

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO.: 75 MAP 2015

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

VICTORIA C. GIULIAN,
Appellant.

**BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, HOMELESS
ADVOCACY PROJECT, THE DEFENDER ASSOCIATION OF
PHILADELPHIA, X-OFFENDERS FOR COMMUNITY
EMPOWERMENT, THE PENNSYLVANIA PRISON SOCIETY, BROAD
STREET MINISTRY, IMPACT SERVICES, AND RESOURCES FOR
HUMAN DEVELOPMENT IN SUPPORT OF APPELLANT VICTORIA C.
GIULIAN**

Appeal from the Order of the Superior Court at No. 906 MDA 2014, dated
February 23, 2015, Affirming the Order of the Centre County Court of Common
Pleas, Criminal Division, at No. CP-14-MD-0000836-2013, dated April 30, 2014.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The eight organizations that appear as friends of the Court in this appeal (“*Amici*”)¹ represent the interests of a coalition of community organizations who all hold a shared commitment to serving disadvantaged populations in Pennsylvania. While the *Amici* specialize in different areas, many of the individuals with whom they work have been involved in the justice system. Each *Amicus* sees firsthand the detrimental effects that criminal records have on the communities in which they work. The important work that *Amici* do in their communities is impeded by the barriers to employment, housing, and education that criminal records create. As a result, *Amici* support any actions that may expand expungement opportunities for individuals with low-level offenses on their record. Therefore, *Amici* respectfully urge this Court to reverse the order of the Superior Court and find that 18 Pa. C.S. § 9122(b)(3)(i) permits for expungement of a summary offense record when the subject of that record has remained free from arrest or prosecution for *any* five-year period following conviction for the summary offense.

STATEMENT OF JURISDICTION

Amici adopt the Statement of Jurisdiction of Petitioner-Appellant Victoria C. Giulian (“Giulian”).

¹ Appendix A sets forth further information regarding *Amici*’s interest in this appeal.

ORDER IN QUESTION

ORDER

AND NOW, this ____ day of _____, 20__, the Court of Common Pleas of Centre County's April 30, 2014 order denying Giuliani's petition is vacated, and the matter is remanded for a hearing to determine whether Giuliani remained free of arrest or prosecution for any five year period following her conviction for the 1997 summary offense.

Jurisdiction relinquished.

STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

Amici adopt the Statement of Scope of Review and Standard of Review of the Petitioner-Appellant Giuliani.

STATEMENT OF QUESTION INVOLVED

Whether the Superior Court erred in finding that 18 Pa.C.S. § 9122(b)(3)(i) permits expungement of a summary offense record only if the individual who is the subject of the record remains free of arrest or prosecution for the five-year period immediately following the conviction for that offense?

[Suggested answer: **Yes.**]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case of the Petitioner-Appellant Giuliani.

SUMMARY OF THE ARGUMENT

To protect and support individuals with low-level offenses who have paid their debt to society and demonstrably changed their lives for the better, *Amici* urge the Court to reverse the Superior Court's decision and find that 18 Pa. C.S. § 9122(b)(3)(i) permits expungement of a summary offense record when the individual who is the subject of the record has been free of arrest or prosecution for any five-year period following the conviction.

The statute, which states that expungement of a summary offense record is permissible when the individual has been free from arrest or prosecution “for five years following the conviction for that offense,” is ambiguous as to when the five-year period must occur. As a result, the rule of lenity dictates that the Court should interpret the ambiguity in favor of the criminal defendant, and find that any post-conviction five-year period without an arrest or prosecution satisfies the statute.

Important public policy reasons counsel in favor of interpreting the statute in this manner and expanding opportunities for the expungement of criminal records. For individuals with low-level offenses, criminal records can create insurmountable barriers to finding employment or housing, or pursuing opportunities for higher education. In the employment context, a job applicant with a record, even one for a minor offense, is severely disadvantaged by the

existence of the record. While some legal protections have been put in place to help individuals with low-level offenses, research shows that records still create significant barriers to finding stable employment. Likewise, records prevent individuals with low-level offenses from getting stable housing. Statistics show that both public housing authorities and private landlords commonly implement policies that exclude those with criminal records from the application process. Finally, individuals with low-level offenses are prevented from pursuing opportunities in higher education due to the existence of criminal records. Despite the lack of any empirical link between criminal history and security risks on college campuses, institutions of higher education frequently review applicants' criminal records, taking even misdemeanor crimes into account when making admissions decisions.

Individuals with low-level offenses are not the only ones who feel the negative effects of criminal records. Indeed, society and the economy suffer as well. Individuals with low-level offenses who lose employment, housing, and education opportunities are hamstrung in their efforts to contribute to the workforce, and thus economic growth and output. Lack of opportunity in these areas also results in higher rates of recidivism. Therefore, providing individuals with low-level offenses with an opportunity to expunge the records of their court

involvement not only helps them in becoming a contributing member of society, it helps society at large and reduces crime in the process.

The benefits of expanding opportunities for expungement have had a clear effect on public policy and legislation in other states. In the last five years, over forty states have enacted laws that enlarged opportunities for expungement or sealing of criminal records. This national trend shows a clear policy preference for expanding expungement opportunities.

Amici come before the Court to insure that individuals with low-level offenses have a fair shot at becoming contributing members of society. Due to the clear benefits of expanding opportunities for expungement, it is in the best interests of the citizens of the Commonwealth of Pennsylvania for the Court to reverse the holding of the Superior Court and find that the ambiguity in the text of 18 Pa. C.S. § 9122(b)(3)(i) permits for expungement of summary offense records when the subject of the record has remained free of arrest or prosecution for any five-year period following the conviction.

ARGUMENT

I. THE STATUTORY TEXT IS AMBIGUOUS

In Pennsylvania, a summary offense is the most minor classification of criminal offense, falling below a misdemeanor. *See* 101 Pa. Code § 15.66; *Summary Offenses in Pennsylvania*, COMMUNITY LEGAL SERVICES OF

PHILADELPHIA (Apr. 22, 2014).² The minor violations which can result in a summary offense conviction include violations of the Motor Vehicle Code, disorderly conduct, and loitering. *See id*; *Traffic Violations and Summary Offenses*, THE PENNSYLVANIA BAR ASSOCIATION³; *see generally* Title 18 of the Pennsylvania Criminal Code and Title 75 of the Pennsylvania Motor Vehicle Code. Indeed, summary offenses are so low level that they create a right to counsel only in the event of a conviction that is reasonably likely to result in a sentence of imprisonment or probation. 234 Pa. Code § 234. Many individuals who receive summary offenses believe they have been given a ticket, and they do not understand that they must show up in court or that the summary offense will become a criminal record. *See* Daniel Denvir, *Is broken windows Philly's new stop-and-frisk?*, PHILADELPHIA CITYPAPER (Aug. 1, 2014).⁴

18 Pa. C.S. § 9122 provides a procedure for the expungement of summary offenses. The text of 18 Pa. C.S. § 9122(b)(3)(i) states that “[c]riminal history record information may be expunged when: . . . [a]n individual who is the subject of the information petitions the court for the expungement of a summary offense and has been free of arrest or prosecution for five years following the conviction for that offense.” When interpreting statutory language, “[w]ords and

² Available at <http://clsphila.org/learn-about-issues/dealing-summary-offenses>.

³ Available at <https://www.pabar.org/clips/trafficviolations.pdf>.

⁴ Available at <http://citypaper.net/News/Is-broken-windows-Phillys-new-stop-and-frisk/>.

phrases shall be construed according to rules of grammar and according to their common and approved usage.” 1 Pa. C.S.A. § 1903(a). Generally, “[a]ll . . . provisions of a statute shall be liberally construed to effect their objects and to promote justice.” 1 Pa. C.S.A. § 1928(c).

Pennsylvania has adopted special rules that reflect the important public policies underlying judicial interpretation of penal statutes. Generally, “remedial [statutes are those] designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and generally [a]re to be liberally construed.” 82 C.J.S. Statutes § 377 (2009). This principle is reflected in the “rule of lenity,” which requires that ambiguous language in penal statutes be resolved in favor of the criminal defendant. *Commonwealth v. Rivera*, 10 A.3d 1276, 1284 (Pa. Super. 2010). These rules dictate that 18 Pa. C.S. § 9122(b)(3)(i) must be liberally construed with ambiguities resolved in favor of the criminal defendant.

Nonetheless, the Superior Court in *Commonwealth v. Giulian* chose to review the statute narrowly. It held that under the statute, persons seeking to expunge summary offenses from their criminal records could do so only if they remain free of arrest and prosecution for the five years *immediately* following the conviction. However, the text of the statute does not specify that the five-year period must occur immediately following the conviction, as the Superior Court

held. Instead, it is silent as to when the five-year must occur, leaving open the possibility that any five-year arrest-and-prosecution-free period following a conviction could satisfy the statute. Despite there being more than one plausible interpretation of when the five-year period may occur, the Superior Court did not find any ambiguity in the statutory language and interpreted it narrowly against the interests of the criminal defendant.

The Superior Court's holding constitutes legal error. Because the text of 18 Pa. C.S. § 9122(b)(3)(i) is in fact ambiguous with respect to when the five-year period must occur, the Rule of Lenity provides that such ambiguity be resolved in favor of the criminal defendant. As such, the Superior Court should have held in Giulian's favor and remanded for a hearing on whether expungement of her summary offense record is appropriate because following that conviction, she can demonstrate a five-year period without an arrest or conviction. *Rivera*, 10 A.3d at 1284.

Indeed, expungement statutes exist "to protect [an] individual from the difficulties and hardships that may result from an arrest on record." *Commonwealth v. Butler*, 672 A.2d 806, 808 (Super. Ct. 1996) (citing *Commonwealth v. Malone*, 366 A.2d 584, 588 (Super. Ct. 1976)). Subsection (b)(3) was passed in January 2009 to increase opportunities for the expungement of summary convictions under certain circumstances. Considering that the purposes

of expungement are to protect individuals with criminal records, acknowledge rehabilitation, and provide them with opportunities to reintegrate as contributing members of their communities, the legislature clearly intended to increase the scope of those eligible for expungement of minor offenses. As the Superior Court has noted, criminal records that become known “may subject an individual to serious difficulties,” including “[o]pportunities for schooling, employment, or professional licenses [which] may be restricted or nonexistent as a consequence.” *Malone*, 366 A.2d at 587-88. By taking these factors into consideration, it becomes clear that because the text of subsection (b)(3) is ambiguous, it should be interpreted to measure *any* five-year period after conviction of a summary offense for purposes of determining the propriety of expungement.

II. PUBLIC POLICY SUPPORTS THIS INTERPRETATION OF THE STATUTE

Public policy strongly supports expanding, not restricting opportunities for expungement of criminal records. An estimated seventy to one hundred million American adults have a criminal record. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012 at 3 (2014).⁵ This number translates to over 2.5 million individuals in Pennsylvania. *Id.* at Table 1. A large majority of arrest and conviction records are for low-level summary and misdemeanor offenses such as

⁵ Available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

disorderly conduct, minor assault, or theft. R. LaFountain et. al., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS at 24 (2012).⁶ Accompanying this rise in criminal statistics is increased access to criminal records. See NAT'L CENTER FOR STATE COURTS, PRIVACY/PUBLIC ACCESS TO STATE COURTS: STATE LINKS.⁷

Prevalence of and easy access to criminal records has become a significant burden in the United States. Individuals are routinely denied employment, housing, and education opportunities due to their criminal records, however minor they may be. As America struggles to compete globally, the detrimental effects of criminal records are felt not only by those who have them, but by the society at large. See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, WASHINGTON COLLEGE OF LAW RESEARCH PAPER NO. 2015-3 (2015). Due to the unequivocally negative impact that criminal records have on individuals and the United States as a whole, policy dictates that courts with discretion to expand opportunities for expungement should do so.

A. Criminal Records Create Barriers to Employment

Individuals with criminal records face unique barriers to finding employment. It is estimated that between 80 and 90% of U.S. employers conduct

⁶ Available at <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.

⁷ Available at <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx>.

some form of criminal background check on prospective employees. *See* Roy Maurer, *More Employers Letting Candidates Explain Conviction Records*, SOC’Y FOR HUMAN RES. MGMT. (May 15, 2015)⁸; Alfred Blumstein and Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 NAT’L INSTITUTE OF JUSTICE JOURNAL 10, 10 (June 2009)⁹. The prevalence of criminal background checks in U.S. hiring can be attributed to two factors. First, technology has rendered criminal background information easily accessible. *See* Blumstein and Kiminori at 10; NAT’L CENTER FOR STATE COURTS, PRIVACY/PUBLIC ACCESS TO STATE COURTS: STATE LINKS. Employers can access criminal background information on their own, or they can choose from one of the many inexpensive commercial background check services currently available. Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million “Need Not Apply”*: *The Case for Reforming Criminal Background Checks for Employment*, THE NAT’L EMPLOYMENT LAW CENTER at 1 (March 2011).¹⁰ Second, insurers have placed increased pressure on employers to reduce any potential liability, including liability related to employee criminal backgrounds. *See* Blumstein and Kiminori at 10; Joe Palazzolo, *Criminal Records Haunt Hiring Initiative: Insurer background checks thwart laws aimed at giving second chance to ex-offenders*, THE WALL

⁸ Available at <http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/candidates-explain-conviction-records.aspx>.

⁹ Available at <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

¹⁰ Available at http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

STREET JOURNAL (Jul. 12, 2015)¹¹. In a 2015 study, 53% of employers reported that their companies continue to ask candidates about criminal records on employment applications despite both EEOC guidelines recommending against it and state and municipal laws that “ban the box.” *EMPLOYMENT SCREENING IN 2015: BACKGROUND SCREENING TRENDS & PRACTICE*, at 4 (Apr. 28, 2015).¹²

The prevalence of criminal background checks in U.S. hiring places unreasonable burdens on those with criminal records. Simply put, many employers are unwilling to hire an individual with a criminal background. Blumstein and Kiminori at 11. In one survey, 11% of employers reported that a minor infraction was the kind of criminal background record that would disqualify a candidate from employment at their company. *EMPLOYMENT SCREENING IN 2015: BACKGROUND SCREENING TRENDS & PRACTICE* at 4. In another study, researchers found that the existence of a criminal record reduced the likelihood of a callback or job offer by nearly 50%, with an even more pronounced effect on minority applicants than white applicants. Rodriguez and Emsellem at 4. Millions of people are likely locked out of the job market due to their criminal records. Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed For Life*, THE NATION (Nov. 6,

¹¹ Available at <http://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255>.

¹² Available at http://content.employeescr.com/hubfs/ESIQ_2015_survey_final2.pdf?utm_referrer=http%3A%2F%2Fcontent.employeescr.com%2Fthanks-for-downloading-our-2015-survey-report%3FsubmissionGuid%3Dec70103a-d8d3-428d-9b02-f1804b8f4bee

2013).¹³ Even if they have paid their debt to society, are qualified for the job, and are unlikely to reoffend, criminal records will hinder a significant portion of these individuals from securing employment. Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT'L INSTITUTE OF JUSTICE JOURNAL 42, 43 (June 2012).¹⁴

Aside from harming job applicants, research suggests that criminal records are an inadequate means of measuring the safety or security risks posed by those applicants. The records themselves include large amounts of information, often making them difficult to read. *See* Rodriguez and Emsellem at 7. Reports also frequently include information relating to arrests that did not result in conviction due to factual innocence, which can further confuse employers or negatively affect applicants. *Id.* Moreover, commercial background reports have been found to be "rife with inaccuracies." *Id.*¹⁵ Regardless of the accuracy of any particular report, a growing body of research is challenging the underlying assumption that those with criminal backgrounds pose an indefinite risk of liability to employers. *See* Palazzolo. One study concluded that generally, after 3-4 years,

¹³ Available at <http://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/>.

¹⁴ Available at <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf>.

¹⁵ Citing NELP & Community Legal Services of Philadelphia, *Comments to Federal Trade Commission regarding FACTA Notices* (Sept. 20, 2010), available at <http://www.nelp.org/page//SCLP/2010/NELPandCLSFCRANewNoticesComments.pdf?nocdn=1>; Shawn Bushway, et al., *Private Providers of Criminal History Records: Do You Get What You Pay For? in Barriers to Reentry?: The Labor Market for Released Prisoners in Post-Industrial America* (2007).

an individual with a low-level offense poses no greater risk of committing another offense than a person without a record. *See* Blumstein and Kiminori at 12; Rodriguez and Emsellem at 6. For more serious crimes or multiple offenses, that period rises to approximately 7-10 years. *See id*; Palazzolo.

The EEOC has recognized the negative impact that criminal records have on job applicants, especially minority applicants. EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982) (2/4/1987).¹⁶ Due to the disproportionate harm caused to black and Hispanic job applicants, the EEOC has held that any blanket prohibitions on hiring individuals with criminal records is unlawful under Title VII. *Id.* The EEOC has not prohibited any consideration of an applicant's criminal records, but instead requires employers to take into account the nature and gravity of the offenses, the time that has passed since the conviction, and the nature of the job held or sought. *Id.* However, these legal protections are not enough. Despite the EEOC's directives, a 2010 study by the National Employment Law Project found rampant abuses in job postings on the website Craigslist. *See* Rodriguez and Emsellem at 13-18. The study found 2,500 job ads that referenced criminal background check requirements, including more than 300 ads that precluded consideration of applicants with criminal records. *Id.* at 13 n.60.

¹⁶ Available at <http://www.eeoc.gov/policy/docs/convict1.html>.

Overall, the existence of criminal records creates a substantial impediment for job applicants. Despite research suggesting that the reasoning underlying the use of criminal background investigations in hiring is flawed, employers have continued to do so at increasing rates. Combined with the fact that existing legal directives provide scant protections to applicants, this information shows that criminal records pose a substantial and inequitable hurdle to ex-offenders.

B. Criminal Records Create Barriers to Housing

Criminal records also serve as a barrier to stable housing, especially for low-income and vulnerable individuals. Like the EEOC guidance on criminal records and employment under Title VII, the Fair Housing Act prohibits landlords from using blanket criminal records bans to deny prospective tenants housing when doing so would have a disparate racial impact. *See Texas Dep't of Housing & Comty. Affairs et al. v. Inclusive Comtys Projects Inc. et al.*, 135 U.S. 2507, 2525 (2015).¹⁷ Therefore, both public and private landlords who use criminal records to ban potential tenants likely violate the Fair Housing Act.

Nonetheless, overbroad criminal records policies continue to flourish among both public housing authorities and property owners. *See Marie Claire*

¹⁷ The United States Supreme Court recently clarified that disparate impact claims do arise under the Fair Housing Act. Thus, the reasoning underlying the EEOC's enforcement guidance on the application of Title VII to adverse employment decisions based on criminal records also applies to the Fair Housing Act.

Trans-Leung, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING, 167-19, 44 (Sargent Shriver National Center on Poverty Law 2015).¹⁸ Federal law allows public housing authorities to create admissions policies regarding drug-related criminal activity, violent criminal activity, and criminal activity that poses a threat to the health, safety, and welfare of other residents. *Id.* at 22. While only these three categories are required, many public housing authorities also deny admission to applicants with other types of criminal backgrounds. *Id.* Indeed, some policies “broadly eliminate anyone with a criminal history, even if that history may only be tenuously related to being a good tenant.” *Id.* Therefore, legal protections currently in place only go so far in protecting those with criminal records from the very severe possibility of failing to find or qualify for available housing.

While not regulated in the same manner as public housing, private landlords also frequently implement background check procedures, either on their own or as a result of municipal laws, to deny housing opportunities to individuals with criminal records. See Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 Clearinghouse Rev. 4,

¹⁸ Available at <http://povertylaw.org/sites/default/files/images/publications/WDMD-final.pdf>.

5-6, 9 (2011).¹⁹ Data shows that criminal records policies have increased in the private rental market in addition to subsidized housing. *Id.* at 5. In fact, one recent study out of Akron, Ohio found that nearly two-thirds of private landlords did not accept applicants with criminal records. *Id.* at 6. The result of this trend is a pervasive barrier in both public and private housing markets that prevents those with criminal records from obtaining a most basic human need.

C. Criminal Records Create Barriers to Higher Education

Like employers and landlords, institutions of higher education have also increased reliance on criminal records information in making admissions decisions. In a recent survey of 273 colleges, 66% said that they collect criminal records information during the admissions process. CTR. FOR CMTY. ALTS., THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED at 1 (2010).²⁰ Even while two thirds of colleges collect this information, less than half have written policies in place, and only 40% train staff on how to interpret it. *Id.* Schools consider a “broad array” of criminal convictions as negative factors, including drug and alcohol convictions, misdemeanor convictions, and youthful offender convictions. *Id.* Approximately one third of schools reported considering pending misdemeanors or misdemeanors arrests in a negative light, and 11% stated

¹⁹ Available at http://www.americanbar.org/content/dam/aba/administrative/human_rights/acc_disparate_impact_theory.authcheckdam.pdf

²⁰ Available at <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

that they viewed youthful offender adjudications negatively. *Id.* at 18. Even at the community college or private vocational school level, applicants with criminal backgrounds will often face barriers similar to those in institutions of higher education because of arrest records. Natalie J. Sokoloff & Anika Fontaine, *Systemic Barriers to Higher Education: How Colleges Respond to Applicants with Criminal Records in Maryland*, 25 (July 2013) (nationally, 40% of two-year programs ask about criminal records in the admissions process).²¹

Despite the prevalence of criminal background investigations in institutions of higher education, research shows no link between having a criminal record and posing a risk to campus safety. CTR. FOR CMTY. ALTS at 2. In fact, crimes committed on campuses are more likely to involve students who do not have criminal records than those who do. *Id.* at 5. In addition, it is well-documented that the criminal justice system is rife with racial disparities. *Id.* at 25. As a result, criminal background screening “cannot be a race-neutral practice.” *Id.* Overall, instead of creating safety on college campuses, criminal background checks often serve to create racial disparities in admissions and campus populations. *See id.* The result of these policies is to restrict opportunities for higher education.

²¹ Available at <http://johnjayresearch.org/pri/files/2013/11/Sokoff-and-fontaine-systemic-barriers-to-higher-education-2013.pdf>

D. Society Suffers the Consequences of Overbroad Criminal Records Policies

Individuals with low-level offenses are not the only ones who suffer as a result of overbroad criminal records policies. Instead, their diminished opportunities for employment, housing, and education have effects on society at large. From an economic standpoint, the tight job market and the surge in criminal background investigations has unnecessarily disadvantaged employers by artificially limiting the pool of qualified candidates. Rodriguez and Emsellem at 2. Furthermore, ensuring that workers have job opportunities is critical for the struggling economy. *Id.* at 3. No economy can sustain such a large population of unemployment workers, especially when they come from communities already hard hit by joblessness. *Id.* One estimate indicates that the reduced output of goods and services from people with felony and prison records totals between \$57 and \$65 billion in losses. *Id.* As former acting chair of the EEOC, Naomi C. Earp has explained: “[f]ears, myths and such stereotypes and biases against those with criminal records continue to be a part of the . . . decision making for many employers. Business and industry suffers as a result because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent.” Commissioner Naomi

C. Earp, *Transcript of November 20, 2008 EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, at 2.²²

Access to employment, housing, and education are critical to ensuring that ex-offenders are able to lead normal lives and benefit society at large. For instance, “[h]igher education opens doors of opportunity, enhances critical thinking, and leads to better and more stable employment Colleges and universities promote public safety when they open their doors to people with criminal records who demonstrate the commitment and qualifications to pursue a college education.” CTR. FOR CMTY. ALTS. at ii. Moreover, those who are locked out of the job market due to their criminal records are not just “sitting around.” *See Wright*, note 7 *supra*. Instead, “[t]hey’re churning through formal and informal part-time work, fueling a shadow economy akin to the one that often exploits undocumented workers.” *Id.* While not identical, the impact is still similar: “billions of dollars in lost productivity, forfeited tax revenue for cities, rampant exploitation by employers, and a cascading series of bans and exclusions from civic life that make it almost impossible . . . to achieve a stable economic existence.” *Id.*

Similarly, criminal records and their effect on employment, housing, and education often result in higher rates of recidivism. Employment substantially

²² Available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm>.

reduces the risk of recidivism outcomes. *Research of Reentry and Employment*, NATIONAL INSTITUTE OF JUSTICE (Apr. 3, 2013).²³ As former U.S. Secretary of Labor Hilda Solis stated: “[s]table employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole.” Housing can also be the difference between an individual’s attempts to stay out of the criminal justice system. *See* Tran-Leung, note 13 *supra* at 6. In one study, researchers found that parolees had a much higher likelihood of reintegrating successfully after leaving prison if they had stable housing. *Id.* Otherwise, when parolees changed residence more often, there was a greater change of recidivism. *Id.* Likewise, an extensive body of research suggests that education is a fundamental tool in improving the long-term outcomes of those in the criminal justice system. *Pathways from Prison to Postsecondary Education Project*, VERA INSTITUTE OF JUSTICE.²⁴ Researchers have found that while approximately 44% of individuals released from prison are re-incarcerated within three years, there are strong inverse correlations between education and recidivism, and offenders with higher education levels are therefore less likely to be re-arrested. *Id.*

²³ Available at <http://www.nij.gov/topics/corrections/reentry/pages/employment.aspx>.

²⁴ Available at <http://www.vera.org/project/pathways-prison-postsecondary-education-project>.

E. Many States Have Expanded Expungement and Sealing Laws to More Effectively Curb the Impact of Criminal Records

Recognizing the harm caused by overbroad retention of criminal records, states across the country have taken important steps to expand expungement and sealing laws to including everything from arrest records to felony convictions. From 2009 to 2014, forty-one states enacted laws to reduce the burden of collateral consequences for people with criminal convictions, including over thirty that specifically related to expungement or the sealing of records. Ram Subramanian, Rebecka Moreno, and Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014*, VERA INSTITUTE OF JUSTICE at 4, 12 (December 2014).²⁵ Additionally, over twenty states enacted laws that restricted access to criminal history information. *Id.* at 12.

For example, in 2011, California passed a law that expanded eligibility for expungement to individuals convicted of a misdemeanor and sentenced to incarceration. *Id.* at 14. While those individuals were previously only permitted to seek expungement after completing the sentence and remaining crime-free for one year, they are now eligible at the court's discretion. *Id.* In 2010, Mississippi expanded expungement eligibility to certain first-time offenders, including those convicted of malicious mischief offenses, after a five-year waiting

²⁵ Available at <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf>.

period. *Id.* And in 2012, Ohio expanded eligibility for record sealing to those with two misdemeanor convictions. *Id.* Today, a total of 27 states allow misdemeanor convictions to be expunged or sealed, and 23 states allow felony convictions to be expunged or sealed in certain situations.

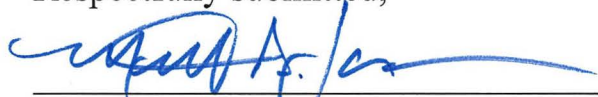
Many states have also implemented procedural changes to their laws to make it easier for ex-offenders to obtain expungements. For example, in 2014, Indiana passed a law that lowered the burden for proof for expungement. *Id.* at 17-18. Now, an individual is only required to show that he or she has no pending charges, no subsequent convictions, and has paid all fees and restitution within a relevant time frame, and the court must expunge their record. *Id.* Likewise, in 2011, Arkansas passed a law that created a presumption of expungement for misdemeanor offenses, which requires expungement unless the court is presented with clear and convincing evidence that the conviction should not be expunged. *Id.* at 17.

III. CONCLUSION

It is clear from the research that individuals who are permitted to have their records expunged or sealed are more likely to find work and less likely to be re-arrested. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, WASHINGTON COLLEGE OF LAW RESEARCH PAPER NO. 2015-3 (2015). In addition, by strengthening opportunities to find housing and obtain education,

expungement permits individuals with low-level offenses to live more fulfilling lives and become positive members of society. The recent trend by other states in increasing opportunities for expungement reflects a clear consensus that criminal records create an unreasonably difficult burden for ex-offenders. With these policy reasons in mind, the Supreme Court should reverse the Superior Court and find that 18 Pa. C.S. § 9122(b)(3)(i) permits expungement of a summary offense so long as the individual remained arrest-and-conviction-free for any five-year period following the original conviction.

Respectfully submitted,



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APPENDIX A

Juvenile Law Center

Founded in 1975, Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center has worked extensively on direct and amicus litigation before this Court.

The Homeless Advocacy Project

The Homeless Advocacy Project (HAP) is a nonprofit organization that provides free civil legal services to individuals and families who are experiencing homelessness in Philadelphia. HAP provides legal assistance in a broad range of legal areas including: establishing eligibility for benefits programs such as Supplemental Security Income (SSI), medical assistance, food stamps (SNAP) and Veterans Compensation and Pension benefits; accessing shelter, medical and behavioral health care and other supportive services; replacing lost or stolen identity documents; preserving private and subsidized housing eligibility; protecting consumer rights; and establishing eligibility for expungement of criminal records. In its legal advocacy work, HAP seeks to reduce or eliminate homelessness and increase access to stable housing by overcoming barriers such as a lack of income and support services and the existence of a criminal record. HAP has represented and continues to represent many individuals who have or may be substantially and detrimentally impacted by an arrest or conviction record.

The Defender Association of Philadelphia

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings and on appeal. The Defender Association is active in trial and appellate courts, and before the Pennsylvania Board of Probation and Parole. The Defender Association attempts to ensure a high standard of representation and to prevent the abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania. The Defender Association has previously participated as amicus curiae in numerous cases before this Court.

X-Offenders for Community Empowerment

X-Offenders for Community Empowerment is a Philadelphia non-profit founded and run by formerly convicted individuals. Its mission is “to empower formerly convicted people to become change agents in mobilizing the community to address issues threatening healthy family and community life, and to reduce recidivism.” X-Offenders for Community Empowerment hosts monthly “Pardon Me” clinics around Philadelphia to help formerly convicted individuals through the pardon application process. X-Offenders for Community Empowerment’s interest in this case stems from its experience helping formerly convicted individuals who are seeking clemency. The “Pardon Me” clinics are already overflowing with individuals who have misdemeanor and felony convictions and are in desperate need of a second chance so they can find employment, housing, and more. If old summary convictions could no longer be expunged and had to go through the pardon process instead, it would greatly impact the ability of X-Offenders for Community Empowerment to serve the many Philadelphians who need help navigating the complex pardon process. X-Offenders for Community Empowerment believes that allowing individuals with the most minor and old convictions to go through the expungement process is critical both to allow such individuals to move past minor indiscretions, and to ensure the pardon process is reserved for those who have been convicted of more serious offenses.

The Pennsylvania Prison Society

The Pennsylvania Prison Society was founded in 1787 by individuals who signed the Declaration of Independence and later drafted the U.S. Constitution. Its mission is to advocate for a humane, just and restorative correctional system, and to promote a rational approach to criminal justice issues. For more than 225 years, the organization has worked to mitigate the consequences of over-criminalization and to help formerly convicted people fully return to society. These goals have been particularly difficult to achieve over the last two decades, as harsh collateral consequences have been enacted and employers have regularly rejected job applicants with even minor records as background screening has become ubiquitous. For these reasons, the Prison Society supported the 2008 amendment permitting the expungement of summary convictions for minor offenses such as disorderly conduct, harassment, obstructing the highways, and small retail theft cases. The organization supports a broad reading of this provision as consistent with the intent of the legislation and necessary for reentry policy purposes.

Broad Street Ministry

In an effort to help Philadelphians living in deep poverty stabilize their lives, Broad Street Ministry provides meals with social services in partnership with other

nonprofit organizations. Criminal records negatively impact our guests' ability to improve their lives in multiple ways. Up to 77% of the more than 5,000 guests Broad Street Ministry will serve this year have a criminal background. These records significantly hinder their ability to obtain housing and employment. Because of this, we support measures that enable more liberal policies regarding criminal record expungement.

Impact Services

Impact Services was founded in 1974 as the first program in the Ford Foundation's national demonstration on supported work. Impact Services' mission is: "to empower people in need to attain the hope, motivation and skills necessary to reach their fullest human potential and highest level of personal and family self-sufficiency." Impact Services has worked with people with criminal records since 1974, helping individuals overcome the challenges of re-entry. In recent years, Impact Services has recognized a growing community need for services to support this population. Impact Services' interest in this case stems from its experience running programs that help people with criminal records find work. Impact Services understands that to increase the chances that ex-offenders will be able to find employment, individuals need to get their records cleared to the largest extent possible. Even minor summary offenses can often hold people back from reaching their full potential, and thus Impact Services believes allowing individuals to expunge old summary convictions is essential.

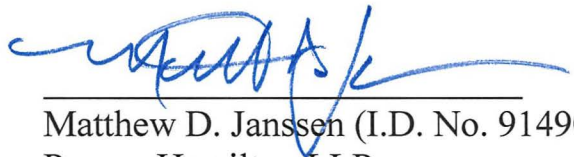
Resources For Human Development

Resources for Human Development (RHD) is a comprehensive, nonprofit, social service organization that works in thirteen states and is headquartered in Philadelphia. RHD's mission is to empower people as they build the highest level of independence possible, building better lives for themselves, their families and their communities. From providing residential services for individuals with mental illness, intellectual and developmental disabilities, chemical addiction and those experiencing homelessness, to providing job training, assisted transportation, and crisis intervention, RHD gives individualized, quality assistance.

CERTIFICATE OF SERVICE

I, Matthew D. Janssen, hereby certify that on November 19, 2015, I served two true and correct copies of the Brief of *Amici Curiae* upon the following individual via First Class, United States Postal Service:

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