STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2019 AP 1272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent-Petitioner.

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

The opening brief summarizes the expungement procedure as Lickes sees it: a procedure consistent with the plain language of the expungement statute, the legislative purpose, and this Court's previous opinions on expungement. *See* Pet'r's Br. at 11–15. Under this procedural framework, the circuit court's order granting expungement must be upheld.

The State's response brief proposes a different procedural framework, delegating unchecked discretionary authority to the executive branch. That procedure is worth summarizing before turning to the State's specific arguments.

Let's begin at sentencing, when a judge ordering probation and expungement usually establishes certain conditions of probation that must be satisfied to earn expungement. *See* WIS. STAT. § 973.09(1)(a). Or, under the State's proposed procedure, the judge may simply delegate to the probation agent the task of establishing rules and regulations of probation that must be satisfied to earn expungement. *See* § 973.10(1).[1] The agent need not consult with the prosecutor, the defense counsel, the court, or the victim when setting rules. *See* WIS. ADMIN. § DOC 328.04. And the agent can add, subtract, or change the rules at any time.[2]

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[1] *See also State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 25, 245 Wis. 2d 310, 630 N.W.2d 164 (explaining the separate statutory authority for court-imposed conditions and DOC-imposed rules).

[2] *See Standard Rules of Community Supervision*, DEP'T OF CORRECTIONS, https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/SupervisionRules.aspx.

During probation, the agent may note a rule violation. At that point, the agent has complete discretionary power to determine whether the probationer earns expungement: if she informs the court of the violation, expungement will be denied; if she does not inform the court, expungement will be granted. Resp't's Br. at 27.

Upon completion of probation, expungement will be granted as long as the probationer has not been convicted of a subsequent offense, has not been revoked, and has not violated a single rule or condition of probation. If the agent informs the court of a rule violation, the judge must deny expungement even if the probationer fulfilled the judge's expectations. *Id.* at 34.

In a nutshell, that's the procedural framework that the State wants this Court to adopt: one that gives unfettered discretion to the probation agent while relegating the sentencing judge to a clerical role; one that cedes the judicial function to the executive branch. That isn't the procedure that the legislature intended. It's a procedure that would arguably violate the Due Process Clause and the separation of powers principle. This Court should reject the State's unreasonable proposal.

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

The main issue presented for review in this appeal is a strict question of statutory interpretation. The opening brief recites this Court's well-established method of statutory interpretation and doctrines of statutory construction and explains why application of those doctrines leads to the conclusion that "conditions" in

§ 973.015(1m)(b) means court-imposed conditions, not DOC-imposed rules. *See* Pet'r's Br. at 16.

In arguing to the contrary, the State relies on a single doctrine: *in pari materia*. That doctrine "requires a court to read, apply, and construe statutes relating to the same subject matter together." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 30 n.6, 381 Wis. 2d 732, 914 N.W.2d 631. Specifically, the State relies on the rule that "[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." *Id.* ¶ 29 (quoting *Bank Mut. v. S.J. Boyer Constr., Inc.*, 2010 WI 74, ¶ 31, 326 Wis. 2d 521, 785 N.W.2d 462).

This same-term-same-meaning rule is easier to apply in some situations than in others. In *Winebow*, for example, the question was how to define "intoxicating liquor" within § 135.02(3)(b). *See id.* ¶ 24. The answer was relatively easy: § 135.066(2) defines the term "intoxicating liquor." This Court explained that that definition applied throughout chapter 135, including § 135.02(3)(b). *See id.* ¶ 29. For "intoxicating liquor" to mean one thing in § 135.066 and to mean another in the rest of the chapter would "run afoul" of the *in pari materia* doctrine. *Id.* ¶¶ 29–30.

The question of how to define "conditions" within § 973.015(1m)(b) isn't quite so clear-cut because "conditions" is not defined in chapter 973. But "conditions" is used multiple times throughout chapter 973 to refer to court-ordered requirements. For example:

- "Imposition of probation . . . shall subject the defendant to the control of the department under conditions set by the court . . . ." § 973.10(1).
- "The probationer has satisfied all conditions of probation that were set by the sentencing court . . . ." § 973.09(3)(d)3.

Application of the same-term-same-meaning rule leads to the conclusion that "conditions" means conditions established by the sentencing court. *See, e.g., Coutts v. Wis. Retirement Bd.*, 209 Wis. 2d 655, 668–69, 562 N.W.2d 917 (1997) ("When the same term is used repeatedly in a single statutory section, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears.").

The State attempts to avoid this conclusion by arguing that "conditions" only means court-ordered conditions when it is followed by the phrase "set by the court." Resp't's Br. at 12. But the State's own footnote evinces the flaw in its reasoning:

> The court of appeals did not consider Wis. Stat. § 973.10(1) because this provision does not contain the exact phrase "conditions of probation." This Court should consider this provision because it and the expungement statute are in the same chapter and use similar terms. . . . The difference in language is not a reason for ignoring section 973.10(1).

Id. at 12 n.5 (cleaned up). That's true. The context surrounding the word "conditions" changes from statute to statute, but the word's meaning remains the same. There's no reason to think that the legislature meant one

thing when referring to "conditions of probation" and another when referring to "conditions." Likewise, there's no reason to think that the legislature meant one thing when referring to "conditions set by the court" and another when referring to "conditions." *Cf. Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 663, 539 N.W.2d 98 (1995) (concluding it reasonable to attribute the definition of "occupational deafness" to the phrase "previous deafness" used within the same statutory chapter).

The flaw in the State's reasoning is also evinced by the multiple statutory sections within chapter 973 that use the word "conditions," alone, to refer to court-ordered conditions. For example:

- "When a defendant is sentenced to pay a fine and is also placed on probation, the court may make the payment of the fine . . . a condition of probation." § 973.05(2).
- "A court may not provide that a condition of any probation involves participation in the intensive sanctions program." § 973.09(1)(e).
- "Restitution ordered under this section is a condition of probation . . . ." § 973.20(1r).[3]

The takeaway from the same-term-same-meaning rule is that "conditions" means court-ordered conditions, regardless whether the phrase "set by the court" follows the term. And as explained in the opening brief, the other doctrines of statutory construction lead to the same conclusion.

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[3] *See also* § 973.09(1)(a), (1)(b), (1)(d), (4)(a), (7m)(a).

B. CIRCUIT COURTS ARE IN THE BEST POSITION TO DETERMINE WHETHER A PROBATIONER HAS SATISFIED THE CONDITIONS OF PROBATION.

The second issue asks whether Judge Beer had the authority to decide that Lickes "has satisfied the conditions of probation." § 973.015(1m)(b).

The State argues that Judge Beer didn't have the authority to make that decision because (1) Lickes admitted to violating rules of probation and (2) the State believes that Lickes also violated a court-ordered condition of probation. As explained above and in the opening brief, violations of DOC-imposed *rules* are irrelevant to the question whether a probationer has satisfied the *conditions* of probation. And as explained below and in the opening brief, Judge Beer found as a matter of fact that Lickes did not violate a court-ordered condition of probation.

But even if Lickes had violated a condition of probation, the question would remain whether Judge Beer erred in deciding that Lickes "has satisfied the conditions of probation" and therefore successfully completed his sentence. The State argues that a single violation of a condition of probation bars a probationer from obtaining expungement. In effect, the State reads the expungement statute as follows:

> A person has successfully completed the sentence if [1] the person has not been convicted of a subsequent offense[;] [2] the probation has not been revoked[;] and [3] *the probationer has not violated a condition of probation.*

But that's not the statutory language. The statute reads:

> A person has successfully completed the sentence if [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) (emphasis added). The statute does not speak of *violations*; it speaks of *satisfaction*.[4]

The third requirement's phrasing is noticeably different from the statute's first two requirements, both of which are stated in the negative: If the person has been convicted of a subsequent offense, then deny

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[4] Black's Law Dictionary defines "satisfaction" as "[t]he fulfillment of an obligation; esp. the payment in full of a debt." It's possible that the legislature added the third requirement to the expungement statute with the payment of a debt—specifically, restitution—in mind. *See* 1983 WIS. ACT 519, § 1. Five years before the third requirement was added, this Court held that when a probationer had made a good faith effort to pay restitution but didn't have the ability to pay the amount ordered, probation couldn't be extended solely for nonpayment. *See Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978). And at that time, restitution could not be converted to a civil judgment—release from probation extinguished the restitution obligation. *See State v. Fernandez*, 2009 WI 29, ¶ 71 & n.37, 316 Wis. 2d 598, 764 N.W.2d 509 (A.W. Bradley, J., dissenting). The "satisfaction" requirement may have been added in response to *Huggett* to incentivize probationers to pay restitution in full during the term of probation.

expungement. If the person's probation has been revoked, then deny expungement. The legislature could have written the third requirement to follow the pattern of negative phrasing: "The probationer has not violated a condition of probation." That phrasing would allow for the conditional statement that the State endorses: If the person has violated a condition of probation, then deny expungement. But the legislature phrased the third requirement differently, premising expungement upon affirmative *satisfaction* of conditions rather than the lack of *violations* of conditions.

The first two requirements are simple enough for a computer program to apply; the third requirement is not. Someone must decide whether the probationer "has satisfied the conditions of probation." That decision is a judicial function, not an executive one. It's reasonable to task the sentencing judge with that decision, as the judge presided over the sentencing, ordered the conditions, and received evidence relevant to the decision. Call this decision-making process what you will: an exercise of discretion, an interpretation of the conditions in the judgment of conviction, a factual finding. The bottom line is that the judge decides whether a probationer "has satisfied the conditions of probation" on a case-by-case basis, the judge is in a better position than the appellate court to make that decision, and so the judge's decision should be entitled to deference.[5]

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[5] *See, e.g., Chen v. Warner*, 2005 WI 55, ¶ 40, 280 Wis. 2d 344, 695 N.W.2d 758 ("Deference to a circuit court ruling is appropriate when the circuit court is in a better position to decide an issue than an appellate court. The circuit court is closer to the evidence, sees and hears the witnesses, and decides more cases on the issue."); *Schultz v. Schultz*, 194 Wis. 2d 799, 807-08, 535 N.W.2d 116 (Ct. App. 1995).

Ozuna holds that a sentencing judge *may* decide that a probationer who violated a condition of probation has not satisfied the conditions of probation, but it does not hold that the judge *must* decide so. As the State concedes, the issue "whether a circuit court may expunge a conviction although a defendant admittedly violated a condition of probation . . . was not presented in *Ozuna* because the circuit court there refused to expunge the defendant's conviction." Resp't's Br. at 30–31. Were this Court to conclude that Lickes in fact violated a condition of probation, it should uphold the sentencing court's determination that Lickes nevertheless satisfied the condition of probation.

C. THE CIRCUIT COURT'S FINDING THAT LICKES DID NOT VIOLATE A CONDITION OF PROBATION MUST STAND.

The State raises two new arguments concerning the third issue presented for review: that Lickes either (1) forfeited the ability to dispute the court of appeals' finding that he violated a court-ordered condition of probation; or (2) is judicially estopped from disputing it. See Resp't's Br. at 32–34.

First, Lickes did not forfeit his right to argue in favor of affirming the sentencing court's factual finding. At the expungement hearings, Lickes argued that he did not violate the condition of probation requiring participation in sex offender treatment because he had in fact participated in and successfully completed treatment—and Judge Beer agreed. *See* R.91:6–8. Lickes alerted the court of appeals of this factual finding. *See* Brief of Defendant-Respondent at 4, 15. There was no reason for Lickes to do more, because Judge Beer found in his favor

and the State didn't argue that the factual finding was clearly erroneous.

If any party has forfeited the ability to argue this factual issue, it's the State. An appellee shouldn't be faulted for assuming that a circuit court's factual findings will be upheld in the absence of an explicit challenge, not to mention in the absence of clear error. *See, e.g., State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727 ("The waiver rule . . . gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection.").

Second, Lickes is not judicially estopped from arguing in favor of affirming the sentencing court's factual finding. Judicial estoppel is an equitable doctrine usually applied by the circuit court, not an appellate court. *See State v. Petty*, 201 Wis. 2d 337, 346–47, 548 N.W.2d 817 (1996). Neither the circuit court nor the court of appeals considered the doctrine here because the State did not request its application. This is another argument that the State has forfeited.

And none of the doctrine's three requirements—"clearly inconsistent" positions, the same facts, and a court "convinced" by the party to be estopped, *see id.* at 348—are met here. Lickes signed an ATR form at his agent's request (that is, at the request of the State). *See* R.57. The form contained a pre-printed statement admitting "that I violated the rules and conditions of probation as described on the front." *Id.* The front of the form contained the probation agent's statement that "Mr. Lickes has violated his probation multiple times." *Id.* The next sentence states: "Mr. Lickes has had unapproved sexual contact, has given his agent false information, and has been terminated from Sex Offender Treatment." *Id.*

The record doesn't indicate the reason for termination, nor does it indicate what rules of probation Lickes was required to follow.[6] But at the expungement hearing, the State represented to Judge Beer that these three acts were "all violations of [Lickes's] Rules of Supervision." R.91:10; *see also, e.g.*, R.76:3–4, 6; R.80:3.[7]

Lickes didn't "convince" the sentencing court to adopt these statements as true; the State did. And regardless, the statements in the ATR are not the facts at issue on appeal. Lickes has consistently maintained that the ATR, and the violations listed in it, do not bar expungement. He has also consistently maintained that he satisfied the condition of probation requiring treatment because he participated in and completed treatment prior to the end of his probationary term.

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[6] It's likely that the "termination" from treatment occurred as a result of the ATR, because Lickes was unable to attend treatment during the 45 days that he served in jail.

[7] One might wonder why the State made this seemingly fatal concession on the record multiple times. It's because at that time, the State's legal theory was that counts 1 and 3 could not be expunged because the 2016 certificate applicable to those two counts indicated that Lickes hadn't yet satisfied the condition requiring sex offender treatment, as he was "still currently participating in sex offender treatment." R.61:1; *see* R.79:2. The State now presents for the first time to this Court a new theory: that all three counts cannot be expunged because the ATR form indicates that Lickes was terminated from treatment. *See* Resp't's Br. at 34–35. The State forfeited this new argument by failing to raise it in the circuit court, and regardless, it fails for the same reason as the original argument: the condition required that Lickes undergo treatment, and Judge Beer found, after reviewing the ATR form and the 2016 certificate, that Lickes satisfied that condition.

Lickes has not taken any inconsistent positions; rather, his actions throughout probation and since then have evinced his sincere desire to get back on his feet and contribute to society free from the burden of criminal convictions.

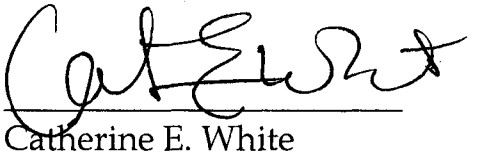
CONCLUSION

For these reasons and the reasons stated in his opening brief, 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, February 5, 2021.

Respectfully submitted,

JORDAN A. LICKES,
Defendant-Respondent



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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 2955 words. *See* WIS. STAT. § 809.19(8)(c)2.

Catherine E. White

CERTIFICATE OF COMPLIANCE WITH RULE 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.

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Catherine E. White