IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO.: 75 MAP 2015

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

VICTORIA C. GIULIAN,
Appellant

BRIEF FOR APPELLANT

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.

Jason S. Dunkle, Esquire
JD Law, P.C.
204 East Calder Way, Suite 306
State College, PA 16801
814-954-7622
ID No.: 93690

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I. STATEMENT OF JURISDICTION

Appellant's Petition for Allowance of Appeal from the judgment of the Superior Court was granted by this Court on September 9, 2015. Therefore, this Court has jurisdiction over this appeal pursuant to section 724(a) of the Judicial Code, 42 Pa.C.S.A. § 724(a).

II. ORDER IN QUESTION

On February 23, 2015, the Superior Court of Pennsylvania issued a precedential opinion that concludes: "Order affirmed. Judgment Entered."

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Whether Appellant is statutorily eligible to seek an expungement of her summary citations under 18 Pa.C.S.A. § 9122(b)(3) is an issue of statutory construction and, therefore, a question of law. The "standard of review is *de novo* and [the] scope of review is plenary." Commonwealth v. Fithian, 961 A.2d 66, 71 n. 4 (Pa. 2008).

IV. STATEMENT OF THE QUESTION INVOLVED

Did the Superior Court commit an error of law in finding that Appellant was not statutorily eligible to have her summary convictions expunged pursuant to 18 Pa.C.S.A. § 9122(b)(3) despite the fact that Appellant has been free of arrest and prosecution for seventeen years following the convictions, over ten years longer than the statutory requirement?

(Answered in the negative by the Superior Court).

V. STATEMENT OF CASE

For seventeen years, Appellant Victoria Giulian has been free of arrest or prosecution. Ms. Giulian petitioned to expunge summary citations from 1997 and 1998, pursuant to the Criminal History Record Information Act (CHRIA), 18 Pa.C.S.A. § 9122. The trial court granted expungement of the 1998 summary citation, but denied expungement, in part, for Ms. Giulian's 1997 summary citations. This appeal followed.

In 1997, when she was twenty years old, Ms. Giulian was arrested in State College and pled guilty to the summary offenses of underage drinking, public drunkenness and harassment; the Commonwealth nolle prossed a misdemeanor disorderly conduct charge. In 1998, Ms. Giulian pled guilty to summary criminal mischief.

On May 8, 2013, Ms. Giulian filed petitions to expunge both the 1997 and 1998 summary cases. Ms. Giulian has remained free of arrest and prosecution since the 1998 summary case was closed, seventeen years ago, on December 16, 1998.

As to the 1998 summary citation, the Centre County District Attorney did not object to expungement. On June 24, 2013, the President Judge Thomas King Kistler signed an Order granting that expungement under 18 Pa.C.S.A. § 9122(b)(3).

As to the 1997 incident, on November 6, 2013, the Centre County District Attorney filed a partial objection to the expungement. The Commonwealth agreed that Ms. Giulian's underage drinking charge was eligible for expungement under 18 Pa.C.S.A. § 9122(a)(3). However, the Commonwealth objected to the expungement of the other 1997 offenses. The trial court initially denied expungement of all of the 1997 offenses.

Ms. Giulian filed a request for a hearing, which was held on April 4, 2014 before the Honorable Bradley P. Lunsford presiding in the Centre County Court of Common Pleas. The Commonwealth agreed to expungement of both the underage drinking citation and the nolle prossed disorderly conduct charge. However, the Commonwealth objected to the expungement of the 1997 summary citations for public drunkenness and harassment. The Commonwealth asserted that

expungement of the 1997 summaries was precluded by the 1998 summary citation because Ms. Giulian had not remained "free of arrest or prosecution" in the immediate five years following her 1997 citation, despite her subsequent seventeen years of clean law enforcement history. The trial court denied expungement as to the 1997 public drunkenness and harassment citations by Order dated April 29, 2014, and filed April 30, 2014. A panel of the Superior Court (Ford Elliott, P.J.E., Shogan, J., Stabile, J.) affirmed. This Court granted allowance of appeal.

The opinion of the trial court is attached as Exhibit "A." The opinion of the Superior Court is attached as Exhibit "B." The Superior Court opinion is reported and published at 111 A.3d 201 (Pa. Super. 2015).

VI. SUMMARY OF ARGUMENT

Appellant Victoria Giulian pled guilty to summary citations in State College in 1997 and 1998. She has not been arrested in the seventeen years since. The Superior Court's incorrect interpretation of the summary offense expungement statute denies Ms. Giulian an important equitable right. This Court should reverse.

In 2013, Ms. Giulian filed for expungement of her summary offense citations, as provided by statute. Section 9122(b)(3) of Title 18 allows rehabilitated individuals to move on from minor offenses by permitting expungement of summary citations after a person has been arrest-free for five years. Pursuant to this statute, Ms. Giulian's 1998 summary citation was expunged. Under the same statute, her 1997 summary citation expungement was denied—a result contrary to the statutory text, legislative purpose and reason.

Summary citations may be expunged when a petitioner "has been free of arrest or prosecution for five years following the conviction for that offense." 18 Pa.C.S.A. § 9122(b)(3)(i). In contradiction to the text of Section 9122(b)(3), the Superior Court incorrectly held that the five years of arrest-free time must be a particular five years; i.e. "**the** five years **immediately** following the conviction." Giulian, 111 A.3d at 204 (emphasis in original on "immediately"; emphasis added to "the"). The Superior Court violated the canons of statutory interpretation by adding words that do not appear in the statutory text.

The Superior Court based its holding on a misguided claim about surplusage. The Superior Court was in error, as the words "following the conviction for that offense" are necessary, not surplusage. They establish that the earliest possible start date for the five year waiting period is after conviction for the summary offense.

Moreover, the General Assembly enacted Section 9122(b)(3) to fill an equitable gap in Pennsylvania's record expungement law. This statute provides for expungement of the most minor offenses, summary citations, by rehabilitated individuals like Ms. Giulian. The Court should protect this legislatively-created right, and construe any exceptions narrowly. Ms. Giulian has earned the right to expungement through her complete rehabilitation, demonstrated by seventeen years of arrest-free living. This Court should reverse.

VII. ARGUMENT

APPELLANT IS STATUTORILY ELIGIBLE TO HAVE HER SUMMARY CONVICTIONS EXPUNGED PURSUANT TO 18 PA.C.S.A. § 9122(B)(3) AS SHE HAS BEEN FREE OF ARREST AND PROSECUTION FOR SEVENTEEN YEARS FOLLOWING THE CONVICTIONS, OVER TEN YEARS LONGER THAN THE STATUTORY REQUIREMENT.

Appellant Victoria Giulian pled guilty to summary citations in State College in 1997 and 1998. She has not been arrested in the seventeen years since. In 2013, Ms. Giulian's 1998 summary citation was expunged. The lower courts, however, denied expungement of Ms. Giulian's 1997 summary offenses of public drunkenness and harassment. The lower courts' reasoning was that the expunged 1998 case made her statutorily ineligible. This result is contrary to the statutory text, legislative purpose and reason. Under the Criminal History Record Information Act (CHRIA), 18 Pa.C.S.A. § 9122(b)(3), Ms. Giulian is eligible to expunge her 1997 summary citations because she has been arrest-free for the last seventeen years, far longer than the statutory requirement. This Court should reverse.

Section 1921(a) of the Statutory Construction Act sets forth the primary task of statutory construction, to ascertain the intent of the legislature:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1 Pa.C.S.A. § 1921. In this process, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa.C.S.A. § 1903(a).

Where there is ambiguity in the text, this Court goes on to consider the factors set forth in Section 1921(c) of the Statutory Construction Act:

> (c) When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute.
> (2) The circumstances under which it was enacted.
> (3) The mischief to be remedied.
> (4) The object to be attained.
> (5) The former law, if any, including other statutes upon the same or similar subjects.
> (6) The consequences of a particular interpretation.
> (7) The contemporaneous legislative history.
> (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S.A. § 1921(c). See also 18 Pa.C.S.A. § 105 (Crimes Code); Fithian, 961 A.2d at 74. Wherever possible, statutes that are *in pari materia* are construed together. 1 Pa.C.S.A. § 1932. Furthermore, the Court presumes "[t]hat the General

Assembly does not intent a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.A. § 1922(1).

A. According to the Statutory Text, Ms. Giulian Is Eligible to Expunge Her 1997 Summary Citations

The statute at issue in Ms. Giulian's case, Section 9122(b)(3) of CHRIA, provides, in relevant part, as follows:

> (b) Generally.--Criminal history record information may be expunged when:
>
> . . .
>
> (3)(i) An 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.**
>
> (ii) Expungement under this paragraph shall only be permitted for a conviction of a summary offense.

18 Pa.C.S.A. § 9122(b) (emphasis added).

The issue in this case is how to interpret the phrase "has been free of arrest or prosecution for five years following the conviction for that offense." 18 Pa.C.S.A. § 9122(b)(3)(i). The specific question is whether the "five years" of arrest-free time must occur during a particular five years. The Commonwealth asserts that a petitioner must be arrest-free for the first five years immediately following the conviction. Ms. Giulian asserts that this timing requirement is not in the statutory text.

There are several aspects of the statutory text that support Ms. Giulian's position—that Section 9122(b)(3) requires five years of arrest-free time, rather than five years of arrest-free time immediately following the summary conviction. Each of these reasons is set forth below. Moreover, even if the Court concludes that the text is ambiguous, Ms. Giulian is entitled to expunge her minor, youthful citations, because this is what the legislature intended.

1. Section 9122(b)(3) Does Not Say "Immediately" Following

Section 9122(b)(3) of CHRIA requires that a petitioner be arrest-free for "five years following the conviction." 18 Pa.C.S.A. § 9122(b)(3)(i). The word "immediately" does not appear in the statutory text. Nevertheless, the Superior Court held that "Appellant was required to remain free of arrest or prosecution for the five years **immediately** following her conviction for the 1997 offense." Giulian, 111A.3d at 204 (emphasis in original).

The Superior Court went so far as to claim that this interpretation is apparent from the plain text of the statute. The Superior Court states that it "discern[s] no ambiguity." Giulian, 111 A.3d at 204. This is false. One cannot say that the phrase "five years following the conviction" is unambiguously equal to "the five years **immediately** following the conviction."

Just as words contained within a statute cannot be dismissed as surplusage, 1 Pa.C.S.A. § 1921(a), neither too can surplus words be read into a statute in order to

fit that statute to a preferred interpretation. 1 Pa.C.S.A. § 1923(c). As a unanimous United States Supreme Court has explained, "we ordinarily resist reading words or elements into a statute that do not appear on its face." Bates v. United States, 522 U.S. 23 (1997). This Court has stated this bedrock principle of statutory construction: "We may not add words or phrases in construing a statute unless the added words are necessary for a proper interpretation, do not conflict with the obvious intent of the statute, and do not in any way affect its scope and operation. Commonwealth v. Segida, 985 A.2d 871, 875 (Pa. 2009).

In the instant case, adding the word "immediately" to Section 9122(b)(3) is improper. Adding words is not necessary to interpret the statute and conflicts with the General Assembly's purpose of expungement of summary offenses. Most importantly, adding the word "immediately" dramatically narrows the scope of the summary expungement statute to exclude petitioners like Ms. Giulian who engaged in a youthful period of acting out and are now fully rehabilitated. "It is not this Court's function to read a word or words into a statute that do not actually appear in the text where, as here, the text makes sense as it is, and the implied reading would change the existing meaning or effect of the actual statutory language." Pa. Sch. Bd. v. Pa. Pub. Sch. Employees' Ret. Bd., 863 A.2d 432, 439 (Pa. 2004).

Ms. Giulian's argument that the word "immediately" does not appear in the text, and cannot be added by judicial fiat, is even stronger because the General

Assembly knows how to use the phrase "immediately following" to pinpoint a precise period of time where, unlike here, this is the legislative intent. In another section of the very same Act, CHRIA, the General Assembly uses the phrase "immediately following." Specifically, the General Assembly uses the phrase "one year immediately following" to refer to the precise period of time, during which the Attorney General may use interim guidelines to implement CHRIA. 18 Pa.C.S.A. § 9143. Section 9143 of CHRIA provides in full:

> It shall be the duty and responsibility of the Attorney General, in consultation with the Pennsylvania State Police, to adopt rules and regulations pursuant to this act. The Office of Attorney General, in consultation with the Pennsylvania State Police, shall have the power and authority to promulgate, adopt, publish and use **guidelines** for the implementation of this act for a period of **one year immediately following the effective date of this section** pending adoption of final rules and regulations.

18 Pa.C.S.A. § 9143 (emphasis added).

By using the phrase "immediately following" in Section 9143 of CHRIA, the General Assembly pinpointed the specific "one year" period they meant—the very first year after the effective date of CHRIA. Had the General Assembly merely said "following" and not "immediately following," there could have been uncertainty as to whether a later one year period would be acceptable; e.g. a one year period after beginning to promulgate the guidelines.

The fact that the General Assembly omitted the word "immediately" from Section 9122(b)(3) of CHRIA, while using the phrase "immediately following" in Section 9143 of CHRIA, is significant for statutory construction purposes. These statutes are *in pari materia* and shall be construed together. 1 Pa.C.S.A. § 1932(b). "[O]mission of a given provision from one of two similar statutes evidences a different legislative intent regarding the two." Commonwealth v. Hoke, 962 A.2d 664, 669 (Pa. 2009); see also Commonwealth v. Haynes, -- A.3d --, 2015 Pa. Super. 214 (Pa. Super. 2015) (holding that similar statute provides evidence that the General Assembly's "omission was volitional"). This is a corollary to the principle that words or phrases used in one portion of a statute mean the same thing when used in another portion of the statute. Housing Auth. v. Pa. State Civil Serv. Comm'n, 730 A.2d 935, 946 (Pa. 1999) (citing Commonwealth v. Maloney, 73 A.2d 707, 712 (Pa. 1950)).

In Ms. Giulian's case, the difference between Sections 9122(b)(3) and 9143 of CHRIA demonstrates that the General Assembly was aware of the difference between "following" and "immediately following." The legislature knows how to use the later phrase when this is its legislative intent, but did not do so in Section 9122(b)(3). The Superior Court erred by adding this word to the text.

2. Section 9122(b)(3) Does Not Use the Definite Article, "The"

Not only did the General Assembly not use the phrase "immediately following," it also did not use the definite article, "the," a telling omission in the statutory interpretation of Section 9122(b)(3). Again, the Superior Court supplied this word when paraphrasing Section 9122(b)(3). Specifically, the Superior Court reworded Section 9122(b)(3) to require Ms. Giulian "to remain free of arrest or prosecution for **the** five years **immediately** following her conviction for the 1997 offense." Giulian, 111A.3d at 204. Adding the definite article "the" to the statute is improper, as this change is not necessary, conflicts with the legislative purpose and narrows the scope of the expungement law to exclude rehabilitated petitioners. See Segida, 985 A.2d at 875; Pa. Sch. Bd., 863 A.2d at 439.

While only one word, adding "the" is no slight alteration. In the practice of statutory construction, the General Assembly's use or non-use of the definite article "the" has been significant. As this Court explained, "[t]he word 'the' is a definite article and is 'used . . . before a noun, with specifying or particularizing effect. . .'" Patricca v. Zoning Bd., 590 A.2d 744, 751 (Pa. 1991); see also Hartford Fire Ins. v. California, 509 U.S. 764 (1993) (relying on the presence of the definite article "the" to select the relevant definition of "business" in an insurance statute).

In Ms. Giulian's case, Section 9122(b)(3) requires arrest-free time "for five years following the conviction." The General Assembly could have, but did not

require arrest-free time "for **the** five years following the conviction." If the legislature intended to "specify[] or particulariz[e]" the very first five years, it could easily have used the word "the." Patricca, 590 A.3d at 751. The legislature did not do so, a fact that further supports Ms. Giulian's position.

3. Section 9122(b)(3) Says "Has Been" Free of Arrest or Prosecution

In the lower court, the Commonwealth parsed the verb tense "has been" in the phrase "has been free of arrest or prosecution for five years following the conviction for that offense." 18 Pa.C.S.A. § 9122(b)(3). In fact, the choice of this verb supports Ms. Giulian's interpretation.

In statutory construction, the choice of a verb tense matters. See Carr v. United States, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."). In this Commonwealth, the Statutory Construction Act states that "[w]ords used in the past or present tense shall include the future." 1 Pa.C.S.A. § 1902. In contrast, it does not state that any other verb tenses are interchangeable.

In Section 9122(b)(3), the verb "has been" supports Ms. Giulian's position that "has been free of arrest or prosecution for five years following the conviction" does not refer to any particular five year period. Specifically, it does not refer only to the five years immediately following the summary conviction. By using the present perfect verb, "has been," Carr, 560 U.S. at 447, the General Assembly

refers to an unspecified five years after conviction, including five year periods that occurred recently.

In contrast, a hypothetical statute that contained the words added by the Superior Court, "the" and "immediately," would not naturally take the present perfect verb "has been." Supplying the Superior Court's additional words, the hypothetical Section 9122(b)(3) would state: "An individual . . . has been free of arrest or prosecution for the five years immediately following the conviction. . ."

This is awkward and grammatically incorrect. Adding the Superior Court's words "the" and "immediately" refers the reader to a defined time period in the past. When referring to a fixed period of time, the proper verb tense is not the present perfect, "has been," but the past tense, "was." The Superior Court's hypothetical statute would more properly read: "An individual . . . **was** free of arrest or prosecution for the five years immediately following the conviction. . ."

This point is even clearer when applied to Ms. Giulian's case. The Superior Court's hypothetical statute would state: "An individual . . . has been free of arrest or prosecution for the years 1997 to 2002." Again, the verb tense is wrong. The hypothetical statute would properly take the past tense; i.e.: "Ms. Giulian . . . **was** free of arrest or prosecution for the years 1997 to 2002."

In fact, when the Superior Court paraphrased Section 9122(b)(3) to add the words "the" and "immediately," the court, perhaps unthinkingly, also changed the

verb from "has been" to "was." The Superior Court wrote: "Appellant **was** not free of arrest or prosecution for **the** five years following the 1997 offense . . ." Giulian, 111 A.3d at 204 (emphasis added).

Of course, in the real Section 9122(b)(3), the General Assembly did not use the verb "was." Rather, it used the present perfect verb "has been." This choice demonstrates that the words "the" and "immediately" are not somehow implicit in the statute. The General Assembly was referring to a non-fixed five year period, which may have occurred recently. Thus, this aspect of the plain text further demonstrates why this Court should reverse.

4. The Superior Court's Argument about Surplusage Is Mistaken

The Superior Court makes the bare assertion that "five years following the conviction" is unambiguously equal to "**the** five years **immediately** following her conviction." Giulian, 111 A.3d at 204. The only argument the Superior Court gives in defense of this position is a misguided argument about surplusage. Specifically, the Superior Court contends that if Section 9122(b)(3) were not specifying those five years, then part of the text would be "mere surplusage." Giulian, 111 A.3d at 204. This argument is mistaken.

The Superior Court focuses on the phrase "following conviction for that offense." It asserts:

> If the General Assembly intended 18 Pa.C.S. § 9122(b)(3)(i) to require only that Appellant remain free

> of arrest or prosecution for **any** period of five years following her 1997 offense, it would not have utilized the phrase 'following the conviction for that offense,' and the statute would have read . . .
>
> 'and has been free of arrest or prosecution for five years[.] ~~following the conviction for that offense.~~'

Giulian, 111 A.3d at 204.

This is incorrect. The phrase "following the conviction for that offense," serves an important function and is not surplusage. Crucially, the phrase "following the conviction for that offense" establishes the earliest possible start date for the five year waiting period.

The General Assembly had other options for the earliest possible start date, such as the date of release from incarceration, or the date of completion of sentence (including payment of all fines and costs). Indeed, the phrase "following the conviction for that offense" distinguishes Section 9122(b)(3) from other sections of CHRIA, which discuss waiting periods that may begin on other dates. For example, in the parallel section of CHRIA addressing summary expungement for juveniles, 18 Pa.C.S.A. § 9123(a)(2.1), the General Assembly provided for a waiting period that may begin, at the earliest, after the petitioner has "satisfied all terms and conditions of the sentence imposed following a conviction for a summary offense. . ."

While Section 9122(b)(3) refers to the date of conviction, the expungement statute for juvenile summary offenses demonstrates that this was not the only option. A person convicted of a summary offense can be ordered to serve a term of imprisonment of not more than 90 days, 18 Pa.C.S.A. § 106(c)(2), and can also be ordered to pay fines and costs, which the defendant may not be able to pay until after completion of a term of incarceration. Rather than choosing these points in time, the General Assembly prescribed a waiting period that may start no earlier than the date of "conviction for that offense." 18 Pa.C.S.A. § 9122(b)(3).

If Section 9122(b)(3) had not included the words "following the conviction for that offense," there would have been ambiguity as to how early the five year waiting period can possibly begin. Thus, these words are not surplusage under Ms. Giulian's interpretation. Indeed, the Superior Court's suggested version that omits the final phrase "following the conviction for that offense" could, technically, allow people to petition immediately for expungement if they had been arrest-free for five years **before** the summary arrest. For all of these reasons, the Superior Court's argument regarding surplusage is mistaken, and this Court should reverse.

B. Even If Section 9122(b)(3) Were Ambiguous, It Should Be Construed in Ms. Giulian's Favor

Ms. Giulian has explained why the text of Section 9122(b)(3) unambiguously supports her interpretation. Moreover, even if this Court were to

conclude that the text is capable of more than one interpretation, the statute should be interpreted in Ms. Giulian's favor. There are two alternative reasons for such a presumption; both support Ms. Giulian.

1. Penal Statues Are Narrowly Construed Against the Commonwealth

In the Opinion below, the Superior Court held that Section 9122(b)(3) is a penal statute and, therefore, "under the rule of lenity, penal statutes must be strictly construed, and ambiguities must be resolved in favor of the criminal defendant." Giulian, 111 A.3d at 204. This Court has succinctly set forth the principles of the rule of lenity, 1 Pa.C.S.A. § 1928(b)(1), as follows:

> [P]enal statutes are to be strictly construed. 1 Pa.C.S.A. § 1928(b)(1). Yet, the need for strict construction does not require that the words of a penal statute be given their narrowest meaning or that legislative intent should be disregarded. It does mean, however, that, if an ambiguity exists in the verbiage of a penal statute, such language should be interpreted in the light most favorable to the accused. More specifically, 'where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt.

Fithian, 961 A.2d at 74 (internal citations omitted) (citing Commonwealth v. Booth, 766 A.2d 843 (Pa. 2001)). Accordingly, when determining legislative intent, the Court follows "our legislature's directive that penal statutes are to be interpreted in the light most favorable to the accused." Fithian, 961 A.2d at 77 (applying rule of lenity to Section 110 of the Crimes Code, the compulsory joinder

statute, 18 Pa.C.S.A. § 110); see also Commonwealth v. Garzone, 34 A.3d 67, 75, 77-78 (Pa. 2012) (applying rule of lenity to statue requiring payment of expenses of the district attorney, 16 P.S. § 7708).

There are several reasons why this Court, like the Superior Court below, may characterize Section 9122(b)(3) of CHRIA as a penal statute. The statute appears in Title 18, the Crimes Code. 18 Pa.C.S.A. § 101, et seq. The expungement process for summary offenses is governed by the Rules of Criminal Procedure, Rule 490. Pa.R.Crim.P. 490; see also Pa.R.Crim.P. 790. In addition, the expungement or non-expungement of a summary offense has direct penal impact. For example, the summary offense of public drunkenness, at issue here, is a recidivist statute. A first citation has a maximum sentence of a $500 fine; if the citation is not expunged, the maximum penalty for second citation is doubled to a $1,000 fine. 18 Pa.C.S.A. § 5505.

Under the rule of lenity, Section 9122(b)(3) should be read narrowly in favor of Ms. Giulian. Therefore, if this Court finds ambiguity in the text, the Court should construe the statute in her favor.

2. In the Alternative, Exceptions to Remedial Legislation Are Narrowly Construed Against the Commonwealth

In In the Interest of A.B., the *en banc* Superior Court considered the statutory construction of Section 9123(a)(3) of CHRIA, which provides for the

expungement of a juvenile record. In the Interest of A.B., 987 A.2d 769 (Pa. Super. 2009). The Superior Court characterized the expungement statute as remedial legislation, with the specific "remedy of record expungement." In the Interest of A.B., 987 A.2d at 775. The characterization of the statute as remedial determined the Superior Court's method of analysis.

A statute that "is remedial in nature . . . should be construed liberally to effectuate its humanitarian objectives." Sch. Dist. of Philadelphia v. Workers Comp. Appeal Bd., 117 A.3d 232, 242 (Pa. 2015). Remedial statutes "shall be liberally construed to effect their objects and to promote justice." 1 Pa.C.S.A. § 1928(c). As to expungement, In the Interest of A.B., the *en banc* Superior Court held, "[g]iven the remedial nature of Section 9123(a), [the juvenile] Appellant was entitled to a liberal construction and application of the statute, while the 'show cause' exception to the remedial provisions should have been narrowly construed against the Commonwealth as its proponent." In the Interest of A.B., 987 A.2d at 780.

Like the juvenile expungement statute, the instant case involves a section of CHRIA, Section 9122(b)(3), which has the remedial aim of record expungement. Prior to the enactment of Section 9122(b)(3) in 2008, the was no provision in CHRIA for the expungement of summary offenses. Rather, the pre-2008 law provided for the expungement of conviction information only for certain

individuals over seventy years old, or three years after death. 18 Pa.C.S.A. §§ 9122(b)(1, 2).

Under the prior law regarding summary offenses, "equitable expungement of conviction data, however well-intentioned, [was] not the law of Pennsylvania." Commonwealth v. Whiteford, 786 A.2d 286 (Pa. Super. 2001). In 2008, the General Assembly changed that. The legislation enacting Section 9122(b)(3), Act 134 of 2008 (H.B. 1543), remedied this situation by permitting expungement of summary citations.

Therefore, as the Superior Court read Section 9123 in In the Interest of A.B., Section 9122(b)(3) may be liberally construed to effect the remedy of expungement of summary offenses. Any exceptions should be construed narrowly against the Commonwealth. Accordingly, if the Court finds that there is ambiguity in the text of Section 9122(b)(3), this Court should rule in Ms. Giulian's favor.

C. The Legislature Intended to Allow Rehabilitated Individuals, Like Ms. Giulian, to Expunge Their Minor Summary Citations

If this Court finds the text of Section 9122(b)(3) to be ambiguous, the legislative history and purpose further demonstrate why Ms. Giulian deserves relief. The General Assembly sought to protect individuals convicted of summary citations—the most minor offenses in the Commonwealth—who have proven their rehabilitation by remaining arrest-free for five years or longer. The legislature

recognized that for even the most minor offenses, a non-expunged criminal record has detrimental consequences. Ms. Giulian herself has remained free of arrest for seventeen years and is the sort of person the legislature had in mind when passing Section 9122(b)(3). Furthermore, as set forth below, any other interpretation would lead to unreasonable or absurd results. This Court should reverse.

1. The Legislature Intended Summary Offenses to Be Broadly Eligible for Expungement

In crafting Section 9122(b)(3), the legislature intended for summary offenses to be broadly eligible for expungement. This is evident from the legislative history, as documented by a House Judiciary Committee Hearing of September 18, 2007, and the Senate Legislative Journal of October 8, 2008. As Pennsylvania Senator Kitchen stated in the Senate Legislative Journal: "Mr. President, this is a very important bill, and it will help hundreds of people across Pennsylvania, especially our young people. . ." Commonwealth of Pennsylvania Legislative Journal 64 (Oct. 8, 2008 at 2633).[1]

The General Assembly recognized that summary offenses are the most minor offenses in the Commonwealth—so minor in fact that, in most cases, there is no right to counsel because the risk of imprisonment is so remote. See Pa.R.Crim.P. 454(A)(2) (right to counsel in summary trials only "if, in the event of

[1] Available at http://www.legis.state.pa.us/WU01/LI/SJ/2008/0/Sj20081008.pdf#page=15.

a conviction, there is a reasonable likelihood of a sentence of imprisonment or probation"); see also Commonwealth v. Thomas, 507 A.2d 57, 59 (Pa. 1986) (noting no constitutional right to counsel when no likelihood of imprisonment). In the House Judiciary Committee Hearing regarding House Bill 1543, which ultimately became Section 9122(b)(3), the discussion centered on the importance of allowing people to move past minor scrapes with the law, particularly summary offenses like disorderly conduct, loitering, low-level retail theft, etc. See Commonwealth of Pennsylvania, House Judiciary Committee Hearing, In re: H.B. 1543 (Sept. 18, 2007 at 4) (hereinafter "House Judiciary Committee Hearing").[2]

Furthermore, discussion in the House Judiciary Committee centered on the unfairness of holding youthful indiscretions against people who have been out of trouble for long periods of time. See House Judiciary Committee Hearing at 16, 37, 47. Representative Daylin Leach pointed out that research shows that once people have been free of arrest for a period of between five and nine years, they are unlikely to ever recidivate. House Judiciary Committee at 24. Several such studies have been cited by the United States Equal Employment Opportunity Commission (EEOC) in urging caution when using criminal records in employment decisions. See EEOC Enforcement Guidance No. 915.002, April 25, 2012, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment

[2] Available at http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2007_0191T.pdf.

Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. 2000e, *et seq*., Endnote 118.[3]

Expungement is an important remedy for Pennsylvania citizens who are trying to deal with "the difficulties and hardships that may result from an arrest on record." Commonwealth v. Butler, 672 A.2d 806, 808 (Pa. Super. 1996). Those difficulties and hardships are just as burdensome, and frequently more so, for a citizen who has been not only arrested, but convicted, even for a minor offense. For example, in the House Judiciary Committee, Representative Jewell Williams pointed out the unfairness of holding records against seniors who want to enter senior housing but may have committed crimes in their youth. House Judiciary Committee Hearing at 47.

Additionally, the House Judiciary Committee considered the burdensome impact of non-expunged summary citations on the pardon process. Secretary of the Board of Pardons, John Heaton, testified to the massive delays and backlog the Board of Pardons was facing with over 1,112 people waiting to have their chance for a hearing before the Board. House Judiciary Committee Hearing at 65. He focused on the very minor nature of some of the offenses the Board was considering, and explained that if the legislature allowed expungements for such offenses, it would reduce the burden on the Board. He stated, "We're forcing

[3] Available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

shoplifters with 69 cent packs of gum and ice cream sandwiches…I had five cases two weeks ago that were under $12. I mean, and you're forcing them to go to the Governor for a pardon? It's absurd. And it demeans our distinguished constitutional board to be sitting there listening to this every month." House Judiciary Committee Hearing at 71.

Thus, for all of these reasons the legislature was moved to create a remedy for those convicted of the most minor offenses, summary citations. The legislation enacting Section 9122(b)(3), Act 134 of 2008 (H.B. 1543), became law shortly thereafter. To effectuate the legislative intent, Section 9122(b)(3) must be construed to allow expungement for summary citations when the petitioner has been free of arrest for at least five years. The legislature intended to allow petitioners like Ms. Giulian, who has been arrest-free for seventeen years, to expunge their summary citations.

2. The Superior Court's Interpretation Would Produce Absurd and Unreasonable Results and Cannot Be What the Legislature Intended

The Superior Court's interpretation of Section 9122(b)(3), disregards the seventeen years that Ms. Giulian has remained arrest-free because she had two summary citations during a period of youthful indiscretion in State College in 1997 and 1998. By the rules of statutory construction, when ascertaining the intent of the

General Assembly, this court presumes "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.A. § 1922(1); Banfield v. Cortes, 110 A.3d 155, 168 (Pa. 2015). The Superior Court's interpretation would produce absurd and unreasonable results for two reasons, as set forth below.

First, it is unreasonable or absurd to treat Ms. Giulian's 1997 summary citations differently from her 1998 summary citation. During a period of her youth, Ms. Giulian acted out in minor, age-related ways in State College, resulting in summary citations from 1997 and 1998. She has not been arrested since. Based upon her seventeen years of rehabilitation, Ms. Giulian was granted an expungement of her 1998 summary citation—the more recent offense—while her older 1997 summary citation remains on her record.

There is no rational justification for allowing a more recent summary citation to be expunged while retaining an older one. The purpose of Section 9122(b)(3) is to provide full dispensation for very minor, summary offenders who reform their ways. The same justification that applies to Ms. Giulian's summary citation from 1998, applies with equal force to the summary citations from 1997. The contrary holding of the lower courts should be seen as unreasonable, and evidence that that the statutory construction below was incorrect.

Second, the language at issue in this case, "for [x] years following," is used in other provisions of the expungement statute and could lead to unreasonable or absurd results. For example, Section 9122(b)(1) allows expungement of any criminal history information when "an individual who is the subject of the information reaches 70 years of age and has been free of arrest or prosecution for ten years following final release from confinement or supervision." 18 Pa.C.S.A. § 9122(b)(1). In the context of petitioners over seventy years old, it could be unreasonable or absurd to require that the ten year arrest-free period occur "immediately following" release—potentially excluding seniors with many decades of arrest-free living. This could not be what the legislature intended when creating a remedy for seniors who may have convictions from early in their lives, but no longer pose any threat to society. The canons of statutory construction caution against such an unreasonable result. Thus, for this reason also, this Court should reverse.

VIII. CONCLUSION

For the foregoing reasons, Ms. Giulian respectfully requests that this Honorable Court grant the relief sought and hold that she is statutorily eligible to seek expungement of her 1997 summary citations under 18 Pa.C.S.A. § 9122(b)(3).

Respectfully submitted,

Jason S. Dunkle, Esquire
JD Law, P.C.
204 East Calder Way, Suite 306
State College, PA 16801
814-954-7622
ID No.: 93690

CERTIFICATION OF COMPLIANCE WITH RULE 2135

I, Jason S. Dunkle, Esquire, hereby certify that on this *** day of November, 2015, that the Brief For Appellant filed in the above captioned case does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is *** as counted by Microsoft Word.

Respectfully submitted,

Jason S. Dunkle, Esquire
JD Law, P.C.
204 East Calder Way, Suite 306
State College, PA 16801
814-954-7622
ID No.: 93690

CERTIFICATE OF SERVICE

I, Jason S. Dunkle, Esquire, hereby certify that on *** , 2015, I served two true and correct copies of the Brief for Appellant and Reproduced Record upon the following individual via First Class, United States Postal Service:

Stacy Parks Miller, Esquire
Centre County District Attorney
Centre County District Attorney's Office
Centre County Courthouse
102 South Allegheny Street, Room 404
Bellefonte, PA 16823-1488

Respectfully submitted,

Jason S. Dunkle, Esquire
JD Law, P.C.
204 East Calder Way, Suite 306
State College, PA 16801
814-954-7622
ID No.: 93690