STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mr. David R. Schanker, Clerk
Wisconsin Supreme Court
Attention: Carrie Janto, Deputy Clerk
Post Office Box 1688
Madison, WI 53701-1688

Re: Supreme Court Rule Petition 09-07; Comments Submitted on behalf of Attorney General J.B. Van Hollen and the Wisconsin Department of Justice

Dear Mr. Schanker:

Thank you for the opportunity to comment on Supreme Court Rule (SCR) Petition 09-07, which would amend Chapter 72 of the Supreme Court Rules relating to expunction of circuit court records. Please accept these comments on behalf of Attorney General J.B. Van Hollen and the Wisconsin Department of Justice.

Petition 09-07 proposes to modify SCR ch. 72 in three ways. First, when a record retention period depends on the type of case, the new rules would provide that the applicable determination will be made at the time of final disposition, rather than commencement. Thus, for example, if a case begins as a felony prosecution, but is resolved as a misdemeanor, record retention rules for misdemeanors would apply. Second, the proposed new rules would create for the first time non-statutory standards for expunction purportedly derived from the Court's inherent powers. Finally, the proposed new rules would require courts to notify the Department of Justice if expunction occurs. Although it is not stated, we presume that the Petitioners intend to require the notification in order to cause any fingerprint record to likewise be expunged or deleted.

For the reasons that follow, we oppose each of these proposed changes. Our objections are based on public policy concerns, our understanding of the limits on the inherent powers of the judiciary, and the lack of a legal basis for a court to order expunction of fingerprint records maintained by the Department of Justice.

Public Policy

The Petitioners primary argument set forth in their memorandum for liberalizing expunction – particularly of cases that pertains to charges against an individual that were

dismissed or resulted in an acquittal – is that this information causes the individual to face a "negative credential" that "can easily be misunderstood or misused by landlords, license providers and employers." (State Bar Memo at 12).[1] We understand that there are circumstances in which public access to information can indirectly result in adverse consequences to individuals named in court records when the person who accesses the record misunderstands its nature or misuses the information in an unlawful manner.

However, expunging and/or limiting access to truthful information about governmental activity implicates important values that cannot be disregarded. In particular, it is "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them."[2] This policy is a recognition that "representative government is dependent on an informed electorate."[3] Records of court proceedings are not an exception to this policy.[4] In fact, the public nature of criminal proceedings has long been recognized as an essential component of liberty.[5]

In addition to knowing who has been convicted of a crime, the public has a legitimate interest in knowing when a person is charged with a crime, even when not convicted. This is true whether the lack of conviction results from a voluntary dismissal or reduction of charges, a not guilty verdict following trial, an appellate reversal or a circuit court's ruling on a question of law. At a minimum, these case records show how elected officials and law enforcement are performing their duties and how they are using—or misusing—public resources.

Expunction may have negative effects on law enforcement as well. In *State v. Leitner*,[6] this Court discussed the value of case information to law enforcement. It stated:

> Case information may assist in identifying suspects, determining whether a suspect might present a threat to officer safety, investigating and solving similar crimes, anticipating and disrupting future criminal actions, informing decisions about arrest or pressing charges, making decisions about bail and pre-trial release, making decisions about repeater charges, and making recommendations about sentencing.[7]

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[1] For simplicity, we cite the State Bar of Wisconsin, Memorandum in Support of Amended Petition 09-07, filed by the State Bar of Wisconsin to Modify Chapter 72 of the Wisconsin Supreme Court Rules (Oct. 27, 2009) as the "State Bar Memo."

[2] Wis. Stat. § 19.31.

[3] *Id.*

[4] Wis. Stat. § 19.32(1) (defining "authority" to which the public records law applies to include "any court of law"); *See also Nixon v. Warner Communications*, 435 U.S. 589, 597-98 (1978) (discussing acknowledgment among courts in the United States of a general right of the public, as opposed to parties, to inspect court records).

[5] U.S. Const. Amend VI (guaranteeing individuals public trials); Wis. Const. art. I, sec. 7 (same); *In re Oliver*, 333 U.S. 257, 266-72 (1948) (discussing history of and policy supporting public trials).

[6] *State v. Leitner*, 2002 WI 77, 253 Wis.2d 449, 646 N.W.2d 341.

[7] *Id.*, ¶ 40.

While the Court was discussing expunged conviction records, the same comments are true, albeit to a lesser extent, with respect to information about charges that do not result in conviction. Such information demonstrates that, at a given point in time, a law enforcement agency or prosecutor made a judgment that there was a sufficient legal and factual basis to initiate proceedings.

There are numerous other reasons why law enforcement, the media, private citizens or others may want access to records that might be expunged under the proposed rules and why that access is important. For example, if felony defendants regularly have charges dismissed or reduced, it may speak to the judgment of the local prosecutors, the willingness of courts to apply existing law, or the effectiveness of existing legislation to address illegal activity. Even when the benefit of access isn't so clear, the state's public records law does not require a member of the public to state reasons why a record is wanted.[8] Ease of access to court records is desirable, in and of itself.

Against these strong public policy principles and practical complications mentioned above, the Petitioners offer that a stigma may attach to those who have been accused but acquitted or charges dropped, and that truthful information about those individuals might be "misunderstood" or "misused" by others. These harms are not unique to this context. There is an inherent risk that people will misuse or misinterpret information from public records, or even information that is simply in the public domain. It is therefore not surprising that those seeking to limit access to public records can provide anecdotal evidence to support their objectives. But this is a risk our free society is willing to take. The cure for "misunderstandings" of the meaning of truthful records is not the destruction of the records, but education about proper understandings of the records. The cure for "misuse" of truthful information, should the misuse be illegal such as unlawful employment discrimination, is not erasing court history, it is education about the law and the enforcement of law through private or public actions.

Finally, there are serious collateral consequences to the expunction of prior convictions. The proposal would give courts standardless authority to issue order expunction when the time period has elapsed for mandatory record retention.[9] This wrongly conflates expunction with record retention. Expunction of a prior conviction, as this Court has explained, means that the prior court record may not be considered at a subsequent sentencing or as a penalty enhancer.[10] By extension, we would add that it would not be considered as a part of an element of a crime that depends on the existence of prior convictions, such as 5th Offense OWI. No such limitation, however, exists with respect to a court record that is no longer retained (though it may present evidentiary challenges to the state in proving the element of the offense). In effect, a court-ordered expunction would rewrite the elements of crimes and enhancers established by the legislature. Those judgments are legislative judgments entitled to respect.

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[8] Wis. Stat. § 19.35(1)(i).

[9] *See* Proposed SCR 72.06(1)(b).

[10] *Leitner*, 2002 WI 77, ¶ 39. The facts underlying the expunged conviction, however, may be used at sentencing. *Id.* ¶ 44.

Inherent Authority

While we believe these public policy reasons are sufficient to reject the Petition, we also believe that the proposed SCR 72.06(1), which allows for judicial expunction in a court's discretion in the absence of a statute, exceeds the court's inherent powers. This precise issue was addressed in a 1981 Attorney General's Opinion.[11] That opinion reviewed the Supreme Court's own discussion of the judiciary's inherent powers in *State v. Braunsdorf*,[12] and offered the following summary:

> Our supreme court then went on to point out that what is learned from these cases and writings is that the inherent powers of a court are those powers without which the courts cannot properly function, that is, they are those powers which are *necessary to the very existence* of the court as a court.[13]

The opinion then concluded that power to expunge records was not a power that was "*necessary to the very existence* of the court as a court."

The State Bar Memo takes the view that this Court has the inherent power to order expunction. However, the arguments presented in the State Bar Memo are not persuasive. The State Bar Memo cites *State ex rel. Bilder ex rel. v. Township of Delevan*[14] for the proposition that a "circuit court possess the inherent authority to limit access to records in the interest of justice." In fact, the *Bilder* case states something quite different:

> The circuit court under its inherent power *to preserve and protect the exercise of its judicial function of presiding over the conduct of judicial proceedings* has the power to limit public access to judicial records when the administration of justice *requires* it.[15]

As shown above, *Bilder* holds that a court has inherent authority to limit access to records only when necessary to preserve and protect the judicial function. Expunction of court records to protect a person's reputation, or avoid potential out-of-court consequences based on a misunderstanding of an adjudicated case, is not necessary to protect the ability to exercise judicial functions. Expunction therefore falls outside the *Bilder* holding.

Though the State Bar Memo appears to recognize the requirement that inherent powers are limited to those that the court needs to exercise its judicial function, the State Bar Memo fails to explain how expunction of records under the proposed rule would, in fact, enable the exercise of judicial functions.[16]

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[11] 70 Op. Atty. Gen 115 (1981).
[12] *State v. Braunsdorf*, 98 Wis.2d 569, 286 N.W.2d 14 (1980)
[13] 70 Op. Atty. Gen 115, 118 (emphasis in original).
[14] *State ex rel. Bilder ex rel. v. Township of Delevan*, 112 Wis. 2d 539, 556-57, 334 N.W.2d 252 (1983).
[15] *Id.* at 556 (emphasis added).
[16] Neither of the Wisconsin Supreme Court decisions cited by the State Bar expressly discussing

While there may be room for debate on the public policy of expunction, the legislature is the proper body to hear that debate and make the judgment of what convictions should be expunged – as it has done.[17] The law defining the inherent power of the judiciary does not allow the Court to make public policy by creating an expunction rule that is not necessary to maintain the courts' ability to exercise judicial functions.

Notice to DOJ

When a record is expunged, proposed SCR 72.06(2) requires notice to the Department of Justice "pursuant to Wis. Stats. § 165.83(2)(a)." This statute sets forth DOJ's obligation to "[o]btain and file fingerprints, descriptions, photographs and any other available identifying data on persons arrested or taken into custody in this state" for specified offenses.

Although it is not stated, we presume that the Petitioners intend to require the notification in order to cause any fingerprint record to likewise be expunged or deleted. We believe the Court lacks the inherent power to impose expunction obligations on records of the Department of Justice, or any other entity outside the judiciary.

In *Matter of E.C,*[18] the Wisconsin Supreme Court expressly held that a court's inherent powers do not allow it to order expunction of police records relating when a juvenile delinquency petition resulting from arrest is dismissed. The Court stated, "The maintenance of such records by the police department, in confidentiality, as statutorily required, does not affect the administration or performance of a circuit court's constitutional and statutory duties."[19] The same is true of fingerprint records. They are maintained by the Department of Justice, pursuant to statute for specific purposes defined by the legislature. Methods of removing the record are provided for by statute.[20] The Court not only lacks authority to order expunction of Department of Justice records, but would create a conflict with existing law if it were to attempt to do so.

Finally, the goals of justice are undermined if fingerprint records are not maintained. Such records are used by law enforcement to identify both suspects and witness and can also used to exonerate the innocent. Because fingerprint records are not limited to convicted offenders, and because there is no claim that fingerprint records are being misused, it makes no sense to expunge them even if underlying case information is expunged.

(..continued)
expungement holds that courts have an inherent power to expunge a record as that term is understood to eliminate the collateral subsequent effects of a conviction. In *Leitner*, the Court addressed the scope of legislatively-enacted law providing for expungement. In *Matter of E.C.*, 130 Wis. 2d 376, 381, 387 N.W.2d 72 (1986), the Milwaukee Police Chief did not challenge the court's authority to expunge its own records so the matter was not litigated, and in any event, the term expungement in that case referred only to the sealing of records.

[17] *See* Wis. Stat. § 973.015.

[18] *Matter of E.C.*, 130 Wis.2d at 387-388.

[19] *Id.* at 388.

[20] Wis. Stat. § 165.84(1).

For these reasons, we respectfully urge the Court to reject Proposed Rule 09-07.

Sincerely,

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Deputy Attorney General

RPT/KMS: pss

c: George C. Brown, State Bar of Wisconsin
Gary H. Hamblin, Department of Justice
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