STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order Denying Expunction Entered in the Walworth County Circuit Court, the Honorable Kristine E. Drettwan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

At sentencing, the circuit court ordered expunction under Wis. Stat. § 973.015(1m)(a)1. upon Ozuna's successful completion of his sentence.

> Whether a probationer must perfectly comply with his or her conditions of probation to meet the "successful completion of the sentence" requirement for expunction under Wis. Stat. § 973.015(1m)(a)1., as that phrase is defined by § 973.015(1m)(b).

By denying Ozuna expunction, the circuit court implicitly answered this question in the affirmative.

The court of appeals affirmed the denial of expunction. It held Ozuna did not satisfy the conditions of his probation due to an alleged violation of his no alcohol condition.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this Court.

STATEMENT OF THE CASE

The State charged 17-year-old Lazaro Ozuna with misdemeanor criminal damage to property and misdemeanor disorderly conduct. (1). Ozuna pled guilty to both charges. (13; 24:7-8; App. 101).

At sentencing, the Walworth County Circuit Court, the Honorable James L. Carlson presiding, agreed to the joint sentencing recommendation of the parties. (24:9-10; App. 106-07). The court imposed and stayed a 120-day jail sentence on count one and a concurrent 30-day sentence for count two, and ordered one year of probation. (24:2-3, 9-10; App. 106). The court imposed the following conditions of probation:

- Pay a $250 fine
- Pay court costs
- Pay supervision fees
- Submit DNA sample and pay DNA surcharges
- Complete AODA assessment and follow through with treatment recommendations
- Receive counseling as recommended by agent
- Not to possess weapons
- Not to possess or consume alcohol or illegal drugs and not to possess drug paraphernalia
- Immediately disclose any prescription for medication to agent
- No early termination of probation

(24:9-10; 13:1-2; App. 101-02, 106-07).[1]

[1] The circuit court initially ordered payment of $1,780.00 in restitution as a condition of probation; however, restitution was set at zero at a subsequent hearing. (13:1; 26:2-3).

The circuit court also agreed with the State's recommendation to order expunction under Wis. Stat. § 973.015 upon Ozuna's successful completion of his sentence. (24:3, 10; App. 107). The court stated: "I will allow expungement if there is no violation of probation, no law enforcement contacts rising to the level of probable cause of illegal conduct . . . ." (24:10; App. 107). One year later, the Department of Corrections (DOC) discharged Ozuna from probation. (14:1; App. 108). Shortly thereafter, on June 5, 2015, Ozuna's probation agent filed a DOC form titled "Verification of Satisfaction of Probation Conditions for Expungement" in the circuit court. (14; App. 108-10).

The Verification Form indicated that Ozuna "successfully completed . . . probation." (14:1; App. 108). However, the form also indicated that all court ordered conditions had not been met due to outstanding supervision fees, outstanding court-ordered financial obligations, and an alleged violation of the no alcohol condition. (14:1; App. 108). Ozuna's agent attached a balance inquiry to the Verification Form, which showed his outstanding balance as well as $700 in total payments made. (14:3; App. 110).

On June 12, 2015, the circuit court denied Ozuna expunction by writing "Expungement DENIED KED"[2] on the bottom of the Verification Form. (14:1; App. 108). Ozuna had no notice and no hearing was held.

The court of appeals affirmed the circuit court's denial of expunction holding that Ozuna did not successfully complete his sentence under Wis. Stat. § 973.015(1m)(b) because, according to the DOC, he failed to comply with the no alcohol condition of his probation. ***State v. Ozuna***, No. 2015AP1877-CR, unpublished slip op., ¶1 (Wis. Ct. App.

[2] KED are the initials of the Honorable Kristine E. Drettwan.

Apr. 13, 2016). (App. 111-16). The court of appeals reasoned that the expunction requirement—"satisfy the conditions of probation"—requires perfection stating: "Although applicable to horseshoes and hand grenades, 'close enough' does not appear to cut it." ***Id.***, ¶10. (App. 115).

On September 13, 2016, this Court granted Ozuna's petition for review.

ARGUMENT

I. Ozuna is Entitled to Expunction of His Misdemeanor Convictions Because a Probationer Need Not Perfectly Comply with the Conditions of Probation to Successfully Complete a Probationary Sentence under Wis. Stat. § 973.015(1m)(a)1. and (b).

A. Introduction.

In Wisconsin and across the United States, court records are easily accessed and searched by the general public at no cost. *See* James B. Jacobs, *The Eternal Criminal Record* 5 (2015). In Wisconsin, court records are available through the Wisconsin Court System Circuit Court Access, commonly known as CCAP, as public records under our open records law.[3] A simple search of CCAP or a similar court record database from another state reveals "various dockets, indexes, and case files created to facilitate the processing of criminal cases from the first court appearance through arraignment, pretrial motions, trial, and sentencing." Jacobs, *supra* at 68.

[3] Wisconsin Court System Circuit Court Access, *Access to the Public Records of the Wisconsin Circuit Courts*, https://wcca.wicourts.gov/index.xsl.

While open access to court records promotes the transparency of our judicial system, open access is not without consequences, especially to individuals with criminal records. Re-integration into society following a criminal conviction is frustrated by the availability of criminal records to employers and landlords, in particular. Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*, 31 Wm. Mitchell L. Rev. 1331, 1332-33 (2005). For example, in a classic study of legal stigma, researchers submitted résumés of applicants with varying criminal records and found employers less likely to consider applicants who had *any* prior contact with the criminal justice system. Richard D. Schwartz and Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 Soc. Probs. 133, 133-38 (1962). A more recent study aimed at assessing the hiring of individuals with criminal records in Milwaukee found "the ratio of callbacks for nonoffenders relative to offenders for whites was two to one, this same ratio for blacks is close to three to one." Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 Wis. L. Rev. 617, 642.

These findings are especially troubling considering that research into recidivism "consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime." *Id.* at 647. Chief Justice Earl Warren recognized these difficulties stating "[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities." ***Parker v. Ellis***, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) *overruled in part by* ***Carafas v. LaVallee***, 391 U.S. 234 (1968).

In 1975, to offer some relief from the harsh realities faced by Wisconsinites with criminal records, the Wisconsin

Legislature enacted a statute to allow expunction of misdemeanor convictions for individuals under the age of 21 upon successful completion of their sentence. Laws of 1975 ch. 39, § 711m.[4] The legislature set forth Wis. Stat. § 973.015 in the same act that created the Youthful Offenders Act and "[t]he Purpose of the Youthful Offenders Act was to shield qualified youthful offenders from some of the harsh consequences of criminal convictions." ***State v. Anderson***, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991); s*ee also* ***State v. Leitner***, 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341.

B. Standard of Review and Principles of Statutory Interpretation.

This case requires the court to interpret the current version of Wis. Stat. § 973.015 (2013-14) in accordance with its long-standing purpose to determine the meaning of an expunction requirement: "satisfied the conditions of probation."

Statutory interpretation presents a question of law that this Court reviews de novo. ***State v. Johnson***, 2009 WI 57, ¶22, 318 Wis. 2d 21, 767 N.W.2d 207. Statutory interpretation begins with the words of the statute and "[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Context and structure are also important to meaning. ***Id.***, ¶46. "Therefore, statutory language is

[4] In 2009, the legislature broadened Wis. Stat. § 973.015 by raising the age requirement to 25 and by allowing some felony convictions to qualify for expunction. *See* 2009 Wis. Act 75, §§3384-86.

interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***

Wisconsin courts will generally only consult extrinsic sources of statutory interpretation, such as legislative history, if the language of the statute is ambiguous. ***Id.***, ¶50. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47.

Finally, when faced with competing reasonable interpretations of a statute, a reviewing court must choose the interpretation that produces a constitutional result. ***Dane Cty. Dept. Human Servs. v. P.P.***, 2005 WI 32, ¶17, 279 Wis. 2d 169, 694 N.W.2d 344; ***Am. Family Mut. Ins. Co. v. Wis. Dept. of Rev.***, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional."); ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 526, 261 N.W.2d 434, (1978) ("Given a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality.").

C. Ozuna Meets Each Requirement for Successful Completion of Sentence under Wis. Stat. § 973.015(1m)(b); Therefore, He is Entitled to Expunction Under § 973.015(1m)(a)1.

Wisconsin Stat. § 973.015(1m)(a)1. lays out the requirements for expunction. It provides, in pertinent part:

> Subject to subd. 2. and except as provided in subd. 3., when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

There is no dispute that Ozuna met the initial requirements for expunction. First, he was 17 years old at the time of the offenses. (1:1) Second, he pled guilty to both offenses. (24:7-8). Third, the maximum period of imprisonment for the offenses—a Class A and a Class B misdemeanor—falls well below the six year maximum. *See* Wis. Stat. § 939.51(3)(a)-(b) (indicating 9 months maximum imprisonment for a Class A misdemeanor and 90 days maximum imprisonment for a Class B misdemeanor). Finally, in accordance with ***State v. Matasek***, 2014 WI 27, ¶6, 353 Wis. 2d 601, 846 N.W.2d 811, the circuit court properly exercised its discretion at Ozuna's sentencing when it declared Ozuna eligible for expunction upon successful completion of his sentence. (24:10; App. 107).

What is at issue is whether Ozuna "successfully completed the sentence" as that phrase is defined in Wis. Stat. § 973.015(1m)(b), which provides, in full:

> 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. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

In ***State v. Hemp***, 2014 WI 129, ¶¶16-17, 359 Wis. 2d 320, 856 N.W.2d 811, this Court recently interpreted this exact statutory language and held that a probationer's successful completion of probation automatically entitled him to expunction.[5] Specifically, the court held: "an individual defendant . . . who is on probation successfully completes probation if (1) he has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) he has satisfied all the conditions of probation."[6] ***Id.***, ¶22. The court continued: "If a probationer satisfies these three criteria, he has earned expungement, and is automatically entitled to expungement of the underlying charge." ***Id.***, ¶23. Here, Ozuna meets each requirement for expunction.

1. Ozuna was not convicted of a subsequent offense.

First, Ozuna was not convicted of a subsequent offense while on probation. The Verification Form submitted by Ozuna's agent lists an alleged citation for underage drinking. (14:1; App. 108). The record contains no further information about the alleged citation. Ozuna had no opportunity to challenge this assertion. However, even assuming for the

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[5] In ***Hemp***, this Court interpreted the 2009-10 version of Wis. Stat. § 973.015, which the legislature has subsequently amended in 2011, 2013, and 2015. As a result of 2013 amendment, the numbering of the applicable subsections has changed, but the statutory language has not. *See* 2013 Wis. Act 362.

[6] Wisconsin Stat. § 973.015(1m)(b) states: "satisfy *the* conditions of probation." ***Hemp*** used slightly different language stating this requirement as "satisfy *all* the conditions of probation." (emphases added).

purpose of argument that it is true, an underage drinking citation is not a conviction of a subsequent offense for the purposes of the expunction statute.

"Offense" is not defined in Wis. Stat. § 973.015 or Wis. Stat. § 967.02, which defines certain words and phrases used in Chapters 967 through 976. However, the common and accepted meaning of "offense" is a crime or criminal offense opposed to a civil forfeiture. For example, offense is commonly defined as "a transgression of law; a crime." *Offense*, *The American Heritage Dictionary* 1222 (5th ed. 2011).

Importantly, the term "offense" appears in § 973.015(1m)(a)1., which the court of appeals has determined refers to "law violations where detention (or probation) can be ordered upon conviction." ***State v. Frett***, 2014 WI App 127, ¶7, 359 Wis. 2d 246, 858 N.W.2d 397 (holding that expunction is not authorized for civil forfeitures). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . . ." ***Kalal***, 271 Wis. 2d 633, ¶46. Furthermore, "[w]hen 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." ***Coutts v. Wisconsin Ret. Bd.***, 209 Wis. 2d 655, 668–69, 562 N.W.2d 917 (1997). It would be unreasonable and counter to principles of statutory interpretation to construe "offense" in § 973.015(1m)(b) to include civil forfeitures while interpreting the same word in § 973.015(1m)(a)1. to exclude civil forfeitures.

Here, the alleged underage drinking citation would be punishable by a forfeiture of $500 or less. *See* Walworth County Municipal Code § 38-34(2) (adopting Wis. Stat. § 125.07 governing underage possession of alcohol). The legislature has determined that "[c]onduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12. Therefore, an alleged underage drinking citation is not a subsequent offense for the purposes of the expunction statute.

2. Ozuna's probation was not revoked.

There can be no dispute that Ozuna's probation was not revoked. Rather, he was successfully discharged from probation on May 27, 2015, as evidenced by the Verification Form his agent filed in the circuit court. (14:1; App. 108).

3. Ozuna satisfied the conditions of probation.

a. Ozuna's probation agent determined that he met all requirements, including the "satisfied the conditions of probation" requirement, thus effectuating automatic expunction under ***State v. Hemp***.

Wisconsin Stat. § 973.015(1m)(b) states, in part: "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 in expunging the record." (emphasis added). Here, Ozuna's agent determined that he had successfully completed probation and that he had successfully completed his sentence for the purpose of expunction. As a result of this determination, the agent filed the Verification

Form with the circuit court; therefore, expunction should have automatically occurred. The agent used the Verification Form, rather than a certificate of discharge, to communicate successful completion of probation because, as will be explained, the DOC does not issue certificates of discharge to misdemeanants.

In ***Hemp***, this Court recently examined the language of the expunction statute and held that the statutory language dictates a self-executing process. ***Hemp***, 359 Wis. 2d 320, ¶27. Meaning once proof of discharge is forwarded to the circuit court, "expungement is effectuated." ***Id.*** In so holding, this Court rejected the court of appeals' conclusion that a "certificate of discharge must be approved by the circuit court." ***Id.***, ¶36. Instead, once a circuit court has made an initial determination regarding expunction at sentencing under ***Matasek***, 353 Wis. 2d 601, ¶6, it plays no further role in the expunction process. ***Hemp***, 359 Wis. 2d 320, ¶27. This point is repeated throughout ***Hemp***. ***Id.***, ¶¶4, 15-16, 23-24, 25, 27, 33, 40, 43 (referring to the expunction process as self-executing or automatic).

Put differently, the expunction process set forth by the legislature, as detailed in ***Hemp***, places the decision-making responsibility of whether an offender has completed his or her probationary sentence for the purposes of expunction with the detaining or probationary authority rather than the circuit court.

Although ***Hemp*** and the language of § 973.015(1m)(b) refer to the forwarding of a certificate of discharge as the mechanism by which expunction automatically occurs, certificates of discharge are not issued for the completion of

probation for misdemeanor offenses.[7] *See* Wis. Stat. § 973.09(5)(b); Wis. Admin. Code DOC § 328.16(2). In accordance with § 973.09(5)(a)-(b) and administrative code, the DOC issues probationers a certificate of discharge for the completion of probation for felony charges and gives "Notice of Case Status Change" to individuals who successfully complete probation for misdemeanor offenses.[8] Accordingly, there is no certificate of discharge for Ozuna's agent to forward to the circuit court.[9] Regardless of the documentation issued, the DOC is required to notify the court of completion of the probationary period in all cases. Wis. Stat. § 973.09(5)(c).

Here, Ozuna's agent forwarded a DOC form titled "Verification of Satisfaction of Probation Conditions for Expungement" to the circuit court. (14; App. 108). The DOC Electronic Case Reference Manual explains that this form is used for offenders who have met the expunction requirements, while a form titled "Failure to Meet Criteria for Expungement" is used for offenders who have not met the

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[7] The defendant in ***Hemp*** was convicted of a felony drug offense and placed on probation; therefore, certificates of discharge were issued at the completion of sentence. ***State v. Hemp***, 2014 WI 129, ¶5, 359 Wis. 2d 320, 856 N.W.2d 811. (App. 120-21)

[8] *See* Wisconsin DOC Electronic Case Reference Manual, *Procedures Prior to Discharge: Case Closing*, § .02 Notification (2012), http://doc.helpdocsonline.com/case-closing/transition/status-change ("A copy of the Notice of Case Status Change should be forwarded to misdemeanant offenders upon discharge, as certificates are not issued for misdemeanants.").

[9] A prior statute required the DOC to issue certificates of discharge to all individuals who completed probation. *See* Wis. Stat. § 973.09(5) (1995-96) ("When the probationer has satisfied the conditions of his or her probation, the probationer shall be discharged and the department shall issue the probationer a certificate of final discharge, a copy of which shall be filed with the clerk.").

§ 973.015 requirements.[10] The fact that Ozuna's agent forwarded the Verification Form to the circuit court communicates her determination that Ozuna met the requirements for expunction.

Under the language of § 973.015 and ***Hemp***, this determination is not reviewable by the circuit court. The fact that Ozuna's probation agent noted additional information on this form is irrelevant because the agent's determination of successful completion of sentence (demonstrated by Ozuna's successful completion of probation and the forwarding of the Verification Form to the circuit court) automatically results in expunction.

b. The legislature chose to place the determination of successful completion of sentence with the supervising authority.

The statutory language does not illuminate a bright line between those probationers who satisfy the conditions of probation and those who do not; however, this is unproblematic. In enacting Wis. Stat. § 973.015, the legislature placed the determination of whether an individual has completed his or her sentence with the supervising authority rather than with the circuit court. Here, this discretionary determination rested with Ozuna's probation agent.

The legislature could have enacted a completely different expunction process and could have required circuit-

[10] Wisconsin DOC Electronic Case Reference Manual, *Procedures Prior to Discharge: Expungement*, § .04 Termination (effective 05/01/15), http://doc.helpdocsonline.com/case-closing/transition/status-change.

court review of DOC determinations. Indeed, the legislature did just that in the juvenile expunction statute, Wis. Stat. § 938.355(4m)(b), which states that "[t]he court shall expunge the court's record of the juvenile's adjudication . . . if the *court* determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order." (emphasis added). Had the legislature intended to have the circuit court review the defendant's performance on probation, it would have said so.

Instead, the legislature chose an expunction process that allows the probationary authority to assess compliance with the conditions of probation to make the determination. This Court cannot rewrite a new process of expunction into the statute. *See* ***State v. Martin***, 162 Wis. 2d 883, 907, 470 N.W.2d 900 (1991).

Furthermore, the legislature's decision to grant discretionary authority to the supervising authority is logical. Probation agents meet regularly with their clients often over long periods of time. This frequent contact provides a window into an individual probationer's struggles, successes, and efforts to comply with the conditions of probation. This ample information allows agents to determine whether an individual probationer has met the conditions of probation in a satisfactory or sufficient manner overall for the purposes of expunction.[11] In addition, the fluid nature of many conditions

[11] Discretionary determinations are frequently made by agents during the course of supervising offenders. For example, an agent's response to a violation of probation ranges from reviewing or altering the rules of supervision to recommending revocation. *See* Wis. Admin. Code DOC § 331.03(2)(b)-(c); *see also* ***State ex rel. Plotkin v. Dept. of Health and Soc. Servs.***, 63 Wis. 2d 535, 542, 217 N.W.2d 641 ("The discretion . . . whether to revoke probation rests within the sound discretion of the Department . . . .").

of probation—such as obtaining full time employment—require agents to assess an individual's efforts to become employed rather than just the end result of employment. The supervising agent is in a better position to monitor these types of conditions than the circuit court.

Here, Ozuna's agent determined that he completed his sentence for the purposes of expunction. Under the expunction process enacted by the legislature, the circuit court had no role to play in the process following Ozuna's sentencing. As a result, Ozuna's agent's determination of successful completion of sentence for expunction must stand.

In addition, while expunction under Wis. Stat. § 973.015 is highly beneficial to offenders, expunction cannot be considered a windfall to convicted individuals. In holding that § 973.015 applies to only court records, rather than other records such as those maintained by law enforcement agencies, this Court clarified that expunction does not "wipe away all information relating to an expunged record of a conviction or to shield a misdemeanant from all of the future consequences of the facts underlying a record of a conviction expunged under § 973.015." ***Leitner***, 253 Wis. 2d 449, ¶38. Instead, expunction authorizes the clerk of court to (1) "[r]emove any paper index and nonfinancial court record and place them in the case file," (2) "[e]lectronically remove any automated nonfinancial record, except the case number," and (3) "[s]eal the entire case file." SCR § 72.06(1)-(3). As a result, an expunged record cannot be viewed in person at the

clerk's office or online through CCAP.[12] An expunged record, however, is not destroyed until the minimum retention period for the case has passed. *See* SCR §§ 72.06(4); 72.02(1).

While an expunged conviction is not an accessible court record, which often benefits convicted individuals applying for housing and employment, it is still a conviction. An employer, school, or licensing agency who requests a background check through the DOJ's Crime Information Bureau will be informed of the conviction.[13]

c. The expunction statute does not require perfection.

Ozuna's probation agent properly determined that he met the "satisfied the conditions of probation" requirement for the purposes of expunction. Even assuming that the filing of the Verification Form did not result in automatic expunction, Ozuna is entitled to expunction because

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[12] This Court has identified other benefits of expunction: "An expunged record of conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement." ***State v. Leitner***, 2002 WI 77, ¶39, 253 Wis. 2d 449, 646 N.W.2d 341.

[13] The DOJ does not remove expunged convictions from the Wisconsin Criminal History Database because under Wis. Stat. § 165.84, removal of arrest information is allowed only when an individual has been either released without charges or cleared of the charges. *See* DOJ, Crime Information Bureau, *Removal of Arrest Information*, https://www.doj.state.wi.us/sites/default/files/expunge.pdf; *see also* Director of State Courts, Office of Court Operations, *Expunging Court Records* (April 2015), http://www.co.kenosha.wi.us/DocumentCenter/View/1108.

§ 973.015 expunction does not require perfect compliance with probationary conditions.

As previously indicated, Wis. Stat. § 973.015(1m)(b) states that the forwarding of the certificate of discharge to the circuit court effectuates expunction. Certificates of discharge are issued in felony cases "[w]hen the period of probation for a probationer has expired." Wis. Stat. § 973.09(5)(a). If a probationer in a felony case has no other pending supervisions (probation or parole for another case), a final certificate of discharge is also issued, which lists restored and unrestored civil rights. Wis. Stat. § 973.09(5)(a)2. A certificate of discharge gives no indication of any alleged violations the probationer may have had during the supervisory period. The legislature's decision to utilize DOC certificates of discharge as the mechanism to effectuate expunction indicates that perfect compliance with the conditions of probation is not required for § 973.015 expunction.

The language of Wis. Stat. § 973.015(1m)(b) requires a probationer to "satisf[y] the conditions of probation" to successfully complete his or her sentence. "Satisfy" is defined as: "To meet *or* be sufficient for (a requirement); conform to the requirements of (a standard, for example). *Satisfy*, *The American Heritage Dictionary* 1559 (5th ed. 2011) (emphasis added). Conditions of probation are typically thought of as probation requirements rather than standards, which makes the first part of the definition—"[t]o meet *or* be sufficient for—applicable. As this dictionary definition demonstrates there are two common, accepted, and ordinary meanings of "satisfy."

One reasonable interpretation, as the court of appeals advocated, is that "satisfy the conditions of probation"

requires a probationer to perfectly meet or comply with probation conditions. ***State v. Ozuna***, No. 2015AP1877-CR, unpublished slip op., ¶10 (Wis. Ct. App. Apr. 13, 2016) (App. 111-16). This interpretation views each probationary condition individually to determine if any violation of any single condition occurred.

An equally reasonable interpretation of the same phrase is that it requires a probationer to comply with the imposed conditions in a sufficient or satisfactory manner. This interpretation views probationary conditions in a more global sense to determine whether the probationer has performed sufficiently overall. Both interpretations are reasonable readings of the plain language of the statute.

Whether the legislature intended "satisfied the conditions of probation" to require a probationer to (1) perfectly meet or conform to the conditions of probation or (2) to comply with conditions in a sufficient or satisfactory manner is not entirely clear from the text of § 973.015 or the common, ordinary, and accepted meaning of "satisfy." When statutory language is ambiguous it is appropriate to consider extrinsic sources, such as legislative history, to determine meaning. ***Kalal***, 271 Wis. 2d 633, ¶50.

i. Legislative history indicates that perfection is not required for probationers to "satisfy the conditions of probation" for the purposes of § 973.015 expunction.

A review of the legislative history of § 973.015 reveals the legislature's intent that the "satisfied the conditions of probation" requirement does not require perfect compliance with conditions of probation.

As referenced previously, Wis. Stat. § 973.015 was first enacted in 1975 alongside the Youthful Offenders Act. Laws of 1975 ch. 39, §§ 429, 711m; *see* ***Anderson***, 160 Wis. 2d at 439-40. The "satisfied the conditions of probation" requirement at issue was added to the statute by 1983 Wis. Act 519. To illustrate this addition:

1975-76	"A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, such probation has not been revoked."
1983-84	"A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, on probation, the probation has not been revoked *and the probationer has satisfied the conditions of probation*."

The drafting file for 1983 Wis. Act 519 indicates that the legislature first considered a slightly different addition:

Proposed:	"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 <u>*or extended*</u> *and the probationer has satisfied the conditions of probation*."

The drafting file then contains analysis of the above proposed language with certain parts of the analysis struck out. The analysis reads: "Under this bill, in order to stay eligible for record expungement, a probationer must ~~not violate any~~ conditions of probation ~~and must not have his or her probation extended~~. (App. 117-18). "[A]lso satisfy the" is

noted next to the "conditions of probation" language, which remained in the above analysis. (App. 117-18). Subsequently, the drafter removed the "or extended" language, but kept the "satisfied the conditions of probation" language.

The notation and struck analysis in the drafting file indicates that the legislature did not agree that the phrase "satisfied the conditions of probation" required no violations of probationary conditions. Had the legislature meant to require no violations of probation for expunction it could have clearly said so. Instead, the struck language from the legislative reference bureau analysis indicates that "satisfied the conditions of probation" does not require perfection.

Also instructive here is the legislature's decision to strike the "or extended" language from the proposed 1983 amendment, which confirms the legislature's willingness to allow expunction for probationers whose probation is extended. Allowing expunction under § 973.015 for individuals whose probation has been extended further supports the conclusion that "satisfied the conditions of probation" does not require perfection because an extension indicates noncompliance with probation conditions. *See* Wis. Stat. § 973.09(3)(c)1.-2. (detailing the good cause requirement for a court to extend probation). Given that a court may extend probation if a condition is left unsatisfied at the conclusion of the probationary period, the legislature's willingness to allow expunction for probationers serving extended terms of probation supports the conclusion that "satisfied the conditions of probation" does not require perfect compliance with probationary conditions.

ii. Requiring perfection to "satisfy the conditions of probation" frustrates the legislative purpose of the expunction statute.

Holding that a probationer is not required to have perfect compliance with the conditions of probation to "satisfy the conditions of probation" under § 973.015(1m)(b) upholds the legislative purpose, as repeatedly recognized by this Court, of the expunction statute. "A cardinal rule in interpreting statutes is that an interpretation supporting the purpose of the statute is favored over an interpretation that will defeat the manifest objective of the statute." ***Leitner***, 253 Wis. 2d 449, ¶36.

"The legislative purpose of Wis. Stat. § 973.015 is 'to provide a break to young offenders who demonstrate the ability to comply with the law' and to 'provide[] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." ***Matasek***, 353 Wis. 2d 601, ¶42 (quoting ***Leitner***, 253 Wis. 2d 449, ¶38) (alteration in original).

In ***Hemp***, this Court further commented on the legislative purpose of § 973.015 by examining legislative efforts to broaden the availability of expunction:

> The subsequent amendments to § 973.015 show a consistent legislative effort to expand the availability of expungement to include a broader category of youthful offenders. This legislative effort is reflected in the language of the relevant statute, in that, originally, only those 21 years or younger who were found guilty of an offense for which the maximum penalty was one year or less in the county jail were eligible for expungement. Laws of 1975 ch. 39, § 711m. However, Wis. Stat. § 973.015 has since been amended to apply to those

> 25 years or younger who are found guilty of an offense for which the maximum period of imprisonment is six years or less. Wis. Stat. § 973.015(1)(a).
>
> Thus, Wisconsin's expunction statute indicates 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 a fresh start, free from the burden of a criminal conviction. Through expungement, circuit court judges can, in appropriate circumstances, help not only the individual defendant, but also society at large.

Hemp, 359 Wis. 2d 320, ¶¶20-21.

The purpose of statutory construction is to "discern and give effect to the intent of the legislature . . . ." ***Kalal***, 271 Wis. 2d 633, ¶43. The purpose and intent of the expunction statute—to help youthful offenders and the public at large—and the legislature's willingness to broaden the availability of expunction would be undercut by requiring probationers to perfectly comply with the conditions of probation. This is because, considering the number of probationary conditions imposed by both courts and the DOC and the general characteristics of probationers, requiring absolute perfection with conditions of probation effectively removes the possibility of expunction for probationers.

Here, for example, the circuit court imposed 10 specific conditions of probation. These 10 conditions do not include additional rules and regulations imposed by the DOC under Wis. Stat. § 973.10(1). Although Ozuna's DOC imposed conditions are not part of the record, the Probation and Parole section of the DOC website lists 18 standard rules

of supervision.[14] For example, these requirements direct probationers to "[r]eport as directed for scheduled and unscheduled appointments" and "[o]btain approval from your agent prior to borrowing money or purchasing on credit."[15]

Requiring perfect compliance with conditions means that a probationer who misses a single meeting with his or her agent during a lengthy probationary term or who uses his or her credit card without prior agent permission is foreclosed from the benefits of expunction.

Requiring perfect compliance with probationary conditions is especially concerning considering the prevalence of substance abuse and addiction in the probation population as well as research into substance abuse treatment. In the first national study of the characteristics of probationers, the Bureau of Justice Statistics (BJS) found that 69.4% of probationers reported past drug use.[16] In 2014, the BJS estimated that 25% of adults on probation had committed a drug-related offense.[17] A commonly imposed condition of probation, as seen in this case, is completion of an Alcohol and Other Drug Abuse (AODA) assessment and treatment as recommended. Furthermore, probationary conditions often

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[14] Wisconsin Department of Corrections, Standard Rules of Supervision, *available at* http://doc.wi.gov/community-resources/Rules-of-Community-Supervision/standard-rules-of-supervision-english.

[15] Another source of generally appropriate conditions of probation is found in the American Bar Association Standards Relating to Probation, which lists numerous suggested conditions. *See* ***Huggett v. State***, 83 Wis. 2d 790, 796 & n.3, 266 N.W.2d 403 (1978).

[16] Christopher J. Mumola, *Substance Abuse and Treatment of Adults on Probation*, 1995, Bureau of Justice Statistics Special Report, 3, Table 2 (March 1998), https://www.bjs.gov/content/pub/pdf/satap95.pdf.

[17] Danielle Kaeble, et al., *Probation and Parole in the United States, 2014*, Bureau of Justice Statistics Bulletin, 5, Table 4 (November 2015), https://www.bjs.gov/content/pub/pdf/ppus14.pdf.

include drug testing.[18] Even when probationers are undergoing treatment, relapse is highly likely because "even high-quality substance abuse treatment programs suffer high relapse rates - by some sources ranging from 50% to 90%."[19] Relapse, however, does not signify that treatment has failed considering "[t]he modern view is that addiction is a chronic relapsing condition that must be managed over an extended period, not thought of as something treatment can 'cure' in the way that doctors can fix a broken bone."[20]

Considering the sheer number of conditions placed on a typical probationer, and the likelihood of relapse for a significant portion of those on probation, requiring perfection would effectively eliminate the possibility of expunction. When the legislature has continuously shown a willingness to expand the availability of expunction, it would be unreasonable for this Court to interpret the expunction statute in such a way that effectively writes it out of the statute books.

Finally, requiring perfection to "satisfy the conditions of probation" produces an absurd result considering that the only requirement for a non-probationer to complete his or her sentence is "the person has not been convicted of a subsequent offense." Wis. Stat. § 973.015(1m)(b). By interpreting "satisfy conditions of probation" to require perfection, a probationer's requirements for "completion of

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[18] *See supra* note 14; *see also* Leo Beletsky, et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose among Individuals Newly Released from Incarceration*, 7 Ne. U.L.J. 149, 202 (2015).

[19] Jonathan P. Caulkins, et al., *Estimating the Societal Burden of Substance Abuse*, in *Substance Abuse in Adolescents and Young Adults* 345, 360 (Donald E. Greydanus et al., eds., 2013).

[20] *Id.*

sentence" under § 973.015 become more onerous than the requirement the legislature placed on individuals sentenced to jail or prison. The legislature could not have intended that probationers, who presumably have committed less serious offenses than confined individuals, have more onerous requirements for expunction than individuals removed from the community. In sum, it is unreasonable to foreclose a probationer from expunction for missing a single appointment with his or her probation agent or for relapsing while in drug treatment all while holding incarcerated individuals to a lesser standard.

To summarize, under ***Hemp***, once Ozuna's agent forwarded the Verification Form to the circuit court expunction was effectuated. Additionally, the agent correctly determined that Ozuna successfully completed his sentence because "satisfied the conditions of probation" does not require perfection. This is the only reasonable interpretation of the requirement because it considers the role a certificate of discharge plays in the process of expunction, furthers the legislative purpose of § 973.015, avoids absurd results, and is in accord with the legislative history of the statute. Ozuna's position also avoids an unconstitutional interpretation of the statute, as explained next.

iii. Interpreting "satisfied the conditions of probation" to require sufficient or satisfactory compliance rather than perfection avoids unconstitutional interpretations.

(1) Requiring perfect compliance with probationary conditions violates equal protection because probationers who make good faith efforts to pay court-ordered costs, but who are unable to pay, are precluded from § 973.015 expunction.

Requiring that a probationer perfectly comply with the conditions of his or her probation under Wis. Stat. § 973.015 means that individuals who are unable to pay court-ordered or supervision costs will be unable to receive the benefits of expunction regardless of their efforts or ability to pay. This interpretation presents an equal protection violation.[21]

"The equal protection clause . . . 'is designed to assure that those who are similarly situated will be treated similarly.'" ***State v. Smith***, 2010 WI 16, ¶15, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting ***Treiber v. Knoll***, 135 Wis.2d 58, 68, 398 N.W.2d 756 (1987)). To demonstrate an equal protection violation "a party must demonstrate that the statute treats members of similarly situated classes differently." ***Blake v. Jossart***, 2016 WI 57, ¶30, 370 Wis. 2d 1, 884 N.W.2d 484. Under the rational basis test, applicable here, "a statute is unconstitutional if the legislature applied an irrational or arbitrary classification when enacting the provision." *See* ***id.***, ¶32.

Here, an interpretation requiring perfect compliance with the conditions of probation results in an equal protection violation. First, the court of appeals' interpretation of

[21] The United States Constitution and the Wisconsin Constitution provide the guarantee of equal protection. U.S. Const. Amend. XIV, § 1; Wis. Const. art. 1, § 1.

§ 973.015 divides similarly situated individuals—those initially deemed eligible for expunction by circuit courts—into two groups: (1) individuals who have the means to pay all costs and fees during the supervision period and (2) individuals, who attempt to pay, but cannot afford to do so during the supervision period.

Because there is no rational basis for granting expunction based on an individual probationer's wealth, an interpretation of the expunction statute requiring perfect compliance with probationary conditions results in an equal protection violation.[22] While the State has an interest in encouraging probationers to discharge fees and costs, preventing expunction from occurring based on a probationer's inability to pay does not further this purpose. Put differently, no amount of consequences will result in full payment for a probationer who lacks the ability to pay all costs during the supervision period.[23]

Furthermore, Ozuna's interpretation of "satisfied the conditions of probation" would not create a disincentive for probationers to pay court-ordered costs for several reasons. First, a probationer's refusal to make any attempt to satisfy monitory conditions of probation may result in revocation. *See* ***State v. Gerard***, 57 Wis. 2d 611, 621-23, 205 N.W.2d 374 (1973). Second, probation may be extended for failure to make "a good faith effort to discharge court-ordered payment obligations" or supervision fees. Wis. Stat. § 973.09(3)(a) &

[22] Ozuna raised this argument at the court of appeals; however, the State did not address it.

[23] To eliminate the possibility of expunction without any determination of an individual probationer's ability to pay runs counter to this Court's pronouncements on ability to pay findings in context of restitution and probation extension. *See* ***State v. Jackson***, 128 Wis. 2d 356, 363-68, 382 N.W.2d 429 (1986).

(3)(c)1. Finally, when a probationer is discharged from probation with unpaid restitution, surcharges, or supervision fees those fees are not forgiven, instead the court "shall" issue a civil judgment for the unpaid amounts.[24] Wis. Stat. § 973.09(b)-(bm).

In essence, an interpretation of § 973.015, which requires perfect compliance with probation conditions results in a penalty based on poverty, which is not rationally related to the State's interest that probationers pay court-ordered costs and other fees. By interpreting "satisfied the conditions of probation" to mean satisfactory or sufficient compliance with the conditions as determined by the supervising authority, this Court can avoid this untenable and potentially unconstitutional result.[25] "Given a choice of reasonable interpretations of a statute, this [C]ourt must select the construction which results in constitutionality." ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978).

This interpretation is also consistent with this Court's recent decision in ***Hemp***. Although this Court stated "Hemp satisfied all the conditions of probation and paid all his supervision fees," ***Hemp*** did not hold that had the defendant failed to pay all supervision fees he would not have had his record expunged. *See* ***Hemp***, 359 Wis. 2d 320, ¶24.

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[24] Ozuna's judgment of conviction states: "If probation is revoked or discharged with outstanding financial obligations, a civil judgment may be entered against the defendant . . . . Collections may include income assignment." (13:1; App. 102).

[25] The court of appeals did not address Ozuna's failure to pay costs, holding instead that his alleged underage drinking citation alone meant he failed to "satisfy the conditions of his probation" for the purposes of expunction. ***State v. Ozuna***, unpublished slip op., ¶8 n.3 (Ct. App. April 13, 2016).

Moreover, the record in ***Hemp*** indicates that Hemp did not pay all supervision fees prior to discharge, but that payment was completed at some point after successful completion of probation. (App. 119-122). Hemp's final certificate of discharge stated "[t]his discharge does not forgive your current (tentative) balance of unpaid supervision fees, in the amount of [$]40.00. . . . This balance is (tentative) as a result of delayed supervision fee charges still to be posted." Appendix for Brief of Petitioner at 30, ***State v. Hemp***, 359 Wis. 2d 320. (App. 121). Although Hemp apparently paid all supervision fees *after* he was discharged from probation, at the time his final certificate of discharge automatically triggered expunction he owed at least $40.00 in supervision fees. ***Id.*** (App. 119-22)

> (2) Overturning the agent's determination of successful completion of sentence for the purposes of § 973.015 expunction without giving a defendant notice and an opportunity to be heard results in a procedural due process violation.

Here, the circuit court overturned the probation agent's determination of successful completion of sentence without giving Ozuna notice or an opportunity to be heard. If this Court disagrees with Ozuna's interpretation of § 973.015 and determines that the Verification Form filed in the circuit court did not automatically expunge his court record then the Due Process Clause[26] affords him a right to notice and an opportunity to be heard.

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[26] The United States Constitution and the Wisconsin Constitution both prohibit the government from depriving an individual of life, liberty, or property without due process of law. U.S. Const.

By reviewing the Verification Form and denying expunction, the circuit court not only contravened this Court's pronouncement in ***Hemp***—"[t]he only point in time at which a circuit court may make an expungement decision is at the sentencing hearing,"[27]—but also deprived Ozuna his constitutional right to procedural due process.

Procedural due process "addresses the fairness of the manner in which a governmental action is implemented." ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶18 n.14, 277 Wis. 2d 378, 690 N.W.2d 849. Notice and an opportunity to be heard generally will satisfy procedural due process requirements. *See* ***Strykowski***, 81 Wis. 2d at 512 (citing ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972).

This Court employs a two-part test to determine whether a violation of procedural due process has taken place. ***Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund***, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849. "First, we examine whether the person has established that a constitutionally protected property or liberty interest is at issue. Second, we consider whether the procedures attendant with the deprivation of the interest were sufficient." ***Id.*** (internal citations omitted).

Amend. XIV, § 1; Wis. Const. art. 1, § 1. The due process protections in our federal and state constitutions are "substantially equivalent." ***Barbara B. v. Dorian H.***, 2005 WI 6, ¶18, 277 Wis. 2d 378, 690 N.W.2d 849.

[27] ***Hemp***, 359 Wis. 2d 320, ¶40 (citing ***Matasek***, 353 Wis. 2d 601, ¶45).

In ***Wisconsin v. Constantineau***, 400 U.S. 433, 437, (1971), the United States Supreme Court stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In ***Paul v. Davis***, 424 U.S. 693, 708-09 (1976), the Court further clarified that reputation alone is not a protected liberty interest. Rather, as the court of appeals has explained, "a person's reputation is protected by procedural due process only when damage to the reputation is accompanied by the alteration or elimination of a right or status previously recognized under state law." ***Stipetich v. Grosshans***, 2000 WI App 100, ¶24, 235 Wis. 2d 69, 612 N.W.2d 346 (citing ***Paul***, 424 U.S. at 707-11).

For example, the damage to reputation in ***Constantineau*** occurred as the result of a Wisconsin law, which allowed the posting of notice to prohibit certain individuals from purchasing alcohol. ***Constantineau***, 400 U.S. at 434 n.2 & 436. The Court held that the posting law so stigmatized the defendant that procedural due process requirements were required prior to the posting. ***Id.*** at 436.

In ***Paul***, the Court explained that the stigma caused by the "posting" in ***Constantineau*** alone was not what triggered procedural due process rights, but rather procedural due process rights were required because of the removal of "a right previously held under state law"—the right to purchase alcohol—in combination with the stigma caused by the posting law. ***Paul***, 424 U.S. at 708-09.

Wisconsin Stat. § 973.015 grants a conditional right of expunction to individuals who meet the statutory requirements. The court of appeals has held that the juvenile expunction statute, Wis. Stat. § 938.355(4m), "confers a substantive right for a juvenile." ***In the Interest of J.C.***,

216 Wis. 2d 12, 14, 573 N.W.2d 564 (Ct. App. 1997). Expunction under Wis. Stat. § 973.015 does the same—it creates a substantive right under state law.

As a result, once the circuit court ordered that Ozuna's record be expunged upon successful completion of his sentence and his agent forwarded the Verification Form confirming successful completion of sentence, his right to expunction under state law cannot be taken away without due process of law. In addition to the removal of a right previously held under state law, the circuit court's denial of expunction also results in harm to Ozuna—his criminal record and the stigma associated with it remains public information easily accessed on the CCAP website.

The fact that an individual has no inherent right to expunction or the fact that Ozuna exposed himself to consequences by pleading guilty to the underlying offenses does not change this result. This is because an application of procedural due processes rights is not governed by a distinction between "rights" and "privileges." *See* ***Bd. of Regents v. Roth***, 408 U.S. 564, 571 (1972).

For example, there is no right to probation yet "basic requirements of due process and fairness require that the department provide a limited hearing to allow petitioners to be confronted with their probation violation and to be heard if they so desire." ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 545, 547, 185 N.W.2d 306 (1971). "After one has gained the conditional freedom of a probationer or parolee, whether by action of court, parole board, or statute, the state cannot summarily revoke such status without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions of his probation or parole." ***Id.*** at 548. Similarly, in ***Goldberg v. Kelly***,

397 U.S. 254, 262, 264 (1970), the United States Supreme Court refused to rely on the argument "that public assistance benefits are 'a privilege and not a right'" and held that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."

The same reasoning applies to § 973.015 expunction in that once the circuit court has ordered expunction at sentencing and the supervising authority has notified the court of successful completion of sentence, the circuit court cannot deny expunction without procedural due process protections such as notice and an opportunity to be heard.[28]

Having established that a constitutionally protected liberty interest is at issue, the court must next "consider whether the procedures attendant with the deprivation of the interest were sufficient." ***Aicher ex rel. LaBarge***, 237 Wis. 2d 99, ¶80. If a procedure was in place it would be appropriate to apply the three-part balancing test set forth in ***Eldridge***, 424 U.S. at 335. This balancing test considers:

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[28] Other jurisdictions have recognized due process rights in the expunction context. *See* ***Carlacci v. Mazaleski***, 798 A.2d 186, 190 (Pa. 2002) ("[T]here exists a [due process] right to petition for expungement of a [Protection from Abuse Act] record where the petitioner seeks to protect his reputation."); ***Key v. State***, 48 N.E.3d 333, 340 (Ind. Ct. App. 2015) (observing that state law "grants the petitioner a due process right to a hearing when the prosecutor objects to the expungement petition"); ***Heine v. Tex. Dept. Public Safety***, 92 S.W.3d 642, 650 (Tex. Ct. App. 2002) (requiring that a defendant be given the opportunity to be heard at an expunction hearing); ***Ohio v. Saltzer***, 471 N.E.2d 872, 873 (Ohio Ct. App. 1984) (holding defendant was denied due process by failure to hold expunction hearing as required by state law).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

Here, however, there are no procedures in place for this Court to review. Instead, the circuit court simply wrote "Expungement DENIED" across the bottom of the Verification Form. Ozuna had no notice and no opportunity to be heard as to the alleged shortcoming noted on this form. When there are no procedures in place it is impossible for procedures to be "attendant with the deprivation of the interest." *See* ***Aicher ex rel. LaBarge***, 237 Wis. 2d 99, ¶80.

This Court, however, can avoid any constitutional violations by upholding the agent's determination that Ozuna successfully completed his sentence for the purposes of § 973.015 expunction and by clarifying that the "satisfied the conditions of probation" requirement in § 973.015(1m)(b) requires sufficient or satisfactory compliance rather than perfection.

CONCLUSION

For the reasons stated above, Lazaro Ozuna requests that this Court reverse the decision of the court of appeals and remand to the circuit court with instructions to expunge Ozuna's record.

Dated this 27th day of October, 2016.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,835 words.

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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 § 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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STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER DENYING EXPUNCTION ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE KRISTINE E. DRETTWAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Because Lazaro Ozuna violated his no-alcohol condition of probation, did the circuit court properly deny him expunction under Wis. Stat. § 973.015?

By denying expunction on this basis, the circuit court implicitly answered this question in the affirmative.

The court of appeals answered this question in the affirmative.

2. Did the circuit court's denial of expunction comport with procedural due process?

The circuit court did not address this issue.

The court of appeals did not resolve this issue because Ozuna did not adequately develop it on appeal.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests oral argument and publication.

STATEMENT OF THE CASE

In November 2013, the State charged Ozuna with criminal damage to property and disorderly conduct for damaging an automobile's windshield and hood during an argument in a parking lot. (1:2-3.) At a combined plea and sentencing hearing in May 2014, Ozuna pled guilty to both charges and was convicted. (13; 24:8.) The circuit court said that it "will allow expungement if there is no violation of probation." (24:10.) One of Ozuna's conditions of probation was not to consume or possess alcohol. (24:10.)

In June 2015, Ozuna's probation agent filed with the circuit court a form titled "Verification of Satisfaction of Probation Conditions for Expungement." (14.) Although a box was checked in front of an item that read "[t]he offender has successfully completed his/her probation," a box was also checked in front of an item that read "[a]ll court ordered conditions have **not** been met." (14:1.) The form stated that Ozuna owed $250 in supervision fees and that he "[f]ailed to comply with the no alcohol condition." (14:1.) It explained that police had cited Ozuna for underage drinking at a hotel when he blew a .102 during a preliminary breath test (PBT). (14:1.) At the bottom of the form, the circuit court wrote, "Expungement DENIED." (14:1.)

Ozuna appealed the denial of expunction to the court of appeals. (18.) The court of appeals affirmed, concluding that the circuit court properly denied expunction because the relevant statute, Wis. Stat. § 973.015, required a defendant to satisfy all conditions of probation to earn expunction. *State v. Ozuna*, Case No. 2015AP1877-CR (A-App. 111-12, ¶ 1).

ARGUMENT

This Court should hold that the circuit court properly denied Ozuna expunction because he violated his no-alcohol condition of probation. This Court should further hold that the circuit court's denial of expunction did not violate Ozuna's due process rights. This Court need not and should not determine whether Ozuna's equal protection rights would be violated if he were denied expunction due to his failure to pay all required supervision fees.

I. Based on the plain language of the expunction statute, the circuit court properly denied Ozuna expunction.

Ozuna presents three alternative statutory arguments for why the circuit court erroneously denied him expunction. (Ozuna Br. 11-26.) This Court should reject all three arguments and hold that (1) Ozuna was not entitled to expunction because he violated his no-alcohol condition of probation; (2) the circuit court had authority to determine whether Ozuna successfully completed his sentence such that he was entitled to expunction; and (3) because Ozuna did not successfully complete his sentence, his probation agent's discharge form did not entitle him to expunction.

A. Controlling legal principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the statute's language. *Id.* ¶ 45 (quoted source omitted). Courts interpret statutory language "reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46 (citations omitted).

"Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* ¶ 46 (citations omitted). "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47 (citations omitted). A court may use legislative history to confirm, but not to contradict, a statute's plain meaning. *Id.* ¶ 51.

"The interpretation and application of a statute are questions of law that [this Court] review[s] de novo while benefitting from the analyses of the court of appeals and circuit court." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 24, 339 Wis. 2d 125, 810 N.W.2d 465 (*Heritage Farms II*) (citation omitted).

B. Because Ozuna violated one of his conditions of probation by consuming alcohol, he was not entitled to expunction.

The expunction statute unambiguously requires a probationer to satisfy all conditions of probation to earn expunction. This conclusion would hold true even if the expunction statute were ambiguous. Because Ozuna violated the no-alcohol condition of probation, he did not satisfy all conditions of probation and thus is not entitled to expunction.

1. The expunction statute unambiguously provides that a defendant is not entitled to expunction if he violates a condition of probation.

If a circuit court grants conditional expunction to a defendant at sentencing, the defendant is entitled to expunction if he successfully completes his sentence. *State v. Hemp*, 2014 WI 129, ¶ 23, 359 Wis. 2d 320, 856 N.W.2d 811. "A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation." Wis. Stat. § 973.015(1m)(b). As this Court recently interpreted that statute in *Hemp*, "an individual defendant like Hemp who is on probation successfully completes probation if (1) he

has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) he has satisfied *all the conditions of probation*." *Hemp*, 359 Wis. 2d 320, ¶ 22 (emphasis added).

This Court's recent interpretation of the expunction statute in *Hemp* is consistent with the Legislature's purpose behind the statute. "The legislative purpose of Wis. Stat. § 973.015 is 'to provide a break to young offenders who demonstrate the ability to comply with the law' and to 'provide[ ] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions.'" *State v. Matasek*, 2014 WI 27, ¶ 42, 353 Wis. 2d 601, 846 N.W.2d 811 (alteration in *Matasek*) (quoting *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341). This statute gives certain offenders a second chance to become law-abiding and creates an incentive for them to rehabilitate, which benefits society. *Hemp*, 359 Wis. 2d 320, ¶ 19 (citation omitted).

Allowing a defendant to receive expunction even though he violated a condition of probation would run counter to the expunction statute's purpose. This conclusion is especially true in cases where the defendant violated a condition of probation by breaking the law. Here, the circuit court gave Ozuna a second chance when, at sentencing, it granted him expunction conditioned upon his successful completion of probation. (24:10.) Ozuna spurned that second chance by subsequently consuming alcohol underage in violation of a condition of probation. (14.) Underage consumption of alcohol is illegal. Wis. Stat. § 125.07(4). Ozuna's underage drinking shows that he did not rehabilitate himself by becoming law-abiding. Allowing Ozuna to receive expunction would reduce young offenders'

incentive to comply with their conditions of probation and rehabilitate themselves.

Reasonably well-informed persons would view the expunction statute as requiring a person to satisfy all conditions of probation. A word's potential ambiguity can be clarified by looking at its context and surrounding language. *State v. Johnson*, 171 Wis. 2d 175, 181, 491 N.W.2d 110 (Ct. App. 1992). The expunction statute has three requirements for successfully completing a sentence: "the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation." Wis. Stat. § 973.015(1m)(b). Even if "the conditions of probation," standing alone, is ambiguous, the surrounding language clarifies what it means. Based on the statute's plain language, a person does *not* successfully complete his sentence if he is convicted of even one subsequent offense or if his probation gets revoked even once. The third requirement has a similar meaning: a person does not successfully complete his sentence if he violates even one condition of probation.

Ozuna argues that the expunction statute does not require a probationer to satisfy all conditions of probation but instead "requires a probationer to comply with the imposed conditions in a sufficient or satisfactory manner." (Ozuna Br. 19.) He views the statute as looking at the "probationary conditions in a more global sense to determine whether the probationer has performed sufficiently overall." (*Id.*) The gist of his argument is that a probationer is entitled to probation if he satisfies most (or perhaps at least some) of his conditions of probation. (*Id.* at 17-26.)

Ozuna's proffered interpretation is incredibly vague and would make the expunction statute unworkable in probation cases. Ozuna does not clearly explain whether his proffered view looks at the number of a defendant's probation violations, their seriousness, or both. For example, if, as Ozuna argues, a single incident of underage drinking is insufficient to render him ineligible for expunction, what about two incidents of underage drinking? Five incidents? Ten? What would be less "satisfactory"—consuming five alcoholic drinks on one occasion or consuming one alcoholic drink on each of five occasions? Could Ozuna properly be denied expunction if his PBT results had been .2 or .3 instead of .102? What if Ozuna had ingested heroin once while on probation instead of consuming alcohol? Not only does Ozuna fail to any provide guidance for answering these and similar questions, but he fails to even acknowledge that his proposed view of the expunction statute would create these difficulties.

In short, this Court should reaffirm what it said just two terms ago: the expunction statute's third requirement for successful completion of a sentence requires a probationer to satisfy "all the conditions of probation." *Hemp*, 359 Wis. 2d 320, ¶ 22.

2. Even if the expunction statute is ambiguous, its legislative history does not help Ozuna.

Because the expunction statute unambiguously requires a probationer to satisfy all conditions of probation, this Court need not consider the statute's legislative history. In any event, the legislative history does not alter this view of the statute.

In 1983, the Legislature added the following italicized language to the expunction statute: "A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, ~~such~~ the probation has not been revoked *and the probationer has satisfied the conditions of probation*." 1983 Wisconsin Act 519, § 1. Ozuna notes that the Legislature did not pass a bill that would have added the following italicized language: "'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 *or extended and the probationer has satisfied the conditions of probation*.'" (Ozuna Br. 20.)

Ozuna argues that this legislative history shows that the Legislature intended to allow defendants to receive expunction even if they violated some conditions of probation. (*Id.* at 21.) His reasoning is that an extension of probation "indicates noncompliance with probation conditions" and that the Legislature, by not passing the bill with the words "or extended," signaled its intent to allow defendants to receive expunction even if their probation was extended. (*Id.*)

Ozuna's argument is not persuasive. An extension of probation does not necessarily suggest noncompliance with probation conditions. A circuit court may, in its discretion, extend probation if there is cause to do so. *State v. Jackson*, 128 Wis. 2d 356, 365, 382 N.W.2d 429 (1986).

Further, regardless of whether an extension of probation indicates noncompliance with probation conditions, Ozuna's resort to legislative history is still unpersuasive. When the Legislature removes particular language from a bill, it does not necessarily signal that it

intends to enact the opposite of that language. *See Richland Sch. Dist. v. Dep't of Indus., Labor, & Human Relations, Equal Rights Div.*, 174 Wis. 2d 878, 896 n.8, 498 N.W.2d 826 (1993). Rather, sometimes it is "equally likely and reasonable" that the Legislature removes language because it is unnecessary. *See id.* Here, the Legislature likely removed the phrase "or extended" because it was unnecessary. If a defendant's probation is extended due to a violation of a probation condition, then the words "or extended" would be redundant with the requirement that a defendant "satisfy the conditions of probation." It is also likely that the Legislature wanted defendants to be able to earn expunction if their probation was extended for reasons *other than* violations of probation conditions. By not passing a bill with the words "or extended," the Legislature did not signal its intent to allow expunction for defendants who violated conditions of probation.

In short, this legislative history does not undermine this Court's pronouncement in *Hemp* that the expunction statute requires a defendant to satisfy all conditions of probation.

3. Ozuna's concerns with the expunction statute are misplaced and do not justify holding, contrary to *Hemp*, that the statute does not require defendants to satisfy all conditions of probation.

Ozuna offers several concerns with the view that the expunction statute requires a probationer to satisfy all conditions of probation. (Ozuna Br. 23-25.) His first concern is that this view would "effectively remove[] the possibility of expunction for probationers." (*Id.* at 23.) To support that assertion, Ozuna states that a probationer could be denied

expunction for a relatively minor infraction, such as missing a single meeting with a probation agent. (Ozuna Br. 24.)

That concern is misplaced. The Legislature wisely chose to require probationers to satisfy all conditions of probation to earn expunction. This bright-line rule provides guidance to probationers as to what is expected of them and it maximizes their incentive for rehabilitating. Further, *Ozuna's* view of the expunction statute would be unfair to probationers. He argues repeatedly that a probation agent has unreviewable discretion to determine whether a probationer has sufficiently earned expunction. (*Id.* at 12, 14-16.) Accordingly, under Ozuna's view, the expunction statute does nothing to prevent a probation agent from determining that a probationer is not entitled to expunction because he missed one meeting—or even because the probationer arrived to a meeting one minute late. A probationer under those circumstances would have no recourse because, according to Ozuna, a circuit court may not review the probation agent's expunction decision. Probationers are better off with the expunction statute's bright-line rule requiring them to satisfy all conditions of probation than they would be with Ozuna's nonexistent standard that leaves their expunction up to the whim of their probation agents.

Ozuna relies on various statistics in arguing that probationers would not be able to receive expunction if they were required to satisfy all conditions of probation. (*Id.* at 24-25.) For example, he notes that almost 70% of probationers had reported *past* drug use and that an estimated 25% of probationers in 2014 had committed a drug crime. (*Id.* at 24.) He then asserts that high rates of probationers relapse when undergoing drug treatment. (*Id.* at 25.)

Those statistics are unhelpful and do not support Ozuna's conclusion that people cannot possibly satisfy all conditions of probation. One shortcoming is that Ozuna has not explained the rate at which probationers are ordered to undergo drug treatment. A source that he cites states that "[f]or individuals who are placed on community supervision *because of charges involving substance use*, submission to drug testing is often a condition of probation or parole."[1] Ozuna, however, provides no statistics on how many probationers have been sentenced for a drug-related offense or have drug-use problems. To be clear, Ozuna's 70% figure does not mean that 70% of people used drugs while on probation. One 1995 study that he cites states that only 31.8% of people on probation had used any drug *the month before* their offense.[2] These statistics do not even come close to proving that people would never be able to earn expunction if they were required to satisfy all conditions of probation.

Further, there is an easy solution for a defendant who wants expunction and shares Ozuna's concerns about failing probation: reject probation. A defendant has a statutory right to reject probation at sentencing or at any time during the probationary period. *State v. McCready*, 2000 WI App 68, ¶ 6, 234 Wis. 2d 110, 608 N.W.2d 762. "A grant of a

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[1] Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam, & Alyssa Tochka, *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 Ne. U.L.J. 149, 202 (2015) (emphasis added).

[2] Christopher J. Mumola, *Substance Abuse and Treatment of Adults on Probation*, 1995, Bureau of Justice Statistics Special Report, 3, Table 2 (March 1998), *available at* https://www.bjs.gov/content/pub/pdf/satap95.pdf.

probationer's request to end probation is not a judicial revocation . . . ." *Id.* ¶ 1. Accordingly, even though the expunction statute provides that a defendant is not entitled to expunction if his or her probation is revoked, a defendant would still be able to earn expunction if a circuit court terminated probation at his or her request.

Ozuna's final concern is that requiring a defendant to satisfy all conditions of probation would make it more difficult for a probationer than a prisoner to successfully complete a sentence. (Ozuna Br. 25-26.) That concern does not justify abrogating this Court's decision in *Hemp*. Indeed, the expunction statute itself mandates that probationers satisfy more requirements than prisoners. The statute has three requirements for successfully completing a sentence and thus earning expunction. *See* Wis. Stat. § 973.015(1m)(b). Only the last two requirements apply to probationers. *See id.* Even under Ozuna's view that the expunction statute merely requires a probationer to satisfy the conditions of probation in an "overall" sense (Ozuna Br. 19), a probationer still must satisfy two statutory requirements that do not apply to a prisoner.

Further, there are good reasons for why the expunction statute imposes more requirements on probationers than prisoners. "[T]here is a significant distinction between the status and freedom enjoyed by one on probation or parole and one confined in a penal institution." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 548, 185 N.W.2d 306 (1971). Conditions of community supervision are the price defendants pay in return for their conditional freedom from confinement. *See Ashford v. Div. of Hearings & Appeals*, 177 Wis. 2d 34, 44-45, 501 N.W.2d 824 (Ct. App. 1993).

In short, Ozuna is not entitled to expunction because he violated the no-alcohol condition of probation.[3]

C. A circuit court may determine whether a defendant has successfully completed his sentence such that he is entitled to expunction.

The analysis above shows why the circuit court reached the right conclusion when it denied Ozuna expunction. The issue now becomes whether the circuit court was allowed to determine whether Ozuna was entitled to expunction. It was allowed to do so.

As Ozuna notes, a probation agent is in the best position to observe a defendant's conduct. (Ozuna Br. 15-16.) However, interpretation and application of a statute are legal questions that a court reviews de novo. *Heritage Farms II*, 339 Wis. 2d 125, ¶ 24 (citation omitted). Accordingly, although a circuit court may defer to a probation agent's observations and factual inferences regarding a probationer's conduct, a circuit court may independently review a probation agent's determination as to whether a defendant is legally entitled to expunction.

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[3] The State concedes that Ozuna met the second statutory requirement for earning expunction because his probation was not revoked. The record is unclear as to whether Ozuna met the first requirement. Ozuna's probation discharge form left *unchecked* a box in front of an item that read, "The offender has not been convicted of a subsequent offense." (14:1.) The State concedes that Ozuna was not *convicted* of underage drinking. Accordingly, this Court need not resolve Ozuna's argument that underage drinking is not an "offense" within the meaning of the expunction statute. (*See* Ozuna Br. 10.) But, the record is unclear as to whether Ozuna was convicted of an offense besides underage drinking while on probation.

Here, the circuit court apparently deferred to the probation agent's factual assertion that Ozuna had been cited for underage drinking and independently reviewed whether Ozuna was legally entitled to expunction. (*See* 14:1.)

Those dual standards apply in similar contexts. For example, in determining whether a traffic stop was lawful, a court defers to the factual observations and reasonable inferences drawn by a police officer in light of the officer's training and experience. *See State v. Drexler*, 199 Wis. 2d 128, 134, 544 N.W.2d 903 (Ct. App. 1995). However, a court still reviews de novo whether the facts meet the legal standard for a valid stop. *Id.* at 133 (citation omitted).

Further, probation agents do not have unreviewable discretion in other contexts. For example, a court may review a probation agent's allegedly arbitrary enforcement of a probation condition. *See State v. Miller*, 175 Wis. 2d 204, 212, 499 N.W.2d 215 (Ct. App. 1993). Similarly, a probation agent may not unilaterally revoke a defendant's probation but instead must petition the Department of Administration to do so. *See* Wis. Stat. § 973.10(2).

Serious due process concerns would result if this Court adopted Ozuna's position that probation agents have unreviewable discretion to make expunction determinations. A court has "a duty to construe a statute to avoid [a] *potential* constitutional violation." *Plumbers Local No. 75 v. Coughlin*, 166 Wis. 2d 971, 994, 481 N.W.2d 297 (Ct. App. 1992) (citation omitted). To avoid serious due process concerns, courts have interpreted statutes as allowing for judicial review of executive actions that affect statutory or constitutional rights. *E.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681-82 n.12 (1986). In *Bowen*, for example, the Supreme Court rejected the government's

"extreme position" that judicial review was unavailable for substantial statutory and constitutional challenges to the government's administration of the Medicare Part B program. *Id.* Here, similarly, this Court should reject Ozuna's extreme contention that courts may not review probation agents' expunction determinations.

Ozuna's analogy between expunction denial and probation revocation highlights these due process concerns. (*See* Ozuna Br. 33.) Probationers have a due process right to a hearing before their probation may be revoked. *State ex rel. Johnson*, 50 Wis. 2d at 547-48. Probationers may file a certiorari action to seek judicial review of an administrative revocation decision. *Id.* at 549-50. A certiorari action is adequate to satisfy due process. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 54, 235 Wis. 2d 610, 612 N.W.2d 59 (citing *State ex rel. Johnson*, 50 Wis. 2d at 549-50). Here, however, Ozuna argues that a court may not review a probation agent's determination as to whether a probationer is entitled to expunction. (Ozuna Br. 12, 14-16.) Further, Ozuna does not contend that a probationer may challenge the probation agent's expunction decision before a neutral decision-maker in an administrative hearing. If a defendant has a liberty or property interest in expunction, then the unavailability of judicial review of a probation agent's expunction determination would likely violate due process.

Not only would judicial review protect defendants' due process rights, but it would also help to protect their right to expunction. As Ozuna points out, a probation agent files in circuit court one of two probation discharge forms, depending on whether the agent thinks that the defendant successfully completed probation. (*Id.* at 13-14.) Probation agents might make erroneous legal conclusions or factual mistakes in deciding which form to file, or they may

inadvertently file the wrong type of form. Judicial review will *benefit* defendants in cases where probation agents mistakenly determine that the defendants have not earned expunction. A determination of entitlement to expunction is too important to be left in the hands of probation agents alone.

Ozuna notes that the juvenile expunction statute, Wis. Stat. § 938.355(4m)(b), states that a court shall grant a juvenile's petition for expunction "'if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order.'" (*Id.* at 15.) Ozuna argues that the absence of clear language to that effect in Wis. Stat. § 973.015 shows that the Legislature did not intend for judicial review in cases under this statute. (*Id.*)

Ozuna's argument is unpersuasive. It is true that, "where 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." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 22, 316 Wis. 2d 47, 762 N.W.2d 652 (*Heritage Farms I*) (quotation marks and quoted source omitted). However, that canon of statutory construction is inapplicable if the similarity between two statutes is questionable. *Id.* ¶ 23. Further, canons of statutory construction are "not rules of law." *State v. Popenhagen*, 2008 WI 55, ¶ 42, 309 Wis. 2d 601, 749 N.W.2d 611.

Here, §§ 938.355 and 973.015 are not similar. Under § 938.355 a person may petition a circuit court to expunge a juvenile adjudication, and the court then decides whether to expunge the record. Wis. Stat. § 938.355(4m)(b). When

ruling on a juvenile petition for expunction, a court must determine whether expunction would benefit the offender or harm society. *Id.* § 938.355(4m)(a). By contrast, § 973.015 is located in an entirely different chapter, applies to criminal convictions, and has a two-stage procedure for expunction. Under this statute, a circuit court may grant conditional expunction of a criminal conviction at sentencing. *See id.* § 973.015(1m)(a)1. At that time, the court determines whether expunction would benefit the defendant or harm society. *Id.* The defendant automatically earns expunction by successfully completing the sentence and need not petition for expunction. *Hemp*, 359 Wis. 2d 320, ¶¶ 23, 32-34. Because of those differences, § 973.015, unlike § 938.355, does not state that courts may determine the appropriateness of expunction when reviewing expunction petitions. Because these two statutes are not similar, the juvenile expunction statute has no bearing on this case. Further, the inapplicable juvenile expunction statute does not trump the serious due process concerns that stem from Ozuna's view of § 973.015.

In short, this Court should hold that a circuit court may independently determine whether a probationer has successfully completed a sentence such that he is entitled to expunction.

D. Because Ozuna did not successfully complete his sentence, his probation agent's discharge form did not entitle him to expunction.

Ozuna's probation agent sent a discharge form to the circuit court that suggested that Ozuna had successfully completed his sentence. (14.) However, Ozuna did not successfully complete his sentence, as explained above.

Accordingly, the circuit court's receipt of this form did not entitle Ozuna to expunction.

This conclusion is based on the plain language of the expunction statute, which provides: "*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)(b) (emphasis added).

This Court in *Hemp* repeatedly noted that successful completion of a sentence is a prerequisite to earning expunction. For example, this Court stated that "[i]f a circuit court finds an individual defendant eligible for expungement and conditions expungement upon the successful completion of the sentence, then the plain language of the statute indicates that once the defendant *successfully completes* his sentence, he has earned, and is automatically entitled to, expungement." *Hemp*, 359 Wis. 2d 320, ¶ 23 (emphasis added). Similarly, the "probationary authority must forward the certificate of discharge to the court of record upon the individual defendant's *successful completion* of his sentence and at that point the process of expungement is self-executing." *Id.* ¶ 25 (emphasis added). Throughout its *Hemp* opinion, this Court tied a probationer's entitlement to expunction to his or her *successful* completion of his or her sentence. *E.g., id.* ¶¶ 15, 16, 24, 27, 40, 43.

Ozuna argues that the self-executing process of expunction shows that he was entitled to expunction once the circuit court received his discharge form. (Ozuna Br. 12.) That argument is mistaken because this self-executing process occurs after a defendant *successfully* completes his sentence.

Ozuna similarly argues that the self-executing process of expunction shows that a circuit court may not review a probation agent's decision as to whether a defendant is entitled to expunction. (*Id.*) This argument has the same problem. In *Hemp*, this Court held that "[o]nce Hemp *successfully completed* probation the circuit court did not have the discretion to refuse to expunge Hemp's record." *Hemp*, 359 Wis. 2d 320, ¶ 39 (emphasis added). A circuit court may not "reverse its decision to find an individual eligible for expungement conditioned upon the successful completion of the sentence." *Id.* ¶ 24 (citation omitted). Ozuna's argument thus begs the question: Who decides whether he successfully completed his sentence? For the reasons explained above, a circuit court may independently review a probation agent's expunction determination.

Ozuna, unlike Hemp, did not successfully complete his sentence because he violated the no-alcohol condition of probation. Unlike in *Hemp*, the circuit court here did not second-guess its decision conditionally granting expunction. It followed that decision by denying expunction when Ozuna did not satisfy the conditions for receiving expunction.

In sum, because Ozuna did not successfully complete probation, he was not automatically entitled to expunction when the circuit court received his probation discharge form.

II. The circuit court did not deprive Ozuna of procedural due process when it denied him expunction.

The circuit court did not violate Ozuna's due process rights when it denied him expunction.

A. Controlling legal principles.

"The Fourteenth Amendment to the United States Constitution provides in part: 'nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .'" *Casteel v. McCaughtry*, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993) (alteration in *Casteel*). "'In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.'" *Id.* at 579 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)) (quotation marks omitted).

To establish a procedural due process violation, a litigant must show that (1) he had a protected life, liberty, or property interest, and (2) the State deprived him of that interest without due process of law. *Brown v. State Dep't of Children & Families*, 2012 WI App 61, ¶ 31, 341 Wis. 2d 449, 819 N.W.2d 827 (citation omitted). A court may dispose of a procedural due process claim under either step without reaching the other one. *See Adams v. Northland Equip. Co.*, 2014 WI 79, ¶ 67, 356 Wis. 2d 529, 850 N.W.2d 272; *Jones v. Dane Cty.*, 195 Wis. 2d 892, 914, 918-19, 537 N.W.2d 74 (Ct. App. 1995). A court reviews alleged violations of due process de novo. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 6, 234 Wis. 2d 335, 610 N.W.2d 129 (citation omitted).

B. In denying Ozuna expunction, the circuit court did not deprive him of a liberty or property interest.

Ozuna's procedural due process claim fails under the first step because he has not shown that he was deprived of a liberty or property interest.

1. Ozuna does not have a liberty interest in expunction.

"Reputation by itself is neither liberty nor property within the meaning of the due process clause of the fourteenth amendment." *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986) (*Weber II*) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)). "[R]eputation can only rise to the level of a constitutionally protected interest when some more tangible interest accompanies the loss of reputation." *State v. Hazen*, 198 Wis. 2d 554, 561, 543 N.W.2d 503 (Ct. App. 1995) (citing *Paul*, 424 U.S. at 701). The Supreme Court in *Paul* mentioned employment as an example of a tangible interest. *Paul*, 424 U.S. at 701.

Here, Ozuna's interest in his reputation is inadequate to establish that he has a liberty interest in expunction. A juvenile offender in *Hazen*, for example, argued that two particular Wisconsin statutes violated procedural due process by placing him in adult criminal court and thus revealing his identity to the public without a hearing. *Hazen*, 198 Wis. 2d at 556, 558. The court of appeals held that Hazen's interest in protecting his reputation by keeping his criminal proceedings confidential was insufficient to establish a liberty interest. *Id.* at 560-61.[4] Here, similarly, Ozuna's interest in confidentiality of his criminal record is insufficient to establish a liberty interest. Ozuna has not shown that he suffered tangible harm, such as loss of an

[4] The court of appeals also applied a test from *Hewitt v. Helms*, 459 U.S. 460 (1983), when determining whether Hazen had a liberty or property interest. *State v. Hazen*, 198 Wis. 2d 554, 560-61, 543 N.W.2d 503 (Ct. App. 1995). The court expressed "grave doubts" that the *Hewitt* test is still good law. *Id.* at 560. Here, this Court should decline to address *Hewitt* because Ozuna has not relied on it.

employment opportunity, because his convictions were not expunged.

Ozuna seems to argue that he had a liberty interest in expunction because the denial of expunction altered his rights under state law. (Ozuna Br. 32-34.) A litigant can prove that state action impacted a liberty interest in reputation by showing that (1) the state action damaged his reputation and (2) this reputational damage has resulted in tangible harm such that a right or status that he previously possessed under state law has been altered or eliminated. *Teague v. Van Hollen*, 2016 WI App 20, ¶ 65, 367 Wis. 2d 547, 877 N.W.2d 379. "'The mere possibility of remote or speculative future injury or invasion of rights will not suffice'" to establish a liberty interest in reputation. *Weber v. City of Cedarburg*, 125 Wis. 2d 22, 30, 370 N.W.2d 791 (Ct. App. 1985) (*Weber I*) (quoting *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981)), *aff'd*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986). Ozuna offers nothing more than a speculative assertion that the denial of expunction "results in harm to [him]" due to the stigma associated with criminal convictions. (Ozuna Br. 33.)

Further, when the circuit court denied Ozuna expunction, it did not alter or eliminate any right or status under state law that he previously possessed. There is no indication in the record that Ozuna received any benefits of expunction before the circuit court determined that he was not entitled to expunction. Moreover, as explained above, Ozuna was not entitled to expunction because he did not satisfy all conditions of probation. His argument that his legal rights were altered hinges on his incorrect view that he was automatically entitled to expunction when the circuit court received his probation discharge form. (*Id.*)

Ozuna cites *In Interest of J.C.*, 216 Wis. 2d 12, 14, 573 N.W.2d 564 (Ct. App. 1997), for the proposition that the *juvenile* expunction statute confers a substantive right for a juvenile. (Ozuna Br. 32-33.) That case is inapposite. There was no due process issue in that case. Rather, when the court of appeals characterized juvenile expunction as a substantive right, it was concluding that the juvenile expunction statute was not remedial and thus did not have retroactive application. *In Interest of J.C.*, 216 Wis. 2d at 14. That case is further distinguishable because the juvenile expunction statute is very different than the expunction statute at issue here, as explained above.

Ozuna's analogy to probation does not help him establish a liberty interest in expunction. (*See* Ozuna Br. 33.) A probationer has a liberty interest in probation, that is, freedom from physical confinement. *See Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *State ex rel. Johnson*, 50 Wis. 2d at 547-48. Expunction does not equate with freedom from imprisonment.

Ozuna's string citations to out-of-state cases in a footnote do not help him, either. (*See* Ozuna Br. 34 n.28.) Ozuna has not explained whether or how Wisconsin's expunction process is similar to the expunction processes in those other states. Further, those cases are distinguishable on their facts. In *Carlacci v. Mazaleski*, 798 A.2d 186, 190 (Pa. 2002), the Pennsylvania Supreme Court held that a person has a right under the state constitution to petition a court to expunge the record of a dismissed Protection From Abuse Act proceeding. That case does not help Ozuna because he is not alleging that he was denied an opportunity to petition for expunction.

In another case cited by Ozuna, a Texas appellate court held that a trial court should have allowed the defendant to personally participate at a hearing on his petition for expunction, instead of allowing only the State and the Department of Public Safety to participate at the hearing. *Heine v. Texas Dep't of Pub. Safety*, 92 S.W.3d 642, 649-50 (Tex. App. 2002). Although the defendant alleged a due process violation, the court seemed to rely solely on a Texas statute in holding that the defendant had a right to be present at the hearing. *Id.* at 649. Here, unlike in *Heine*, Ozuna never petitioned for expunction and the circuit court did not hold an *ex parte* expunction hearing.

In the other two cases cited by Ozuna, appellate courts held that a hearing on a defendant's petition for expunction was mandatory under a state statute. *Key v. State*, 48 N.E.3d 333, 340 (Ind. Ct. App. 2015); *State v. Saltzer*, 471 N.E.2d 872, 873 (Ohio Ct. App. 1984). Although the defendant in *Saltzer* alleged a due process violation, the appellate court merely held that a hearing was statutorily required. *Saltzer*, 471 N.E.2d at 873. In *Key*, the appellate court stated in passing that the statute "grants the petitioner a due process right to a hearing when the prosecutor objects to the expungement petition." *Key*, 48 N.E.3d at 340. The courts in those cases did not engage in any due process analysis. Further, in contrast to those cases, Ozuna did not petition for expunction, and no Wisconsin statute entitles him to a hearing to determine whether he earned expunction.

In short, Ozuna does not have a liberty interest in expunction.

2. Ozuna does not have a property interest in expunction.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). Property interests are not created by the Constitution but rather by independent sources, such as state law. *Stipetich v. Grosshans*, 2000 WI App 100, ¶ 24, 235 Wis. 2d 69, 612 N.W.2d 346 (quoting *Roth*, 408 U.S. at 577). "However, 'federal constitutional law determines whether that [substantive property] interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.'" *Arneson v. Jezwinski*, 225 Wis. 2d 371, 386, 592 N.W.2d 606 (1999) (alteration in *Arneson*) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

Under U.S. Supreme Court precedent, a person has a legitimate claim of entitlement to a statutory benefit that he is already receiving. *See Schmidt v. State*, 68 Wis. 2d 512, 518-19, 228 N.W.2d 751 (1975). Thus, such a person has a due process right to establish his entitlement to continued receipt of the benefit. *Id.* However, the same is not true of a person who is attempting to establish his entitlement in the first instance, not having previously received the benefit. *Id.* at 519-20.

Here, Ozuna does not have a property interest in expunction because there is no indication that his convictions were expunged before the circuit court determined that he was not entitled to expunction. Ozuna does not argue otherwise.

In short, Ozuna's procedural due process claim fails because he does not have a liberty or property interest in expunction.

C. Even if Ozuna has a liberty or property interest in expunction, the judicial process provided him with all the process that he was due.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 48, 244 Wis. 2d 333, 627 N.W.2d 866 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "This opportunity to be heard 'must be at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Kelly*, 397 U.S. at 267) (quotation marks omitted). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* ¶ 49 (alteration in *Milwaukee Dist. Council 48*) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

"The requirement of procedural due process is met if a state provides adequate post-deprivation remedies." *Brown*, 341 Wis. 2d 449, ¶ 32 (citing *Thorp*, 235 Wis. 2d 610, ¶ 53). "A state post-deprivation remedy is considered adequate unless it can readily be characterized as inadequate to the point that it is meaningless or nonexistent and thus, in no way can be said to provide the due process relief guaranteed under the fourteenth amendment." *Id.* (quotations marks and quoted sources omitted).

Courts use a three-part test to determine the adequacy of available procedures:

> "'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"

Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005) (quoting *Eldridge*, 424 U.S. at 335). A court must balance the first factor against the other two. *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299, 305, 483 N.W.2d 295 (Ct. App. 1992).

Here, Wisconsin law provides adequate due process protections for a defendant who thinks that he was wrongly denied expunction under Wis. Stat. § 973.015. Ozuna seems to argue that he was entitled to a hearing before the circuit court denied him expunction. (Ozuna Br. 34-35.) The first *Eldridge* factor, however, does not require a pre-deprivation hearing in expunction cases. This factor considers the nature and weight of the private interest and the duration of any potentially wrongful deprivation. *See Mackey v. Montrym*, 443 U.S. 1, 12 (1979). A defendant has a substantial interest in expunction because it gives certain young offenders a second chance. *See Hemp*, 359 Wis. 2d 320, ¶¶ 18-21. Expunction also provides defendants with advantages in subsequent cases. *Leitner*, 253 Wis. 2d 449, ¶ 39. However, its importance is not weighty enough to require a pre-deprivation hearing.

Supreme Court case law supports this conclusion. For example, in *Kelly*, the Supreme Court held that a welfare recipient had a due process right to an evidentiary hearing *before* his welfare benefits were terminated. *Kelly*, 397 U.S.

at 264. The Supreme Court emphasized that because a recipient relies on welfare to obtain such essentials as food and shelter, "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* By contrast, because disability payments are not based upon financial need, the private interest in such payments does not require a pre-termination evidentiary hearing. *Eldridge*, 424 U.S. at 340-43. The Supreme Court has also held that although people have a substantial property interest in an issued driver's license, due process does not require a hearing before the government may revoke a person's driver's license. *Montrym*, 443 U.S. at 11-12; *Dixon v. Love*, 431 U.S. 105, 113-15 (1977).

Under those principles, a defendant's private interest in expunction does not mandate a pre-deprivation hearing. A person does not rely on expunction for survival. Further, in this case, there is no indication that Ozuna received any benefits of expunction before the circuit court determined that he was not entitled to expunction. Accordingly, Ozuna's personal interest in expunction is weaker than the private interests in benefits that were actually revoked in *Eldridge*, *Montrym*, and *Love*—none of which required a pre-deprivation hearing.

The second *Eldridge* factor heavily supports the conclusion that the judicial review procedures available to Ozuna provided him with all the process that he was due. To be clear, due process is satisfied if adequate procedures are *available*, regardless of whether a person is successful in obtaining relief by using those procedures. *Jones*, 195 Wis. 2d at 918-19. Further, a person may not claim that he was denied due process if he did not use the procedures

available under state law for seeking relief. *See Thorp*, 235 Wis. 2d 610, ¶ 56.

Ozuna had procedures available to challenge his expunction denial. A defendant may file a postconviction motion in circuit court. Wis. Stat. §§ (Rule) 809.30(2)(h), 974.02. A circuit court must hold a hearing if a defendant makes a legally sufficient postconviction motion or if the credibility of the motion's allegations is questionable. *State v. Allen*, 2004 WI 106, ¶ 12 & n.6, 274 Wis. 2d 568, 682 N.W.2d 433. As of right, a defendant may appeal a circuit court's final judgment or final order to the court of appeals. Wis. Stat. § 808.03(1). A defendant may petition this Court for review. *Id.* § (Rule) 809.62. "Remand is the appropriate course of action '[w]hen an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute.'" *State v. Kleser*, 2010 WI 88, ¶ 123, 328 Wis. 2d 42, 786 N.W.2d 144 (alteration in *Kleser*) (quoting *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155 (1980)). Thus, to be entitled to a remand for a hearing, "an appellant must allege sufficient material facts that, if true, would entitle him or her to relief." *State v. Maloney*, 2006 WI 15, ¶ 18, 288 Wis. 2d 551, 709 N.W.2d 436. Ozuna has not acknowledged these available procedures or explained how they were inadequate.

Wisconsin courts have held that similar available procedures provided adequate due process protections. For example, the availability of a certiorari action in circuit court to challenge a zoning decision is an adequate post-deprivation remedy. *Thorp*, 235 Wis. 2d 610, ¶ 54. So, too, is the opportunity to seek judicial review of an administrative license revocation. *See Brown*, 341 Wis. 2d 449, ¶ 34. Indeed, in *Brown*, the court of appeals emphasized that Brown took advantage of her available remedies by seeking circuit court

review of an administrative decision and ultimately appealing to the court of appeals. *Id.*

Ozuna took advantage of some of those procedures by appealing the circuit court's expunction denial to the court of appeals and obtaining discretionary review in this Court. Although the circuit court did not hold an evidentiary hearing, Ozuna is to blame because he did not file a postconviction motion.[5] The circuit court likely would have been required to hold an evidentiary hearing had Ozuna alleged in a postconviction motion that he did not violate any conditions of probation. He made no such allegation, and the court of appeals noted that Ozuna did not dispute that he consumed alcohol while on probation. *Ozuna*, Case No. 2015AP1877-CR (A-App. 115, ¶ 9). The risk of an erroneous deprivation of a liberty or property interest is especially low where, as here, the person does not dispute the factual basis for the deprivation. *See Montrym*, 443 U.S. at 14-15.

Wisconsin law provided Ozuna with adequate judicial procedures for contesting the factual basis of his expunction denial. He simply decided not to use all of those procedures. Those available procedures minimized the risk that he was erroneously denied expunction.

Further, Ozuna has not explained why due process required any additional safeguards. He has not even explained what kind of additional safeguards should have

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[5] A "person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stat. § (Rule) 809.30(2)(h); *see also id.* § 974.02(2). Accordingly, it appears that Ozuna was required to file a postconviction motion in circuit court before filing a notice of appeal.

been available to him. He seems to argue that he should have received a pre-deprivation hearing. (Ozuna Br. 34-35.) However, there is no reason to think that an evidentiary hearing would have been more accurate had it been held before, rather than after, the circuit court denied him expunction. This conclusion is especially true where, as here, the person does not dispute the factual basis for the deprivation. *See Love*, 431 U.S. at 113-14.

The third *Eldridge* factor also heavily supports the conclusion that Ozuna received all the process that he was due. The cost of providing a hearing weighs against concluding that due process requires a hearing. *See Eldridge*, 424 U.S. at 347. Wisconsin's postconviction pleading requirements preserve scarce judicial resources by eliminating unnecessary evidentiary hearings when no material facts are in dispute or when the defendant would not be entitled to relief even if his allegations were true. *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999). Here, an evidentiary hearing would have been pointless because no material facts were in dispute.

In short, Ozuna's due process claim fails because he had no liberty or property interest in expunction and because adequate procedures for challenging his expunction denial were available to him.[6]

[6] The remedy for a procedural due process violation is a remand for an adequate hearing. *See, e.g.*, *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 557, 185 N.W.2d 306 (1971). Accordingly, if this Court concludes that Ozuna's procedural due process rights were violated, it should remand the matter to the circuit court to conduct a hearing.

III. This Court should decline to resolve Ozuna's equal protection claim.

Ozuna's probation discharge form noted that he violated two conditions of probation: he consumed alcohol and he had a $250 balance of unpaid supervision fees. (14:1.) Ozuna argues that denying him expunction based on his inability to pay those fees would violate his equal protection rights. (Ozuna Br. 27-30.)

This Court should decline to resolve that equal protection claim for several reasons. First, as the court of appeals concluded, resolution of this issue is unnecessary because Ozuna's alcohol consumption by itself rendered him ineligible for expunction. *Ozuna*, Case No. 2015AP1877-CR (A-App. 114, ¶ 8 n.3). Second, Ozuna did not raise this equal protection claim before the circuit court. An appellate court generally does not address a claim on appeal that was not presented to the circuit court in a postconviction motion. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78 & n.3, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). Finally, the record is inadequate to resolve this claim because it does not establish whether Ozuna is able to pay his outstanding supervision fees. A defendant has the burden of proving at an evidentiary hearing that he is unable to pay a fee and that a statute is unconstitutional as applied to him because it requires him to pay the fee. *See State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 296, 201 N.W.2d 778 (1972); *In re Attorney Fees in State v. Helsper*, 2006 WI App 243, ¶¶ 23-24 & n.5, 297 Wis. 2d 377, 724 N.W.2d 414. If this Court concludes that Ozuna's non-entitlement to expunction hinges on his failure to pay his supervision fees, Ozuna at most would be entitled to a remand for an evidentiary hearing to pursue his equal protection claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 16th day of November, 2016.

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 8580 words.

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

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Dated this 16th day of November, 2016.

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order Denying Expunction Entered in the Walworth County Circuit Court, the Honorable Kristine E. Drettwan, Presiding.

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ARGUMENT

Ozuna is Entitled to Expunction because Perfect Compliance with Probationary Conditions is Not Required for Successful Completion of Sentence Under Wis. Stat. § 973.015(1m)(a)1. and (b).

The circuit court improperly denied Ozuna expunction for two main reasons. First, the "satisfied conditions of probation" requirement does not require perfection and ***State v. Hemp,*** 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811, did not hold otherwise. Second, the legislature placed the discretionary determination of whether a probationer successfully completed his or her sentence with the "detaining or probationary authority" rather than the circuit court. *See* Wis. Stat. § 973.015(1m)(b). Ozuna's probation agent determined that he successfully completed his sentence as evidenced by the Verification Form filed in the circuit court. His agent made the correct determination and the expunction statute grants no authority to the circuit court to sua sponte review the agent's decision.

A. ***State v. Hemp*** did not define the meaning of "satisfied the conditions of probation."

The State appears to assert that ***Hemp***, 359 Wis. 2d 320, already interpreted the "satisfied the conditions of probation" requirement as requiring perfect compliance with probationary conditions. (State's Resp. 5, 7, 9, 12). The State relies on this Court's slight rephrasing of the "satisfied *the* conditions of probation" requirement in ***Hemp*** as requiring a probationer to "satisfy '*all the* conditions of probation.'" (State's Resp. 5, 7) (citing ***Hemp***, 359 Wis. 2d 320, ¶22) (emphasis added). The State places too much

weight on this Court's slight rephrasing of the requirement considering this requirement was not at issue in ***Hemp*** and the Court engaged in no statutory interpretation of this requirement.

Rather, ***Hemp*** addressed the role of the defendant, the supervising authority, and the circuit court in the expunction process when it was undisputed that the defendant had successfully discharged from probation and had fulfilled each of the Wis. Stat. § 973.015(1m)(b) requirements to complete his sentence.[1] ***Id.***, ¶¶3, 24.

Additionally, in ***Hemp***, this Court did not engage in any statutory interpretation of the "satisfied the conditions of probation" requirement and it did not grapple with the meaning of "satisfied" in the statutory language. Whether a probationer must satisfy "the" or "all the" conditions of probation does not address the issue here—the meaning of "satisfied" within the "satisfied the conditions of probation" requirement. To be clear, Ozuna's argument that "satisfied" means sufficient or satisfactory compliance rather than perfect compliance requires no modification of ***Hemp.***

B. The meaning of "satisfied the conditions of probation" is not clear from the plain language of the statute.

Wisconsin Stat. § 973.015(1m)(b) contains three requirements for a probationer to successfully complete his or her sentence: (1) "the person has not been convicted of a subsequent offense," (2) "probation has not been revoked,"

[1] The record in ***Hemp*** indicates Hemp had not met all monetary conditions of probation prior to his discharge, but neither party appears to have alerted this Court to this fact. (*See* Brief-in-Chief 29-30; App. 119-22).

and (3) "the probationer has satisfied the conditions of probation."

The State asserts that when these three requirements are read together the meaning of "satisfied the conditions of probation" plainly requires perfect compliance because the first two requirements refer to singular events. (State's Resp. 6). However, that the first two statutory requirements unambiguously refer to singular events—"a subsequent offense" and revocation[2]—cannot be grafted onto the third requirement to somehow indicate that conditions of probation cannot be satisfied if a single probation violation occurs. The State cites no cannon of statutory interpretation to support this method of textual analysis and offers no support for the type of inference that the State's analysis relies upon.

Under the plain language of § 973.015, once proof of discharge is forwarded to the circuit court "expungement is effectuated." ***Hemp***, 359 Wis. 2d 320, ¶27. Certificates of discharge are issued in felony cases at the expiration of the probationary period and they give no indication of the probationer's performance during probation. *See* Wis. Stat. § 973.09(5)(a). That the legislature chose certificates of discharge as the means by which to effectuate expunction indicates that perfect compliance with probationary conditions is not required.

Despite this plain language in support of Ozuna's position, Ozuna maintains the meaning of "satisfied the conditions of probation" is ambiguous because it can be reasonably interpreted as requiring either (1) perfect compliance or (2) sufficient or satisfactory compliance.

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[2] Revocation under Wis. Stat. § 973.10(2)(a)-(b) can occur only once per case. *See* ***State v. Balgie***, 76 Wis. 2d 206, 208, 251 N.W.2d 36 (1977).

The legislative policy and legislative history underlying Wis. Stat. § 973.015 resolves the ambiguous statutory language in favor of Ozuna's reasonable interpretation.

There is no dispute that "[t]he legislative purpose of Wis. Stat. § 973.015 is 'to provide a break to young offenders who demonstrate the ability to comply with the law' and to 'provide[] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions.'" ***State v. Matasek***, 2014 WI 27, ¶42, 353 Wis. 2d 601, 846 N.W.2d 811. (quoting ***State v. Leitner,*** 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341. There can also be no dispute that the legislature amended Wis. Stat. § 973.015 to expand the availability of expunction. *Compare* Wis. Stat. § 973.015 (1975-76) (permitting expunction for individuals under age 21 found guilty of offenses punishable by a maximum of one year or less in jail) *with* Wis. Stat. § 973.015 (2013-14) (permitting expunction for individuals under age 25 convicted of offenses, including some non-violent felonies, punishable by a maximum of 6 years or less of imprisonment).

The State's bright-line interpretation requiring perfect compliance with probationary conditions goes beyond the legislative purpose of the expunction statute in such a way as to stymie expunction in probationary cases. This is because not all violations of probationary conditions demonstrate an inability to comply with the law. For example, under the State's bright-line rule, a probationer who misses a single appointment[3] or who fails to fulfill all monetary conditions

[3] The State suggests that circuit court review would benefit probationers in this situation; however, under the State's bright-line rule of perfect compliance, circuit court review would never benefit a

during probation cannot successfully complete his or her sentence for expunction. Considering the number of conditions placed on probationers, the State's interpretation makes § 973.015 expunction practically unattainable, which is in direct conflict with the legislature's willingness to expand its availability.

In addition, the legislative history supports Ozuna's position that "satisfied the conditions of probation" does not require perfection. First, the drafting file in 1983 Wis. Act 519, which added the "satisfied the conditions of probation" requirement, contains a crossed out portion of analysis indicating that the added language should not be interpreted as requiring perfect compliance. (*See* Brief-in-Chief 20-21). The State did not refute Ozuna's interpretation of the stuck analysis in the drafting file. "Unrefuted arguments are deemed admitted." ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878.

Second, contrary to the State's assertion, the legislature's decision to remove the "or extended" language during the drafting process supports Ozuna interpretation. (*See* State's Resp. 8). Probation may be extended "for cause and by order" of the circuit court. Wis. Stat. § 973.09(3)(a). However, the State's suggestion that probation may be extended for a reason unrelated to an unmet condition of probation is incorrect. (*See* State's Resp. 9). This is because "cause" for probation extension is limited by statute to (1) a lack of "good faith effort to discharge court-ordered payment obligations" or supervision fees, (2) an inability to "make required restitution payments" where an agreement to complete community service in lieu of restitution is reached

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probationer who violates any condition of probation. (*See* State's Resp. 10).

and additional time is needed to complete the community service, and (3) when the defendant stipulates to an extension and "the court finds that extension would serve the purposes for which probation was imposed." Wis. Stat. § 973.09(3)(c)1.-3. Each of the three ways to show cause for probation extension contemplate a failure to meet the conditions of probation and the need for an additional period of supervision to allow completion of conditions.

Finally, Ozuna's interpretation—sufficient or satisfactory compliance—is both reasonable and workable. Section 973.015(1m)(b) places the determination of whether an individual has completed his or her sentence with the supervising authority rather than the circuit court. To ask Ozuna's probation agent to consider his performance during probation and determine whether he satisfied the conditions of his probation in a satisfactory or sufficient manner is within his agent's expertise. Probation agents frequently engage in discretionary decisionmaking concerning the supervision of probationers including determinations of how to respond to probation violations. *See* Wis. Admin. Code DOC § 331.03(2)(b)-(c). To quell the State's concerns, this Court could certainly enumerate a non-exhaustive set of factors for probation agents to consider when determining whether the conditions of probation have been satisfied for § 973.015. These factors could include consideration of the type, severity, and frequency of any violation as well as the probationer's behavior both in response to the violation and following the violation.[4]

[4] Further guidance from this Court as to whether unmet monetary conditions of probation prevent expunction where a probationer has made a good faith effort to meet such conditions may also be warranted.

C. The legislature placed the determination of successful completion of sentence with the supervising authority.

Wisconsin Stat. § 973.015(1m)(b) states: "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." This Court recently held this statutory language requires the detaining or probationary authority to issue the certificate and forward it to the circuit court upon successful completion of sentence. ***Hemp***, 359 Wis. 2d 320, ¶27. It follows that the legislature placed the determination of whether an individual has completed his or her sentence with the supervising authority rather than the circuit court. Ozuna's probation agent correctly determined that a single alleged underage drinking citation coupled with unpaid monetary conditions does not prevent him from successful completion of his sentence for § 973.015 expunction.[5]

The State asserts that "a circuit court may independently review a probation agent's determination as to whether a defendant is legally entitled to expunction." (State's Resp. 14). The State's conclusion appears to stem from the fact that circuit courts are tasked with applying factual findings to legal standards in other situations, such as whether a traffic stop meets Fourth Amendment requirements.[6] (*Id.*).

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[5] The State asserts that the circuit court reversed the agent's determination based on the alleged underage drinking citation. (State's Resp. 14). However, it is impossible from the court's "Expungement DENIED" order to know the reason for denial.

[6] In making this argument, the State incorrectly asserts that courts "defer" to testimony of police officers. (State's Resp. 14). In fact,

The State's assertion, however, is completely divorced from the language of § 973.015. This Court has already explained the legislature chose an expunction process that requires the circuit court to exercise its discretion at the time of sentencing. ***Hemp***, 359 Wis. 2d 320, ¶39; ***Matasek***, 353 Wis. 2d 601, ¶¶6, 45. This Court stated: "The only point in time at which a circuit court may make an expungement decision is at the sentencing hearing. ***Hemp***, 359 Wis. 2d 320, ¶40. Furthermore, this Court has already rejected the argument that certificates of discharge must be reviewed and approved by the circuit court before expunction occurs. ***Id.***, ¶36.

This Court has also recognized that policy reasons may support an expunction process that allows circuit court determinations at the culmination of a probationer's supervision; however, this is not the process the legislature enacted. *See* ***Matasek***, 353 Wis. 2d 601, ¶41. The legislature did enact this type of expunction process in the juvenile expunction statute, Wis. Stat. § 938.355(4m). Although the juvenile expunction statute and § 973.015 expunction utilize different processes, the statutes are similar as each address the same relief—expunction—and both require a circuit court to determine whether expunction is proper considering the benefit to the individual and harm to society. Wis. Stats. §§ 938.355(4m)(a); 973.015(1m)(a). Furthermore, when interpreting § 973.015, this Court has found it useful to look to the language of the juvenile expunction statute. *See* ***Matasek***, 353 Wis. 2d 601, ¶¶21-22; ***Leitner***, 253 Wis. 2d 449, ¶33.

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a circuit court makes factual findings based on all of the evidence presented. *See* ***State v. Trecroci***, 2001 WI App 126, ¶2, 246 Wis. 2d 261, 630 N.W.2d 555 (citing Wis. Stat. § 805.17(2)).

Finally, Ozuna's interpretation of § 973.015 does not result in serious due process concerns. (State's Resp. 14-16).[7] These due process concerns are not present when the DOC, the supervising authority, makes discretionary determinations related to expunction because DOC administrative code provides for administrative review of department decisions. *See* Wis. Admin. Code DOC § 328.12. The DOC is required to inform probationers about this process. Wis. Admin. Code DOC § 328.04(2)(g). As a result, a probationer who is unhappy with his or her agent's determination on completion of sentence could utilize the administrative review process.[8]

D. Ozuna's interpretation of "satisfied the conditions of probation" avoids unconstitutional results.

If this Court agrees with Ozuna's interpretation of § 973.015, it need not address either constitutional argument because Ozuna's interpretation of § 973.015 avoids unconstitutional results.

1. Equal protection

Ozuna maintains there is no rational basis to deny expunction to probationers who cannot afford to satisfy monetary conditions during supervision. (Brief-in-Chief 27-30). If this Court holds that § 973.015 requires perfect compliance with probationary conditions then it should reach

[7] The State inconsistently asserts that Ozuna's interpretation of § 973.015 results in a potential due process violation while also arguing that Ozuna cannot establish a protected interest, a prerequisite to establishing a due process violation. (*See* State's Resp. 14-15, 19-26).

[8] Whether a circuit court could review a final administrative decision is not at issue.

Ozuna's equal protection argument and determine if unsatisfied monetary conditions prevent a probationer from satisfying the conditions of probation for expunction purposes.

Ozuna raised his equal protection argument before the court of appeals and in his petition to this court. The State did not respond to the equal protection argument at the court of appeals and did not file a formal response to the petition for review. This Court is not prohibited from addressing issues of statewide importance not first raised in the circuit court. *See* ***Mack v. State***, 93 Wis. 2d 287, 296-97, 286 N.W.2d 563 (1980).

Furthermore, a decision from this Court on whether a probationer satisfies the conditions of probation for § 973.015 expunction if unable to meet all monetary conditions during probation will provide much needed guidance. This issue will continue to arise and guidance from this Court will prevent additional costly litigation. At least one case involving denial of expunction based entirely on failure to pay supervision fees is currently pending in the court of appeals.[9]

2. Procedural due process

If this Court determines the circuit court has authority to review Ozuna's agent's determination then procedural due process affords him meaningful notice and an opportunity to be heard.

To establish state action affected Ozuna's liberty interest in his reputation, he must show (1) damage to reputation and (2) tangible harm "such that a 'right or status

[9] ***State v. Colbert***, 2015AP1880-CR.

previously recognized under state law' that he previously possessed has been altered or eliminated." ***Teague v. Van Hollen***, 2016 WI App 20, ¶65, 367 Wis. 2d 547, 877 N.W.2d 379 (quoting ***Stipetich v. Grosshans***, 2000 WI App 100, ¶24, 235 Wis. 2d 69, 612 N.W.2d 346).

First, absent expunction, the criminal convictions forever remain on Ozuna's easily accessed criminal record. Criminal convictions are absolutely damaging to an individual's reputation. Second, once Ozuna's agent forwarded the Verification Form to the circuit court expunction was effectuated. ***Hemp***, 359 Wis. 2d 320, ¶27. The circuit court's denial of expunction constitutes the tangible harm of altering Ozuna's right to expunction under § 973.015.

"Generally, due process requires that notice and an opportunity to be heard be provided before a constitutional deprivation occurs; this is to prevent wrongful deprivations." ***Collins v. City of Kenosha Hous. Auth.***, 2010 WI App 110, ¶6, 328 Wis. 2d 798, 789 N.W.2d 342.

Under ***Mathews v. Eldridge***, 424 U.S. 319, 335 (1976), postconviction relief does not adequately protect Ozuna's liberty interest. First, Ozuna has a substantial interest in record expunction. Unlike the temporary suspension of a driver's license in ***Mackey v. Montrym***, 443 U.S. 1, 11-12 (1979), the circuit court's denial of expunction, unless reversed, permanently bars expunction. Even if the circuit court's expunction decision is reversed, Ozuna cannot be made whole for the period when the criminal convictions erroneously appeared on his record. This was not the case in ***Eldridge***, 424 U.S. at 340, where an erroneous determination would be corrected by retroactive disability payments. Furthermore, unlike immediate review

available in ***Mackey***, 443 U.S. at 12, correction of a circuit court's denial of expunction through postconviction proceedings is time-consuming.

Second, this Court must consider the "fairness and reliability of the existing pretermination procedures . . .". ***Eldridge***, 424 U.S. at 343. This factor is concerned with the risk of an erroneous determination. ***Id.*** at 335. Here, there are no pretermination procedures in place. Whether Ozuna satisfied the conditions of probation is not easily discerned from review of minimal information contained on a form. Here, the risk of error is especially present because the circuit court reversed the agent's determination without explanation.

Third, the cost of providing a hearing before denial does not outweigh Ozuna's substantial interest and the risk of error. Additionally, expunction is conditionally ordered in a limited number of criminal cases.

CONCLUSION

Lazaro Ozuna requests that this Court reverse the decision of the court of appeals and remand to the circuit court with instructions to expunge his record.

Dated this 1st day of December, 2016.

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Dated this 1st day of December, 2016.

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SUPREME COURT OF WISCONSIN
Case No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER DENYING EXPUNCTION ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE KRISTINE E. DRETTWAN, PRESIDING

AMENDED NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC.

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Legal Action of Wisconsin (LAW) is Wisconsin's largest provider of free civil legal services to low-income citizens. In the past decades, LAW has increasingly represented clients not only in the traditional areas of poverty law, but also in matters directly affecting employability. For LAW's clients, the most important civil legal barrier to employment is the collateral consequences associated with criminal records. Under state law, the most important relief from these consequences ex-offenders can receive is through expungement.

Because LAW believes the Court of Appeals' decision undermines the legislature's intent in enacting and expanding our expungement law, LAW urges this Court to reverse that decision and make it clear that, under Wis. Stat. 973.015, (1) successful completion of a sentence does not require perfect compliance with all probationary conditions at all times and that (2) the probationary authority has the ultimate authority, at the time of discharge, to determine whether a sentence has been successfully completed.

INTRODUCTION

As of 2010, 65 million Americans had some kind of criminal record.[1] The immediate cost of a criminal conviction has long been recognized. But we have only recently begun to recognize, and track, the indirect, long-term costs of criminal records, costs that are especially high in poor communities of color.[2]

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[1] Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks,* 3(2011) http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1).

[2] *See, generally,* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction,*160 U. Pa. L. Rev. 1789 (2012); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity,* 85

New concern with these indirect costs reflects several historical trends. First, the increase in mandatory discrimination against individuals with criminal records. The American Bar Association (ABA) has identified over 38,000 statutes and regulations that impose collateral consequences on people convicted of crimes.[3] Over half of these laws deny employment opportunities.[4] These laws often cause special harm to low-income communities because they impose employment barriers on offenders long after they have ceased criminal activity.[5] Access to criminal record information has also dramatically increased. Private data vendors and state-run databases now provide records information easily, cheaply, and almost universally. An offense history that once would have languished in the practical obscurity of an old court file, has now become a permanent and highly stigmatizing [6]part of an individual's public history.

Given these trends, it is not surprising that LAW has seen an increase in requests to help effectuate ordered expungements. Because these potential clients had completed their sentences, they were not eligible for a state-funded attorney. None had money to pay a private attorney.

N.Y.U. L. Rev. 457, 467-68 (2010) and David J. Norman, Note, *Stymied by the Stigma of A Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 Quinnipiac L. Rev. 985, 986 (2013).

[3] *ABA National Inventory of Criminal Consequences,* ABA Criminal Justice Section, http://www.abacollateralconsequences.org

[4] Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII In Discrimination Against Persons with Criminal Record*, 12 Seattle J. for Soc. Just. 109, 112 (2013).

[5] *See* Chin *supra* note 2.

[6] Society for Human Resource Management, *Background Checking: Conducting Criminal Background Checks*, (2010) http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx

In the past, a typical expungement client contacted LAW long after completing his or her sentence. Most reported a belief that their offenses had already been expunged, only discovering their mistake when an employer or landlord reported seeing it. These clients were victims of a system whose procedural requirements were radically unclear.

Two recent decisions by this Court helped remedy that problem, providing clarity to attorneys, courts, and defendants. *See State v. Matasek*, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 618, 846 N.W.2d 811, 820 (holding that circuit courts must order expungements "at the sentencing proceeding"); *see also State v. Hemp*, 2014 WI 129, ¶ 40, 359 Wis. 2d 320, 344–45, 856 N.W.2d 811, 823 (holding that a " circuit court cannot amend its expungement order… once the detaining or probationary authority forwards the certificate of discharge, expungement is effectuated.").

If the Court of Appeals' decision stands, it will reintroduce uncertainty into the expungement process and place new burdens on courts and probationary authorities. It will also make expungements more difficult to complete, undermining the legislature's clear intent that expungement be more widely available to a broader range of youthful defendants.

ARGUMENT

The purpose of Wis. Stat. 973.015 is to provide "a break to young offenders who demonstrate the ability to comply with the law" by shielding them from "some of the harsh consequences of criminal convictions." *State v. Leitner*, 2002 WI 77, ¶¶ 37-38, 253 Wis. 2d 449, 646 N.W.2d 341. Any interpretation of Wis. Stat. 973.015 must be consistent with this goal and

with the legislature's intent, manifested in the 2009 revisions to the statute, to expand the impact of expungement. Because the Court of Appeals' interpretation of the statute is inconsistent with those goals, it must be rejected.

I. OZUNA SUCCESSFULLY COMPLETED HIS SENTENCE FOR THE PURPOSES OF WIS. STAT. 973.015 (1M)(A)1.

The Court of Appeals held that Ozuna did not successfully complete his sentence because he did not "satisfy all conditions of probation." *State v. Ozuna*, 2016 WI App 41, ¶ 6, 369 Wis. 2d 224, 880 N.W.2d 183. The opinion summarily rejected Ozuna's argument that "satisfy" does not mean perfect performance, ("Although applicable to horseshoes and hand grenades, "close enough" does not appear to cut it"), 2016 WI App 41 at ¶ 10, asserting, without analysis, that Warr's interpretation has no "support in the statutory language." *Id.* The Court of Appeals is wrong.

a. The plain meaning of "satisfied the conditions of probation" is not perfect performance in every respect at every moment.

"Satisfied" does not mean perfectly performed in every respect. If it does, probationers who have been timely discharged, demonstrated rehabilitation, and convinced the probationary authority they have successfully completed their sentences must be denied expungement if they ever failed, even temporarily, to perfectly carry out a condition of probation. (Res. Br. at 6, 7).

This interpretation is not supported by the language or the structure of the statute. Wisconsin Stat. 973.015(1m)(b) defines "successful completion" of a sentence in three ways. The first two are negative: (1) no defendant successfully completes a sentence if he/she has a "subsequent conviction"; and (2) no

probationer successfully completes a sentence if revoked. The State argues the third requirement is also negative: no defendant successfully completes a sentence if he/she fails to perfectly fulfill any ordered condition of probation.

This interpretation violates basic canons of statutory construction. Revocation, by definition, requires violation of a condition of probation. *State rel. Warren v. Schwarz*, 211 Wis.2d 710, 724, 566 N.W.2d 173 (Ct.App.1997) ("[v]iolation of a condition is both a necessary and a sufficient ground for the revocation of probation."). Conviction for a "subsequent offense" similarly involves violating a probation condition—generally expressed as "no new law violations." If the State is correct that any failure to perfectly satisfy a probationary condition equals failure to "successfully" complete a sentence, the first two parts of the statutory definition are superfluous. Interpretations that render words or phrases in the statute superfluous must be avoided. *See, e.g., Moustakis v. State of Wisconsin Dep't of Justice*, 2016 WI 42, ¶ 17, 368 Wis. 2d 677, 685, 880 N.W.2d 142, 146, *citing Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis.2d 92, 673 N.W.2d 676.

As Ozuna argues, the State's interpretation cannot be reconciled with other subsections of the statute. (Reply Br. at 3). Wisconsin Stat. 973.015 specifies that expungement is effectuated when certificates of discharge are forwarded to the circuit court. That statutorily created mechanism reflects the legislature's judgment that the probationary authority is the appropriate authority to determine: 1) whether a defendant was convicted of a subsequent offense; 2) whether the defendant was revoked; and 3) whether the defendant "satisfied the conditions" of probation. Nothing in the record suggests certificates of discharge were different in

1975, when Wis. Stat. 973.015 was enacted, than they are today. Certificates are not extended summaries of activities. If the legislature intended trial courts to review the conclusions of the detaining or probationary authority, the legislature would have created a procedure that made such review possible.

After 1975, the DOC began using new forms to notify trial courts that misdemeanants have completed their sentences. Therefore, courts may get information they did not get in certificates of discharge. But that change in practice does not justify interpreting Wis. Stat. 973.015 as requiring something not contemplated by the original legislation.[7]

The structure of Wis. Stat. 973.015 and the context it creates strongly support the conclusion that the plain meaning of "satisfied the conditions of probation" is that a probationer complied well enough with ordered conditions to allow DOC to find performance satisfactory.

b. The extrinsic evidence and Supreme Court precedent support Ozuna's construction of the statute.

Hemp held that "the detaining or probationary authority *must* forward the certificate of discharge to the court of record upon the individual defendant's successful completion of his sentence and *at that*

[7] The first Attorney General Opinion construing Wis. Stat. 973.015 interpreted "which shall have the effect of expunging the record' as "mean[ing] that the filing of a certificate of discharge *will give notice to the clerk of courts* to physically strike from the record all references to the name and identity of the defendant." 67 Wis. Op. Att'y Gen. 301, 1978. Though not precedential authority, the opinion supports Ozuna's position because a party knowledgeable about the legislative history described effecting an expungement as a process not involving the court.

point the process of expungement is self-executing." *State v. Hemp,* 2014 WI 129, ¶ 25, 359 Wis. 2d 320, 336, 856 N.W.2d 811, 818 (emphasis added). Under *Hemp*, the probationary authority is the ultimate authority, at discharge, on whether a sentence is successfully completed.

This reading of the statute is eminently rational. Probation agents must maintain regular contact with probationers— monitoring employment, housing and finances.[10] The procedure created by Wis. Stat. 973.015 reflects our legislature's understanding and approval of that reality.

The State's rule of perfection would have the absurd result of transforming a simple, self-executing process into a complex, burdensome mess**.** Under that rule, probation agents who believe clients are making good faith efforts to comply with a condition will have to request modification of the problematic condition. Courts will then have to conduct hearings where agents will have to provide testimony to justify modification. This process might be repeated multiple times, burdening the entire system.

The State suggests its proposed rule increases incentives to comply with conditions. (Res. Br. at 10). Realistically, the rule is far more likely to punish individuals for predictable forms of imperfect performance. Judges commonly order probationers to work full-time—a condition notoriously difficult to satisfy. Youthful offenders often lack the education and work history necessary to obtain full-time employment. Worse, recent criminal convictions substantially decrease employability. The ABA's collateral consequences catalogue evidences the extent of state-mandated discrimination against offenders. Private employer discrimination exacerbates the problem. Most employers indicate they would "probably"

or "definitely" deny a job to an applicant with a criminal record.[8] If expungement requires perfect compliance, probationers who can't work full-time, in spite of real effort, will be denied the expungement that is supposed to provide relief from exactly the kind of consequences they struggle with on probation.

The State dismisses the negative consequences of its extreme construction of Wis. Stat. 973.015 because "a defendant who wants expunction" can "reject probation" in favor of incarceration. (Res. Br. at 11- 12). The argument is absurd. We know that even short term incarceration has negative psychological effects.[9] We also know that the intent of Wis. Stat. 973.015 is to limit the long-term effects of criminal conviction, not to add psycho-social damage to the negative effects. The State's argument also ignores basic sentencing principals. A sentence should impose the "minimum amount of custody or confinement … consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis.2d 263, 275, 182 N.W.2d 512 (1971). Youthful offenders cannot be asked to choose incarceration to improve their chances of completing an expungement.

This Court should reject the State's interpretation of Wis. Stat. 973.015 either because it is contrary to the statute's plain language or because extrinsic evidence supports Ozuna's interpretation.

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[8] Holzer, Harry J., Steven Raphael, and Michael A. Stoll, "Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers," *The Journal of Law and Economics* 49.2 (2006): 451, 453–454.

[9] Mika'il DeVeaux "The Trauma of the Incarceration Experience" Harvard Civil Rights- Civil Liberties Law Review Vol. 48 pp 258.

II. IF CIRCUIT COURTS CAN "OVERRULE" THE PROBATIONARY AUTHORITY'S DETERMINATION A SENTENCE WAS SUCCESSFULLY COMPLETED, DUE PROCESS REQUIRES NOTICE AND THE OPPORTUNITY TO BE HEARD ON THAT QUESTION.

The Fourteenth Amendment protects liberty interests created by the Constitution and those created by state law. *see Vitek v. Jones*, 445 U.S. 480, 488 (1980) (The Supreme Court has "repeatedly held *that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the fourteenth amendment*.")(emphasis added) and 445 U.S. 480, 488, (1980); *see also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) and *Staples v. Young*, 149 Wis. 2d 80, 84, 438 N.W.2d 567, 569 (1989).

Although the doctrine of state-created liberty interests developed in debates over the right to good-time credits, it applies to any law that creates a liberty interest "by establishing 'substantive predicates' to govern official decision-making, ... [and] ... by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 109 (1989).

Defendants like Ozuna have a state-created liberty interest in their ordered expungements. Once a trial court orders expungement, the outcome is "mandated" "upon a finding that the relevant criteria have been met." Wis. Stat. 973.015(1m)(b) ("A person has successfully completed the sentence if the person *has not been convicted of a subsequent offense. 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 … which *shall have the effect of expunging the record*.).

Wisconsin Stat. 973.015 employs the mandates that create a protected interest for Due Process purposes. Once a defendant with an expungement order satisfies fixed criteria (no revocation, no subsequent offense, satisfies conditions of probation), a certificate must be issued and expungement must be effected.

A defendant's interest in a completed expungement implicates liberty in the broad Fourteenth Amendment sense. An individual with an "expunged conviction" has a different status than an individual with an unexpunged conviction in future interactions with the criminal justice system. An expunged conviction record cannot be considered at a subsequent sentencing; cannot be used for impeachment at trial under 906.09(1); and is not available for repeater sentence enhancement. *See, e.g.*,2014 WI 129, ¶ 19, 359 Wis. 2d 320, 856 N.W.2d 811.

For the purposes of occupational licensure, an expunged conviction often eliminates legal disqualifications. More generally, "expungement offers young offenders a fresh start….allowing [them] to "present themselves to the world—including future employers—unmarked by past wrongdoing." *Hemp,* 353 Wis.2d 146, ¶ 17, 844 N.W.2d 421.

Because expungement implicates the liberty associated with "starting" afresh in the criminal justice system and the liberty associated with occupational/associational choice, an individual cannot be deprived of an ordered expungement without due process. *See Goldberg v. Kelly* 397 U.S. 254, 265 (1970). The State is correct that due process is flexible, and that *predeprivation hearings* are not always necessary. (Res. Br. at 26).

But some kind of process is necessary and the State ignores that requirement.

If the State is correct that a circuit court can reject the probationary authority's decision without fact-finding, evidence or argument, the only check on arbitrary deprivation is the possibility of winning, years later, on appeal. The State cites no precedent suggesting that this "protection" satisfies due process because there is none.

Under *Matthews v. Eldridge,* some form of pre-deprivation process is required. The first *Matthews* factor, the private interest in an earned expungement, is profound for reasons this Court recognized in *Hemp* and *Matesek***.** *See*, e.g., 2014 WI 129, ¶ 20; 2014 WI 27, ¶ 42. The second factor, the risk of an erroneous deprivation and the probable value of additional procedural safeguards, weighs heavily on the side of a hearing. Under the procedure set up by Wis. Stat. 973.015, the circuit court will have only the document submitted by the authority on which to base its decision. Given the limits of those forms, erroneous deprivations are likely. Notice and a meaningful opportunity to present evidence would reduce the risk of error.

The third factor, the government interest in less procedure, is minimal. The government wants successful probationers to get expungements and, as the State admits, the probationary authority is in the best position to assess a defendant's behavior and performance on probation. (Res. Br. at 13). The added cost to the government of a hearing on difficult cases would be minimal--courts are used to conducting limited scope hearings.

LAW agrees with Ozuna that a proper construction of Wis. Stat.

973.015 would make it unnecessary to decide the due process question. But if this Court affirms the Court of Appeals, it must determine how much process is required to protect Ozuna's state-created liberty interest.

CONCLUSION

For the reasons argued here and in Ozuna's briefs, this Court should reverse the Court of Appeals.

Dated this 3rd day of January 2017

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CERTIFICATION OF FORM/LENGTH

Kori L. Ashley, herein certifies that the motion meets the form and length requirements of Wis. Stat § 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,981 words.

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

Kori L. Ashley herein certifies the following:

I have submitting an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on or after 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 parties.

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CERTIFICATION OF SERVICE

Kori Ashley, herein certifies that she is employed by Legal Action of Wisconsin, which is located at 230 W. Wells St, Milwaukee, WI 53203, that on the 3rd day of January, 2017, 23 copies of Legal Action's Amended Non Party Brief was hand delivered to the Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688. Kori Ashley further certifies that she deposited in the U.S. Mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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