STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2019 AP 1272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent-Petitioner.

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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

JORDAN A. LICKES,
Defendant-Respondent-Petitioner

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ISSUES PRESENTED

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. *See State v. Lickes*, 2020 WI App 59, ¶¶ 23–32, 394 Wis. 2d 161, 949 N.W.2d 623.

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. *See id.* ¶¶ 35–36.

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. *See id.* ¶¶ 21–22.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The reasons for granting review also counsel for oral argument and publication, which rightly is this Court's usual practice.

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' 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. On April 17, 2012, Jordan Lickes, who had recently turned 19, engaged in an act of sexual intercourse with a 16-year-old girl he knew from school. Criminal charges resulted and, a year later, Lickes entered pleas of guilty and no contest to all four counts in the criminal complaint.

On January 23, 2014, Judge Beer sentenced Lickes to concurrent terms of probation totaling three years and a concurrent 90-day jail sentence.[1] Judge Beer announced 10 "terms and conditions" of probation, including, as relevant here, "You will enter into, participate and successfully complete sex offender treatment." R.90:5–6.[2] Judge Beer ordered that upon successful completion of Lickes' three-year term of probation, counts 1, 3, and 4 would be expunged. R.90:2, 4, 6.

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[1] Because WIS. STAT. § 973.09(2)(a)1m and 2 limited the maximum term of probation on counts 1 and 3 to two years, Judge Beer achieved this sentence as follows: for count 1, sentence withheld in favor of two years' probation; for count 2, 90 days' jail; for count 3, sentence withheld in favor of two years' probation; for count 4, one-year sentence of confinement imposed and stayed in favor of three years' probation. *See* R.48:1–5.

[2] In the judgment of conviction, the condition was stated as "Defendant to undergo sex offender treatment and counseling." R.48:2.

Over the next three years, 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. R.61:1. The agent noted on the 2016 form that Lickes had not yet met all court-ordered conditions of probation, as he was "still currently participating in sex offender treatment and is expected to complete in January 2017," when his third year of probation would come to an end. *Id.* 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. R.67:1.

Lickes subsequently requested expungement of his record. R.68:1. The State opposed expungement. R.76. It pointed to a form filed with the court by Lickes' probation agent on October 6, 2015. 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, apparently in violation of rules imposed by the agent.[3] R.57:1. The agent requested, Lickes stipulated

[3] These alleged violations were based on an interpretation of a polygraph test to which Lickes had submitted at the direction of his agent, pursuant to the court-ordered condition that he comply with all polygraph testing. R.91:5. Lickes later explained to the circuit court that the polygrapher's question concerned suspected consensual sexual contact between himself and an adult woman whom he was dating. R.91:12–13. 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." R.91:14. As the circuit court noted, the polygraph results would have been inadmissible in court because of their unreliable nature. *See* R.91:5–14; *State v.*

to, and the court ordered, 45 days of conditional jail time as an alternative to revocation, despite the fact that there was no admissible evidence on which to base a revocation proceeding, as Judge Beer later noted. *See* R.91:5. On the back of the form, Lickes signed a pre-printed statement admitting "that I violated the rules and conditions of probation as described on the front." R.57:2. (In fact, the front of the form listed only rule violations.) The State argued that this document established that Lickes had "violated the rules of his probation" and that he was therefore "not entitled to expungement" under *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20. R.76:3.

Judge Beer held two hearings on the issue of expungement. At those hearings, Judge Beer succinctly described the issue: "The *Ozuna* [Court] concluded that violating [a] court order, specifically a court ordered obligation is a violation of the satisfactory completion of probation. . . . [T]he State argues that pursuant to *State v. Ozuna* that rule should also extend to violations of rules and regulations established by the Department for supervision of probationers." R.92:2–3. He 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." R.92:8. He 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." R.92:7. He concluded that it was "in the best interest of the people of the State of Wisconsin" to expand, rather than constrict, the availability of expungement. R.92:8. As a

Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981) (establishing a per se ban on polygraph evidence in criminal cases).

result, he exercised his discretion to order count 4 expunged. *Id.*

As for counts 1 and 3, the State suggested that Lickes violated a court-ordered condition of probation on those counts 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 the end of the third year of probation. R.91:3–4. Judge Beer explained that he had ordered sex offender treatment as a condition of probation "as to the 3rd Count [that is, count 4] as long as probation was put on," that is, that he had not expected Lickes to complete treatment by the two-year mark. R.91:7–8.[4] Therefore, he found that Lickes had satisfied that condition and all other court-ordered conditions of probation that had been ordered by the court on all three counts. He ordered counts 1 and 3 expunged. R.91:17.

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. *Lickes*, 2020 WI App 59, ¶¶ 23–32. 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. *Id.* ¶¶ 35–36. As a result, the court of appeals reversed the circuit court's order granting expungement on all three counts.

[4] The judgment of conviction lists conditions of probation for count 1, including the condition "Defendant to undergo sex offender treatment and counseling." R.48:2. It also notes that counts 3 and 4 were to have the "same conditions" as count 1. R.48:1.

The court of appeals had no reason to address expungement on counts 1 and 3 separately, but it did so anyway. *See id.* ¶ 32 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. *Id.* ¶¶ 21–22. In so doing, the court of appeals ignored Judge Beers' factual finding concerning whether Lickes had satisfied the condition that Judge Beer himself imposed: Lickes was required to participate in treatment throughout his three-year term of probation, Lickes did so, and therefore Lickes satisfied all court-ordered conditions of probation. *See* R.91:7–8.

ARGUMENT

The three issues presented for this Court's review each 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 the 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. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record.

WIS. STAT. § 973.015(1m)(a)1 & (b). The procedure that this statute requires has been the source of considerable confusion. Within the past decade, this Court has interpreted this statute three times. Each time, this Court has reaffirmed the plain language of the statute.

Thanks to this Court's guidance, we now know that when the statute states "the court may order at the time of sentencing that the record be expunged," the statute means just that: a circuit court must determine *at sentencing* whether to order expungement upon the successful completion of the sentence. *State v. Matasek*, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 846 N.W.2d 811. This is so regardless whether the court sentences the person to imprisonment or places the person on probation. *Id.* ¶ 36.

Upon the completion of the sentence, be it imprisonment or probation, the detaining or probationary authority must forward a certificate of discharge to the circuit court—just as the statute states. *State v. Hemp*, 2014 WI 129, ¶ 27, 359 Wis. 2d 320, 856 N.W.2d 811. That certificate of discharge must indicate whether, in the detaining or probationary authority's view, the person successfully completed the sentence. *See id.* To successfully complete a sentence of imprisonment means to not have been convicted of a subsequent offense. To successfully complete probation means to (1) not have

been convicted of a subsequent offense; (2) not have had probation revoked; and (3) have satisfied all the conditions of probation. *Id.* ¶ 22.

When the term of probation is completed (not revoked) and the probationary authority forwards a certificate of discharge, the circuit court will encounter one of three scenarios: (A) the record undisputedly indicates that the person satisfied the conditions of probation; (B) the record undisputedly indicates that the person violated a condition of probation; or (C) the record does not clearly indicate whether the person satisfied the conditions of probation. In Scenario A, in which there is no dispute that the person successfully completed probation, expungement is automatic. *Id.* ¶ 23. Under this scenario, the circuit court has no discretion to deny expungement. *Id.* ¶ 42. In Scenario B, in which there is no dispute that the person violated a condition of probation, the circuit court *may* conclude that the person did not satisfy the conditions of probation and deny expungement. *State v. Ozuna*, 2017 WI 64, ¶ 14, 376 Wis. 2d 1, 898 N.W.2d 20. The circuit court has no duty to expunge the record or even to hold a hearing regarding expungement. *Id.* In Scenario C, in which there is a dispute as to whether the person satisfied the conditions of probation, the circuit court must make a factual determination and must then proceed to grant or deny expungement based on its factual findings. *See id.* ¶ 14 n.9. Under all three scenarios, expungement is effectuated immediately upon its grant; the clerk's actions to strike the person's name from the record is a "mere formality." *Hemp*, 2014 WI 129, ¶ 33 n.11.

This case presents the Court with the opportunity to confirm several aspects of this procedural framework. The first issue presented for this Court's review asks the

Court to confirm that the three statutory requirements for successfully completing a sentence that are applicable to probationers are just as the statute states: (1) "the person has not been convicted of a subsequent offense," (2) "the probation has not been revoked," and (3) "the probationer has satisfied the conditions of probation." A probationer who has undisputedly violated a rule of probation—but not a condition—still winds up in Scenario A because he or she has undisputedly satisfied the conditions of probation.

The second issue, which this Court need only address if it disagrees with Lickes on the first issue, asks the Court to confirm that when a probationer undisputedly violated a condition of probation—Scenario B, as described above—the circuit court may exercise discretion to determine whether the probationer has nevertheless "satisfied the conditions of probation."

The third issue presented for this Court's review asks the Court to confirm that in Scenario C, in which there is a dispute as to whether the person satisfied the conditions of probation, the circuit court's factual determinations should be reviewed for clear error, just like all other findings of fact.

In sum, Lickes asks this Court to confirm that that these basic procedures govern expungement in Wisconsin. At the time of sentencing, circuit courts must exercise discretion to decide whether to allow expungement upon successful completion of the sentence and, when placing the person on probation, to define what successful completion of the sentence means by imposing certain conditions of probation. Once the sentence is completed, the circuit court's sole role is to determine whether the sentence was completed successfully. If it was,

expungement must be granted. If it was not, expungement must be denied. When it comes to a probationer's violation of a condition of probation, the circuit court may find facts and exercise discretion to determine whether the probationer nevertheless complied with the conditions of probation to the satisfaction of the circuit court—the court that ordered the conditions in the first place. Rule violations are relevant to the expungement procedure only if they prompt the probation agent to seek revocation of probation; they are not independent grounds for a circuit court to deny expungement.

This is the procedure that is laid out in the plain language of the statute, that accords with the purpose of the statute, and that is consistent with this Court's previous opinions on expungement. Lickes asks this Court to uphold the expungement statute's plain language and clear legislative intent.

A. "CONDITIONS OF PROBATION" DOES NOT INCLUDE RULES SET BY THE PROBATION AGENT.

At sentencing, Judge Beer ordered expungement of Lickes' convictions. Thus, expungement was required "upon successful completion of the sentence." WIS. STAT. § 973.015(1m)(a)1; *Hemp*, 2014 WI 129, ¶ 23. When an individual is placed on probation, the expungement statute defines "successful completion of the sentence" as follows: (1) "the person has not been convicted of a subsequent offense," (2) "the probation has not been revoked," and (3) "the probationer has satisfied the conditions of probation." § 973.015(1m)(b).

There is no dispute that Lickes satisfied the first two statutory requirements: he was not convicted of a

subsequent offense, and his probation was not revoked. Judge Beer found, as a matter of fact, that Lickes also satisfied the third requirement: he did not violate a court-ordered condition of probation. *See* Part C, *infra*. But the State argues that Lickes nevertheless has not "satisfied the conditions of probation" because he admitted to violating a rule set by his probation agent.

The State's argument requires this Court to construe WIS. STAT. § 973.015. Statutory interpretation presents a question of law that this Court reviews de novo. *Hemp*, 2014 WI 129, ¶ 12. "Statutory interpretation begins with the language of the statute," and if the language is unambiguous, that's also where it ends. *Id.* ¶ 13. "Words are ordinarily interpreted according to their common and approved usage; technical words and phrases and others that have a particular meaning in the law are ordinarily interpreted according to their technical meaning." *Id.* (quoting *Matasek*, 2014 WI 27, ¶ 12). "[S]tatutes are interpreted to avoid surplusage, giving effect to each word." *Id.* "The definition of a word or phrase can vary in different statutes or under different circumstances. When a word is used multiple times in the same enactment, [the Court] attribute[s] the same meaning to the word each time." *Matasek*, 2014 WI 27, ¶ 12. "[W]ords are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose." *Id.* ¶ 13. Each of these rules of statutory interpretation points to the same result: "Conditions of probation" means just that: conditions. It does not include rules.

1. *"Conditions" is commonly used to refer to court-ordered conditions, not agent-imposed rules.*

To begin, the language of the statute is plain: probationers must satisfy "the conditions of probation." Within the context of probation, 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. For example, this Court recently explained that "Probation agents have the authority to establish rules of probation that are supplemental to court-imposed conditions." *State v. Purtell*, 2014 WI 101, ¶ 6 n.7, 358 Wis. 2d 212, 851 N.W.2d 417. The DOC explains the same thing to its probationers: "You will be subject to the control of the department under conditions set by the court and rules and regulations established by the Department of Corrections for your supervision." DEP'T OF CORR. DIV. OF CMTY. CORR., OFFENDER HANDBOOK 2 (2018).[5] The Division of Hearings and Appeals (DHA) revocation handbook refers repeatedly to "court-ordered conditions of probation" and explains that "[i]n addition to any court-ordered conditions, offenders are required to follow standard and special rules of community supervision imposed by the DOC agent." STATE OF WIS.

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[5] https://doc.wi.gov/Documents/AboutDOC/CommunityCorrections/POC-0004_DCCOffenderHandbook.pdf. *See also Standard Rules of Community Supervision*, DEPARTMENT OF CORRECTIONS, https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/SupervisionRules.aspx (last visited Jan. 2, 2021) (hereinafter *Standard Rules*) (explaining that probationers "must comply with the Standard Rules of Community Supervision," that the "agent may impose additional rules of supervision," that "the sentencing court may impose additional conditions of supervision," and that one of the "standard rules" is to "comply with any court ordered conditions").

DIV. OF HEARINGS AND APPEALS, RESOURCE HANDBOOK FOR COMMUNITY SUPERVISION REVOCATION HEARINGS 1–3 (2016).[6] And the DHA's administrative rules define "conditions" as "specific regulations imposed on the client by the court or department" and separately define "rules" as "those written department regulations applicable to a specific client under supervision." WIS. ADMIN. § HA 2.02(4) & (9).

Even *Ozuna*—the opinion upon which the State relies—uses the term "conditions" to refer to court-ordered conditions. *See Ozuna*, 2017 WI 64, ¶ 2 ("[T]he defendant had violated the court's expressly ordered condition that he neither possess nor consume alcohol."); *id.* ¶ 16 ("*Hemp* does not control a case where DOC informs the circuit court that the probationer violated the court-ordered conditions of probation.").

This usage is not new. The same distinction between court-ordered conditions and DOC-imposed rules was in use around the time that the expungement statute was enacted in 1975 and around the time that the "conditions of supervision" language was added to the statute in 1984.[7] For example, in 1986, this Court quoted a 1976 opinion to explain the source of limitations on a probationer's liberty: "A sentencing judge may impose conditions which appear to be reasonable and appropriate. A sentence of probation places the probationer 'in the custody of the department' subject to the conditions of probation and rules and regulations of the Department of Health and Social Services." *State v. Griffin*, 131 Wis. 2d 41, 54, 388 N.W.2d 535 (1986) (citation

[6] https://doa.wi.gov/DHA/Handbook Final (9.1.2016).pdf.

[7] *See* 1975 WIS. ACT 39, § 711m; 1983 WIS. ACT 519, § 1.

omitted) (quoting *State v. Tarrell*, 74 Wis. 2d 647, 654, 274 N.W.2d 696 (1976)).

This Court must presume that the legislature means what it says in the statute and that the statute says what the legislature means. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 681 N.W.2d 110. The plain language of the statute requires satisfaction of the conditions of probation set by the court, not rules established by the probation agent.

2. *The rule against surplusage supports the plain-language meaning of "conditions."*

The rule against surplusage also supports interpreting "conditions of probation" to mean just that.

Again, the statute imposes three, and only three, requirements for expungement upon the completion of probation: (1) no new convictions; (2) no revocation; and (3) satisfaction of the conditions of probation. It's logical to assume that each of these requirements is distinct. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012) ("Because legal drafts should not include words that have no effect, courts avoid a reading that renders some words altogether redundant."); *accord Kalal*, 2004 WI 58, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.").

Thus, "[w]hether a probationer's conduct was adequate to avoid revocation is a question separate and distinct from whether the probationer 'has satisfied all the conditions of probation.'" *Ozuna*, 2017 WI 64, ¶ 13 (quoting *Hemp*, 2014 WI 129, ¶ 22). There is no dispute

that revocation of probation may occur only upon violation of a rule or condition of probation. *See, e.g.*, WIS. ADMIN. § HA 2.05(6)(f) ("The department has the burden of proof [at a revocation hearing] to establish . . . that the client violated the rules or conditions of supervision."); *id.* § 2.05(7)(b)3 ("[V]iolation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision."). In other words, a probationer who has had probation revoked has necessarily not satisfied a rule or condition of probation. If "conditions of probation" were read to include rules, it would render the second requirement—no revocation—superfluous, because it is impossible to revoke the probation of an individual who has satisfied all rules and conditions of probation.

Interpreting "conditions of probation" to mean just that—court-ordered conditions—gives effect to every word in the expungement statute. There may be some situations in which probationers violate the rules of probation, resulting in revocation, even though they satisfy each and every court-ordered condition. Their records shall not be expunged. And there may be some situations in which probationers avoid revocation, even though they violate a court-ordered condition. (Such was the case in *Ozuna*.) Their records shall not be expunged. But where, as here, the probationer avoids revocation and satisfies each court-ordered condition, the statute mandates that expungement be granted.

3. *Statutory and legislative context confirms that "conditions" means court-ordered conditions.*

The context surrounding the phrase "conditions of probation" also indicates that the phrase means just that, and nothing more. "When a word is used multiple times

in the same enactment, [the Court] attribute[s] the same meaning to the word each time." *Matasek*, 2014 WI 27, ¶ 12. As discussed above, the third requirement, satisfaction of "the conditions of probation," was added to the expungement statute in 1984. *See* 1983 WIS. ACT 519, § 1. That same bill also amended WIS. STAT. § 973.09, which authorizes sentencing courts to impose conditions of probation. Specifically, the bill allowed sentencing courts to increase the original term of probation where there were multiple convictions at the same time. It is reasonable to assume that a bill focused on court-ordered conditions of probation used the term "conditions" to mean just that.

Other statutes in Chapter 973 make clear that the legislature knows the difference between court-ordered conditions and agent-imposed rules. For example, elsewhere in § 973.09, the legislature refers to "conditions of probation that were set by the sentencing court" and, separately, "rules and conditions of probation that were set by the department." § 973.09(3)(d)3 & 4. And § 973.10(1) refers to "conditions set by the court and rules and regulations established by the department."

Where, as here, "a statute with respect to one subject 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." *Kimberly-Clark Corp. v. Pub. Serv. Comm'n*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) (quoting *State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961)). If the legislature intended to premise expungement on satisfaction of the rules established by a probation agent, it would have included "rules" in § 973.015(1m)(b), just as it did in § 973.09(3)(d) and § 973.10(1).

The State and the Court of Appeals point to § 973.10(2) in support of the proposition that "conditions" includes rules. That subsection states, "If a probationer violates the conditions of probation, the department of corrections may initiate a [revocation] proceeding before the division of hearings and appeals in the department of administration." As the State and the Court of Appeals point out, actors within the criminal justice system have long assumed that revocation proceedings may be initiated upon a violation of an agent-established rule in addition to a violation of a court-ordered condition. *See Lickes*, 2020 WI App 59, ¶ 28 (citing *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 20, 297 Wis. 2d 749, 728 N.W.2d 1). But that doesn't mean that "conditions" should be read to include rules in each and every statute. The State has not pointed to a case interpreting "conditions" in § 973.10(2) to include rules. It seems more likely that the criminal justice community has long agreed that revocation may result from rule violations because § 973.10(1) explicitly allows probation agents to impose rules—rules that would be meaningless if they could not serve as grounds for revocations. Ultimately, this case doesn't ask the Court to interpret § 973.10(2), and the fact that there's an apparent aberration in that statute shouldn't stop the Court from reaching the obvious conclusion, based on the plain language of § 973.015 and surrounding statutes, that "conditions" means conditions, not rules.

4. *Interpreting "conditions" to mean court-ordered conditions, not agent-imposed rules, gives effect to the legislative purpose of the statute.*

Reading the words "and rules" into the language of § 973.015(1m)(b) would yield a result "clearly at odds with the legislature's purpose." *Hemp*, 2014 WI 129, ¶ 13

(quoting *Matasek*, 2014 WI 27, ¶ 13). Indeed, it would run contrary to three legislative purposes: the expungement statute's goal of providing a fresh start to youthful offenders; the expungement statute's requirement that courts decide at sentencing whether to allow expungement upon successful completion of the sentence; and the rehabilitative purpose of probation.

First, "[t]he overarching legislative purpose of the expungement statute is to provide 'a break to young offenders who demonstrate the ability to comply with the law.'" *Ozuna*, 2017 WI 64, ¶ 11 (quoting *Hemp*, 2014 WI 129, ¶ 20). The statute "expresses our legislature's willingness (as expressed by the plain language of the statute) to help young people who are convicted of crimes get back on their feet and contribute to society by providing them with a fresh start, free from the burden of a criminal conviction." *Hemp*, 2014 WI 129, ¶ 21.

Interpreting the expungement statute to require perfect compliance with any rule imposed by a probation agent would run contrary to this purpose. The standard rules of supervision imposed on probationers include, for example, the requirements to "avoid all conduct . . . which is not in the best interest of the public welfare or your rehabilitation," to report "all police contact to your agent within 72 hours," and to "report as directed for scheduled and unscheduled appointments." *Standard Rules*, *supra* note 5. Did the legislature intend to deny expungement to the woman 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? Adopting the State's interpretation of "conditions of probation" would categorically deny expungement to these individuals, contrary to the legislature's intent to expand the

availability of expungement and offer a fresh start to youthful offenders who demonstrate an ability to comply with the law.

Second, this Court has explained that the expungement statute requires that the expungement decision be made by the circuit court at the time of sentencing and that there's a logical reason for this requirement: "By deciding expunction at the time of sentencing, a circuit court creates a meaningful incentive for the offender to avoid reoffending." *Matasek*, 2014 WI 27, ¶ 43. The timing of the initial expungement decision is consistent with the statute's requirement that the probationer satisfy court-ordered conditions, not agent-imposed rules. At sentencing, in consultation with the prosecutor, the victim, and the defendant, the judge imposes reasonable conditions of probation and premises expungement upon the probationer's satisfaction of those conditions, creating "a meaningful incentive" for the probationer to satisfy each and every condition. But rules of probation are not imposed at sentencing and, indeed, the judge has no control over what those rules are. Interpreting the statute to require perfect compliance with rules, which are set by the probation agent after the fact with no judicial oversight (save for revocation proceedings) and which can be modified by the agent at any time, takes the discretionary authority meant for the circuit court and gives it to the probation agent. Such an interpretation is more akin to the "wait-and-see" approach that this Court explained was contrary to the legislative purpose of the expungement statute. *See id.*

Finally, the main purpose of probation itself is to rehabilitate the probationer. *See, e.g.*, *State v. Sepulveda*, 119 Wis. 2d 546, 561, 350 N.W.2d 96 (1984). Agents impose rules with the expectation that probationers may

not comply perfectly with every rule, every time. The goal is for probationers to learn from their mistakes and to learn new behaviors and responses. Were the expungement statute to allow the circuit court to deny expungement based on a single violation of a rule, expungement would cease to act as a "meaningful incentive" for the probationer to complete probation successfully. *Cf. Matasek*, 2014 WI 27, ¶ 43. In fact, such an interpretation might result in defense attorneys encouraging their youthful offenders to turn down probation in favor of imprisonment, because the expungement statue places only a single requirement on individuals who serve a sentence of imprisonment: don't get convicted of a subsequent offense. At the time of sentencing, the potential probationer will not know who their probation agent will be, what rules the probation agent will impose, how strictly the probation agent will interpret those rules, and whether the probation agent will report any claimed rule violations to the court. Rather than take the risk associated with probation, an individual deemed eligible for expungement could rationally choose to serve a term of incarceration, in which the requirements for expungement are clear.

In sum, the plain language of the expungement statute requires satisfaction of the conditions of probation, not the rules of probation. Rule violations may result in the denial of expungement if they are serious enough to warrant revocation, giving purpose to the no-revocation requirement in the statute. This plain-language reading accords with the expungement statute's purposes of giving a fresh start to offenders and incentivizing their performance on probation, and it accords with the greater rehabilitative purpose of probation.

B. IF "CONDITIONS OF PROBATION" WERE TO INCLUDE RULES, CIRCUIT COURTS MUST HAVE DISCRETION TO DETERMINE WHETHER A PROBATIONER HAS SATISFIED THE CONDITIONS OF PROBATION DESPITE VIOLATING A RULE.

If this Court were to interpret the expungement statute to require probationers to satisfy rules of probation, in addition to conditions of probation, it would then need to address this second issue: did Judge Beer have discretion to determine, upon completion of probation, that Lickes had "satisfied the conditions of probation" despite the conceded rule violation? This issue also presents a question of statutory interpretation, a question of law that this Court reviews de novo. *Hemp*, 2014 WI 129, ¶ 12. On this issue, the statutory language is admittedly less clear, but the interpretive process is aided by this Court's recent decisions on similar issues, in particular *Ozuna*.

In *Ozuna*, this Court was asked to determine whether a circuit court erred by denying expungement to a probationer who had undisputedly violated a court-ordered condition of probation. 2017 WI 64, ¶¶ 7, 8. The Court reiterated that the statute requires the circuit court to determine at sentencing whether the defendant is eligible for expungement. *Id.* ¶ 11 (citing *Matasek*, 2014 WI 27, ¶ 45). If the circuit court determines that the defendant is eligible, the sole question at the end of the defendant's sentence is whether the defendant completed the sentence "successfully." *Id.* ¶ 12. If the defendant indisputably completed the sentence successfully, expungement is automatic. *Id.* (citing *Hemp*, 2014 WI 129, ¶ 23). If the defendant did not satisfy the conditions of probation, the circuit court "may" deny expungement. *Id.* ¶ 14. "[A] court has no *duty* to expunge

a probationer's record if the probationer has not satisfied the conditions of probation." *Id.* (emphasis added).

As the language emphasized above makes clear, the *Ozuna* Court did not hold that the circuit court was *required* to deny expungement to Ozuna based on his admitted probation violation, nor did it hold that the circuit court was *required* to grant expungement based on the probation agent's representation that Ozuna "successfully completed" probation. *Id.* ¶ 6. Rather, the *Ozuna* Court held that the circuit court was *allowed* to deny expungement. In other words, the circuit court, which set the conditions of probation in the first place, did not erroneously exercise its discretion in reviewing the record, which included an uncontested description of Ozuna's violation of a condition of probation, and determining that Ozuna had not satisfied those conditions. Denying expungement was within the range of available options before the circuit court at that point; but it was not necessarily the only available option.

Allowing circuit courts discretion to determine whether a probationer has "satisfied the conditions of probation" makes sense based on the language of the expungement statute and the policy behind it. The expungement statute premises expungement upon the satisfaction of the conditions of probation. As this case and its predecessors show, satisfaction of the conditions of probation is far from a clear or objective standard. The circuit court is in the best position (having presided over the sentencing proceeding, imposed the conditions of probation at issue, and reviewed the record concerning the probationer's actions while on probation) to determine whether, in that judge's view, the probationer has truly "satisfied" the conditions of probation. The expungement statute explicitly calls on the circuit court

to exercise discretion when making the initial determination about expungement. *See* § 973.015(1m)(a)1 (allowing sentencing courts to order a record expunged "if the court determines the person will benefit and society will not be harmed by this disposition"); *Matasek*, 2014 WI 27, ¶ 2 ("Wisconsin Stat. § 973.015 grants circuit courts discretion to order a record expunged."). Once that initial determination is made, the circuit court's role is then confined to determining whether the individual successfully completed the sentence. But that determination is not always any easy yes or no, at least not within the context of probation. The circuit court may still exercise discretion to determine whether, in its view, the probationer "satisfied the conditions of probation."

Here, Judge Beer decided to exercise his discretion. He considered the nature of the rule violation (in addition to the factual dispute about a condition violation) and he determined that Lickes had "satisfied the conditions of probation."[8] Judge Beer's decision was not outside the bounds of reasonableness; it was not an erroneous exercise of discretion. *See Pulkkila v. Pulkkila*, 2020 WI 34, ¶ 19, 391 Wis. 2d 107, 941 N.W.2d 239 ("A discretionary determination will be upheld as long as the court 'examined the relevant facts, applied a proper standard

[8] Lickes admitted the rule violation as part of an ATR. *See* R.57. Judge Beer inquired into the circumstances leading to the ATR and learned that the violations alleged by the probation agent were all based on the interpretation of 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. R.91:5. Judge Beer 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." R. 91:14. Judge Beer noted that the polygraph results themselves were inadmissible in court because of their unreliable nature. *See* R.91:5-14.

of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" (quoting *LeMere v. LeMere*, 2003 WI 67, ¶ 13, 262 Wis. 2d 426, 663 N.W.2d 789). Therefore, Judge Beer's discretionary determination should be affirmed.

C. THE CIRCUIT COURT DID NOT CLEARLY ERR WHEN IT FOUND THAT LICKES SATISFIED THE COURT-ORDERED CONDITIONS OF PROBATION.

At sentencing, Judge Beer imposed the following condition of probation: "You will enter into, participate and successfully complete sex offender treatment." R.90:5–6. Lickes entered into, participated in, and successfully completed sex offender treatment by the end of his three-year term of probation. At a hearing on expungement, Judge Beer explained that Lickes had satisfied that condition of probation because he had ordered sex offender treatment as a condition of probation "as to the 3rd Count [that is, count 4] as long as probation was put on," that is, that he had not expected Lickes to complete treatment by the two-year mark. R.91:7–8. In other words, Judge Beer found that Lickes had satisfied all court-ordered conditions of probation.

This Court must "uphold a circuit court's findings of fact unless they are clearly erroneous." *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶ 34, 319 Wis. 2d 1, 768 N.W.2d 615. The same is true of the court of appeals. *Id.* ¶ 43. "The circuit court's findings are to be sustained if they do not go 'against the great weight and clear preponderance of the evidence.'" *Id.* ¶ 39 (quoting *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748).

Yet the court of appeals 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. *Lickes*, 2020 WI App 59, ¶¶ 21–22. The court of appeals erred. The condition that Judge Beer imposed at sentencing did not include an explicit deadline. Judge Beer was in the best position to know whether he intended for Lickes to complete sex offender treatment a year before the end of probation. Judge Beer found that Lickes satisfied the condition of probation that Judge Beer himself had imposed, and the court of appeals erred by substituting its own judgment for that of the circuit court.

CONCLUSION

For these reasons, Jordan Alexander Lickes now respectfully requests that this Court reverse the court of appeals' mandate and **AFFIRM** the judgment of the Green County Circuit Court.

Dated at Madison, Wisconsin, January 4, 2021.

Respectfully submitted,

JORDAN A. LICKES,
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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 6,600 words. *See* WIS. STAT. § 809.19(8)(c)1.

Catherine E. White

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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