STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER EXPUNGING THREE CONVICTIONS ENTERED IN GREEN COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF STATE OF WISCONSIN

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ISSUE PRESENTED

Did Jordan Alexander Lickes lose his eligibility for expungement of three convictions because he admittedly violated conditions of probation by having unapproved sexual contact, giving his probation agent false information, and being terminated from sex offender treatment?

The circuit court answered "no" and expunged three of Lickes' convictions.

The court of appeals answered "yes" and reversed the expungement order.

This Court should answer "yes" and affirm the court of appeals' decision.[1]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

Lickes was convicted of three misdemeanors and a felony because he had sex with a 16-year-old girl when he was 19. The circuit court ordered probation as part of the sentence. Lickes later admittedly violated multiple Department of Corrections (DOC) rules of his probation. Despite Lickes' repeated probation violations, the circuit court expunged two of his misdemeanor convictions and the felony conviction. The court erred.

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[1] Lickes' brief raises three issues. The State addresses Lickes' second and third issues in Argument sections D.4. and D.5. of this brief.

Under *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20, a defendant does not meet the statutory requirements for earning expungement if the record shows that he violated one or more conditions of probation. The circuit court refused to follow *Ozuna*, relying in part on the *Ozuna* dissent and a pending bill that would expand expungement. The court also said that *Ozuna* did not require it to deny Lickes expungement.

The court of appeals correctly reversed the expungement order. It followed the reasoning of *Ozuna* and applied a straightforward analysis relying on established rules of statutory interpretation. As a matter of law, a defendant is required to follow probation conditions expressly set by a sentencing court and DOC probation conditions. Because Lickes admittedly violated multiple probation conditions, he has not met all the statutory requirements for expungement. This Court should affirm the court of appeals' decision.

STATEMENT OF THE CASE

In 2012, the State charged Lickes with four counts: (1) third-degree sexual assault, a Class G felony; (2) sexual intercourse with a child, a Class A misdemeanor; (3) child enticement, a Class D felony; and (4) exposing genitals or pubic area, a Class I felony. (R. 12.) All four counts stemmed from his having "vaginal sexual intercourse" with a 16-year-old girl when he was 19 years old. (R. 12.)

The State and Lickes resolved the case in July 2013. The State filed the following amended charges: (1) fourth-degree sexual assault, a Class A misdemeanor; (2) sexual intercourse with a child, a Class A misdemeanor; (3) disorderly conduct, a Class B misdemeanor; and (4) exposing genitals or pubic area, a Class I felony. (R. 36.)

That same day, Lickes pled guilty to Count 2 and pled no contest to the other three counts. (R. 48:1, 4; 50.)

The circuit court sentenced Lickes on January 23, 2014. (R. 90:1.) On Counts 1 and 3, the court withheld sentence and imposed concurrent terms of probation for "24 months." (R. 90:2–3.) For Count 2, the court sentenced Lickes to serve 90 days in jail. (R. 90:2.) On Count 4, the court imposed and stayed a prison sentence and placed Lickes on probation for "three (3) years." (R. 90:4.) The court told Lickes that if he "successfully complete[d]" his probation, he would "receive [Wis. Stat. §] 973.015 treatment," meaning expungement. (R. 90:2, 4, 6.) The court imposed several conditions of probation, including a requirement that Lickes "enter into, participate and successfully complete sex offender treatment." (R. 90:5–6.)

In October 2015, Lickes' probation agent wrote a letter informing the circuit court that "Mr. Lickes has violated his probation multiple times. Mr. Lickes has had unapproved sexual contact, has given his agent false information, and has been terminated from Sex Offender Treatment." (R. 57:1.) The next page of the document contained the following admission from Lickes, "I hereby admit as shown by my signature affixed below, that I violated the rules and conditions of probation as described on the front [page]." (R. 57:2.) Lickes' statement further provided: "In lieu of probation revocation proceedings being initiated, I hereby accept 45 days . . . in the Green County Jail with work release privileges." (R. 57:2.) The court signed the front page of the letter, thus ordering that "[a]s a condition of probation, the defendant is to serve 45 days in the Green County Jail with Huber privileges for employment and treatment, said term to commence effective the date of this order." (R. 57:1.)

Lickes completed his term of probation on Counts 1 and 3 on January 23, 2016. (R. 61:1; 90:1–3; 91:3.) In July 2016, Lickes wrote a letter to the circuit court requesting expungement. (R. 78:6.)

In September 2016, Lickes' probation agent filed with the circuit court a letter titled "Verification of Satisfaction of Probation Conditions for Expungement." (R. 61.) This form related to Counts 1 and 3, fourth-degree sexual assault and disorderly conduct. (R. 61:1.) The letter contained conflicting information about whether Lickes had successfully completed his probation, entitling him to expungement. The form checked a box before an item that read, "The offender has successfully completed his/her probation." (R. 61:1.) The form, however, left unchecked a box in front of an item that read, "All court ordered conditions have been met." (R. 61:1.) The form did check a box in front of an item that read, "All court ordered conditions have **not** been met. . . [Lickes] is still currently participating in sex offender treatment and is expected to complete in January 2017." (R. 61:1.)

Lickes completed his term of probation for Count 4 on January 23, 2017. (R. 67:1; 90:1, 4; 91:3.)

In July 2018, Lickes' probation agent filed in circuit court a form titled "Certificate of Discharge and Satisfaction of Probation Conditions for Expungement." (R. 67 (capitalization omitted).) This letter related to Count 4, exposing genitals to a child. (R. 67.) The form checked boxes in front of items that read "[t]he offender has successfully completed his/her probation" and "[a]ll court ordered conditions have been met." (R. 67.)

The parties filed several briefs on whether Lickes was entitled to expungement in early 2019. (R. 76; 78–81.) The briefs discussed a case where this Court held that the

defendant was not entitled to expungement, *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

The circuit court held expungement hearings in March 2019 relating to Counts 1 and 3 and in May 2019 relating to Count 4. (R. 91; 92.) The court determined that Lickes was entitled to expungement on Counts 1 and 3 because (1) the Legislature was considering changes to the expungement statute; (2) *Ozuna* was not a unanimous decision; and (3) Lickes completed probation before *Ozuna* was decided. (R. 91:8, 15, 17, 19–20.) The court similarly determined that Lickes was entitled to expungement on Count 4 because of the proposed legislation and lack of unanimity in *Ozuna*. (R. 92:7–8.)

The court mentioned an article about a pending bill. (R. 91:20.) The prosecutor said that the bill had not been passed into law. (R. 91:20.) The court responded by saying, "Well in the past they had favored youthful offenders to put this in and they are looking—I would like to see what the result of their current intent is or what their intent is." (R. 91:20.) The court again noted that there was a "new bipartisan bill" that would "expand expungement." (R. 92:7.) The court reiterated that "Assembly Bill 33 is bipartisan."[2] (R. 92:8.)

Turning to *Ozuna*, the court said that "[s]ometimes a dissent can be convincing to the Court because the Court has changed its makeup." (R. 91:19.) The court noted that the

[2] Two Wisconsin bills recently sought to expand the availability of expungement. *See* 2019 Assembly Bill 33; 2019 Senate Bill 39. Neither has passed: History of Assembly Bill 33, https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/ab33 (last visited January 19, 2021); History of Senate Bill 39, https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/bill/sb39 (last visited January 19, 2021).

two dissenting justices in *Ozuna* were then still on the Wisconsin Supreme Court. (R. 91:19.) The court reiterated that *Ozuna* "was not a unanimous decision" because "there was a dissent" by two justices who were "on the Court yet." (R. 92:7.) The court further said 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. And I'm going to decline to expand it and I am going to grant the expungement as requested." (R. 92:8.)

The court said that "it could be that Mr. Lickes is caught between a rock and a hard place in the back waters of an ongoing dispute with the legislature and a not unanimous decision by the Supreme Court." (R. 91:20.) The court noted that "Mr. Lickes did break a rule, but it was not deemed serious by the Department, in that they didn't try to revoke probation, they didn't come back to court asking for additional sanctions, they didn't come back ask for jail time."[3] (R. 92:7.)

On June 13, 2019, the circuit court entered a written order expunging Lickes' convictions on Counts 1, 3, and 4. (R. 83.) The State appealed that order. (R. 84.)

In a unanimous published opinion, the court of appeals reversed the expungement order. *State v. Lickes*, 2020 WI App 59, 394 Wis. 2d 161, 949 N.W.2d 623.

Lickes filed a petition for review, which this Court granted.

[3] As noted, Lickes agreed to serve 45 days in jail for these rule violations in lieu of probation revocation proceedings. (R. 57.)

STANDARD OF REVIEW

This Court independently interprets the expungement statute and independently decides how this statute applies to undisputed facts. *State v. Ozuna*, 2017 WI 64, ¶ 9, 376 Wis. 2d 1, 898 N.W.2d 20.

ARGUMENT

Lickes cannot receive expungement because he admittedly violated conditions of his probation.

A. The expungement statute is highly restrictive and requires a defendant to satisfy all the conditions of probation.

Wisconsin law does not easily allow defendants to get their convictions expunged. Expungement is available only in limited circumstances, and a defendant must satisfy certain requirements to earn expungement.

The statute at issue here, Wis. Stat. § 973.015, strictly limits what kinds of records courts may expunge. This statute allows courts to expunge "only court records." *State v. Leitner*, 2002 WI 77, ¶ 23, 253 Wis. 2d 449, 646 N.W.2d 341. When expungement is ordered, "the clerk of court seals the case and destroys the court records." *State v. Braunschweig*, 2018 WI 113, ¶ 19, 384 Wis. 2d 742, 921 N.W.2d 199. Expungement does not vacate or invalidate a conviction. *Id.* ¶ 22. This statute allows expungement only of misdemeanor convictions and "certain felony convictions for which the maximum period of imprisonment is six years or less." *Kenosha Cty. v. Frett*, 2014 WI App 127, ¶ 9, 359 Wis. 2d 246, 858 N.W.2d 397. Given this six-year rule, Class A through Class G felony convictions are ineligible for expungement. *See* Wis. Stat. § 939.50(3) (listing penalties for felony classes). Although Class H and Class I felonies can be eligible for expungement, there are several exceptions to

that rule. *See* Wis. Stat. § 973.015(1m)(a)3.a. & 3.b. And expungement is available only if the defendant was "under the age of 25 at the time of the commission of" the offense for which expungement is sought. Wis. Stat. § 973.015(1m)(a)1.

There are also limits on when a circuit court may exercise discretion to expunge a conviction. "[I]f a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." *State v. Matasek*, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 846 N.W.2d 811.

The statute also imposes requirements on a defendant who has conditionally been granted expungement at sentencing. If a person is granted expungement at sentencing, he is entitled to expungement after he completes his sentence if "[1] the person has not been convicted of a subsequent offense and, if on probation, [2] the probation has not been revoked and [3] the probationer has satisfied the conditions of probation." *Ozuna*, 376 Wis. 2d 1, ¶ 12 (alterations in original) (quoting Wis. Stat. § 973.015(1m)(b)). A "probationer must meet all three of [these] statutory criteria" to be entitled to expungement. *Id.* ¶ 13.

Under the third statutory requirement, a defendant must satisfy "all the conditions of probation." *Ozuna*, 376 Wis. 2d 1, ¶ 13 (quoting *State v. Hemp*, 2014 WI 129, ¶ 22, 359 Wis. 2d 320, 856 N.W.2d 811). A defendant does not earn expungement if the record shows that he violated a condition of probation. *See id.* ¶¶ 17–19. The defendant in *Ozuna* committed a single violation of a no-alcohol condition

of probation and thus failed the third statutory requirement for getting expungement. *Id.* ¶¶ 18–19.[4]

This third statutory requirement is the subject of the dispute here. Lickes argues that it requires a defendant to satisfy only court-imposed conditions of probation to earn expungement. Under Lickes' view, a defendant may receive expungement despite violating DOC conditions of probation if the sentencing court did not expressly say that the defendant was required to comply with those conditions. There is no legal basis for this distinction. Under a straightforward statutory analysis, the phrase "conditions of probation" in the expungement statute includes DOC conditions.

Of course, the State agrees that "[e]xpungement offers young offenders a fresh start without the burden of a criminal record and a second chance at becoming law-abiding and productive members of the community." *Hemp*, 359 Wis. 2d 320, ¶ 19. But the issue before this Court is not the public policy question whether expungement is beneficial to society or whether it should be more widely available. "When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court." *Progressive Northern. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 60, 281 Wis. 2d 300, 697 N.W.2d 417 (citation omitted). "Thus, when the legislature has acted, 'the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy

[4] Then-Judge Brian Hagedorn similarly rejected the argument "that a probationer need not comply with 100% of the conditions to be entitled to expungement." *State v. Ozuna*, Case No. 2015AP1877-CR, ¶ 10 (authored but unpublished) (Wis. Ct. App. Apr. 13, 2016) (A-App. 152–157), *aff'd*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

choices.'" *Id.* (citation omitted). When interpreting a statute, "a court may not balance the policy concerns associated with the 'consequences of alternative interpretations.'" *Anderson v. Aul*, 2015 WI 19, ¶ 107, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring for a majority of the Court).

So, the issue before this Court is whether Wis. Stat. § 973.015(1m)(b) allows a circuit court to expunge a defendant's convictions despite his admission to violating several conditions of probation, including DOC-imposed conditions. The answer is "no." Three closely related statutory provisions compel this conclusion. A contrary view would produce unreasonable or absurd results.

B. Closely related statutes show that the phrase "conditions of probation" in the expungement statute includes DOC probation requirements.

This case requires this Court to interpret the phrase "conditions of probation" in Wis. Stat. § 973.015(1m)(b). Three closely related statutory provisions indicate that the phrase "conditions of probation" in the expungement statute includes DOC probation rules. First, Wis. Stat. § 973.10(1) equates DOC probation rules with probation rules expressly set by a sentencing court. Second, Wis. Stat. § 973.10(2) uses the same phrase as the expungement statute—"conditions of probation"—and that phrase includes DOC probation rules. Third, Wis. Stat. § 973.09(3)(d) gives the same meaning to the same phrase.

A court should interpret a statute "in relation to the language of surrounding or closely-related statutes." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773 (citation omitted). "Statutes are closely related when they are in the same chapter, reference one another, or use similar terms." *Id.* "When the same term is used

throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 29, 381 Wis. 2d 732, 914 N.W.2d 631 (citation omitted).

1. Wisconsin Stat. § 973.10(1) supports the State's view of the expungement statute.

Wisconsin Stat. § 973.10(1) equates DOC probation rules with probation conditions set by a court. This statute provides that *"[i]mposition of probation shall have the effect* of placing the defendant in the custody of the department [of corrections] 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." Wis. Stat. § 973.10(1) (emphases added). This statutory provision requires a probationer "to abide, as a matter of law, with departmental regulations." *State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 52, 393 N.W.2d 105 (Ct. App. 1986).

So, DOC probation rules *are* court-imposed conditions as a matter of law. A *court's* imposition of probation is the reason why a defendant must comply with DOC probation rules. In other words, a defendant does not need to comply with DOC probation rules unless a *court* imposes probation. Lickes' view of the expungement statute rests on the incorrect notion that there is a relevant legal distinction between DOC-imposed probation conditions and court-imposed conditions. There is none. By operation of Wis. Stat. § 973.10(1), a court's order imposing probation necessarily requires a defendant to comply with DOC probation rules and regulations.

The precise language of Wis. Stat. § 973.10(1) further supports the State's view of the expungement statute. When discussing probation, section 973.10(1) uses the language "conditions *set by the court* and rules and regulations established by the [DOC] for the supervision of probationers." Wis. Stat. § 973.10(1) (emphasis added). The phrase "set by the court" is significant. It shows that the Legislature knows how to refer specifically to probation conditions set by a court. "[I]f a statute contains a given provision, 'the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.'" *Outagamie Cty. v. Town of Greenville*, 2000 WI App 65, ¶ 9, 233 Wis. 2d 566, 608 N.W.2d 414 (citation omitted). The expungement statute does not modify the term "conditions of probation" with "set by the court." The omission of this qualifying language shows that the expungement statute does not apply only to probation conditions expressly set by a court.[5]

Lickes argues that section 973.10(1) supports his view because it uses the word "conditions" to refer to court-imposed conditions. (Lickes' Br. 21.) That argument fails for the reasons just explained. Section 973.10(1) shows that the

[5] The court of appeals did not consider Wis. Stat. § 973.10(1) because this provision "does not contain the exact phrase 'conditions of probation.'" *State v. Lickes*, 2020 WI App 59, ¶ 32 n.5, 394 Wis. 2d 161, 949 N.W.2d 623. This Court should consider this provision because it and the expungement statute "are in the same chapter" and "use similar terms." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. Section 973.10(1) is perhaps the most relevant statutory provision besides the expungement statute because it requires probationers to comply with DOC probation rules and regulations. The difference in language is not a reason for ignoring section 973.10(1). Rather, this differing language supports the State's view for the reasons stated above.

Legislature knows how to use qualifying language when it wants to distinguish court-imposed conditions from DOC rules, and it did not use qualifying language in the expungement statute. And section 973.10(1) equates court-imposed conditions with DOC rules.

2. Wisconsin Stat. § 973.10(2) supports the State's view of the expungement statute.

Like the expungement statute, Wis. Stat. § 973.10(2) uses the unmodified phrase "conditions of probation," which includes DOC probation rules. Section 973.10(2) is important here because, "[w]hen the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears." *Winebow, Inc.*, 381 Wis. 2d 732, ¶ 29 (citation omitted). Because the phrase "conditions of probation" in section 973.10(2) includes DOC rules, that phrase has the same meaning when used in the expungement statute, section 973.015(1m)(b).

Section 973.10(2) states that probation may be revoked "[i]f a probationer violates the conditions of probation." Wis. Stat. § 973.10(2). Despite using the plural word "conditions," section 973.10(2) allows revocation if a defendant "violated a condition of probation." *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997) (citing Wis. Stat. § 973.10(2)); *see also id.* at 514 (noting that a revocation proceeding determines "whether the probationer acted in violation of one or more of the conditions of probation").

Significantly, the phrase "conditions of probation" in section 973.10(2) has never been interpreted to include only conditions that have been expressly set by a court. To the contrary, a "probationer" is "subject to *all of the conditions*

and rules of supervision, the violation of which could be cause for revocation." *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 20, 297 Wis. 2d 749, 728 N.W.2d 1 (emphasis added). Again, by placing a defendant on probation, a court "subject[s] the defendant to the . . . rules and regulations established by the [DOC] for the supervision of probationers." Wis. Stat. § 973.10(1). That statutory provision requires a probationer "to abide, as a matter of law, with departmental regulations." *Rodriguez*, 133 Wis. 2d at 52. A violation of a departmental regulation can thus result in probation revocation. *See, e.g.*, *id.* Probation can also be revoked if a defendant violates a term of a probation agreement with DOC. *See, e.g.*, *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 77, 80–81, 242 N.W.2d 244 (1976).

The phrase "conditions of probation" in section 973.10(2) is thus broad—it includes not only conditions mentioned by a court but also departmental rules and regulations as well as terms of a probation agreement. This phrase has the same meaning in the expungement statute.

The court of appeals correctly used similar reasoning. It "conclude[d] that 'conditions of probation' as used in § 973.10(2) encompasses both court-imposed conditions and DOC-imposed rules of probation." *Lickes*, 394 Wis. 2d 161, ¶ 30. It thus determined that "[t]his weighs in favor of giving the same meaning to 'conditions of probation' as used in Wis. Stat. § 973.015(1m)(b)." *Id.*

Lickes has not persuasively rebutted this reasoning. He argues that "[t]he State has not pointed to a case interpreting 'conditions' in § 973.10(2) to include rules."

(Lickes' Br. 22.)[6] The court of appeals has explained why Lickes' argument does not work: "[W]hen a court upholds a decision revoking probation due to a violation of a DOC probation rule, it necessarily relies on Wis. Stat. § 973.10(2) as the source of the court's authority for the revocation because that is the statutory provision authorizing probation revocation proceedings." *Lickes*, 394 Wis. 2d 161, ¶ 30. "Lickes has not explained what other statute might authorize probation revocation proceedings." *Id.* And, tellingly, Lickes concedes that a DOC rule violation may result in probation revocation. (Lickes' Br. 19–20, 25.) Lickes thus does not seem to dispute that the phrase "conditions of probation" in section 973.10(2) includes DOC rules and regulations.

Instead, Lickes urges this Court to ignore section 973.10(2). He asserts that the language in section 973.10(2) is "an apparent aberration," without adequately explaining what he means or why. (Lickes' Br. 22.) He also argues that "this case doesn't ask the Court to interpret § 973.10(2)." (Lickes' Br. 22.) True, but this Court should rely on this statute because it is closely related to the expungement statute at issue. *See Reyes Fuerte*, 378 Wis. 2d 504, ¶ 27. Lickes further argues that the word "conditions" should not "be read to include rules in each and every statute." (Lickes' Br. 22.) He might be right, but section 973.10(2) and the expungement statute use the same unqualified phrase, "conditions of probation." Because these two statutes are closely related, the Legislature presumptively intended to give the same meaning to this phrase in both statutes. *See*

[6] The court of appeals has cited Wis. Stat. § 973.10(1) when holding that a violation of a departmental regulation may result in probation revocation. *State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 52, 393 N.W.2d 105 (Ct. App. 1986).

Winebow, Inc., 381 Wis. 2d 732, ¶ 29. Lickes is not just asking this Court to ignore section 973.10(2); he is asking this Court to abandon these established rules of statutory interpretation. This Court should decline that invitation.

3. Wisconsin Stat. § 973.09(3)(d) supports the State's view of the expungement statute.

The court of appeals also correctly determined that "Wis. Stat. § 973.09(3)(d) likewise supports the State's interpretation of 'conditions of probation' to include rules and conditions set by DOC." *Lickes*, 394 Wis. 2d 161, ¶ 31. As the court noted, "Section 973.09(3)(d) states that '[t]he court may modify a person's period of probation and discharge the person from probation' if certain delineated criteria are met." *Id.* (alteration in original). "Included in the criteria are that '[t]he probationer has satisfied all conditions of probation that were set by the sentencing court,' § 973.09(3)(d)3., and that '[t]he probationer has satisfied all rules and conditions of probation that were set by the department [of corrections],' § 973.09(3)(d)4." *Id.* (alterations in original). The court thus concluded that, "[b]ecause the phrase 'conditions of probation' in § 973.09(3)(d) is used to refer to both conditions imposed by a court and to those conditions imposed by DOC, this is another ground for interpreting 'conditions of probation' similarly in the expungement statute." *Id.*

Yet Lickes argues that the language and legislative history of section 973.09 support his view of the expungement statute. (Lickes' Br. 21.) The statutory language supports the State's view for three reasons.

First, as just noted, section 973.09(3)(d)4. uses the phrase "conditions of probation" to refer to DOC-imposed requirements. Because this statute is closely related to the

expungement statute, the Legislature presumably gave the same meaning to the phrase "conditions of probation" in both statutes. *See Winebow, Inc.*, 381 Wis. 2d 732, ¶ 29.

Second, section 973.09(3)(d)3. shows that the Legislature knows how to use qualifying language to specifically refer to court-imposed conditions, yet it did not include such qualifying language in the expungement statute. The absence of this qualifying language strongly suggests that the Legislature did not intend for the expungement statute's phrase "conditions of probation" to mean "conditions of probation that were set by the sentencing court." *See Outagamie Cty.*, 233 Wis. 2d 566, ¶ 9 (noting significance of omitting language used in a similar statute).

Third, section 973.09 puts court-imposed conditions and DOC-imposed conditions on equal footing. As just explained, section 973.09(3)(d) requires a defendant to comply with court-imposed and DOC-imposed conditions. So does section 973.10(1), as the State has already explained. It is reasonable to interpret the expungement statute as also mandating compliance with DOC-imposed conditions. Lickes has not persuasively explained why only two of these three statutes require probationers to comply with DOC-imposed conditions.

In sum, Wis. Stat. §§ 973.09(3)(d), 973.10(1), and 973.10(2) support the conclusion that the expungement statute's phrase "conditions of probation" includes DOC probation requirements. Sections 973.09(3)(d) and 973.10(2) use the phrase "conditions of probation" to include DOC probation requirements. Section 973.10(1) requires probationers to follow court-imposed conditions and DOC-imposed conditions alike.

C. Lickes' view of the expungement statute would produce unreasonable results.

Lickes' view of the expungement statute—that the phrase "conditions of probation" does not include DOC requirements—would violate a cardinal rule that courts must interpret statutory language "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. If adopted, Lickes' view would lead to three unreasonable results. It would make some defendants' entitlement to expungement hinge on whether they were able to avoid revocation for their violations. It would make expungement in some cases hinge on whether the sentencing court uttered magic words. And it would allow some defendants to get expungement despite committing relatively serious misconduct while on probation.

First, Lickes' view would result in unequal treatment among similarly situated probationers by hinging their entitlement to expungement on whether their DOC rule violations led to revocation. As noted, probation can be revoked if a defendant violates a departmental rule. *See, e.g.*, *Rodriguez*, 133 Wis. 2d at 52. And a defendant cannot get expungement if his probation is revoked. *See Ozuna*, 376 Wis. 2d 1, ¶¶ 12–13. A violation of a DOC rule can thus result in probation revocation and, consequently, denial of expungement. Indeed, Lickes concedes that a defendant cannot get expungement if the defendant's probation is revoked due to a DOC rule violation. (Lickes' Br. 20, 25.) It would be incongruous to hold that a defendant can get expungement after admittedly violating DOC probation rules simply because he avoided revocation. A holding to that effect would make expungement availability depend on whether the defendant's probation got revoked. This Court has already rejected that unreasonable result, concluding

that a probationer who violated a condition of probation cannot get expungement even if he avoided revocation. *Ozuna*, 376 Wis. 2d 1, ¶ 13.

The facts of Lickes' case highlight this point. Lickes admitted to violating several conditions of his probation and agreed to serve 45 days in jail in lieu of probation revocation proceedings. (R. 57:2.) Imagine a hypothetical defendant who committed the same violations as Lickes, disputed them at a probation revocation proceeding, and got revoked. That defendant would be ineligible for expungement because his probation was revoked. *See Ozuna*, 376 Wis. 2d 1, ¶¶ 12–13 (listing the three requirements for earning expungement). It would be unreasonable to allow Lickes, but not this hypothetical defendant, to receive expungement simply because Lickes avoided revocation proceedings by agreeing to serve extra time in jail. After all, "the mere fact that a probationer has completed the term of probationary supervision without revocation does not necessarily establish that the probationer has also satisfied the conditions of probation." *Id.* ¶ 13. Lickes and this hypothetical defendant committed identical violations, so they both lost their eligibility for expungement.

Second, Lickes' view of the expungement statute would require circuit courts to utter magic words at sentencing. Sentencing courts, however, are "not required to use magic words." *State v. Ziller*, 2011 WI App 164, ¶ 13, 338 Wis. 2d 151, 807 N.W.2d 241. Under Lickes' logic, a DOC rule violation would make a defendant ineligible for expungement only if the sentencing court uttered certain words like, "You must comply with all DOC rules of probation." Perhaps, even more absurdly under Lickes' logic, a DOC rule violation would deny a defendant expungement only if the sentencing court expressly told the defendant to comply with that specific rule. The law does not require

circuit courts to say those things. By placing Lickes on probation, the circuit court automatically required him to follow all DOC probation rules. *See* Wis. Stat. § 973.10(1). Lickes may not get expungement simply because the sentencing court failed to utter magic words making that statutory mandate explicit.

Stated differently, Lickes' main argument rests on a legally unsound distinction between court-imposed conditions and DOC-imposed conditions. That distinction has no legal basis because a court automatically requires a defendant to follow DOC rules and regulations by placing the defendant on probation. Wis. Stat. § 973.10(1). And Lickes' distinction rests on a very thin reed because it hinges on whether a circuit court explicitly told a defendant to follow DOC rules. Under Lickes' logic, DOC probation rules would be "conditions of probation" under the expungement statute only if the sentencing court explicitly told a defendant to follow those rules. But the availability of expungement does not vary based on whether a sentencing court parroted the language from section 973.10(1).

Third, Lickes' view would unreasonably allow some defendants to receive expungement although they committed relatively serious DOC rule violations. The facts of *Rodriguez* help illustrate this concern. In *Rodriguez*, the defendant's probation was revoked because, among other things, he struck a woman in the face several times. *Rodriguez*, 133 Wis. 2d at 49. Citing Wis. Stat. § 973.10(1), the court of appeals upheld the revocation decision because the defendant's assault violated a departmental regulation. *Id.* at 52. It reasoned that, "even without a written agreement, Rodriguez still had to abide, as a matter of law, with departmental regulations prohibiting 'conduct which is in violation of state statute.'" *Id.* (quoting Wis. Admin. Code

§ (HSS) 328.04(3)(a)).[7] The court noted that "Rodriguez's assaultive conduct obviously violated this regulation." *Id.*

Yet, if Lickes' view is correct, a probationer like the one in *Rodriguez* could satisfy the third statutory requirement for earning expungement if *the sentencing court* never said to refrain from committing new crimes while on probation. So, under Lickes' view, a probationer could physically assault someone in violation of DOC rules and still get expungement if he managed to avoid revocation and a conviction for the assault. That opportunity for expungement would be absurd given the holding of *Ozuna*. The defendant in *Ozuna* committed a single violation of a court-ordered no-alcohol condition of probation and thus failed the third statutory requirement for earning expungement. *Ozuna*, 376 Wis. 2d 1, ¶¶ 18–19. But under Lickes' logic, a probationer would satisfy this statutory requirement even after committing a relatively serious crime, so long as the crime did not violate any *court-ordered* probation condition. Under the reasoning of *Ozuna*, a probationer loses eligibility for expungement after drinking a beer in violation of a court-ordered sobriety condition. It would thus be unreasonable to leave the door for expungement open to a defendant who commits more serious misconduct, even criminal behavior, in violation of DOC probation rules. A defendant's entitlement to expungement cannot hinge on whether the sentencing court explicitly said something like, "You must refrain from assaulting people or otherwise committing new crimes while on probation." It would be unreasonable to interpret the expungement statute that way.

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[7] This probation regulation is now located at Wis. Admin. Code § (DOC) 328.04(3)(a).

Fortunately, the law avoids all those unreasonable results. As a matter of law, a circuit court requires a defendant to comply with DOC probation rules when the court imposes probation. Wis. Stat. § 973.10(1). A defendant is not entitled to expungement if he violates those rules, whether or not the court made section 973.10(1)'s mandate explicit at sentencing.

D. Lickes' arguments are not persuasive because they are divorced from the expungement statute's language and established rules of statutory interpretation.

Lickes argues that the expungement statute and case law support his view that the phrase "conditions of probation" does not include DOC rules. He claims that the State's view of the expungement statute creates superfluous language and conflicts with the statute's purposes. He further argues that, even if "conditions of probation" includes DOC rules, circuit courts still have discretion to decide whether to expunge a conviction after a defendant has completed his sentence. He also argues that he satisfied the court-ordered requirement to undergo sex-offender treatment. His arguments are unavailing for the following reasons.

1. The expungement statute and case law do not support Lickes' view of the phrase "conditions of probation."

Lickes cites case law and other sources to support his argument that "the term 'conditions' is commonly used to refer to the requirements set by the sentencing court, whereas the term 'rules' is commonly used to refer to expectations set by the probation agent or the Department of Corrections." (Lickes' Br. 17.) Those sources hurt Lickes'

argument or are otherwise inapposite. He cites a Division of Hearings and Appeals rule that defines "conditions" to include *department*-imposed regulations, undercutting his argument that "conditions" refers only to *court*-imposed requirements. (Lickes' Br. 18.)

Lickes' citation to *State v. Purtell*, 2014 WI 101, ¶ 6 n.7, 358 Wis. 2d 212, 851 N.W.2d 417, is misplaced because this Court in *Purtell* did not interpret statutes that are relevant to Lickes' case. And the Court in *Purtell* used the phrase "court-imposed conditions," *id.*, but the expungement statute does not qualify the word "conditions" with "court-imposed." If the Legislature wanted to limit the expungement statute's phrase "conditions of probation" to include only court-imposed conditions, it could have easily done so. But it didn't.

Lickes' reliance on *Ozuna* is also misplaced. This Court in *Ozuna* referred to court-ordered conditions of probation because that case involved the violation of a court-ordered condition. The *Ozuna* Court did not hold that the expungement statute's phrase "conditions of probation" does not include DOC requirements.

The dissenting opinion noted that, under the majority opinion's approach, a defendant would be denied expungement for violating one of the "standard rules of community supervision that probationers must follow." *Ozuna*, 376 Wis. 2d 1, ¶¶ 43–44 (A.W. Bradley, J., dissenting). Lickes thus cannot plausibly argue that *Ozuna* supports his view. Even the dissenting opinion believed that the majority opinion would apply to DOC rule violations.

2. The State's view of the phrase "conditions of probation" does not create redundant statutory language.

Lickes argues that the State's view would make the no-revocation requirement in the expungement statute superfluous. (Lickes' Br. 19–20.) He is wrong. As noted, the three requirements for earning expungement are that the defendant (1) must not have been convicted of a subsequent offense, (2) must not have had his probation revoked, and (3) must have satisfied the conditions of probation. Wis. Stat. § 973.015(1m)(b). Of course, a defendant will usually (perhaps always) fail the third requirement if he fails the first or second one. But the first two requirements are not superfluous with the third one just because a defendant might have failed multiple requirements. As the court of appeals noted, "Lickes cites no authority for the proposition that statutory language is rendered superfluous simply because a defendant's conduct might result in the violation of more than one statutory requirement." *Lickes*, 394 Wis. 2d 161, ¶ 36 n.7.

None of the three statutory requirements for earning expungement is superfluous. The first two requirements serve an important function: they allow a court to easily determine that a defendant is not entitled to expungement just by looking at a new judgment of conviction or revocation order, avoiding the need for a possibly fact-intensive inquiry into whether the defendant violated a condition of probation. The third requirement also has an independent purpose: denying a defendant expungement for violating a condition of probation even if he avoided revocation and a new conviction.

As the court of appeals noted, "Lickes fails to show how his interpretation of 'conditions of probation' would solve whatever surplusage problem he argues exists under

the alternative interpretation." *Lickes*, 394 Wis. 2d 161, ¶ 36 n.7. "That is, because revocation may result from either the violation of a court-imposed condition or a DOC-imposed rule, the statute would equally suffer from a surplusage problem under Lickes' construction of the statute as it would under the State's." *Id.*

Lickes apparently tries to avoid that problem by arguing that the no-revocation requirement only denies expungement to a defendant whose probation gets revoked due to a DOC rule violation. (Lickes' Br. 20, 25.) But the no-revocation language in the expungement statute does not distinguish between violations of court-imposed and DOC-imposed conditions. A court "should not read into [a] statute language that the legislature did not put in." *State v. Simmelink*, 2014 WI App 102, ¶ 11, 357 Wis. 2d 430, 855 N.W.2d 437 (citation omitted). Lickes' argument adds the following italicized words to Wis. Stat. § 973.015(1m)(b): "the probation has not been revoked *due to a violation of a department requirement*."

In short, this Court should reject Lickes' surplusage argument. His argument tries to create a surplusage problem in the expungement statute where none exists. Contrary to Lickes' argument, the no-revocation requirement serves an independent function under the State's view of the expungement statute. Lickes tries to fix this non-existent surplusage problem by adding language to the statute.

3. Lickes' view of the phrase "conditions of probation," not the State's view, conflicts with the expungement statute's purposes.

Lickes argues that "[r]eading the words 'and rules' into the language of § 973.015(1m)(b) would yield a result 'clearly at odds with the legislature's purpose.'" (Lickes' Br. 22 (citation omitted).) The premise of his argument is wrong because the State is not reading words into the statute. Instead, the State reads the expungement statute's phrase "conditions of probation" to include DOC requirements, consistent with the phrase "conditions of probation" in Wis. Stat. §§ 973.09(3)(d) and 973.10(2). Lickes' argument adds language to the expungement statute, reading it to mean "conditions of probation set by the sentencing court."

Lickes argues that the State's view of the expungement statute would contravene this statute's purpose in three ways. His arguments all fail.

First, he asserts that the State's view would hinder the statutory purpose of providing a break to young offenders. (Lickes' Br. 23–24.) Not so. The expungement statute provides certain offenders with "a second chance at becoming law-abiding and productive members of the community." *State v. Hemp*, 2014 WI 129, ¶ 19, 359 Wis. 2d 320, 856 N.W.2d 811. Lickes got a second chance when the sentencing court conditionally granted him expungement. He blew that second chance when he admittedly and repeatedly violated several conditions of probation by having unapproved sexual contact, giving his agent false information, and being terminated from sex offender treatment. There is "nothing in the statute" that allows a court to "extend a third chance when [the defendant] chose to spurn the second." *State v. Ozuna*, Case No. 2015AP1877-

CR, ¶ 10 (Hagedorn, J.) (Wis. Ct. App. Apr. 13, 2016) (A-App. 152–157), *aff'd*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

Lickes claims that the State's view would deny expungement to a defendant "who misses a meeting with her agent because her bus broke down or the man who forgets to tell his agent about the police officer who said hi to him on the street." (Lickes' Br. 23.) That parade of horribles is unrealistic. A defendant is not entitled to expungement if *the record* shows that he did not successfully complete his sentence. *Ozuna*, 376 Wis. 2d 1, ¶¶ 16–20, 25. It is highly unlikely that a probation agent would file in circuit court a document stating that a defendant missed a meeting because her bus broke down.

The facts of Lickes' case bear this point out. A document in the record informed the circuit court of Lickes' probation violations because they were so serious that Lickes agreed to serve 45 days in jail in lieu of revocation proceedings. (R. 57.) Minor infractions, by contrast, will likely go unreported to a circuit court and thus will not prevent expungement. And it is far from clear that a defendant would violate probation rules by rescheduling a meeting with a probation agent due to transportation issues.

Lickes' view of the expungement statute does little to prevent this parade of horribles, even if it is realistic. If a sentencing court expressly told a defendant to attend all meetings with his probation agent, then even under Lickes' logic, a defendant would seemingly risk not getting expungement if he missed one meeting with his agent. After all, Lickes recognizes that "records shall not be expunged" if defendants "violate a court-ordered condition." (Lickes' Br. 20.)

So, Lickes' parade of horribles is essentially an attack on how strict the expungement statute is. The *Ozuna* dissent raised similar concerns with the majority opinion. *Ozuna*, 376 Wis. 2d 1, ¶¶ 42–44 (A.W. Bradley, J., dissenting). But "[a] dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Lickes is implicitly urging this Court to accept the *Ozuna* dissenting opinion and overrule the majority opinion.

Second, Lickes argues that "agent-imposed rules" do not advance the expungement statute's purpose of incentivizing probationers to avoid reoffending. (Lickes' Br. 24.) His rationale is that "rules of probation are not imposed at sentencing." (Lickes' Br. 24.)

The factual premise of that argument is wrong because DOC probation requirements do exist at sentencing. Lickes violated at least one of those requirements. Among other violations, Lickes gave "his agent false information." (R. 57:1.) He thus violated a DOC regulation and one of DOC's standard rules of community supervision. *See* Wis. Admin. Code § (DOC) 328.04(3)(p); Rule 16, Standard Rules of Community Supervision, https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/SupervisionRules.aspx (last visited Jan. 8, 2021). Throughout his brief, Lickes seems to incorrectly suggest that he violated only agent-imposed rules. (Lickes' Br. 16, 21, 22, 23, 24.)

Besides, Lickes' view of the expungement statute—that a defendant may violate DOC probation requirements and still get expungement—would provide an incentive for defendants to violate those requirements. His view, not the State's, would undercut the expungement statute's purpose of incentivizing compliance with conditions of probation.

Third, Lickes argues that the State's view would hurt the expungement statute's goal of rehabilitating offenders. (Lickes' Br. 24–25.) He asserts that, under the State's view of the expungement statute, defendants would have an incentive to be imprisoned instead of being placed on probation. (Lickes' Br. 25.) Once again, however, Lickes' argument undercuts the statute's purpose. Lickes' view of the statute would provide an incentive for defendants to violate DOC probation requirements that were not expressly imposed by the sentencing court, hurting their effort at rehabilitation.

And the incentive to prefer imprisonment over probation is inherent in the expungement statute; it is not unique to the State's view. In other words, even if Lickes is correct that the expungement statute's phrase "conditions of probation" refers only to court-imposed conditions, the statute still imposes two requirements on probationers that it does not impose on prisoners. Even under Lickes' view, a prisoner will need to satisfy only one requirement to earn expungement (avoid a new conviction), but a probationer will need to satisfy two more requirements (avoid revocation and satisfy the conditions of probation). Lickes' real objection is with the statute itself, not with the State's view of it. His recourse rests with the Legislature.

4. Circuit courts do not have discretion to expunge convictions if a defendant failed to satisfy the conditions of probation.

In the alternative, Lickes argues that circuit courts have discretion to grant expungement even for defendants who violated one or more conditions of probation. (Lickes' Br. 26–29.) He is wrong.

This Court has repeatedly rejected the argument that circuit courts have discretion to make expungement decisions after a sentencing hearing. The expungement statute gives circuit courts discretion to order expungement "at the time of sentencing." Wis. Stat. § 973.015(1m)(a)1. This Court construed "Wis. Stat. § 973.015 to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the time of the sentencing proceeding." *State v. Matasek*, 2014 WI 27, ¶ 6, 353 Wis. 2d 601, 846 N.W.2d 811. This Court relied on that holding in *State v. Hemp*, noting that "the only point in time at which a circuit court may make an expungement decision is at the sentencing hearing." 2014 WI 129, ¶ 40, 359 Wis. 2d 320, 856 N.W.2d 811 (citing *Matasek*, 353 Wis. 2d 601, ¶ 45). This Court recently reiterated that "the sentencing hearing" is "the only time at which the circuit court could exercise its discretion to expunge a record under the statute, if it was going to do so." *State v. Arberry*, 2018 WI 7, ¶ 21, 379 Wis. 2d 254, 905 N.W.2d 832.

Lickes' argument conflicts with those precedents. In his view, a circuit court has discretion to decide, after the completion of a sentence, whether a defendant's convictions should be expunged. But "[n]othing in the expungement statute grants the circuit court the authority to revisit an expungement decision." *Hemp*, 359 Wis. 2d 320, ¶ 40. Although the circuit courts in *Matasek*, *Hemp*, and *Arberry* denied expungement, this fact does not distinguish those cases from Lickes'. There is no language in the expungement statute to support this distinction. The statute does not give circuit courts discretion to grant or deny expungement after sentencing.

Lickes argues that *Ozuna* supports his position. (Lickes' Br. 26–27.) It does not. This Court in *Ozuna* did not address whether a circuit court may expunge a conviction

although a defendant admittedly violated a condition of probation. That issue was not presented in *Ozuna* because the circuit court there refused to expunge the defendant's conviction.

Lickes contends that his view finds support in "the language of the expungement statute and the policy behind it." (Lickes' Br. 27.) But Lickes has not identified any statutory language that would allow a circuit court to expunge a conviction even after a defendant admittedly violated a condition of probation. As just noted, the statute gives circuit courts discretion to order expungement "at the time of sentencing." Wis. Stat. § 973.015(1m)(a)1. And his policy argument fails under *Matasek*. Consistent with Lickes' reasoning, this Court in *Matasek* recognized that "there are policy reasons for permitting the circuit court to decide on expunction after the offender completes his or her sentence rather than at the time of sentencing." *Matasek*, 353 Wis. 2d 601, ¶ 41. The Court also recognized, though, that allowing discretion only at the sentencing hearing "creates a meaningful incentive for the offender to avoid reoffending." *Id.* ¶ 43. Policy considerations aside, this Court held that "the statutory language restricts the time at which the circuit court may order expunction." *Id.* ¶ 45. Lickes' policy-based argument cannot override the statute's language and this Court's precedent interpreting it.

Of course, a circuit court sometimes will have to make a "factual determination" as to whether a defendant violated a condition of probation. *Ozuna*, 376 Wis. 2d 1, ¶ 14 n.9. But the interpretation and application of the expungement statute to an undisputed set of facts present legal questions subject to *de novo* review. *Id.* ¶ 9. Lickes' case turns on these legal questions.

Lickes suggests that the circuit court properly exercised its discretion in expunging his convictions because his probation violations were not serious and there was a "factual dispute" about them. (Lickes' Br. 28.) But, as already explained, the circuit court had no discretion to expunge Lickes' convictions after he did not successfully complete his sentences. The circuit court had discretion to order expungement only at sentencing, conditioned on Lickes' successful completion of his sentence. *See, e.g.*, *Hemp*, 359 Wis. 2d 320, ¶¶ 39–40. Whether Lickes satisfied the statutory criteria for earning expungement, despite his admitted and repeated probation violations, was a legal question of statutory interpretation, not a discretionary decision. *See Lickes*, 394 Wis. 2d 161, ¶¶ 35–36.

And Lickes is judicially estopped from factually disputing whether he violated his probation requirements. The doctrine of judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Ryan*, 2012 WI 16, ¶ 32, 338 Wis. 2d 695, 809 N.W.2d 37 (citation omitted). "For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Id.* ¶ 33. These three criteria are met. Lickes admitted to violating conditions of his probation, the circuit court adopted that position by ordering him to serve 45 days in jail, and the facts are the same because this is the same case. (R. 57.)

Finally, taken to its logical conclusion, Lickes' view would allow a circuit court to expunge a conviction even if a defendant received a new conviction or had his probation revoked. Again, to earn expungement, a defendant (1) must

not have been convicted of a subsequent offense, (2) must not have had his probation revoked, and (3) must have satisfied the conditions of probation. Wis. Stat. § 973.015(1m)(b). Lickes' view is that a circuit court has discretion to overlook this third requirement. But his view, if adopted, would seemingly allow a court to ignore all three requirements. He has not identified any statutory language that grants courts discretion to ignore any of these requirements. Nothing in the statute allows a court to override the Legislature's decision to impose these three requirements on probationers.

5. Lickes failed the probation condition requiring him to undergo sex-offender treatment, though this violation ultimately does not matter.

Lickes argues that he satisfied the court-ordered probation requirement to undergo sex-offender treatment. (Lickes' Br. 29–30.) This Court should decline to consider that argument for three independent reasons.

First, that violation is immaterial because Lickes is not entitled to expungement due to his violations of DOC probation requirements. As the court of appeals noted, Lickes was not entitled to expungement of any conviction because he violated DOC probation rules, regardless of whether he satisfied the court-ordered requirement to undergo sex-offender treatment. *Lickes*, 394 Wis. 2d 161, ¶¶ 32 n.6, 44–45.

Second, as explained, Lickes is judicially estopped from arguing that he satisfied this condition of probation. The sentencing court imposed several conditions of probation, including a requirement that Lickes "enter into, participate and successfully complete sex offender treatment." (R. 90:5–6.) Lickes admittedly violated probation conditions, including being "terminated from Sex Offender

Treatment." (R. 57:1.) The circuit court accepted that admission when it ordered Lickes to serve extra jail time in lieu of revocation proceedings. (R. 57.) Lickes may not dispute that admitted violation now.

Third, Lickes forfeited this argument by not raising it in the court of appeals. *See, e.g.*, *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 30 n.5, 274 Wis. 2d 1, 681 N.W.2d 914 (argument forfeited if not raised in court of appeals). The court of appeals noted that "Lickes does not specifically address the State's argument related to Counts 1 and 3." *Lickes*, 394 Wis. 2d 161, ¶ 22. Lickes just "appear[ed] to assume" that he satisfied the treatment requirement for Counts 1 and 3 because he completed treatment before his term of probation on Count 4 ended. *Id.* Lickes may not first advance this argument in this Court.

In any event, Lickes did not satisfy the sex-offender-treatment requirement regarding Counts 1 and 3, which had two-year probation terms. The discharge form for these two counts stated, "All court ordered conditions have **not** been met. . . [Lickes] is still currently participating in sex offender treatment and is expected to complete in January 2017." (R. 61:1.) As the court of appeals correctly held, "[t]he circuit court's probation condition requiring Lickes to 'complete' sex offender treatment for Counts 1 and 3 cannot reasonably be construed to mean that Lickes was permitted to complete the treatment after his probationary period ended for those counts." *Lickes*, 394 Wis. 2d 161, ¶ 22.

Yet Lickes argues that the circuit court said that he had three years to complete sex-offender treatment, even on Counts 1 and 3, which had two-year terms of probation. (Lickes' Br. 29 (citing R. 91:7–8).) The record does not seem to support that argument. And even if Lickes had three years to *complete* sex-offender treatment, he still violated this condition of probation by failing to participate in sex-

offender treatment throughout his entire probationary period. In other words, he failed this condition of probation because he was terminated from sex-offender treatment.

And, again, this Court need not decide whether Lickes satisfied this treatment requirement. He admittedly violated other conditions of probations, and these other violations provide an independent ground for denying him expungement.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 25th day of January 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9261 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

Dated this 25th day of January 2021.

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