc.
Amicus Curiae

Electronically signed by:

s/ Susan C. Lund

Susan C. Lund

State Bar No.: 1087904

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12), Stats.

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 1st day of October, 2020.

Legal Action of Wisconsin, Inc.
Amicus Curiae

Electronically signed by:

s/ Susan C. Lund

Susan C. Lund

State Bar No.: 1087904

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that:

On this day, I caused Twenty-two (22) copies of the Nonparty Motion and Brief to be deposited with a third-party commercial carrier (FedEx) for delivery to the Clerk of the Supreme Court and Court of Appeals by first class mail or other class of mail that is expeditious.

I further certify that on this day, I caused three copies of this brief and appendix, if any, to be served by third-party commercial carrier (FedEx) on a counsel of record for Petitioner and Respondent.

I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 1st day of October, 2020.

Legal Action of Wisconsin, Inc.
Amicus Curiae

Electronically signed by:

s/ Susan C. Lund

Susan C. Lund

State Bar No.: 1087904