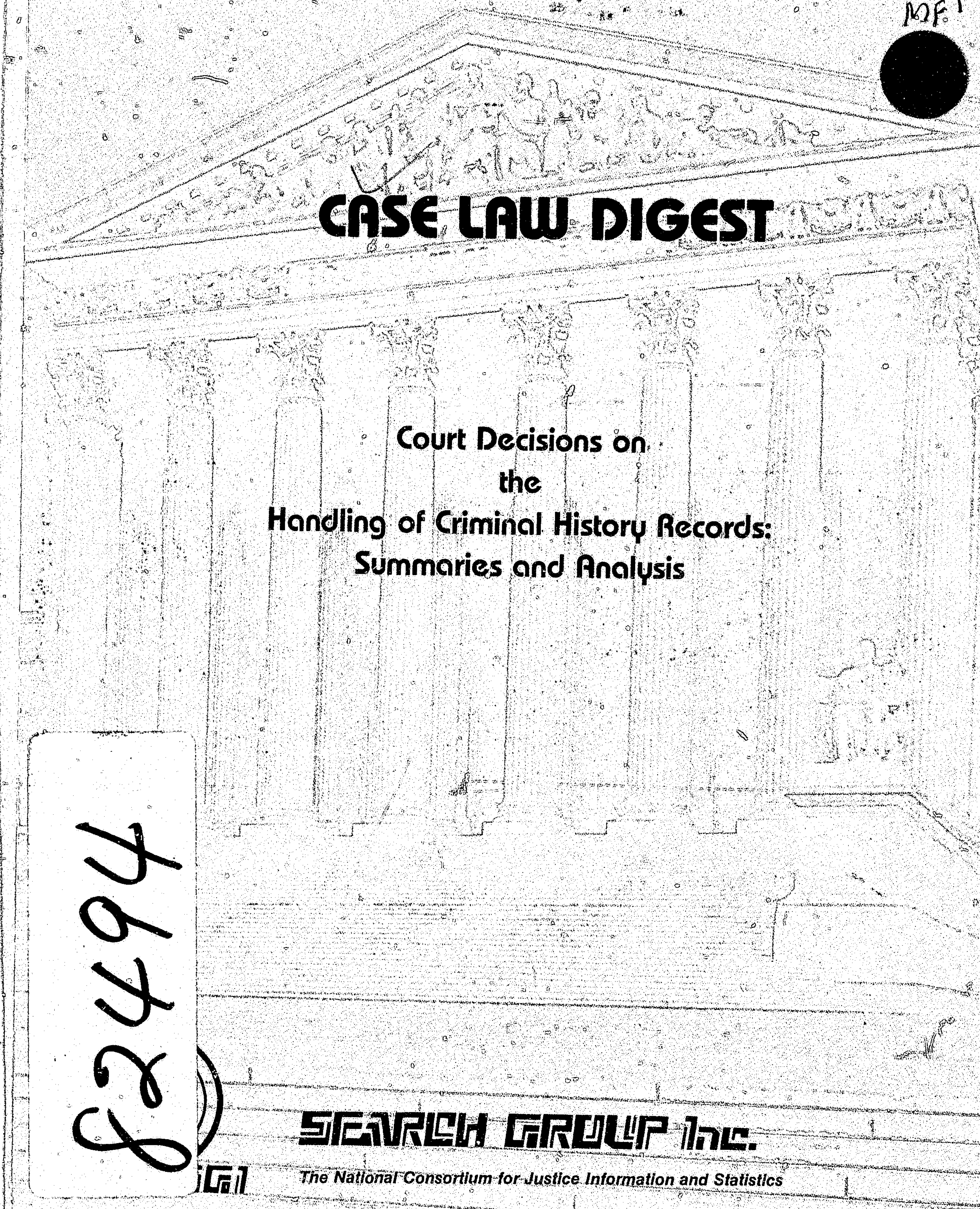

CASE LAW DIGEST

Court Decisions on the Handling of Criminal History Records: Summaries and Analysis

SEARCH GROUP Inc.

The National Consortium for Justice Information and Statistics

July, 1981

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PREFACE

SEARCH is a state consortium of criminal justice officials appointed by the Governor and Chief Justice of each state. For over 10 years it has endeavored to further the application of information technology and policy to the administration of criminal justice.

Since the late 1960's, SEARCH has provided state and local criminal justice agencies with leadership and a forum for national expression on complex issues of criminal justice information law and policy. SEARCH efforts have produced more than 30 technical and issue analysis publications to assist those who deal with criminal justice information policy.

The Case Law Digest provides yet another tool for use by policymakers, criminal justice administrators and information managers. The Digest pulls together the wealth of information contained in the highly significant body of federal and state case law regarding criminal history record information practices. It identifies, categorizes, describes and analyzes over 225 court decisions covering a time period from 1950 to the present. It is a unique and valuable resource prepared by experts with over 25 years of field experience in criminal justice information law and policy development and implementation.

The Digest provides quick and convenient access to a comprehensive set of case summaries, assists the reader in determining whether review of the text of the full opinion is needed, and gives the necessary citation for case retrieval.

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INTRODUCTION

Since 1969, SEARCH Group, Inc. (SEARCH), The National Consortium for Justice Information and Statistics, has studied, reported upon and participated in the development of law and policy for the handling of criminal history record information by federal, state and local criminal justice agencies.[1]

During this period SEARCH published a landmark report, Standards for Security and Privacy of Criminal Justice Information, (Technical Report No. 13) which proposed comprehensive standards for handling criminal justice information, based upon analysis of relevant law and policy. In addition, SEARCH has published indepth legal and policy reports on many of the most pressing criminal justice information and privacy and security issues.

Naturally, judicial decisions dealing with criminal history record information create or, at the very least, reflect much of this law and policy. And yet until now this case law, numbering several hundred federal and state court decisions published over the last three decades, has never been collected and analyzed in one volume.

Case Law Digest identifies, categorizes, describes, and analyzes over 200 court decisions that concern the handling of criminal history record information by criminal justice agencies. This book is a unique and valuable resource for federal, state and local criminal justice officials--particularly those who are responsible for or involved in the handling of criminal history record information.

Each case summary describes the court's decision briefly, usually in one page. The case summary contains a short identification of the parties involved in the action; the legal theories that they relied upon and the relief that they sought; a description of the background facts; a concise statement of the court's decision and the point of law for which it stands; and a brief analysis, where appropriate, of the decision's effect or impact.

The cases are organized according to the recordkeeping operation or type of record at issue. Within each of these categories the cases are further arranged by jurisdiction with the most recent case appearing first. In many instances a summary applies to more than one category. When this occurs, the summary is repeated in each affected category and a notation of cross reference is included. In addition, a table of cases listed in alphabetical order is included in the Digest. Each category or chapter in the book is introduced by a brief analysis.

The Digest is an important reference because case law plays such a major part in the development of law and policy for the handling of criminal history records. For one thing, the courts "make" law by setting out the constitutional and common law standards that apply to the handling of criminal history records. For example, it was the courts, and not the legislatures or criminal justice agencies, that first articulated and imposed a requirement that criminal justice agencies must maintain accurate and complete records.

Case law is also important because the courts' interpretation of statutory or regulatory standards has an enormous influence on the ultimate meaning and effect of any statute or regulation. Even comprehensive

[1]This book uses standard criminal justice information terminology as defined in the Department of Justice's regulations at 28 C.F.R. Part 20 or in SGI's Technical Report Number 13 entitled Standards for Security and Privacy of Criminal Justice Information. Criminal history record information means information collected by criminal justice agencies about individuals consisting of identifiable descriptions, such as photographs and fingerprints, and notations of arrest, detentions and indictments, informations or other formal criminal charges, and any disposition arising therefrom.

and detailed legislative or regulatory schemes can be significantly affected, changed, and even negated by the courts.

Criminal justice officials need to be especially aware of interpretations and decisions made by the courts of their jurisdiction. Indeed, most public officials have learned the hard way that the full meaning or effect of a statute or regulation cannot be appreciated without reviewing applicable case law. For example, until the federal Court of Appeals for the District of Columbia circuit decided otherwise, most experts believed that the Federal Bureau of Investigation (FBI) had ample statutory authority to maintain arrest records, even if a particular arrest was not based upon probable cause.[2]

Finally, a review of recent criminal history record case law provides criminal justice officials with an insight into key developments and trends. For instance, in 1976 the Supreme Court published a landmark decision in a case called Paul v. Davis.[3] The court held that a record subject's constitutional right of privacy is not violated by a sheriff's dissemination of a list of "active shoplifters" to merchants, even if the record subject had been arrested but never tried. Federal district court cases decided in the wake of Paul v. Davis strongly indicate that the courts are now reluctant to place constitutional obstacles in the way of criminal justice agency decisions to disseminate criminal history records in any and all situations.

Organization of Digest

The Digest is organized into three parts, and within those parts, into several chapters. Each part covers the federal and state court decisions that deal with a key criminal justice agency recordkeeping operation: (1) standards governing the dissemination of criminal history record information; (2) standards governing the maintenance of criminal history record information; and (3) standards governing subject access to criminal history record information.

The dissemination chapters categorize the cases according to the identity of the proposed recipient and his purpose in seeking the criminal history record. Specifically, the book contains the following dissemination chapters:

- Dissemination of Records: Criminal Justice Community
- Dissemination of Records: Government Non-Criminal Justice Agencies
- Dissemination of Records: Litigants
- Dissemination of Records: Private Employers, the Media and the Public

The maintenance chapters categorize the cases according to the nature of the criminal history record or the criminal justice process associated with the creation of the record. Specifically, the book contains the following maintenance chapters:

- Maintenance of Records: Inaccurate or Incomplete
- Maintenance of Records: Illegal or Improper Arrest or Conviction
- Maintenance of Records: Arrests Ended in Acquittal or Other Demonstration of Innocence
- Maintenance of Records: Arrests Ended in Dismissal or Not Pursued
- Maintenance of Records: Juvenile Offenses, First Offenses, or Special Category Offenses
- Maintenance of Records: After Subject Established Clean Record Period
- Maintenance of Records: After Subject Received Gubernatorial Pardon

Subject access cases are highly homogeneous in nature and limited in number, and accordingly are categorized singularly as:

- Subject Access

The cases that are identified and described deal exclusively with criminal justice agencies. Cases that concern the handling of criminal history records by non-criminal justice agencies, such as private employers or consumer reporting agencies, are not included. (Of course, decisions that concern the dissemination of criminal history data by criminal justice agencies to those kinds of organizations, are covered.)

Furthermore, only cases that concern the handling of criminal history records are included. Judicial decisions that deal with the handling of identification information, intelligence and investigative information or other types of criminal justice information are left for a later volume.

Methodology

Research covered post-1950 decisions of all federal and state courts that have been published in the national reporter system. Naturally, some cases that concern the handling of criminal history records by criminal justice agencies are not included, either because an opinion was not written or published (although the court made a decision) or because a small percentage of cases are always overlooked in any research plan. However, SEARCH is confident that it has identified and included well over 90 percent of all of the applicable reported judicial opinions written since 1950--and all of the landmark or leading cases.

Observations

The review of over 200 judicial decisions dealing with the handling of criminal history record information led to several general observations.

First, the great majority of criminal history cases, perhaps 80 percent, involve a claim by a record subject for the sealing or purging of all or part of his record. Several factors no doubt contribute to this high percentage, including the fact that over 40 states have adopted statutes that permit individuals to petition a court to seal or purge a record if specified criteria are met. In addition, a seal or purge order is probably the most useful remedy for many criminal history record subjects.

Other remedies sought by criminal history record subjects (either in addition to or in lieu of a seal or purge order) include orders to correct, amend or supplement information in their records or money damages against the criminal justice agency or, occasionally, against the responsible official. Although the cases contained in this book are not organized according to the type of remedy sought by the record subject, nevertheless each case summary carefully identifies the relief sought and granted.

Another general point that emerges from a review of the case law is the seeming reluctance of courts over the last 5 to 8 years to find constitutional implications in agency handling of criminal history records. No doubt the Supreme Court's 1976 decision in Paul v. Davis has much to do with this development. Furthermore, this trend may be partly caused by the failure of jurists and scholars to develop a coherent, persuasive constitutional theory of information privacy. In addition, the recent unwillingness of the courts to read constitutional implications into agency recordkeeping actions may reflect the present Supreme Court's distaste for judicial activism and interference in agency conduct. Whatever the cause, in the last part of the 1970's a marked shift occurred which moved the courts away from an earlier judicial receptivity to arguments that agency maintenance and dissemination decisions about criminal history records involve constitutional interests.

[2] See, Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1978).

[3] 424 U.S. 693 (1976).

Perhaps the one area where courts continue to be receptive to interventionist arguments involves the accuracy and completeness of criminal history records. Record subjects who are successful in demonstrating that their records contain inaccurate or incomplete information are usually able to obtain judicial relief. In such circumstances courts are likely to provide relief even if they cannot rely on statutory grounds, but instead, must base the relief on constitutional grounds or on the inherent power of the courts to police agency behavior.

Finally, the courts appear to be receptive to arguments that the right of subjects to access their own criminal history records is an absolute right. Whether this right is provided for by statute or is provided for by reliance on common law or constitutional standards, the courts are quick to insure that subjects have a right to inspect their own records.

PART I

DISSEMINATION OF CRIMINAL HISTORY RECORD INFORMATION

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From a privacy and security standpoint, dissemination[4] is always a key issue. It hardly needs stating that if criminal history record information is not disseminated, its potential for harm to the record subject and, conversely, its potential for benefit to the criminal justice system and society is minimized.

Given the importance of this issue, it is not surprising that state and federal policymakers have devoted considerable attention to developing criminal history record dissemination policies. However, it sometimes seems that very few jurisdictions have implemented policies with which they are wholly satisfied or which remain unchanged over any significant period of time. In other words, national dissemination policies for criminal history records are still in flux.

In consequence, only a few broad generalizations can be made about dissemination policies. Certainly a fundamental point to be made is that in almost every jurisdiction the degree of permitted dissemination turns on two factors: (1) the identity and purpose of the proposed recipients; and (2) the nature or status of the particular criminal history record. In general, the likelihood of free and open dissemination increases if the recipient is a criminal justice agency or, at least, a governmental agency, and the purpose of the dissemination furthers a criminal justice interest or some related interest such as national security. Conversely, the likelihood of dissemination decreases if the proposed recipient is not a public entity and is not seeking the record to further some public purpose.

[4]The term "dissemination" is used to mean the disclosure of criminal history record information to any party outside of the criminal justice agency that created the record.

At the same time, it is probably true in virtually every jurisdiction that, regardless of the identity and purpose of the potential recipient, the likelihood of dissemination goes up if the record to be disseminated is a conviction record and goes down if the record is a non-conviction record.[5]

Policymaking Considerations

The court opinions presented in this part indicate that several underlying policy considerations lead policymakers, such as legislators and jurists, to focus on the identity of the recipient and the nature of the record in setting dissemination policies. For example, criminal justice agencies are more likely than other parties to get access to criminal history records because courts and legislators often accept the following arguments made in support of such access:

- criminal justice agencies have a pressing need for access to criminal history records in order to accomplish their mission;
- criminal justice personnel can better interpret, apply and otherwise use criminal history records than non-criminal justice personnel; and
- record subjects should be considered

[5]"Non-conviction information" means arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

to have waived their entitlement to confidentiality when they are convicted of a crime.

Conversely, non-conviction information is less likely to be disseminated, again regardless of the recipient, because:

- it is not an accurate, or at least wholly reliable, indication of wrongdoing;
- its dissemination would stigmatize and harm subjects who are often in fact, innocent; and
- if the record is aged it may no longer be a relevant indicator of the subject's character and conduct.

Of course, many policy considerations argue for confidentiality or for dissemination regardless of the identity of the proposed recipient or the character of the record. For example, society's very real interest in rehabilitating offenders is served by confidentiality regardless of the character of the record and, to a lesser extent, regardless of the identity of the recipient. On the other hand, society's interest in permitting public and private decisionmakers to identify and evaluate individuals with a history of criminal conduct may be served by wide dissemination regardless of the character of the record or the identity of the recipient. These broad and competing policymaking considerations underlying dissemination policies may account for the inconsistency, instability and controversy associated with criminal history record dissemination policies.

Mechanisms for Setting Dissemination Policies

Statutory or Regulatory Policies

Any summary of statutory and regulatory policies for state and local dissemination of criminal history records starts with the regulations of the Law Enforcement Assistance Administration[6] (LEAA). The LEAA Regulations apply to any criminal justice agency which has received LEAA monies in support of its information system. The regulations do not place restrictions upon agency dissemination of conviction information. However, covered agencies are prohibited from disseminating non-conviction information to non-criminal justice agencies unless authorized by state or local law or court order.

Virtually every state has adopted its own legislation or regulations which supplement or supercede the LEAA Regulations. With few exceptions the state legislation authorizes or, at the least, fails to prohibit criminal justice agencies from sharing criminal history data with criminal justice agencies. However, 39 states seal[7] or purge[8] criminal history records under certain circumstances--usually upon a finding of an improper arrest, or failure to secure a conviction, or the passage of an extended period of time without criminal involvement.[9] Usually when a record is sealed and, of course, always when a record is purged, it cannot be disseminated, even to other criminal justice agencies.

Twenty-four states have enacted statutes that comprehensively regulate and limit dissemination of criminal history data

[6]28 C.F.R. Part 20.

[7]The term "sealed" is used to mean an order prohibiting any dissemination of a record.

[8]The term "purged" is used to mean destroyed.

[9]Part II of the book which analyzes and describes cases dealing with the maintenance of records, discusses sealing and purging law at length.

to non-criminal justice agencies.[10] In most other states the question of whether non-criminal justice requestors can obtain criminal history records is left to be answered by regulations or on an ad hoc basis by individual criminal justice agencies. To the extent that generalization is possible, it can be said that in most states criminal justice agencies are authorized to disseminate cumulative conviction information to non-criminal justice recipients.

On the other hand, a greater number of states have adopted statutes or regulations which prohibit agencies from disseminating non-conviction information to non-criminal justice recipients. However, some states make exceptions for certain kinds of non-criminal justice requestors. For example, ten states have now adopted provisions that give private employers authorization, in certain circumstances, to obtain both conviction and non-conviction information.[11]

The extent of public access to non-conviction information is increased by two "quirks" in statutory policy. First, as discussed in more detail in Chapter 4, even in jurisdictions which prohibit public access to cumulative non-conviction information, members of the public can obtain arrest and other non-conviction data by checking non-name indexed, non-cumulative, original records of entry, such as police blotters and court arraignment records. These original records of entry are made public by both law and custom in virtually every jurisdiction.

Second, many state criminal history information statutes regulate only the central state repository or records disseminated by that repository.[12] Thus in many

[10]Alabama (Ala. Code Sec. 41-9-590 et seq.); Alaska (Alaska Stat. Sec. 12.62.010 et seq.); Arizona (Ariz. Rev. Stat. Sec. 41-2210 et seq., 41-1750); Arkansas (Ark. Stat. Ann. Sec. 5-1101 et seq.); California (Cal. Penal Code Sec. 11075 et seq. (West)); Colorado (Colo. Rev. Stat. Sec. 24-72-301 et seq.); Connecticut (Conn. Gen. Stat. Ann. Sec. 54-142 (West)); Georgia (Ga. Code Sec. 92A-3001 et seq.); Hawaii (Haw. Rev. Stat. Sec. 846-1 et seq.); Iowa (Iowa Code Ann. Sec. 692.1 et seq. (West)); Kansas (Kan. Stat. Ann. Sec. 4701 et seq.); Louisiana (La. Rev. Stat. Ann. Sec. 15-575 et seq. (West)); Maine (Me. Rev. Stat. Sec. 16-611 et seq.); Maryland (Md. Ann. Code 1957, Art. 27 Sec. 742 et seq.); Massachusetts (Mass. Gen. Laws Ann. Sec. 6-167 et seq.); Montana (Mont. Rev. Codes Ann. Sec. 44.5.101 et seq.); Nebraska (Neb. Rev. Stat. Sec. 29-3501 et seq.); Nevada (Nev. Rev. Stat. Sec. 179A-010 et seq.); Oregon (Or. Rev. Stat. Sec. 181.010 et seq.); Pennsylvania (Pa. Stat. Ann. Sec. 18-9101 et seq. (Purdon)); South Carolina (S.C. Code Sec. 23-3-110 et seq.); Vermont (Vt. Stat. Ann. Sec. 20-2051 et seq.); Virginia (Va. Code Sec. 19.2 - 388 to 390; 9.111.6); Washington (Wash. Rev. Code Ann. Sec. 10.97.010 et seq.).

[11]Florida (Fla. Stat. Ann. Sec. 943.053 (West)); Illinois (Ill. Ann. Stat. Ch. 38 Sec. 206-7 (Smith Hurd)); Kentucky (Ky. Rev. Stat. Ann Sec. 17.150(4) (Baldwin)); Minnesota (Minn. Stat. Ann. Sec. 15.1695 (West)); Montana (Mont. Rev. Codes Ann. Sec. 44.5.301, 44.5.302); Nebraska (Neb. Rev. Stat. Sec. 29-3520); Nevada (Nev. Rev. Stat. Sec. 179A.100); Pennsylvania (Pa. Stat. Ann. Sec. 18-9121(b) (Purdon)); Virgin Islands (V.I. Code Ann. Title 3 Sec. 881(g)); West Virginia (W. Va. Code Sec. 15-2-24(d)).

Note: In Illinois, Montana, Nebraska, Nevada and West Virginia, the written consent of the record subject is required in order to obtain some type of data.

[12]Only nineteen of the states have statutes that apply to local agency dissemination policies. The rest limit only the state central repository or information disseminated by the state repository. The nineteen states with statutes that apply to local units are Alabama, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, Pennsylvania, the Virgin Islands, Virginia and Washington.

states local police agencies are free--absent a local ordinance--to release to the public whatever arrest or other non-conviction data (not to mention conviction data) they choose.

Judicial Remedies

The chapters in Part I are comprised of cases in which courts have looked at dissemination issues in terms of one or more of three bodies of law: (1) constitutional law; (2) the courts' inherent and equitable authority to police agency action; and (3) statute law.

As noted in the Introduction, by the late 1970's courts were largely unwilling to restrict agency dissemination of criminal history records on the basis of a record subject's constitutional interest. In the wake of Paul v. Davis,[13] the courts have all but said that the Constitution does not give an individual a right of confidentiality in his criminal history record, even if the record contains non-conviction information.

Furthermore, cases decided in the late 1970's and presented in this part of the book indicate that the courts are reluctant to exercise their inherent, equitable powers to overturn an agency's dissemination decision. Courts appear willing to exercise these powers only upon a showing that the record is factually inaccurate or that dissemination would result in manifest injustice.[14]

[13]424 U.S. 693 (1976).

[14]See, Fite v. Retail Credit Company, 386 F.Supp. 1045 (D. Mont. 1975) aff'd, 537 F.2d 384 (9th Cir. 1976); Newspapers, Inc. v. Breier, 279 N.W.2d 179 (Wis. 1979).

Most of the opinions included in Part I interpret and apply criminal history record dissemination statutes or open record and freedom of information statutes. Because courts are bound by the language and legislative history of particular statutes, their treatment of a particular statute is not indicative of the court's own point of view. Nevertheless, the language in many of the opinions indicates that most courts accept, to one degree or another, the policymaking considerations discussed earlier in this analysis. These policymaking considerations probably have the effect of encouraging courts to maximize the dissemination of criminal history records within criminal justice and governmental communities and minimize the dissemination, at least of non-conviction information, to private employers, the media and other members of the public.

Organization of Record Dissemination Chapters

Part I groups and discusses the cases according to the identity and purpose of the proposed recipient and contains the following chapters:

- Dissemination of Records: Criminal Justice Community;
- Dissemination of Records: Government Non-Criminal Justice Agencies;
- Dissemination of Records: Litigants; and,
- Dissemination of Records: Private Employers, the Media and the Public.

Chapter 1

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Statutory Standards

Criminal justice agencies in virtually every jurisdiction enjoy some type of statutory authorization to share or disseminate criminal history record information with local, state and federal criminal justice agencies. The only statutory limitations on such dissemination are the sealing and purging statutes adopted in 39 states, which make some types of criminal history records unavailable for dissemination. From a statutory standpoint the key question in most jurisdictions is whether a particular requestor is, in fact, a criminal justice agency within the meaning intended by the Legislature; or whether the requestor is a governmental entity with only civil or quasi criminal justice functions.

Judicial Standards

Only a handful of cases have dealt expressly with the question of the dissemination of criminal history record information within the criminal justice community. There is an easy explanation for this relative silence: criminal record subjects who wish to prohibit or contest the dissemination of their records within the criminal justice community are likely to petition the courts for an order purging or sealing the record. This likelihood is explained by the fact that if a court is willing to prohibit dissemination within the criminal justice community, it will also be willing, in virtually every case, to prohibit dissemination to all other recipients. Thus, criminal record subjects who hope to prohibit the dissemination of their criminal history records within the criminal justice community can almost always be expected to bring an action for sealing or purging.

In a very real sense, then, every sealing and purging decision concerns dissemination of criminal history record information within the criminal justice community. However, because we think that it is more useful to categorize the several dozen sealing and purging cases according to the reason why the court sealed the record (usually a breach by a criminal justice agency of some record maintenance duty) sealing and purging cases are not included in this chapter unless they specifically and expressly discuss dissemination within the criminal justice community.

In order to persuade a court to prohibit the dissemination of criminal history records within the criminal justice community a record subject will ordinarily need to show that his record is inaccurate or otherwise deficient; that it will not be useful to a criminal justice agency; that, conversely, its dissemination will harm the subject; and that such dissemination would violate the subject's legal rights, whether statutory, constitutional or common law.

Courts have prohibited criminal justice agencies from sharing criminal history records with other criminal justice agencies on three bases: (1) where a statute or regulation prohibits such dissemination or, more likely, expressly authorizes a court to prohibit such dissemination if certain criteria are met; (2) where the courts exercise inherent or equitable powers to prohibit dissemination in order to avoid or remedy a manifest injustice to the record subject; and (3) where the courts conclude that dissemination would violate the record subject's constitutional rights.

A review of the cases included in this chapter suggests several important points. For instance, the cases, particularly the older cases, make it clear that the courts have the authority to prohibit criminal

justice agencies from trading criminal history record information with other criminal justice agencies if such dissemination does an injustice to the criminal record subject. For example, in Morrow v. District of Columbia,[15] a federal court of appeals panel held that it is within the power of a criminal trial court to issue an order directed to an entire municipal authority, including the arresting police agency, prohibiting dissemination of a subject's criminal record, where the record did not result in a conviction, is not useful to a police agency and its dissemination would harm the subject.

In other cases the courts have said that a criminal record subject who attempts to obtain a court order blocking dissemination within the criminal justice community must show specifically that such dissemination would lead to inappropriate harm to the subject. In United States v. Rosen,[16] for example, a federal district court held that an order prohibiting dissemination within the criminal justice community of a record of an arrest that ended in acquittal would be appropriate whenever the record subject can show that: (1) his photographs would be publicly displayed in a rouges gallery; or (2) his arrest record would be disseminated to employers; or (3) retention of the record would be likely to result in harassment by law enforcement or government officials.

However, since the Supreme Court's decision in Paul v. Davis in 1976 courts have been less inclined to prohibit the dissemination of criminal history records within the criminal justice community. Instead, these courts have stressed the special needs that criminal justice agencies have for access to criminal history data.

For example, in Loder v. Municipal Court,[17] the California Supreme Court denied a record subject's petition to purge his arrest record. The record subject came to the aid of his wife who was being beaten by a policeman. The subject was arrested but two days later all charges were dropped. The court said that the government and, in particular, criminal justice agencies, have a compelling interest in retaining even this type of arrest record: (1) for identification purposes; (2) for prompt and accurate police reporting; (3) for future police work; and (4) for use at pre- and post-trial proceedings. Several other cases included in this chapter also emphasize the need to insure the free flow of criminal history record data within the criminal justice community.

Only a couple of recent decisions buck this trend. The most notable is District of Columbia v. Hudson,[18] in which the court sealed several sets of arrest records. In one instance an individual had been arrested for a murder that was later shown to be a suicide. In another instance an individual was arrested for failure to attend driving school and it was later shown that he had attended the school. In a third instance an individual was arrested for carrying a pistol, but law enforcement officials later conceded that they had arrested the wrong man.

The court in Hudson rested its analysis on an assumption that criminal justice records are ordinarily useful to criminal justice officials and therefore ought to be preserved. However, where the arrest record is admittedly wrong, the court concluded that the record has no utility to law enforcement officials. Consequently, a court should use its equitable (inherent) powers to give these record subjects relief and order the records to be sealed.

Presumably, where a criminal history record has severe deficiencies and where a record subject can show a real likelihood of harm if the record is traded within the criminal justice community, courts will continue to be somewhat receptive to claims that dissemination should be prohibited.

[15] 417 F.2d 728 (D.C. Cir. 1969).

[16] 343 F.Supp. 804 (S.D.N.Y. 1972).

[17] 533 P.2d 624 (1976).

[18] 404 A.2d 175 (D.C. Ct. of Apps. 1979).

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Paul v. Davis
424 U.S. 693 (1976)
(Rehearing denied 425 U.S. 985 (1976))

RELIEF SOUGHT

An individual arrested for shoplifting brought this action, based on the federal civil rights laws, against county and city police chiefs for circulating his name and photograph to local businessmen in a compilation of "known shoplifters" while the charge against him was still unresolved. He asked for damages as well as declaratory and injunctive relief.

HOLDING

Distribution of the flyer did not deprive the plaintiff of his constitutional rights of liberty and due process and there is no constitutional privacy interest that is violated by dissemination of arrest records under the circumstances involved. Injury to reputation alone is not sufficient to establish a violation of the constitution.

BACKGROUND

While a shoplifting charge against the subject was still outstanding, his photo and name were included in a flyer of "active shoplifters" prepared and distributed to local businessmen jointly by the chiefs of the Jefferson County and Louisville, Kentucky police departments to help minimize holiday losses. The charge against the subject was dismissed shortly thereafter, but his supervisor saw the flyer and reprimanded him.

SPECIAL NOTE

This is the landmark constitutional dissemination case which, in the words of a subsequent federal court opinion, "snuffed out the constitutional privacy interest in the confidentiality of arrest records."

Cross Reference: Pages 79 & 149

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Utz v. Cullinane
520 F.2d 467
(D.C. Cir. 1975)

RELIEF SOUGHT

Criminal record subjects brought a class action based on the constitution and on statutory law challenging a police practice of routinely forwarding comprehensive arrest information to the Federal Bureau of Investigation (FBI).

HOLDING

The District of Columbia's Duncan Ordinance prohibits dissemination by the D.C. Metropolitan Police of comprehensive arrest information to the FBI unless a specific request has been made for the information within the context of a specific criminal investigation or proceedings involving the record subject.

BACKGROUND

Prior to this case it was the routine practice of the D.C. Metropolitan Police Department to forward arrest data to the FBI, including arrestee identification data and information concerning the arrest. The FBI in turn released the data not only to other law enforcement agencies but also to federally chartered or insured banks and state and local agencies for employment and licensing purposes.

SPECIAL NOTE

The court observed that the subjects were not challenging the routine dissemination of more limited data, such as fingerprints or names, which may serve a legitimate state interest in checking for warrants in other jurisdictions.

Cross Reference: Page 47

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Morrow v. District of Columbia
417 F.2d 728
(D.C. Cir. 1969)

RELIEF SOUGHT

A criminal record subject brought this appeal in order to resolve the issue of whether the trial court in which his case was heard had the authority to issue an order directing the police not to disseminate his arrest record.

HOLDING

It is within the power of a criminal trial court to issue an order directed to an entire municipal authority, including the arresting police agency, prohibiting dissemination of the criminal record of a subject brought to trial in that court.

BACKGROUND

After the trial judge dismissed the case against the subject because it was brought by the Corporation Counsel rather than the U.S. Attorney, the subject moved for expungement of the arrest. The judge issued an order prohibiting the District of Columbia and all its agencies, including the police department, from disseminating the subject's arrest record to anyone, even other law enforcement agencies. The District obtained an order from a higher court forbidding the trial judge from enforcing his order on the ground that it exceeded his authority, and both the subject and the judge appealed.

The U.S. Court of Appeals declined to say whether the trial court's order was appropriate in the circumstances, but left that issue to be determined on remand to the D.C. Appeals Court. The court noted that the Duncan Report rules would appear to be a good rule of thumb, but conceded that unusual circumstances, such as an unjustified invasion of privacy, might justify expungement. (For the decision on remand, see In the Matter of Alexander.)

Cross Reference: Page 243

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

United States v. Thorne
467 F.Supp. 938
(D. Conn. 1979)

RELIEF SOUGHT

In this action the federal government sought to compel state officials to give testimony concerning a state criminal proceeding in which the subject had been acquitted and his records then erased under state law. The testimony was sought in connection with a federal prosecution of the subject.

HOLDING

Under the Supremacy Clause of the United States Constitution the federal court had a constitutional duty to do justice in the federal criminal trial, and the court had the power to order the state officials to furnish the requested testimony.

BACKGROUND

The subject had been charged with a criminal offense by the state. A search warrant was issued in connection with that charge and evidence was seized under the warrant. The subject was acquitted and state law mandated that his records then be automatically expunged and forbade any disclosure of any information contained in the expunged records.

The subject was then charged with a federal offense arising out of the state-conducted search. He moved to suppress the seized evidence. In preparation for the suppression hearing the government subpoenaed the state court clerk (for a copy of the search warrant), the chief court reporter (for a portion of the state trial transcript), and the state police officer who had conducted the search. They refused to testify, citing the erasure statute.

Cross Reference: Page 194

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Testa v. Winquist
451 F.Supp. 388
(D.R.I. 1978)

RELIEF SOUGHT

In this very complex case, arrestees had originally sued the arresting officers for damages on a number of constitutional and state grounds, including arrest without probable cause, false imprisonment, libel and slander, and trespass. The arresting officers brought suit in turn against the persons who furnished them with the criminal record information upon which they based their actions. The arresting officers argued that these persons (the state administrator of the National Crime Information Center and a Warwick, Rhode Island police officer) were liable to the arresting officers for any damages which they might be forced to pay to the arrestees. The arresting officers based their claim on the grounds that the information furnished to them was inaccurate. The administrator and officer sought in this suit to be dismissed from the case, on the basis that the arresting officers had not stated a legally cognizable claim against them.

HOLDING

Dismissal denied. First, the administrator and officer had a duty to maintain reasonably accurate and current records. This duty was owed to the arrestees, so if the duty was breached the administrator and officer could be liable for any resulting injury to the arrestees. Second, while reliance by an officer in the field on record information furnished by a computer service and another officer might be reasonable, the court would not so find as a matter of law, but would leave the issue for the jury. Third, a jury could find that the administrator and officer should have reasonably foreseen that the arresting officers would rely on the information furnished to them; the administrator and officer could then be liable for the acts of the arresting officers following their receipt of the information. And fourth, although there is usually no liability for one who in good faith gives inaccurate information which leads to an arrest, the special position of expertise and authority held by the administrator and officer justified holding them to a stricter duty of accuracy than a private citizen.

BACKGROUND

Officers of the East Providence, Rhode Island police force, observing suspicious activities at the arrestees' auto body shop, stopped a car the

arrestees were driving. When the arrestees were unable to show ownership the officers ran a check with the NCIC, and were told that the car was reported as stolen out of Warwick. The officers then checked with the Warwick officer, who confirmed that the car was stolen. One arrestee was charged with possession of a stolen vehicle, both arrestees were detained overnight even though their attorney came to the station house with the title to the car, their shop was searched, and other actions injurious to their property and reputations were taken. It turned out that the car had been stolen, but was recovered by the insurance company and sold to the arrestees. The arrestees sued the arresting officers; the arresting officers sued the administrator of the Rhode Island division of the NCIC and the Warwick officer.

SPECIAL NOTE

Since this opinion was given on a motion to dismiss, the court was not ruling on the merits of the case, but only on whether the facts and law were so clear that no trial was necessary. Since the court found that liability was possible, it denied dismissal.

Cross Reference: Page 131

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Rowlett v. Fairfax
446 F.Supp. 186
(W.D. Mo. 1978)

RELIEF SOUGHT

An imprisoned federal arrest record subject brought this action seeking to compel the Federal Bureau of Investigation (FBI) to expunge two entries in his FBI record reflecting an arrest where the resulting charges had been dismissed. He alleged that these entries affected his status in prison. In support of his motion the subject argued that by statute the FBI can only maintain records of convictions for offenses punishable by imprisonment for one year or more, and only when upon receipt of a certified copy from the trial court.

HOLDING

Denied. The FBI is empowered to collect and maintain even arrest records with no known dispositions. Pursuant to the Supreme Court decision in Paul v. Davis, 424 U.S. 693 (1976), the subject had no interests, such as in privacy or reputation, sufficient to justify the requested expungement.

BACKGROUND

The subject, imprisoned in Leavenworth federal penitentiary, had been arrested many years earlier for interstate transportation of counterfeiting tools. He claimed that the charges growing out of the arrest were dismissed, but that his FBI record still carried two entries reflecting the arrest.

Cross Reference: Page 246

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Hammons v. Scott
423 F.Supp. 618
(N.D. Cal. 1976)

Hammons v. Scott
423 F.Supp. 625
(N.D. Cal. 1976)

RELIEF SOUGHT

A record subject brought this action challenging the maintenance, use, and dissemination by state (423 F.Supp. 618) and federal (423 F.Supp. 625) officials of the arrest records of persons never in any way found responsible for the crime charged, alleging violation of constitutional due process and privacy rights and seeking an order ending such practices.

HOLDING

(Pursuant to the United States Supreme Court ruling in Paul v. Davis) The use, maintenance, and dissemination of arrest records of persons who have never been convicted of or pled guilty or nolo contendere to the crime charged does not violate any constitutional due process or privacy rights.

BACKGROUND

The subject was arrested by the San Francisco Police Department on the basis of a neighbor's complaint that he had fired a gun at her. The charges were later dropped, but the subject's arrest record was retained by the SFPD and was sent to the state Bureau of Identification and Investigation and to the Federal Bureau of Investigation. The subject claimed that this would adversely affect his employment, licensing, and certification opportunities.

Cross Reference: Page 248

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Tarlton v. Saxbe
407 F.Supp. 1083
(D.D.C. 1976)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought suit seeking expungement from his FBI file of certain arrest entries without dispositions and other arrests and convictions which he alleged had been unconstitutional. His action was dismissed initially; on appeal the Circuit Court said that the FBI did have a duty to maintain reasonably accurate files and remanded the case for the lower court to set the exact limits of that duty. (See Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).) This is the decision on remand.

HOLDING

First, although a record subject should address his first challenge to local and state authorities, when the FBI receives such a challenge it must be forwarded to the appropriate criminal justice agencies and courts for further consideration. Second, while a challenge is pending the FBI does not have to so indicate on the subject's record, since to do so would seriously impair the credibility of FBI criminal records, and could provide criminals with a way to improperly lessen the impact of their records by making frivolous challenges. Third, non-serious offenses are to be deleted from all FBI criminal records, either when the records are converted to computerized form or when a dissemination request is honored. And finally, while the FBI for practical reasons may still disseminate for law enforcement purposes arrest records more than one year old without dispositions, it must conduct a feasibility study to see if some practical way can be found to keep dispositions more up to date.

BACKGROUND

The subject's FBI criminal record file contained a number of arrests without subsequent dispositions and some arrests and convictions that he claimed had occurred in violation of his constitutional rights. He alleged that this inaccurate information had caused him sentencing and parole problems in the past and could do so in the future.

Cross Reference: Page 134

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Urban v. Breier
401 F.Supp. 706
(E.D. Wis. 1975)

RELIEF SOUGHT

This class action was brought against a city police chief under the federal civil rights laws on behalf of 54 arrest record subjects named as dangerous motorcycle gang members by the city police department. The suit alleged that the subjects had been arrested for murder without probable cause, and asked that all resulting arrest records be expunged. The suit also asked that the court order the police department to recall and destroy leaflets it had prepared which displayed each subject's name and photograph, labelled him as a known gang member, and stated that many of the subjects were armed and used drugs. It was also requested that any further printing of the leaflets be prohibited.

HOLDING

Relief granted. Where arrest record subjects were arrested for murder without probable cause the unlawfulness of the arrests and the extreme infamy of the charge justified expungement on due process grounds. The police chief was ordered to expunge his department's own records on the subjects, and to recall and expunge any arrest or identification information disseminated to any agencies or persons, state or federal, governmental or private. The recall requests were to include notice that the arrests were made without a legally sufficient basis. The police chief was also ordered to retreive all the leaflets, from his own force as well as from any other law enforcement authorities, agencies, or persons, public or private, who received them, and forbidden from printing more.

BACKGROUND

A Milwaukee newspaper carrier was killed by a bomb which was apparently set in retaliation against a member of a motorcycle gang who had recently testified against members of a rival gang. In the following days the Milwaukee police arrested 54 known or suspected members of the gang which the police believed set the bomb. These persons were booked for murder and interrogated. The police later printed the leaflets and distributed them to area law enforcement agencies as well as within the Milwaukee Police Department.

SPECIAL NOTES

1. The court's order to expunge the arrest records was based on its inherent powers. The order to recall the leaflets was based on constitutional due process considerations.

2. Part of the court's reasons for directing recall of the leaflets appeared to be that it felt public access to some of the leaflets was otherwise inevitable in view of their widespread distribution.

3. In reaching its decision concerning the leaflets, the court relied in part upon a United States Circuit Court case which was later reversed by the Supreme Court (Paul v. Davis, 424 U.S. 693 (1976)). Paul v. Davis repudiates the rationale of the court's holding on the leaflets (damage to reputation alone as amounting to a violation of due process).

4. The court denied a request that the Milwaukee Police Department be allowed to transfer the subjects' fingerprints and photographs to a neutral, non-criminal identification file. The court expressed a very strong desire to ensure that no subject could ever be connected with the highly improper murder arrests, and that the department had no such existing files, suggesting that the "neutral" files might begin and end with the records of the 54 arrestees.

Cross Reference: Pages 85 & 166

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

United States v. Rosen
343 F.Supp. 804
(S.D.N.Y. 1972)

RELIEF SOUGHT

Federal arrest record subjects sought return of their arrest and identification records on the ground that all charges against them resulted in acquittal or dismissal.

HOLDING

Denied. In the absence of extreme or unusual circumstances, such as an illegal arrest or public display of arrest records in a Rogue's Gallery, and where there has been no claim of injury such as harrassment, lost job opportunities, or improper dissemination, expungement is not justified. The legitimate law enforcement value of retaining arrest and identification records outweighs an individual's simple right of privacy.

BACKGROUND

The subjects were indicted and charged with unlawful importation during a National Emergency, a violation of federal law. A set of charges against one subject resulted in acquittal; further charges against both subjects were dismissed after the corporate defendants in the case pled guilty.

Cross Reference: Pages 169 & 199

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Hughes v. Rizzo
282 F.Supp. 881
(E.D. Pa. 1968)

RELIEF SOUGHT

Arrest record subjects brought an action under the federal civil rights laws on behalf of all those allegedly arrested illegally by city police in an apparent attempt to discourage hippies from frequenting a city park.

HOLDING

Where mass arrests were made with no legal justification the court would order the destruction of all resulting arrest records, including the destruction of any arrest records disseminated to other law enforcement agencies, and the return or destruction of all photographs taken in connection with the arrests, including negatives and any copies.

BACKGROUND

In June and July of 1967 Philadelphia police made mass arrests in a city park known as Rittenhouse Square. Those arrested consisted of hippies, anyone seen associating with them, and those who objected to or inquired about the arrests. This action seemed designed to discourage the hippies from using the park, which was located in a wealthy area. The first group of arrestees were photographed; no charges were ever filed against any of the arrestees.

Cross Reference: Page 172

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

United States v. Kalish
271 F.Supp. 968
(D.P.R. 1967)

RELIEF SOUGHT

A federal arrest record subject who was never prosecuted asked that his arrest records, including fingerprints and photographs, be destroyed.

HOLDING

When a subject has never been prosecuted or convicted there is no public interest in retaining his arrest record or criminal identification data. Moreover, retention does seriously injure the individual's privacy and personal dignity. The United States Attorney General was ordered to destroy the subject's arrest record and criminal identification file in his custody, and those in the Identification Division of the Federal Bureau of Investigation. He was further forbidden from disseminating the records to any governmental agency or to any person.

BACKGROUND

The subject, on the advice of counsel, refused induction into the Army on the good faith argument that he was constitutionally entitled to reclassification or to a hearing before his local Selective Service board. He was arrested contrary to an agreement reached with the Assistant U.S. Attorney, at which time he was fingerprinted and photographed. He submitted to induction half an hour later and was never prosecuted on the arrest.

Cross Reference: Pages 138, 200 & 251

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Loder v. Municipal Court
553 P.2d 624
(Cal. 1976)
cert. denied, 429 U.S. 1109 (1977)

RELIEF SOUGHT

An arrest record subject who was not prosecuted on the charges against him brought this action seeking an order directing the erasure of any records resulting from his arrest and the notification of any agencies to which such records had been sent that they had been erased and that the agencies should do likewise.

HOLDING

Denied. In light of the compelling public interest in the maintenance of criminal records and the extensive statutory protection given to record subjects to prevent improper use or dissemination of their files, the individual's interest in preventing misuse of his record does not outweigh the factors in favor of retaining it.

BACKGROUND

The record subject was arrested for battery, obstructing an officer, and disturbing the peace after he attacked a San Diego, California police officer who was beating his wife with a nightstick. The officer was later suspended, the city attorney declined prosecution, and the charges were dismissed. The subject requested expungement of his record at the time of dismissal, but the municipal court denied the request on the basis that there was no statutory authority for expungement. The subject then wrote to the chief of police and the records custodian of the police department requesting expungement. When he received no reply, the subject brought this suit against the municipal court judge, the police chief, and the records custodian.

Cross Reference: Page 253

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

White v. State
95 Cal. Rptr. 175
(Ct. App. 1971)

RELIEF SOUGHT

A state criminal record subject brought this damage suit against various state officials alleging negligent posting of entries to his record and negligent dissemination thereof. He sued for, among other things, defamation and invasion of privacy.

HOLDING

Relief denied. There is no duty on the part of the state to alter a subject's criminal record on the basis of his unsubstantiated claim that it contains inaccurate or incorrect information. The court also found that dissemination of the subject's record on request to authorized recipients was conditionally privileged, and that the subject failed to show the malice on the state's part necessary to overcome that privilege.

BACKGROUND

The subject was arrested in 1939 for grand theft auto. In 1941 he was identified by photograph as the passer of a forged check in a chain store. That same year a notation was added to his file reflecting the passed check charge and listing a number of aliases, presumably derived from bad checks traced to the subject. From 1951-1962 the subject encountered his record a number of times as a result of his applications to and employment by various police departments. In 1967 he visited the state's Bureau of Criminal Identification and Investigation, was shown his file, and denied that it was his. This suit was the culmination of his subsequent efforts to change his records.

Cross Reference: Page 139

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

District of Columbia v. Sophia
306 A.2d 652
(D.C. 1973)

RELIEF SOUGHT

In this consolidated action three arrestees who were not prosecuted and who affirmatively demonstrated their innocence sought to have their arrest records sealed or expunged.

HOLDING

Relief denied. When an arrest is shown to be mistaken and nonculpability has been shown, neither sealing nor expungement are appropriate remedies. Rather, the records should be modified to reflect the fact of innocence. Similarly, dissemination of such records should not be restricted, and disseminated records need not be returned. The police need merely inform those agencies or persons already in possession of the records of the subject's innocence and include such notation in any future disseminations.

BACKGROUND

The subjects were arrested near a civil disturbance in Georgetown. Charges against them subsequently were dropped. The subjects filed motions to expunge and judicially established their innocence. The lower court prohibited dissemination of the records and ordered them sealed; the District appealed.

Cross Reference: Pages 176, 207 & 258

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

In the Matter of Alexander
259 A.2d 592
(D.C. App. 1969)

This is the decision on remand in Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969)

RELIEF SOUGHT

The record subject in this case petitioned for an order prohibiting the dissemination of his arrest record after the trial court had dismissed a disorderly conduct charge because it had been brought by the corporation counsel instead of the U.S. Attorney. The trial court granted the order.

HOLDING

Trial court order vacated. The Duncan Report rules on dissemination of police records (which permit dissemination of arrest records only if they have resulted in conviction on forfeiture of collateral) are adequate to protect arrest record subjects except in rare cases where unusual facts might justify expungement. No such facts are present in this case.

BACKGROUND

This is the second time the D.C. Court of Appeals considered this case. The first time it reversed the trial court on the ground that it lacked authority to issue an order prohibiting dissemination of an arrest record. The U.S. Court of Appeals reversed and remanded. It held that the trial court did have ancillary jurisdiction to issue the order to effectuate its decision in the case. But the appeals court refused to rule on the appropriateness of the trial court's order, leaving that to be decided by the D.C. Court of Appeals on remand. This is the remand decision.

Cross Reference: Page 261

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

State v. Boniface
369 So.2d 115
(La. 1979)

RELIEF SOUGHT

A criminal record subject who was not prosecuted on the charges against him brought this suit seeking to compel state law enforcement officials to obtain return of his records from the Federal Bureau of Investigation (FBI) and to then have his arrest record sealed. The lower court refused on the ground that the state expungement statute applied only to misdemeanors, while the subject had been arrested on a charge which at the time was classified as a felony.

HOLDING

Reversed and remanded. In light of the remedial nature of the expungement statute it would be unduly harsh to deny relief simply because the subject's alleged crime, currently defined as a misdemeanor, was at the time of his arrest classified as a felony. The court remanded the case for the lower court to issue an order directing destruction of the subject's arrest and disposition records pursuant to the statute and also requesting return of the subject's FBI records.

BACKGROUND

The subject was arrested in 1969 for possession of marijuana, but the charge against him was dropped. In 1977 the subject learned that this arrest appeared on his FBI file and brought suit to seal it, alleging irreparable harm arising out of use of that record by the United States Bureau of Prisons and the United States Parole Commission. There was a state statute which provided for expungement in appropriate cases, but by its terms it was limited to misdemeanor cases; possession of marijuana, though a misdemeanor in 1978, had been a felony in 1969.

Cross Reference: Page 267

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Doe v. Commander, Wheaton Police Department
329 A.2d 35
(Md. 1974)

RELIEF SOUGHT

An arrest record subject, who claimed he could demonstrate complete innocence after charges of committing an unnatural sexual act were dropped, brought suit seeking to have further dissemination of his record restrained, his file expunged, any computer files erased, an explanatory note inserted in the court files, and any records transmitted to the Federal Bureau of Investigation returned. He based his action on his constitutional right of privacy. The lower court dismissed, and he appealed.

HOLDING

Reversed and remanded. The subject should be allowed to present his case, in light of the possible applicability of the constitutional right of privacy. The fact that there was a statute explicitly authorizing expungement did not prohibit granting expungement in cases falling outside the provisions of that statute.

BACKGROUND

The subject, an employee of Georgetown University Law Center, was arrested by a store security guard and charged with committing an unnatural and perverted sexual act. The prosecution against him was dropped and he subsequently filed suit to have his records expunged. He alleged invasion of his constitutional right of privacy and irreparable harm from the continued existence of his files.

Cross Reference: Pages 212 & 268

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Rzeznik v. Chief of Police
373 N.E.2d 1128
(Mass. 1978)

RELIEF SOUGHT

In this action an ex-felon whose criminal records had been statutorily sealed appealed the revocation of his firearms licenses by a chief of police. The subject claimed his sealed records should be unavailable to the chief for gun licensing purposes.

HOLDING

Under the language of the sealing statute the chief did have access to the records, either as a member of a "criminal justice agency" or as a member of a law enforcement agency authorized access to the records by law.

BACKGROUND

The subject was convicted of two separate felonies in 1949 and 1953. The subject obtained a sealing order in 1974. He applied to the chief of police for licenses to carry, sell, rent, and lease firearms. The chief knew of the subject's record but was unable to get a firm answer from the district attorney or the Commissioner of Probation as to its legal effect. He therefore issued the licenses. Later that year the Criminal History Systems Board issued a memorandum stating that sealed records were entirely available for purposes such as evaluating firearms license applications; the subject's licenses were revoked some time later.

SPECIAL NOTE

The subject also sued the chief for slander based on his publication of the fact of the subject's felony convictions. He argued that sealing erased the fact of his convictions, so legally they did not exist. Although the subject actually waived the entire issue by admitting to the convictions in a stipulation, the court did comment that sealing does not erase the fact that a conviction occurred.

Cross Reference: Page 358

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Walkowski v. Macomb County Sheriff
236 N.W.2d 516
(Ct. App. Mich. 1975)

RELIEF SOUGHT

The subject of a computerized criminal record brought suit against officers from three police departments following her incarceration based on inaccurate information. She sued for battery, assault, false arrest, unlawful imprisonment, and defamation. The Director of the Michigan State Police Department, which maintained the computer service, appealed in this case from the lower court's refusal to drop him from the action.

HOLDING

Reversed. The actions of the executive head of the state police in overseeing the operations of a computerized criminal record system are clearly discretionary. The Director was therefore immune from this suit by operation of state law.

BACKGROUND

The subject was stopped for running a red light by officers of the Macomb County Sheriff's Department. A warrant check on the Michigan State Police Department's Law Enforcement Information Network (LEIN) mistakenly indicated an outstanding warrant on the subject for perjury, a felony. There was admittedly a bench warrant outstanding against the subject for contempt of court due to failure to appear for a traffic ticket, a misdemeanor. (Apparently the LEIN "charge code" for perjury and contempt was identical.) The subject contended that if the officers had been correctly informed that the warrant was for a misdemeanor they would not have taken her into custody.

Cross Reference: Page 141

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

People v. Anonymous
416 N.Y.S.2d 994
(Crim. Ct. N.Y. 1979)

RELIEF SOUGHT

A prosecutor brought this ex parte action trying to reopen a criminal docket which had been statutorily sealed for failure to prosecute. The court had to decide whether the statute prohibited the court from gaining access to its own records.

HOLDING

The sealing statute clearly exempted materials necessary for the orderly administration of justice or to allow the court to carry on its day-to-day functions, and that the sealed docket was that type of material. The clerk was ordered to deliver the docket to the court for temporary unsealing during the prosecutor's argument to reopen the case, to be resealed immediately thereafter if appropriate.

BACKGROUND

The original criminal proceeding was dismissed for failure to prosecute when the prosecutor indicated he was not ready to proceed. The prosecutor's inability to proceed was based on his belief that the complainant was not in the courthouse; in bringing this motion he claimed that the complainant was in fact present and ready to be heard, but that he was unaware of this due to a communications failure within the district attorney's office.

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Gleason v. Hongisto
414 N.Y.S.2d 93
(Sup. Ct. 1979)

RELIEF SOUGHT

In this action a criminal record subject challenged his dismissal as a Corrections Officer Trainee, which was based on a discovery by the corrections department that he had been adjudicated a Youthful Offender on a firearms charge. Youthful Offender records are statutorily sealed. The court was asked to rule on whether they could properly be considered by the corrections department in deciding on the subject's fitness for employment.

HOLDING

Youthful Offender records were not intended to be sealed so completely as to deny access to them by the Corrections Commissioner in evaluating a job applicant whose employment would require him to carry a firearm and work under pressure.

BACKGROUND

The subject received a permanent appointment as a Corrections Officer Trainee with the Department of Correctional Services. He was dismissed shortly thereafter when the Department discovered that he had been adjudicated a Youthful Offender following his involvement in a robbery in which a firearm was used. The Department believed that this would bar the subject from possessing a firearm under federal law, which was a job requirement.

Cross Reference: Page 325

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

People v. A
415 N.Y.S.2d 919
(N.Y. Local Crim. Ct. 1978)

RELIEF SOUGHT

In this unusual case, two anonymous subjects, apparently cadets at the United States Military Academy, sought to avoid any possible ill effects flowing from their arrests on narcotics charges which had been dismissed in the interest of justice. The subjects here requested that all records reflecting their arrest and prosecution be sealed, and that the court prohibit any village police officers, West Point military police, officers of the Criminal Investigation Division at West Point, and any other police agency involved in the case from giving any testimony, information, or evidence against the subjects at any disciplinary proceedings held by the Corps of Cadets at the Academy, the Academy itself, the Department of the Army, or any other federal agency. They based their request on state statute.

HOLDING

By statute the court was required to seal all records of the case, making them unavailable to any person or public or private agency except as provided for in the statute. The court found no specific authority empowering it to enjoin testimony against the subjects, but noted that anyone doing so would not be given access to any official records. The court did emphasize the rehabilitative purpose of the sealing statute to the officials of the U.S. Military Academy and federal government who had filed affidavits on the subject's motion. And finally, the court ruled that the Federal Bureau of Investigation should, upon being notified of the court's order, return any records in its possession.

BACKGROUND

Few facts are given due to the anonymous nature of the case. The two subjects were arrested for possession of marijuana, but on motion of the district attorney the charges were dismissed in the interests of justice.

Cross Reference: Pages 51 & 275

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Brunetti v. Scotti
353 N.Y.S.2d 630
(Sup. Ct. 1974)

RELIEF SOUGHT

In this case a criminal record subject with a juvenile record sought an order prohibiting the district attorney from using Family Court records in bail proceedings. He alleged that such use of juvenile records violated the statutory confidentiality accorded to them.

HOLDING

There is no conflict, in letter or spirit, between the statutory grant of confidentiality to Family Court records and consideration of those records by a court in considering a subject's bail application.

BACKGROUND

None given as to the individual case. This action was a broad suit attempting to end the entire practice involved, brought by the Legal Aid Society on behalf of all criminal subjects with prior Family Court records.

Cross Reference: Page 335

DISSEMINATION OF RECORDS: CRIMINAL JUSTICE COMMUNITY

Di Malfi v. Kennedy
213 N.Y.S.2d 886
(Sup. Ct. 1961)

RELIEF SOUGHT

A subject whose name was in a "known gamblers" file maintained by the police brought this action to have it removed, alleging that he was a law-abiding citizen who had nonetheless been subjected to periodic police harassment deriving from the presence of his name in the gamblers file.

HOLDING

Relief granted. In light of the subject's single 1946 conviction and $25 fine for bookmaking, his arrest later that year on the same charge which resulted in acquittal, affidavits attesting to the subject's good character, the police commissioner's admission that he had no information with which to reply to the subject's claims of law-abiding behavior since 1946, and since the police department rules required the police to compile a report on the subject at least once a year, subjecting him to periodic investigation and embarrassment, maintenance of the subject's name in the "known gamblers" file was arbitrary, capricious, and unreasonable. His name was therefore ordered expunged from the file.

BACKGROUND

The subject was arrested in 1946 for bookmaking, pled guilty, and paid a $25 fine. Later that year he was arrested again on the same charge, but was acquitted. Based on this record his name was placed in the "Known Gamblers File" kept by the New York City Police Department; under department regulations, a report had to be made on each known gambler at least once a year. The subject had no other record besides the two 1946 charges.

Cross Reference: Page 142

Chapter 2

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Governmental non-criminal justice agencies usually seek criminal history records for employment screening purposes. And, in general, governmental non-criminal justice agencies are more likely to be able to obtain criminal history data than are private organizations, the media or the public. On the other hand, these agencies are far less likely to be able to obtain such records than are criminal justice agencies.

Statutory Standards

In recent years, government employers have seemingly stepped up their efforts to obtain criminal history record information. At a minimum, applicants for federal employment receive what the federal government calls a "National Agency Check," which consists primarily of a review of the FBI's identification and criminal history records.[19] But, in reviewing applicants for sensitive positions, agencies typically conduct a more detailed criminal history check which includes requests for criminal history records maintained by state and local police.[20]

In addition, federal law requires criminal history checks for employees who work in certain sensitive private sector positions. For example, applicants for many positions with defense contractors or in nuclear power facilities must receive a criminal history check.[21]

It is also true that today every state has adopted statutes or regulations that require criminal history record checks prior to granting certain types of occupational licenses. National statistics on occupational licensing compiled in a 1974 American Bar Association study estimate that seven million people are employed in license occupations. This study counted a total of 1,948 separate state licensing statutes, for an average of 39 per state. Connecticut had a high of 80 categories of employment covered by occupational licensing statutes and New Hampshire had a low of 22. In California, for example, 47 different licensing boards can use state criminal history files for screening applicants.

New York State, as another example, requires a conviction records check for applicants for the following positions (most, but not all of which, require licenses): professional boxers, referees and judges; harness racing officials; private investigators and guards; users or transporters of explosives; male employees of manufacturers or wholesalers of alcoholic beverages; employers of migrant laborers; most employees or members of national securities exchanges; professional bondsmen; employees of check cashing businesses; top employees in insurance companies; horse owners, trainers and jockeys; employees of liquor stores and certain employees of bars; and funeral directors.

At least two policy reasons are advanced to support the argument that governmental non-criminal justice agencies should have special access rights to criminal history information. First, many policymakers believe that the importance and sensitivity of some governmental activities justifies access to such records for pre-employment screening, for internal investigations and other purposes. Second, many

[19] 1978 law prohibits federal agencies from taking arrest record (but not conviction record) information into account in making hiring decisions for "non-sensitive positions."

[20] Executive Order 10450.

[21] Executive Order 10865 and DOD Directive 5220.

policymakers believe that government, non-criminal justice agency decisionmakers will use criminal history records in a more responsible and discerning manner than their private sector counterparts--and in the event that public officials misuse such records they can be held accountable more readily.

Judicial Standards

In many instances, state legislatures, and to a lesser extent the Congress, have accepted these arguments. However, the few court decisions that have considered the government agency access issue have been relatively inarticulate about their reasons for upholding agency access. Some of the decisions seem to suggest that the importance of the governmental function in question makes such access appropriate.[22] Other opinions seem to suggest that such access will not harm record subjects.[23]

Only a couple of cases were found in which courts reject dissemination of criminal history record information to non-criminal justice, governmental agencies. In each of those cases an express statutory or state constitutional provision provided the basis for the court's ruling.[24]

For state and local criminal justice officials with responsibility for handling criminal history record information the "bottom line" is relatively clear. In those jurisdictions where agency officials have discretion to set dissemination policies for criminal history record information there is little chance of an adverse court review if the officials choose to disseminate such records to governmental, non-criminal justice agencies.

[22] See, In re Hecht, 394 N.Y.S. 2d 368 (Sup. Ct. 1977)--access by a legislative committee.

[23] See, Monroe v. Tielsch, 525 P.2d 250 (Wash 1974)--dissemination of juvenile records to educational institutions.

[24] See. Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger, 157 Cal. Rptr. 117 (Ct. App. 1979).

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Utz v. Cullinane
520 F.2d 467
(D.C. Cir. 1975)

RELIEF SOUGHT

Criminal record subjects brought a class action based on the constitution and on statutory law challenging a police practice of routinely forwarding comprehensive arrest information to the Federal Bureau of Investigation (FBI).

HOLDING

The District of Columbia's Duncan Ordinance prohibits dissemination by the D.C. Metropolitan Police of comprehensive arrest information to the FBI unless a specific request has been made for the information within the context of a specific criminal investigation or proceedings involving the record subject.

BACKGROUND

Prior to this case it was the routine practice of the D.C. Metropolitan Police Department to forward arrest data to the FBI, including arrestee identification data and information concerning the arrest. The FBI in turn released the data not only to other law enforcement agencies but also to federally chartered or insured banks and state and local agencies for employment and licensing purposes.

SPECIAL NOTE

The court observed that the subjects were not challenging the routine dissemination of more limited data, such as fingerprints or names, which may serve a legitimate state interest in checking for warrants in other jurisdictions.

Cross Reference: Page 16

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Central Valley Chapter of 7th Step Foundation, Inc. v. Younger
157 Cal. Rptr. 117
(Ct. App. 1979)

RELIEF SOUGHT

A variety of criminal record subjects and interested parties brought this suit challenging the state's policy of routinely disseminating non-conviction criminal record information to public employers. The subjects alleged that arrests without dispositions were used incorrectly and abusively by the employers, and based their suit on their constitutional rights, including the state constitutional right of privacy. The lower court dismissed, and they appealed.

HOLDING

Reversed. The allegations in the subject's complaint, that non-conviction criminal records are improperly disseminated to and used by public employers, stated a prima facie violation of the state constitutional right of privacy.

BACKGROUND

Under California law, the state Attorney General was required to furnish arrest records to public employers for use in evaluating prospective employees. While the employers were generally forbidden from asking job applicants about arrests not resulting in convictions, the statutory scheme specifically stated that the state Department of Justice did not have to edit such arrest entries from the subjects' records before forwarding them to public employers.

SPECIAL NOTE

This was not a decision on the merits, but simply a determination that the dismissal was inappropriate.

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Oden v. Cahill
398 N.E.2d 1061
(Ill. App. Ct. 1979)

RELIEF SOUGHT

A successful police force applicant who had initially been denied employment by the civil service commission on the basis of expunged arrest records brought suit seeking back pay, seniority, and pension rights from the date she could first have been appointed, had those records not been considered. She based her action on her state constitutional right of privacy. The lower court dismissed the complaint for failure to state a cause of action.

HOLDING

Dismissal affirmed. Since the fact of the subject's arrest was in the realm of public knowledge, the city civil service commission's use of her expunged arrest records did not violate her state constitutional right of privacy, even though it did violate the court's expungement order.

BACKGROUND

The subject was arrested by the Chicago Police Department in December of 1968 and January of 1969, but was not convicted. In 1972 she passed the civil service test for policewomen; in 1974 she passed the physical examination. Shortly thereafter she obtained court orders expunging her arrest records, pursuant to state statute. A few days later the director of personnel for the police department transmitted the subject's arrest records to the Chicago Civil Service Commission, even though he knew of the expungement orders. One month later the Commission considered the subject's application to join the police force but stripped her of eligibility after reviewing her arrest records. Eventually the Commission was reversed by the circuit court, and the subject was appointed to the Chicago Police Department in 1976.

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Application of Jascalevich
404 A.2d 1239
(N.J. Super. Ct. 1979)

RELIEF SOUGHT

In this case the record subject, a medical doctor, had been tried for murder, sued by the estates of the decedents and investigated by the State Board of Medical Examiners, all during the same period. After his acquittal on the murder charges he requested expungement of all the related criminal records, as authorized by state statute. This case arose to resolve the issue of the availability of the various records arising out of the subject's arrest and trial to the civil litigants and to the State Board.

HOLDING

Since there was law enforcement objection to expungement of the subject's record, he was by terms of the statute limited to sealing as a remedy. The court ordered the sealing of all records as to which the subject had requested expungement, with two exceptions. First, there was to be no sealing of the public and hospital records in the prosecutor's files since the civil litigants were entitled to these by way of discovery. Second, despite the sealing order the State Board was to have full access to all records for use in its administrative proceeding in regard to the subject's license to practice medicine. As to all other records, access was to be granted to the civil litigants only upon a showing that their need to know outweighed any harm to the subject. And finally, the court ordered that once the State Board concluded its proceeding any material in the prosecutor's file which belonged to the subject was, upon request, to be returned to him.

BACKGROUND

The subject was indicted and tried on several murder counts. He was simultaneously sued by a number of decedents' estates, presumably on wrongful death actions. Those civil suits were stayed pending the outcome of the criminal trial. Upon being acquitted the subject asked that his criminal records be expunged. The civil litigants opposed his request, desiring access to those files for use in their suits.

Cross Reference: Pages 67 & 215

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

People v. A
415 N.Y.S.2d 919
(N.Y. Local Crim. Ct. 1978)

RELIEF SOUGHT

In this unusual case, two anonymous subjects, apparently cadets at the United States Military Academy, sought to avoid any possible ill effects flowing from their arrests on narcotics charges which had been dismissed in the interest of justice. The subjects here requested that all records reflecting their arrest and prosecution be sealed, and that the court prohibit any village police officers, West Point military police, officers of the Criminal Investigation Division at West Point, and any other police agency involved in the case from giving any testimony, information, or evidence against the subjects at any disciplinary proceedings held by the Corps of Cadets at the Academy, the Academy itself, the Department of the Army, or any other federal agency. They based their request on state statute.

HOLDING

By statute the court was required to seal all records of the case, making them unavailable to any person or public or private agency except as provided for in the statute. The court found no specific authority empowering it to enjoin testimony against the subjects, but noted that anyone doing so would not be given access to any official records. The court did emphasize the rehabilitative purpose of the sealing statute to the officials of the U.S. Military Academy and federal government who had filed affidavits on the subject's motion. And finally, the court ruled that the Federal Bureau of Investigation should, upon being notified of the court's order, return any records in its possession.

BACKGROUND

Few facts are given due to the anonymous nature of the case. The two subjects were arrested for possession of marijuana, but on motion of the district attorney the charges were dismissed in the interests of justice.

Cross Reference: Pages 39 & 275

DISSEMINATION OF RECORDS:
GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

In re Hecht
394 N.Y.S.2d 368
(Sup. Ct. 1977)

RELIEF SOUGHT

A state legislative committee investigating the juvenile justice system served a legislative subpoena on a city probation department, seeking Family Court probation records on a certain juvenile. The probation department brought this action in an effort to quash the subpoena, citing the statutory confidentiality given to records of juvenile proceedings.

HOLDING

It was within the power of the committee to inspect the subpoenaed records, on application to the court, since the probation records were relevant and material to the committee's inquiry.

BACKGROUND

The New York State Selective Legislative Committee on Crime, Its Causes, Control, and Effect on Society (the Marino Committee), while in the process of examining the juvenile justice system, became concerned with a highly publicized case in which a teenager who murdered an elderly widow was discovered by the media to have been adjudicated a juvenile delinquent a few months before the murder, based on a charge of rape, and committeed to a youth facility. In the course of its investigation into the matter the Marino Committee subpoenaed the youth's probation records from the New York City Department of Probation.

Cross Reference: Page 332

DISSEMINATION OF RECORDS:
GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Doe v. County of Westchester
358 N.Y.S.2d 471
(Sup. Ct. App. Div. 1974)

RELIEF SOUGHT

The County of Westchester, the County Sheriff and the District Attorney appealed from a lower court ruling enjoining the sheriff from disclosing the petitioner's youthful offender adjudication to the U.S. Army, ordering the county clerk to delete the petitioner's name from all public records and substitute an anonymous title and ordering the sealing of all papers in the proceedings.

HOLDING

Affirmed. The provisions of a state statute (CPL 720.35) mandate the nondisclosure of the youthful offender adjudication to the Army. The issue was not rendered moot by the fact that the Army recruiter already knew of the arrest and youthful offender adjudication when he visited the sheriff's office. Failure of the sheriff to divulge the adjudication would not violate section 1001 of title 18 of the U.S. Code.

BACKGROUND

The petitioner was convicted as a youthful offender and sentenced to a term in prison. He applied to have his sentence modified on the ground that he wished to join the Army. The sentencing court agreed to modify the sentence if the Army accepted the petitioner. The Army accepted him and he enlisted. When the petitioner later learned that the sheriff would disclose the arrest and disposition to the Army, he brought suit to enjoin the disclosure under the New York statute which bars any police agency from making available to any public agency any official records and papers relating to the case of a person adjudicated a youthful offender. Although the Army recruiter apparently already knew of the youthful offender record, neither party pressed the mootness issue because they wanted a decision on the crucial issue of the application of the statute to the Army in these circumstances.

Cross Reference: Page 334

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

S.P. v. Dallas County Child Welfare Unit of the Texas Department of Human Resources
577 S.W.2d 385
(Civ. App. Tex. 1979)

RELIEF SOUGHT

A criminal record subject who was released without prosecution on child abuse charges brought this appeal from a lower court's order limiting expungement of his records to those held by criminal justice agencies and officials. The subject argued that under the state expungement statute any records in the possession of the Department of Human Resources should also be destroyed. The lower court had held that the statute did not apply to the Department.

HOLDING

Reversed. The statute, which authorized expungement as to "all records and files relating to the arrest," did include the Department within its scope.

BACKGROUND

The subject was arrested in 1977 on charges of child abuse, but the county grand jury failed to return a true bill against him. He then moved for expungement of the resulting records and the lower court found him entitled to relief, though limiting it as stated. The Child Welfare Unit of the Department of Human Resources wanted to keep its records for use in a pending petition to terminate the subject's parental rights over his children.

SPECIAL NOTE

The court observed that the expungement order did not cover certain non-accusatory and investigative reports, except for any references to police records contained therein.

Cross Reference: Page 287

DISSEMINATION OF RECORDS: GOVERNMENT NON-CRIMINAL JUSTICE AGENCIES

Monroe v. Tielsch
525 P.2d 256
(Wash. 1974)
(en banc)

RELIEF SOUGHT

Juvenile arrest record subjects who were not convicted of the charges against them sued to obtain expungement of their complete arrest files, including previous arrests as well as the ones giving rise to this action. They based their suit on a constitutional right of privacy and cited impairment of educational and employment opportunities.

HOLDING

Denied. The legitimate uses to which the arrest records of unconvicted juveniles can be put are sufficiently valuable to justify their continued maintenance. The philosophy of the juvenile justice system, rather than supporting expungement, actually argues in favor of retention so that those records may help ensure appropriate treatment of minors in any future contact with the legal system. However, in light of the stigma attached even to mere arrestees, and since the unquestioned impairment of educational and employment opportunities which that stigma causes is directly contrary to the rehabilitative aim of juvenile justice, the court directed that juvenile arrest records may not be disseminated to prospective employers or non-rehabilitative educational institutions under any circumstances.

BACKGROUND

The four minor arrestees, ages 10, 14, 14, and 16, had a total of 25 arrests among them on charges including rape, robbery, and assault. In the case out of which this expungement motion arose they were all charged with indecent liberties, one was also charged with assault, and another with shoplifting, possession of a dangerous weapon, and burglary. They sought to expunge not only the immediate arrests but all prior arrests.

Cross Reference: Pages 105 & 342

Chapter 3

DISSEMINATION OF RECORDS: LITIGANTS

It is not uncommon for individuals involved in court proceedings ("litigants") to request that the court issue an order to a criminal justice repository to provide them with specified criminal history record information. Litigants, for example, may seek access to criminal history record information about co-defendants, adverse witnesses[25] or the opposing party.[26]

Statutory Standards

From a statutory or regulatory standpoint, litigant requests for access to criminal history records are governed by "rules of discovery" as set out in federal and state rules of civil and criminal procedure. The discovery rules generally take into account the relevance of the requested material, the burden of producing the record, and any privilege or other judicially cognizable interest that the party opposing production may be able to assert.

Judicial Standards

To the extent that it is possible to generalize about litigant access cases, a couple of points can be made. First, the courts are usually unsympathetic to requests by defendants for access to the criminal history records of co-defendants, witnesses or other parties. All of the cases that we have found deny defendants access to those records because of the potential for violation of the subject's privacy. However, the courts usually caution that in extreme circumstances, where the fairness of the defendant's trial is at stake, access would be provided.

Second, and by contrast, the courts usually are sympathetic to requests by defendants in civil actions such as libel or malicious prosecution, for access to even sealed criminal history records, if the record concerns the plaintiff's involvement in the event that is the subject of the civil suit. For example, in one case summarized in this chapter the plaintiff was arrested on a larceny complaint lodged by the defendants. The plaintiff was acquitted and her arrest record sealed, pursuant to a state statute. The subject then sued for false imprisonment and malicious prosecution based on her larceny arrest. The court said that a criminal record subject may not, in the interests of justice, assert a right to the sealing of records, while simultaneously maintaining a civil suit based on the sealed incident.[27]

The litigant access issue seldom presents problems for criminal justice agencies and their officials. In almost all such cases criminal justice agencies will not provide litigants with access to criminal history records except to the extent that a member of the public would have access. A litigant wishing to contest this policy is already in court and thus has a ready avenue for relief. Most criminal justice agencies that receive court orders requiring dissemination of records to a litigant will promptly comply--although the agency presumably has a right to judicially challenge such an order. More often the criminal record subject will contest the order.

[25] See, United States v. Martinello, 556 F.2d 1215 (5th Cir. 1977).

[26] See, Maxie v. Gimbel Brothers, Inc., 423 N.Y.S. 2d 802 (Sup. Ct. 1979).

[27] Maxie v. Gimbel Brothers, Inc., 423 N.Y.S. 2d 802 (Sup. Ct. 1979).

DISSEMINATION OF RECORDS: LITIGANTS

DISSEMINATION OF RECORDS: LITIGANTS

United States v. Brown
562 F.2d 1144
(1980)

RELIEF SOUGHT

This action involved an appeal from a criminal trial court's refusal to grant a conspiracy defendant discovery of his co-defendats' Bureau of Prisons records under the Freedom of Information Act (FOIA).

HOLDING

A defendant in a criminal trial may obtain discovery of government records under the FOIA without being required to bring a separate civil action. The prison records were also found to be discoverable under the FOIA, but any harm to the defendant from denial of his request was ruled harmless.

BACKGROUND

The defendant and four others were indicted for conspiracy. The defendant moved before trial to obtain Bureau of Prisons records on three of his co-defendants, basing his motion on the FOIA, but the trial judge denied the motion of the ground that the FOIA was not applicable to discovery in a criminal trial and the defendant should first file a routine FOIA disclosure request before seeking court intervention.

DISSEMINATION OF RECORDS: LITIGANTS

United States v. Martinello
556 F.2d 1215
(5th Cir. 1977)
(per curiam)

RELIEF SOUGHT

A federal defendant convicted of conspiracy brought suit seeking to obtain the presentence reports of his co-defendants. He alleged that the reports might contain prejudicial or inaccurate information concerning him. His motion was dismissed and he appealed.

HOLDING

Affirmed. Presentence reports are not public records and allowing disclosure would be against the public interest as it would interfere with the sentencing court's ability to obtain confidential information for use in the sentencing process.

BACKGROUND

The accused pled guilty to conspiracy but moved to delay sentencing so he could inspect the presentence reports prepared on his co-defendants by the United States Probation Officers.

DISSEMINATION OF RECORDS: LITIGANTS

Cowles Communications, Inc. v. Department of Justice
325 F.Supp. 726
(N.D. Cal. 1971)

RELIEF SOUGHT

A corporation brought suit under the Freedom of Information Act (FOIA) (out in draft) to obtain records from the office of the Director of the Immigration and Naturalization Service regarding a certain individual.

HOLDING

If records are "investigatory records compiled for law enforcement purposes" they are exempt from disclosure regardless of whether any enforcement proceeding is pending. However, the government cannot block disclosure by simply presenting an affidavit stating that requested records are investigatory, but must deliver the records for court inspection.

BACKGROUND

A company defending itself from a libel suit had earlier tried to subpoena records from the office of the Director of the Immigration and Naturalization Service pertaining to a named individual. The Service refused. In anticipation of another trial in the libel suit the company filed suit to obtain the records under the FOIA.

Cross Reference: Page 89

DISSEMINATION OF RECORDS: LITIGANTS

Craig v. Municipal Court
161 Cal. Rptr. 19
(Ct. App. 1979)

RELIEF SOUGHT

The subject in this case, charged with resisting arrest and assault and battery on highway patrol officers, obtained a court order directing the highway patrol to produce the names and addresses of all persons arrested by the officers on similar charges within the last two years. The highway patrol commissioner then obtained a higher court's order blocking production of the requested information, and the subject appealed.

HOLDING

Affirmed. The minor and speculative advantage to the subject in obtaining the desired records was insufficient to overcome the privacy rights of the third-party arrestees whose identities he sought to discover. This applied to records of both unconvicted individuals, whose privacy interest was high, and convicted individuals, whose testimony was least likely to be helpful to the subject.

BACKGROUND

The subject was arrested for resisting arrest and assault and battery upon officers of the California Highway Patrol, and apparently intended to defend on the ground that the officers had used excessive force. He was hoping to discover the names of arrested persons who had been abused by these officers but failed to complain.

SPECIAL NOTE

The court also observed that the subject already had the benefit of an order which would give him all records of complaints lodged against the officers for excessive use of force, so that in this action he was on what the court regarded as a fishing expedition.

DISSEMINATION OF RECORDS: LITIGANTS

Commonwealth v. Ferrara
330 N.E.2d 837
(Mass. 1975)

RELIEF SOUGHT

A criminal defendant convicted of manslaughter brought this appeal, alleging in part that the trial court erred in refusing the defendant access to juvenile records of a principle prosecution witness. The defendant wanted the records for use in impeaching the witness; the trial court withheld them on the basis of their statutory confidentiality.

HOLDING

Affirmed. The relevant statute clearly intended to confer broad confidentiality on juvenile records; the trial judge had not erred in denying them to the defendant.

BACKGROUND

The defendant was tried for murder and convicted of manslaughter. The only witness who claimed to have seen the shooting was a fourteen-year old with a significant juvenile record.

Cross Reference: Page 316

DISSEMINATION OF RECORDS: LITIGANTS

State ex rel. Curtis v. Crow
580 S.W.2d 753
(Mo. 1979)
(en banc)

RELIEF SOUGHT

In this action a defendant newspaper sought to obtain, by way of a discovery order served on the prosecuting attorney, access to expunged arrest and disposition records relating to a criminal record subject who was suing the newspaper for libel. The trial court ordered production of the records, and the record subject petitioned the Supreme Court to prohibit enforcement of the order. In opposing the petition, the newspaper argued that the expungement order was void on its face; that, if valid, it applied only to records open to public inspection and not to the prosecuting attorney's working file; that by bringing the libel action the subject waived his expungement rights; and that inspection of the prosecutor's file should be allowed to determine if parts of it, for example investigatory records, might be exempt from expungement.

HOLDING

The expunged records cannot be made available. The expungement order was not void on the basis that it did not recite the statutory prerequisites for expungement. Those prerequisites were merely elements the subject had to prove in order to invoke the statute, not jurisdictional elements which would have to be set forth in the order to give it validity. Second, the remedial intent of the expungement statute indicated it was not limited to public records open to inspection, and did apply to the prosecutor's file. Third, the subject did not waive his expungement rights by bringing this libel suit. And fourth, it would be contrary to the statutory purpose to allow inspection of the file in a search for exempt material. The newspaper was permanently barred from access to the file.

BACKGROUND

In 1972 the subject was convicted on a narcotics charge, but received a suspended sentence and was placed on probation. He was later discharged from probation and the court ordered the sheriff's office to expunge the subject's records pursuant to state statute. In 1975 the subject was prosecuted for attempted buggery; the prosecution was dismissed after a preliminary hearing. The newspaper printed a story on the later case and the subject brought suit for libel. The newspaper then sought access to the subject's criminal records from 1972 and 1975. This case dealt only with the 1972 narcotics conviction.

DISSEMINATION OF RECORDS: LITIGANTS

Application of Jascalevich
404 A.2d 1239
(N.J. Super. Ct. 1979)

RELIEF SOUGHT

In this case the record subject, a medical doctor, had been tried for murder, sued by the estates of the decedents and investigated by the State Board of Medical Examiners, all during the same period. After his acquittal on the murder charges he requested expungement of all the related criminal records, as authorized by state statute. This case arose to resolve the issue of the availability of the various records arising out of the subject's arrest and trial to the civil litigants and to the State Board.

HOLDING

Since there was law enforcement objection to expungement of the subject's record, he was by terms of the statute limited to sealing as a remedy. The court ordered the sealing of all records as to which the subject had requested expungement, with two exceptions. First, there was to be no sealing of the public and hospital records in the prosecutor's files since the civil litigants were entitled to these by way of discovery. Second, despite the sealing order the State Board was to have full access to all records for use in its administrative proceeding in regard to the subject's license to practice medicine. As to all other records, access was to be granted to the civil litigants only upon a showing that their need to know outweighed any harm to the subject. And finally, the court ordered that once the State Board concluded its proceeding any material in the prosecutor's file which belonged to the subject was, upon request, to be returned to him.

BACKGROUND

The subject was indicted and tried on several murder counts. He was simultaneously sued by a number of decedents' estates, presumably on wrongful death actions. Those civil suits were stayed pending the outcome of the criminal trial. Upon being acquitted the subject asked that his criminal records be expunged. The civil litigants opposed his request, desiring access to those files for use in their suits.

Cross Reference: Pages 50 & 215

DISSEMINATION OF RECORDS: LITIGANTS

Ulinsky v. Avignone
372 A.2d 620
(N.J. Sup. Ct. App. Div. 1977)

RELIEF SOUGHT

This case involved the issue of whether an acquitted criminal record subject who obtains expungement and then brings an action for malicious prosecution against those responsible for his arrest may deny the persons he is suing access to his records.

HOLDING

As a condition to maintaining a malicious prosecution suit a subject who has obtained expungement must consent to the request of those he is suing for inspection and copying of the expunged records. The subject must authorize the court to order the records custodian to make the records available to the defendants. The court in which the subject brings his suit will have jurisdiction to order disclosure, if consented to by the subject. If the subject does not consent his suit will be dismissed.

BACKGROUND

The subject was arrested for indecent exposure based on a complaint filed by the defendants in this case. He was acquitted and requested expungement of all records. Since there was no law enforcement opposition expungement was ordered. Several months later the subject brought suit against the defendants, alleging that the complaint had been filed falsely and maliciously. The defendants brought a motion before the judge who had ordered the subject's records expunged, requesting that he now order production of the records. The judge refused on the basis that he lacked jurisdiction to grant such an order.

SPECIAL NOTE

Under New Jersey law at this time, "expungement" consisted of removing records from the main files and placing them in the custody of a person who would see to it that the records were not disclosed to anyone, for any reason. While technically this is a strict form of sealing, the term "expungement" was used since New Jersey law also provided a lesser statutory remedy designated as "sealing."

Cross Reference: Page 216

DISSEMINATION OF RECORDS: LITIGANTS

Maxie v. Gimbel Brothers Inc.
423 N.Y.S.2d 802
(Sup. Ct. 1979)

RELIEF SOUGHT

In this case the defendants in a malicious prosecution suit moved that the plaintiff be required to consent to the unsealing of her earlier criminal records concerning the incident which gave rise to this action.

HOLDING

Relief granted. While the subject of sealed records will not be forced to waive the statutory sealing privilege, the subject may not in the interests of justice assert that right while simultaneously maintaining a civil suit based on the sealed incident. The court ordered the subject to either authorize release of the sealed records to the defendants or be marked off the court calendar, subject to restoration if she later obtained the records and delivered them to the court.

BACKGROUND

In 1976 the subject was arrested on a larceny complaint lodged by the defendants in this case. She was acquitted, and her records were sealed pursuant to state statute. She then sued the defendants for false imprisonment and malicious prosecution based on her larceny arrest.

Cross Reference: Page 218

Chapter 4

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Historically, the courts have been least receptive to arguments in favor of dissemination or access when the proposed recipient is a member of the public. The courts interpret the term public to include private employers and the media. Indeed, customarily the courts treat all requestors as members of the public except criminal justice agencies, non-criminal justice governmental agencies and litigants.

Despite persistent media arguments that their requests for access should not be treated as mere requests from the public (and despite informal policies in many jurisdictions that give media representatives a greater degree of access than other members of the public) the courts have consistently held that the media enjoys only the same access rights as belong to the public.

Thus, in Branzburg v. Hayes, the United States Supreme Court, in concluding that reporters do not have a constitutional right to protect the identity of their confidential sources, stated:

> (T)he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.[28]

Although the press cannot be denied access to information already in the public domain,[29] the Court has made it clear that such public information would be available generally and without discrimination to any member of the public.

> The Constitution does not . . . require government to afford the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources . . . and that government cannot restrain the publication of news emanating from such sources . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. The proposition finds no support in the words of the Constitution or in any decision of this Court.[30]

Dissemination of Original Records of Entry and Contemporaneous Data

Statutory Standards

The extent of public access depends, to a large degree, upon the type of criminal history record information being sought. In virtually all jurisdictions, for example, chronologically arranged, original records of entry that record arrest and charging information, and that are maintained at police station houses and by the courts, are treated as public records (either as a result of informal, long-standing policies or as an express matter of state or municipal law).

[28] 408 U.S. 665, 684 (1972) (citations omitted).

[29] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[30] Pell v. Procunier, 417 U.S. 817, 834-5 (1974).

Judicial Standards

With rare exceptions,[31] the courts have resisted occasional efforts by authorities to deny the public and the media access to this type of information. Where available the courts base this result on a statutory interpretation but, where necessary, the courts have been willing to say that the First Amendment demands that such records be open to the public. The courts' rationale for such openness seems to be that the Constitution requires authorities to make public certain types of basic, original information about governmental conduct and that countervailing public policies or constitutional considerations (such as personal privacy) do not outweigh the interest in access to this type of data.

For example, in Houston Chronicle Publishing Co. v. City of Houston,[32] a Texas state court ruled that the media have a First Amendment right to access to certain chronologically arranged, factual data such as the arrest sheet and police blotter and the first page of the offense report which supply basic information needed to report on crime and criminal activities.

The Houston Chronicle opinion is consistent with other state court decisions contained in this chapter. Thus, in Holcombe v. State,[33] the Alabama Supreme Court held that jail dockets and records which contain information describing each prisoner received into a local jail, his age, sex, identifying characteristics and the charged offense are public records and can be inspected by newspaper reporters.

In Dayton Newspapers, Inc. v. City of Dayton,[34] the Ohio Supreme Court held that a city jail log, which listed arrest numbers, names of prisoners, charges, dates, times and dispositions, was a public record and should be disclosed to a newspaper.

In Northwest Publications, Inc. v. Anderson[35] the Minnesota Supreme Court held that two county district courts could not prohibit the press from obtaining access to criminal complaint information or to the court's own arraignment files. The court said that only rare and extraordinary circumstances could justify a restraint such as this upon First Amendment rights.

At least a couple of courts have also suggested, without deciding, that even cumulative criminal history record information sould be available to the public in those instances where an individual has recently been arrested and his history is therefore a newsworthy matter of immediate public interest.

For example, in Tennessee Newspaper, Inc. v. Levi,[36] a newspaper claimed that the United States Attorney's policy of withholding information about individuals recently arrested of federal crimes violated the First Amendment, the Federal Freedom of Information Act and the Federal Privacy Act. The court's opinion did not mention the newspaper's constitutional claim, but, in holding for the paper on statutory grounds, the court did stress the legitimate and extensive public interest in contemporaneous arrest information.

The opinion states that individuals who are arrested or indicted:

> . . . become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private . . . this right (right of privacy) becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.[37]

[31] See, for example, Town Crier, Inc. v. Chief of Police, 282 NE2d 379 (Mass. 1972).

[32] 531 S.W.2d 177 (Tex. Ct. of App. 1975).

[33] 200 SO 739 (Ala. 1941).

[34] 341 NE2d 576 (Ohio 1976).

[35] 259 NW2d 254 (Minn. 1977).

[36] 403 F.Supp. 1318 (M.D. Tenn. 1975).

Dissemination of Cumulative, Non-Contemporaneous Arrest and Conviction Data

The courts have had a difficult time setting out a policy for dissemination of cumulative criminal history records in cases where the individual record subjects' history and activities have not become matters of public interest by virtue of a recent arrest.

Statutory and Administrative Standards

Of course, much of the dissemination policy for these records is set by statute or regulation. At the state level, many states flatly prohibit state agencies and, in some cases, local agencies from disseminating non-conviction information to the public. Some states also prohibit the dissemination of cumulative conviction information to the public.

At the federal level, the LEAA regulations, as previously noted, prohibit the dissemination of state and local non-conviction information to the public unless authorized by state or local law. The LEAA regulations do not place restraints on the dissemination of conviction information.

The Department of Justice regulations[38] prohibit the dissemination of federal criminal history data, including both conviction and non-conviction information, unless the subject has been arrested within the last year or charges are still actively pending.

At least one court has also held that the federal Freedom of Information Act, which makes all federally held written information available upon request unless the data comes within one of the Act's exemptions, does not require the dissemination of criminal history data. Malloy v. United States Department of Justice[39] held that FBI rap sheets are protected by the FOIA exemption which shelters information which, if disclosed, would constitute a clearly unwarranted invasion of privacy.

Judicial Standards: Paul v. Davis

It is also important to emphasize that once a jurisdiction decides to make criminal history information public (bearing in mind that, with perhaps a few exceptions, they are not under a constitutional compulsion to do so), neither the right to privacy nor any other constitutional doctrine restricts or conflicts with that decision. This statement could not have been made during the first part of the 1970's. However, as discussed earlier, the Supreme Court's 1976 opinion in Paul v. Davis, in the words of one federal district court, "snuffed out" the constitutional right of privacy for criminal history records.[40]

Paul v. Davis involved the following facts. In anticipation of the 1972 Christmas season the police chiefs of Louisville, Kentucky, and surrounding Jefferson County circulated a flyer to local merchants containing the names and photos of "active shoplifters," including Plaintiff Davis. Davis had been arrested for shoplifting some 18 months earlier but had never been convicted (although the charges were still pending). Davis sued the police chiefs for a violation of the federal statute (42 U.S.C. Sec. 1983) that makes it unlawful to deprive a person of his constitutional rights under color of state law.

Davis claimed that circulation of the flyer violated several of his constitutional rights, including his right of due process, his right to liberty (which Davis argued had been violated by the damage caused to his reputation), and finally, his right to privacy.

[37] Id. at 1321.

[38] "Federal System and Interstate Exchange of Criminal History Record Information", 28 C.F.R. (Subpart C), Section 20.30.

[39] 457 F.Supp. 543 (D.D.C. 1978).

[40] Hammons v. Scott, 423 F.Supp. 618, 619 (N.D. Calif. 1976) referring to Paul v. Davis, 424 U.S. 693 (1976).

In addressing the privacy claim the Supreme Court said that the constitutional right of privacy protects certain kinds of very personal conduct, usually related to marriage or procreation. The Court said that Davis' claim was unrelated to these types of privacy considerations, and concluded that the Constitution does not require criminal justice agencies to keep confidential matters that are recorded in official records.

> (Davis) claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based not on any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private" but instead on a claim that the state may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[41]

This is not to say that Paul v. Davis eliminates all constitutional arguments for prohibiting the public's access to criminal history records. For one thing, Paul v. Davis only indirectly involves the Constitution. The Supreme Court has traditionally taken a narrow view of actions brought under Section 1983. It is possible that the Court would have given the constitutional arguments a better hearing in another context.

Secondly, the charges against Davis were still actively pending at the time when the police circulated the flyer. Had charges been dropped or Davis been acquitted, the Court might have been more receptive to Davis' constitutional arguments.

To date, only two decisions have given careful attention to the effect of Paul v. Davis on the constitutional right of privacy in criminal history records. However, both courts interpreted Paul v. Davis broadly to hold that arrestees do not have a constitutional interest in prohibiting the dissemination of their arrest records.[42]

Pre-Paul v. Davis Constitutional Decisions

Paul v. Davis and its progeny appear to be sweeping away a rich accumulation of earlier constitutional case law which held that criminal justice agency dissemination of arrest record information (but not conviction record information) to the public could be a violation of the subject's constitutional right of privacy.[43]

Menard v. Mitchell[44] was perhaps the most influential and widely quoted pre Paul v. Davis constitutional privacy case involving dissemination of arrest record information. Menard was arrested for suspicion of burglary, but two days later charges were dropped, and Menard subsequently sued the FBI to purge his arrest record. The federal court of appeals' panel said that if the arrest was made without probable cause, there is a real question as to, "(W)hether the Constitution can tolerate any adverse use of information or tangible objects obtained as a result of an unconstitutional arrest . . ."[45]

Even if the arrest were made with probable cause, but the charges eventually resulted in a favorable disposition, the Menard Court felt that an order limiting dissemination (sealing) might be appropriate (although purging would not be) if the record subject could show that: (1) his pictures would be publicly displayed in a rogues gallery; or (2) his arrest record would be disseminated to employers; or (3) retention of the record would be likely to result in harrassment by government officials.

From a policy standpoint, one important point emerges from this analysis of the constitutional principles affecting public access to criminal history records: public access to this data is now largely a matter of federal and state statutory law and its implementing regulations as well as agency discretion.

[41] 424 U.S. at 713.

[42] Hammons v. Scott, 423 F.Supp. 618 (N.D. Calif. 1976); Rowlett v. Fairfax, 446 F.Supp. 186 (N.D. Mo. 1978); and, see also United States v. Schnitzer, 576 F.2d 536 (2nd Cir. 1977) cert. denied 435 U.S. 907 (1978) and United States v. Singleton, 442 F.Supp. 722 (S.D. Tex. 1977).

[43] See, for example, Davidson v. Dill, 503 P.2d 157 (Colo. 1972); Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971); United States v. Kalish, 271 F.Supp. 968 (D.P.R. 1967); Sullivan v. Murphy, 278 F.2d 938 (D.C. Cir. 1973); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); and Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975).

[44] 430 F.2d 486 (D.C. Cir. 1970).

[45] 430 F.2d at 491.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

CASE SUMMARIES

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Paul v. Davis
424 U.S. 693 (1976)
(Rehearing denied 425 U.S. 985 (1976))

RELIEF SOUGHT

An individual arrested for shoplifting brought this action, based on the federal civil rights laws, against county and city police chiefs for circulating his name and photograph to local businessmen in a compilation of "known shoplifters" while the charge against him was still unresolved. He asked for damages as well as declaratory and injunctive relief.

HOLDING

Distribution of the flyer did not deprive the plaintiff of his constitutional rights of liberty and due process and there is no constitutional privacy interest that is violated by dissemination of arrest records under the circumstances involved. Injury to reputation alone is not sufficient to establish a violation of the constitution.

BACKGROUND

While a shoplifting charge against the subject was still outstanding, his photo and name were included in a flyer of "active shoplifters" prepared and distributed to local businessmen jointly by the chiefs of the Jefferson County and Louisville, Kentucky police departments to help minimize holiday losses. The charge against the subject was dismissed shortly thereafter, but his supervisor saw the flyer and reprimanded him.

SPECIAL NOTE

This is the landmark constitutional dissemination case which, in the words of a subsequent federal court opinion, "snuffed out the constitutional privacy interest in the confidentiality of arrest records."

Cross Reference: Pages 15 & 149

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DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Cox Broadcasting Corp. v. Cohn
420 U.S. 469
(1975)

RELIEF SOUGHT

The father of a deceased 17-year-old rape victim brought an action for money damages against a television station that had obtained the victim's name from public court documents and identified her by name in television newscasts. He based his action on an invasion of privacy, grounded on a Georgia criminal statute making it a misdemeanor to broadcast or publish the name of a rape victim. The trial court granted summary judgment for the plaintiff and the television station appealed. The Georgia Supreme Court sustained the constitutionality of the statute as a legitimate limitation on the First Amendment right of freedom of expression.

HOLDING

Reversed. The protection of freedom of the press under the First and Fourteenth Amendments barred the state from imposing sanctions for the accurate publication of information obtained from judicial records maintained in connection with a public prosecution and open to public inspection. The legitimate interest of the public in criminal prosecutions and judicial proceedings outweighs the interests of privacy when the information involved already appears on public record and there is no allegation that it was obtained improperly.

BACKGROUND

The reporter obtained the facts of the case by attending the trial and taking notes, and he obtained the victim's name from the official indictments which were handed to him in the courtroom by the court clerk. The Supreme Court said that the Georgia legislature may protect privacy interests by prohibiting public documentation or other public exposure of private information. But once such information has been disclosed in public documents open to public inspection, the press cannot be sanctioned for publishing it.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Malloy v. United States Department of Justice
457 F.Supp. 543
(D.D.C. 1978)

RELIEF SOUGHT

An imprisoned federal criminal record subject brought suit under the Freedom of Information Act (FOIA) to compel disclosure of withheld portions of his Federal Bureau of Investigation (FBI) investigative file, including FBI rap sheets of persons other than the subject.

HOLDING

Disclosure denied under exemptions set out in the FOIA. Third-party FBI rap sheets are exempt from disclosure by Exemption 6 of the FOIA which exempts "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Rap sheets list arrests and charges regardless of whether they have resulted in conviction. Disclosure of such files would raise privacy considerations similar to those presented by disclosure of intimate details contained in personnel or medical files. Since the records relate to persons other than the plaintiff there is no public interest in disclosure of them to him that would outweigh the privacy interests involved, since his interest in them would be purely personal.

BACKGROUND

The plaintiff sought his "entire investigative file" from the FBI. The Department of Justice provided some of the file, but withheld portions that it claimed fell under exemptions in the FOIA. The plaintiff brought this action seeking the withheld documents.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Dobbs v. Huff
446 F.Supp. 35
(N.D. Ga. 1977)

RELIEF SOUGHT

Individuals arrested on tax fraud charges sued the Internal Revenue Service (IRS) agents involved for damages allegedly resulting from the publicity surrounding their arrests. They claimed that the manner in which the arrests were made violated their constitutional right of privacy, and was contrary to an IRS service manual.

HOLDING

Relief denied. Even if the persons sued were in fact responsible for publicizing the subjects' arrests, they had taken no actions which violated any of the subjects' constitutional rights. The court also declined to accord any legal force to the service manual cited by the subjects.

BACKGROUND

The subjects, who were engaged in the business of preparing individual income tax returns, were aware that they might be arrested and had asked to be allowed to surrender voluntarily. Instead, they were taken into custody at their place of business, with some customers present, and, since the IRS agents had notified the media, there were a number of reporters and photographers present when the subjects were brought to the United States Courthouse following their arrests. The subjects were convicted, but claimed that the agents had, by their actions, committed a constitutional tort against them. They also relied upon an IRS service manual which directed agents not to publicize arrests.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Philadelphia Newspapers, Inc. v. United States Department of Justice
405 F.Supp. 8
(E.D. Pa. 1975)

RELIEF SOUGHT

A newspaper brought this suit under the Freedom of Information Act (FOIA) to compel the Chairman of the United States Board of Parole to disclose the names of persons who had written letters in support of granting parole to a convict, a former city official. The Chairman refused on grounds that releasing the names would be a clearly unwarranted invasion of privacy, and that the letters were investigatory and therefore exempt from disclosure.

HOLDING

Disclosure ordered. Although release of the names would be an invasion of privacy, it would not be clearly unwarranted given the strong public interest in examining the basis for the parole of a convicted public official. The court likewise ruled that even if the letters were investigatory, their release would not be an unwarranted invasion of personal privacy in light of the public interest. And finally, the court concluded that the protection given to confidential sources whose names appear in investigatory records was primarily intended for informers, not persons who of their own volition write letters to a parole board.

BACKGROUND

The 39 letters involved were written to the United States Board of Parole recommending the granting of parole to a former Chairman of the Philadelphia City Commission who had been convicted of fraud, conspiracy, and obstruction of justice, and sentenced to six years in prison. The publishers of the Philadelphia Inquirer requested disclosure of the letters from the Chairman of the parole board under the FOIA. He refused for the reasons stated above. After the publishers instituted this suit the Board released the letters, but deleted all information which could identify the writers.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Tennessean Newspaper, Inc. v. Levi
403 F.Supp. 1318
(M.D. Tenn. 1975)

RELIEF SOUGHT

Various news media representatives sued the United States Attorney General and the United States Attorney for the Middle District of Tennessee seeking an order prohibiting them from withholding certain information about persons arrested or charged with violations of federal criminal statutes. The media based their action on the Privacy Act of 1974 and the Freedom of Information Act (FOIA).

HOLDING

Since the Privacy Act does not forbid the dissemination of the type of information sought and the FOIA requires it, the order would be granted.

BACKGROUND

Prior to the passage of the Privacy Act the U.S. Attorney had routinely provided the news media with "age, address, marital status, employment status, circumstances of arrest, the scope of the investigation leading to arrest or indictment, and other background material" on persons arrested or charged with violations of federal criminal laws. However, the U.S. Attorney read the Privacy Act as prohibiting the disclosure of anything beyond what was already on the public record and therefore discontinued his prior practice.

SPECIAL NOTE

The court, while granting the order, warned the media that there might be factual situations in which disclosure of the type of information involved in this suit might properly be withheld.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Urban v. Breier
401 F.Supp. 706
(E.D. Wis. 1975)

RELIEF SOUGHT

This class action was brought against a city police chief under the federal civil rights laws on behalf of 54 arrest record subjects named as dangerous motorcycle gang members by the city police department. The suit alleged that the subjects had been arrested for murder without probable cause, and asked that all resulting arrest records be expunged. The suit also asked that the court order the police department to recall and destroy leaflets it had prepared which displayed each subject's name and photograph, labelled him as a known gang member, and stated that many of the subjects were armed and used drugs. It was also requested that any further printing of the leaflets be prohibited.

HOLDING

Relief granted. Where arrest record subjects were arrested for murder without probable cause the unlawfulness of the arrests and the extreme infamy of the charge justified expungement on due process grounds. The police chief was ordered to expunge his department's own records on the subjects, and to recall and expunge any arrest or identification information disseminated to any agencies or persons, state or federal, governmental or private. The recall requests were to include notice that the arrests were made without a legally sufficient basis. The police chief was also ordered to retreive all the leaflets, from his own force as well as from any other law enforcement authorities, agencies, or persons, public or private, who received them, and forbidden from printing more.

BACKGROUND

A Milwaukee newspaper carrier was killed by a bomb which was apparently set in retaliation against a member of a motorcycle gang who had recently testified against members of a rival gang. In the following days the Milwaukee police arrested 54 known or suspected members of the gang which the police believed set the bomb. These persons were booked for murder and interrogated. The police later printed the leaflets and distributed them to area law enforcement agencies as well as within the Milwaukee Police Department.

SPECIAL NOTES

1. The court's order to expunge the arrest records was based on its inherent powers. The order to recall the leaflets was based on constitutional due process considerations.

2. Part of the court's reasons for directing recall of the leaflets appeared to be that it felt public access to some of the leaflets was otherwise inevitable in view of their widespread distribution.

3. In reaching its decision concerning the leaflets, the court relied in part upon a United States Circuit Court case which was later reversed by the Supreme Court (Paul v. Davis, 424 U.S. 693 (1976)). Paul v. Davis repudiates the rationale of the court's holding on the leaflets (damage to reputation alone as amounting to a violation of due process).

4. The court denied a request that the Milwaukee Police Department be allowed to transfer the subjects' fingerprints and photographs to a neutral, non-criminal identification file. The court expressed a very strong desire to ensure that no subject could ever be connected with the highly improper murder arrests, and that the department had no such existing files, suggesting that the "neutral" files might begin and end with the records of the 54 arrestees.

Cross Reference: Pages 24 & 166

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Fite v. Retail Credit Company
386 F.Supp. 1045
(D. Mont. 1975)
aff'd, 537 F.2d 384
(9th Cir. 1976)

RELIEF SOUGHT

A federal criminal record subject sentenced under the Federal Youth Corrections Act (FYCA) who was discharged from probation before the end of his maximum sentence and whose conviction was therefore set aside sued a credit reporting agency to enjoin it from disseminating his criminal records and to prohibit further maintenance of those records by the agency.

HOLDING

There is no evidence that either the FYCA or the Fair Credit Reporting Act were intended to conceal the existence of a set-aside conviction. General public policy does not support concealment, and since court records are traditionally public and the credit report was complete and accurate the subject was denied all relief.

BACKGROUND

The subject pled guilty to theft of government property and received a suspended sentence and one year's probation under the FYCA. He was discharged before the end of his probation period, resulting in his conviction being automatically set aside. He then procured employment as an insurance salesman, but was fired when his employer obtained a credit report on him which included records of his arrest, sentence, and the setting-aside of his conviction.

SPECIAL NOTE

Ths court disagreed with the cases that have said that a FYCA "set aside" amounts to expungement. The case was affirmed by the 9th Circuit Court of Appeals which noted that the issues had been adequately covered by the District Court.

Cross Reference: Page 303

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Quad-City Community News Service, Inc. v. Jebens
334 F.Supp. 8
(S.D. Iowa 1971)

RELIEF SOUGHT

Plaintiff, an "underground newspaper," brought this action under the Federal Civil Rights Act and the Iowa Public Records Act, seeking an injunction, as well as money damages against the city, based on city officials' refusal to permit it the same access to police investigative reports accorded to other newspapers and their refusal to issue a press pass to the plaintiff on the ground that it was not an "established" newspaper.

HOLDING

Judgment for plaintiff. The city may not refuse to permit plaintiff access to investigative reports under the "confidentiality" provision of the Iowa Public Records Act, if it has already made such reports available to other newspapers. Denying access to plaintiff while permitting access to other newspapers is also an unconstitutional classification under the equal protection clause of the 14th Amendment where no compelling grounds for the classification can be shown. Denying a press pass to plaintiff to provide identification at police and fire lines on the grounds that it is not an "established" newspaper violates the due process and equal protection clauses of the 14th Amendment, because the standard is not specific enough to meet constitutional requirements.

BACKGROUND

The plaintiff newspaper was a loosely organized limited circulation bi-weekly newspaper located in a private home. Its staff activities were performed on a voluntary basis and its stories and editorials were generally of an anti-establishment nature. The city denied it access and a press pass on the grounds that it was not a "legitimate" or "established" newspaper. But the city had no written policy defining what constitutes a legitimate or established newspaper and there were no local ordinances or regulations bearing on the question.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Cowles Communications, Inc. v. Department of Justice
325 F.Supp. 726
(N.D. Cal. 1971)

RELIEF SOUGHT

A corporation brought suit under the Freedom of Information Act (FOIA) (out in draft) to obtain records from the office of the Director of the Immigration and Naturalization Service regarding a certain individual.

HOLDING

If records are "investigatory records compiled for law enforcement purposes" they are exempt from disclosure regardless of whether any enforcement proceeding is pending. However, the government cannot block disclosure by simply presenting an affidavit stating that requested records are investigatory, but must deliver the records for court inspection.

BACKGROUND

A company defending itself from a libel suit had earlier tried to subpoena records from the office of the Director of the Immigration and Naturalization Service pertaining to a named individual. The Service refused. In anticipation of another trial in the libel suit the company filed suit to obtain the records under the FOIA.

Cross Reference: Page 63

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Holcombe v. State
200 So. 739
(Ala. 1941)

RELIEF SOUGHT

This suit sought a writ of mandamus in the name of the state on behalf of a group of newspaper publishers compelling the sheriff of Mobile County to permit the newspapers' representatives to review a list of prisoners, and other information about them (including age, sex, race and charges) kept by the sheriff pursuant to state statute. The lower court granted the writ and the sheriff appealed to the Alabama Supreme Court.

HOLDING

Affirmed. (1) The public generally has the right to inspect public records required by law to be kept by public officials. (2) Persons engaged in publishing newspapers perform the function of gathering information for the public, and thus have such an interest in public official records as to entitle them to due and reasonable inspection in order to disseminate correct information about the records to the public.

BACKGROUND

No background facts given other than those stated above.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

McCarthy v. Freedom of Information Commission
402 A.2d 1197
(Conn. Sup. Ct. 1979)

RELIEF SOUGHT

In this action by present and former police officers seeking to stay release of records of complaints and disciplinary actions against them, the subjects argued that a criminal record erasure statute should be extended to apply to their internal police records.

HOLDING

The erasure statute, which provided for expungement of criminal records in the event of acquittal, nolle pros., or absolute pardon applied in criminal cases only and could not be extended to cover internal complaints against police officers and records of disciplinary proceedings.

BACKGROUND

A Hartford, Connecticut newspaper obtained an order from the Freedom of Information Commission directing the city of New London to release various records concerning complaints lodged against New London police officers and reflecting the resulting disciplinary proceedings. A number of present and former police officers brought suit in an effort to block disclosure.

Cross Reference: Page 204

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

State ex rel. Tallahassee Democrat, Inc. v. Cooksey
371 So.2d 207
(Dist. Ct. App. Fla. 1979)

RELIEF SOUGHT

A newspaper brought this suit appealing a lower court's order sealing the court files in a pending criminal case. The newspaper argued that the trial court judge should have provided notice and a hearing before sealing the records, and that his sealing order should have set out specific reasons for the action.

HOLDING

Reversed and remanded. First, while the judge's procedure in sealing these records was acceptable, in the future a trial court issuing such a sealing order should post a copy of that order at the courthouse for 15 days after it is rendered. Second, such an order should include reasons specific enough to allow meaningful review on appeal. Since this order gave as reasons simply "the interests of Justice," the case was remanded for entry of specific reasons. And third, the trial judge had erred in stating that portions of the file did not need to be sealed, and then sealing them anyway.

BACKGROUND

In the underlying trial three men were charged with first degree murder and other crimes. The trial court, without notice or a hearing, ordered the court file sealed. The newspaper petitioned the trial court for reconsideration of its order; after a hearing the trial court denied the petition and the newspaper appealed.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Honolulu Advertiser, Inc. v. Takao
580 P.2d 58
(Hawaii 1978)

RELIEF SOUGHT

A newspaper brought this suit challenging a judge's action in sealing a preliminary hearing transcript of a controversial criminal case.

HOLDING

Sealing order affirmed. Since the hearing had been open to the public and the newspaper had had a reporter present, there were no constitutional issues involved. Further, given the judge's reasonable desire to minimize publicity in the interests of a fair trial, he had not abused his discretion in sealing the transcript.

BACKGROUND

In the underlying criminal case a great deal of controversy had arisen following the hearing judge's dismissal of a rape charge against the defendant. The newspaper apparently wished to publish the transcript to allow the public to see on what basis the hearing judge had acted. The judge issued the sealing order, fearing that publication would stimulate even greater publicity over the case, making it difficult to obtain a fair trial for the defendant on remaining charges.

Cross Reference: Page 262

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

State v. Stauffer Communications, Inc.
592 P.2d 891
(Kan. 1979)

RELIEF SOUGHT

A newspaper brought this appeal from its conviction for publishing the names of arrest warrant subjects before the warrants were executed. The conviction was based on state statute; the paper challenged the statute as unconstitutional.

HOLDING

Reversed. The newspaper could not constitutionally be punished for accurately reporting facts obtained from public records. The conviction was reversed, but the statute as so interpreted was left intact.

BACKGROUND

The Topeka Daily Capital, despite repeated warnings from the police, printed the names of two arrest warrant subjects prior to execution of the warrants. The names were obtained from public records in the office of the clerk of the district court, specifically from the criminal appearance docket.

SPECIAL NOTE

A concurring opinion observed that the county in which the warrants were issued had already sealed all records pertinent to the filing of complaints and the issuance of warrants until an arrest was made.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Carr v. Watkins
177 A.2d 841
(Md. 1962)

RELIEF SOUGHT

An individual brought this action for money damages against two county police officers based on their allegedly having told his employer of his having been charged several years previously with molesting a minor and drunkenness. He claimed he had been fired on the basis of that information, and sued on a number of counts, including slander, invasion of privacy, and divulgence of information without legal right. His case was dismissed and he appealed.

HOLDING

Reversed. The officers did not have an absolute privilege or immunity against liability. If it could be shown that the officers had acted with malice and outside the scope of their duties in communicating the information, they would be liable.

BACKGROUND

While working in the Naval Ordnance Laboratory in 1954 the subject was charged with molesting a minor and drunkenness. Apparently the only hearing on the charges took place before officials of the Laboratory. The individual was cleared and continued in his position. In 1960, while he was employed as a shopping center security guard, he alleges that two Montgomery County Police Department officers told his employer of those charges and that he was consequently fired.

The court disagreed with the trial court's finding that there is no tort of invasion of privacy in Maryland. It stated that recognition of the right had been rapid in recent years, and it saw no reason why there should not be compensatory redress for a wrongful invasion of privacy in a proper case.

SPECIAL NOTE

This case sought money damages against the police officers personally rather than against their police agencies. The court's ruling makes it clear that personal liability may result if public officials act outside the scope of their duties and with malice.

Cross Reference: Page 213

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

New Bedford Standard-Times Pub. Co. v. Clerk, etc.
387 N.E.2d 110
(Mass. 1979)

RELIEF SOUGHT

A newspaper brought this action seeking a declaration that an alphabetical index of judicial criminal records maintained by the clerk of court could not be withheld from public access under the Massachusetts Criminal Offender Records Information Act, and seeking an injunction ordering the clerk to make the index available or provide an equally convenient method of access to court dockets.

HOLDING

Relief denied. The statute prohibiting public access to alphabetical name indexes of criminal records did not violate the constitutional guarantee of freedom of the press, in the absence of a showing that the public interest in access outweighed the legislative intent to further the public's interest in privacy and rehabilitation.

BACKGROUND

The plaintiffs argued that the chronological dockets were available to the public and that withholding the alphabetical name index had the practical effect of denying convenient access to the chronological records. However, the court noted that current criminal events could be covered by the media in person, and that the public interest in media coverage faded after the termination of the proceedings. In terminated proceedings, the privacy interests of those not convicted and the rehabilitation of convicted offenders could properly be the reasons for a legislative decision to deny access to cumulative name indexed court records.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Town Crier, Inc. v. Chief of Police
282 N.E.2d 379
(Mass. 1972)

RELIEF SOUGHT

A newspaper brought this action to gain access to a town's arrest register and daily log, kept by the police department. The newspaper claimed that these were public records, and thus it was entitled to access.

HOLDING

Access denied. "Public records" are those records required to be kept by law, and this does not include all records made by public officials. There was no town by-law requiring the records in question to be kept. Further, even if these records were used to compile further records which were public, the public status of these further records did not render the register and log public.

BACKGROUND

The newspaper originally demanded access to the records in question from the Weston chief of police. The arrest register included the name, address, and crimes charged of each arrestee; the daily log contained information on investigations, arrests, and complaints received by the police. When the chief refused to release the records the paper brought suit, contending that the register and log were public records as defined by statute. That statute, which was not clearly worded, was advanced by the paper as defining as public records all records kept by public officials. In the alternative, the paper argued that since the register and log were used to compile statistical information which was required by law to be reported to the Commissioner of Corrections, the register and log also had to be kept by law and were therefore public records.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Northwest Publications, Inc. v. Anderson
259 N.W.2d 254
(Minn. 1977)

RELIEF SOUGHT

In this suit, newspaper publishers challenged the actions of two county district courts in prohibiting access to public records. In one instance the record was the complaint against a criminal defendant, and in the other instance the court had sealed its own court files in a criminal case.

HOLDING

Access granted. The facts did not reveal any circumstances which, in the rare and extraordinary case, could justify prior restraint on first amendment free press rights. The court accordingly forbade the district court judges from enforcing their restrictive orders.

BACKGROUND

Two different incidents were involved. In the first, an individual was charged with first and second degree murder, but the complaint was retained by the county clerk pursuant to a motion by the state and the court later issued an order prohibiting disclosure of the complaint to the news media. In the second incident, which also involved an individual charged with first degree murder, when the newspaper tried to look at the district court files it was denied access. The district court, after initially directing the clerk of the court to release the file, reversed itself on joint motion of the state and the defendant and ordered the file sealed.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

State v. Nolan
316 S.W.2d 630
(Mo. 1958)

RELIEF SOUGHT

Defendant was convicted of second degree murder and was given a life sentence under the Habitual Criminal Act on a finding by the jury that he had been convicted of a prior felony. He filed a motion for a new trial on several grounds, one of which was that introduction of evidence concerning the prior conviction invaded his constitutional right of privacy.

HOLDING

New trial denied and judgment affirmed. The court found that there is a constitutional right of privacy. But the constitution does not guarantee the secrecy of judgments in criminal cases. The Habitual Criminal Act furthers a strong public interest in the proper punishment of persons convicted of criminal acts which overrides the individual's right of privacy. Further, a person convicted of a crime forfeits any right of privacy he may previously have had.

BACKGROUND

The defendant had been convicted of the felony of manslaughter 22 years before and had been sentenced to a term in the reformatory for young men. He claimed that consideration of this prior offense under the Habitual Criminal Act was improper on several grounds, including the fact that the conviction was too remote to be considered, the fact that he was sentenced to serve a term in a reformatory rather than in the penitentiary as required by the Habitual Criminal Act, and the claim that reference to the prior conviction violated his right of privacy.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Kiss v. County of Putnam
398 N.Y.S.2d 729
(App. Div. 1977)

RELIEF SOUGHT

In this action a minor record subject sued the county and the news media for damages for disseminating information concerning the court proceedings associated with his adjudication as a youthful offender. He based his suit on his right of privacy and his rights under the Criminal Procedure Law. The lower court dismissed and he appealed.

HOLDING

Since in New York the right of privacy is purely statutory, and the minor had not claimed that his name was used for commercial purposes without his consent, he had failed to state a cause of action for invasion of privacy.

BACKGROUND

None given beyond those stated above.

SPECIAL NOTE

The court observed that since the subject did not claim that the information published was defamatory, there was no need to rule on whether the privilege which normally attaches to reports of judicial proceedings was unavailable when reports of youthful offender proceedings are involved.

DISSEMINATION OF RECORDS:
PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Dayton Newspapers, Inc. v. City of Dayton
341 N.E.2d 576
(Ohio 1976)

RELIEF SOUGHT

A newspaper sought an injunction compelling the chief of police to consider the city jail log (which listed prisoners' names, arrest numbers, charges, dates and dispositions) as a public record and make it available to the media pursuant to a state statute providing that all records "required to be kept" by any governmental unit are public records and shall be open to the public. The trial court denied the relief and the intermediate appellate court affirmed. The newspaper appealed to the state supreme court.

HOLDING

Reversed. A record is "required to be kept" by a governmental unit when the record is necessary to the unit's execution of its duties and responsibilities. The jail log is such a record, and is not within any exception in the statute, and thus it must be made available to the public.

BACKGROUND

The phrase "required to be kept" had not previously been construed by the State Supreme Court. The chief of police interpreted the phrase to mean "required by law to be kept" and denied access to the jail log which was not a legally required record.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Houston Chronicle Pub. Co. v. City of Houston
531 S.W.2d 177
(Civ. App. Tex. 1975)

RELIEF SOUGHT

A publishing company brought an action under the state Open Records Act challenging the city's refusal to allow it access to records maintained by law enforcement agencies, including offense reports, show-up sheets, police arrest blotters, arrest sheets, and personal criminal history records. The trial court held that the publishing company did not have a statutory right to access to the records and that certain sections of the Open Records Act were unconstitutional. Both parties appealed.

HOLDING

Reversed and remanded. The court held the Open Records Act to be constitutional. It found that the Act mandated press and public access to the police blotter, the show-up sheet and arrest sheet. However, the court found that the offense report and personal criminal history records were maintained for the detection and investigation of crime and for internal use in matters relating to law enforcement, and thus were within exceptions set out in the Open Records Act and could be withheld under the Act.

As to whether the publishing company had a constitutional right to these records aside from the state statute, the court found that the competing interests of freedom of press and privacy rights could be reconciled by granting access to the first page of the offense report, which contained basic information about the offender and the offense, but denying access to the rest of the offense report and to personal criminal history records, because these records contain information that is confidential or protected under the right to privacy.

The court also noted that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.

BACKGROUND

All of the records in dispute except the police blotter had routinely been made available to the press prior to the enactment of the Open Records Act. Subsequent to passage of the Act, the publishing company

requested access to airport security arrest records. The city declined and requested an Attorney General's opinion as to the meaning of the Open Records Act concerning law enforcement records. The opinion ultimately rendered granted only limited access to offense reports and denied access to personal criminal history records. Thus, the media found itself in a worse situation after passage of the Open Records Act than before.

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Doe v. Salmon
378 A.2d 512
(Vt. 1977)

RELIEF SOUGHT

This action involved a determination of the public's right of access to records of gubernatorial pardons.

HOLDING

Such records are available for public access. A gubernatorial pardon is an official act, of which by law a record must be kept. Such records are public. The court found no statutory authority for withholding the records, and ruled that a determination by the Governor that disclosure would be against public policy is not enough to justify secrecy. The court finally held that even the fact that the Governor had promised some of the pardon recipients that their records would be confidential did not empower him to prevent release of the information.

BACKGROUND

This case originated as a class action brought by a member of the state Parole Board and a recipient of a gubernatorial pardon. They sought, and received, a court order prohibiting the Governor and other state officials from making public any information relating to certain pardons. A number of news media representatives intervened on appeal, asking that the records be declared public. They claimed the right to publish the names of those pardoned and the crimes for which they had been pardoned.

Cross Reference: Page 383

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Monroe v. Tielsch
525 P.2d 250
(Wash. 1974)
(en banc)

RELIEF SOUGHT

Juvenile arrest record subjects who were not convicted of the charges against them sued to obtain expungement of their complete arrest files, including previous arrests as well as the ones giving rise to this action. They based their suit on a constitutional right of privacy and cited impairment of educational and employment opportunities.

HOLDING

Denied. The legitimate uses to which the arrest records of unconvicted juveniles can be put are sufficiently valuable to justify their continued maintenance. The philosophy of the juvenile justice system, rather than supporting expungement, actually argues in favor of retention so that those records may help ensure appropriate treatment of minors in any future contact with the legal system. However, in light of the stigma attached even to mere arrestees, and since the unquestioned impairment of educational and employment opportunities which that stigma causes is directly contrary to the rehabilitative aim of juvenile justice, the court directed that juvenile arrest records may not be disseminated to prospective employers or non-rehabilitative educational institutions under any circumstances.

BACKGROUND

The four minor arrestees, ages 10, 14, 14, and 16, had a total of 25 arrests among them on charges including rape, robbery, and assault. In the case out of which this expungement motion arose they were all charged with indecent liberties, one was also charged with assault, and another with shoplifting, possession of a dangerous weapon, and burglary. They sought to expunge not only the immediate arrests but all prior arrests.

Cross Reference: Pages 55 & 342

DISSEMINATION OF RECORDS: PRIVATE EMPLOYERS, THE MEDIA AND THE PUBLIC

Newspapers, Inc. v. Breier
279 N.W.2d 179
(Wis. 1979)

RELIEF SOUGHT

A newspaper brought this action under the Wisconsin Public Records Statute seeking an order compelling the chief of police to grant access to records showing the charges entered against arrestees. The chief opposed on the basis that disclosure would be against the public interest in protecting the arrestees' reputations.

HOLDING

Disclosure order granted. The public interest in disclosure of the charges made against arrestees outweighs the corresponding harm to the public interest in the form of possible damage to the arrestees' reputations.

BACKGROUND

The Milwaukee Journal initially requested access to a number of records from the Milwaukee Chief of Police. He granted access to some, but not all. Among those withheld were records showing the charges on which persons had been arrested. He gave as his reason the possible reputational and economic harm resulting to an arrestee who may later be charged with a lesser crime or acquitted. In this suit the actual record at issue was the Daily Arrest List, commonly referred to as the daily blotter, a chronological list of charges made at the time an arrestee was booked.

The Wisconsin Public Records Statute was passed in 1917. It states that public records shall be open to inspection unless expressly provided otherwise. The Wisconsin courts, however, have not interpreted the law literally. They have held that a public record custodian may withhold records if he can cite reasons for withholding them that would outweigh the legislative policy of full disclosure.

The court agrees that reputational damage might in some cases be such a reason, but, citing Paul v. Davis, holds that where arrest records are made public, the arrested person has no remedy for an invasion of his reputational interest.

PART II

MAINTENANCE OF CRIMINAL HISTORY RECORD INFORMATION

Although dissemination policy is a key issue from a privacy standpoint, record maintenance policies are perhaps more important to officials charged with responsibility for operating criminal history record systems. These officials are concerned daily about the law and policy that governs the creation, maintenance, management and internal use of criminal history records. The chapters in Part II bring together, describe and analyze the court decisions that deal with precisely these issues.

Both federal and state criminal justice agencies have implicit authority to maintain records about their official acts, including such acts as arrests and convictions. Indeed, one of the first statutes enacted by the Congress--popularly known as the "Housekeeping Act"--gives federal agencies broad authority to maintain records of their activities.[46] Furthermore, the courts have held that criminal justice agencies, including the courts, not only have a right, but a duty, to maintain chronologically organized, non-cumulative, original records of entry describing events such as arrests, arraignments, and criminal adjudications.

However, the law is by no means so clear cut or emphatic when it comes to setting policies for the creation and maintenance of name organized, cumulative criminal history records. There is no single, unqualified answer to this question: under what circumstances do federal, state and local criminal justice agencies have authority to maintain cumulative criminal history records which contain information about all of an individual's arrests and any subsequent dispositions? The courts, legislatures and administrative agencies have answered this question differently in different jurisdictions (and have from time to time changed their minds about their answers).

[46]Stat 28, July 27, 1789, 5 U.S.C., Sect. 301.

Policymaking Considerations

In setting maintenance policies, courts, legislatures and administrative agencies customarily take several factors into account. Perhaps the factor that is given the greatest weight is the utility of the record to criminal justice agencies. When the record of the arrest and the disposition is accurate, is reflective of a valid and proper arrest, and is recent, the record's utility to criminal justice agencies is high. Such records have obvious and recognized utility for identification and investigative purposes and for charging and sentencing purposes.

A second factor that the court decisions described in this part of the book recognize and discuss is the broader utility of the record to society. A criminal history record, unless wholly inaccurate, provides a description of a governmental action. Whether the action is right or wrong, proper or improper, the event nonetheless occurred and therefore, it is argued, a record should be made and preserved. In fact the record may serve not so much to penalize the individual--particularly if dissemination policy makes the record confidential or precludes its use in decisions about the individual--as to permit effective oversight and review of criminal justice agency activities.

The extent to which the record defames the subject or unfairly harms the subject is a third factor, or issue, that courts and other policymakers usually recognize. A government record about an individual that is inaccurate or incomplete has at least the potential to unfairly damage the subject. Of course, such a record is of little or no value to government agencies.

More difficult, but still compelling, questions are presented by records which, though accurate on their face, describe events, typically arrests, which should not have occurred. If the arrest was made without probable cause, or on the basis of an unconstitutional statute, some courts and legislators believe that a record should not be maintained. They argue that it is unfair to expose subjects of such arrests to the harms that flow from the existence of an arrest record.

A fourth factor sometimes taken into account, is the effect of an acquittal or other demonstration of innocence. Arrests that end in this kind of disposition, by definition, are not probative of criminal conduct, and thus, it is argued should not be maintained. However, it is often pointed out that arrest information, even with a disposition favorable to the subject, provides criminal justice agencies with useful, and indeed vital, information for identification and investigative purposes.

Moreover, a disposition favorable to the subject may be unrelated to the merits of the arrest. The favorable disposition may be a windfall to the subject that results from evidentiary or witness problems, prosecutorial caseload or other factors unrelated to the subject's culpability. Some criminal justice officials have argued that if police are not permitted to retain and use records which common sense argues are relevant, police record systems may be driven "underground." Police may resort to the use of informal, unregulated record systems, such as newspaper morgues.

A fifth factor, and one of the most difficult for courts and other policymakers, concerns the length of time that agencies should keep criminal history records. If a criminal history subject, who is not incarcerated, is free from any involvement with the criminal justice system for a substantial period of time, should his record be destroyed? And, if the record is destroyed what is the rationale? Should such a record be destroyed as a reward or incentive for good behavior, or as a simple reflection of the fact that the subject is now rehabilitated and therefore society does not need the record and the subject should not bear the burden of the record? Finally if such records are to be destroyed, what period of time during which the subject is free of involvements in the system should elapse, and should the period vary depending upon the type of record or the number of entries on the record?

A sixth factor discussed in some of the cases contained in the chapters in this part concerns the effect of governmental failure or wrongdoing on the maintenance of criminal history records. Some courts and legislatures have taken the view that when the government fails to act (by failing, for example, to press charges, or having pressed charges, failing to prosecute) or when the government acts improperly (by arresting or convicting, for example, on the basis of information obtained from an illegal search) the government should not be permitted to maintain a record of the relevant arrest or conviction.

A seventh and final policy consideration that provides a basis for placing restrictions upon the maintenance of some criminal history records is the notion that some classes of offenders deserve special consideration. Juvenile offenders are perhaps the prime example. Almost every jurisdiction severely limits the maintenance of juvenile justice records.

In addition, some jurisdictions seal records of adult first offenders who have committed certain kinds of crimes. Victimless crimes, such as drug use offenses, are a good example. The purpose of such standards is to give first offenders a "second chance" when the crime that they have committed does not result in direct physical or financial harm to another person.

Mechanisms for Setting Maintenance Policies

Sealing and Purge Statutes

In those circumstances where the courts, legislatures or administrative agencies determine that criminal history records should not be maintained, or, at the least, should be maintained subject to strict limitations, several mechanisms are available. The most important mechanism is a statutory direction to seal or purge a record. A purging (destruction) of the record represents the ultimate maintenance limitation. The record simply ceases to exist. A seal order, removing the record from the agency's standard record-keeping system and prohibiting its dissemination or use except in limited and clearly defined circumstances, is a hybrid remedy.

As pointed out in the dissemination discussion, a seal order, in a very real sense, sets a dissemination policy. However, because a sealed record is ordinarily maintained apart from an agency's other records (at least in manual systems) and ordinarily cannot be routinely used, even within the agency maintaining the record, sealing orders also set a maintenance policy. For this reason, court decisions involving sealing orders are discussed in this part of the book.

By the end of the 1970's most states had enacted statutes permitting or requiring the sealing and purging of criminal history records. Research indicates that just over 40 states have adopted statutes that specifically regulate the sealing or purging of criminal history records. At the federal level, a few statutes provide a basis for a sealing or purging remedy.

With one exception, constitutional standards do not limit the scope or nature of statutory sealing and purging remedies. The one exception, accepted by some but not all courts, holds that legislatures are restrained by the Constitution from requiring courts to purge or seal their own records. According to these courts, such requirements would violate the rights that each of the three branches of government enjoy under the Constitution's separation of powers clause. For example, in People v. Chapman[47] a California court of appeals panel suggested that a statute that required the purging of court records would be unconstitutional:

> "(t)he integrity of the court system requires that the courts have sole custody and control of their own records."[48]

Variations in state sealing and purging laws are sufficiently great that only a few generalizations can be made. First, sealing is a more common statutory remedy than purging. However, a substantial minority of states permit the purging of records either as the sole remedy or, more commonly, as a substitute remedy for sealing.

Second, a great majority of the states require record subjects to petition a court in order to obtain a sealing or purging order. Only a few state statutes direct criminal justice agencies (or the courts upon dismissal of charges or an acquittal) to "automatically" purge or seal records. South Carolina's statute is an example of an especially strong automatic purging procedure. The South Carolina code requires agencies to automatically purge arrest records upon notification that charges were dropped or that the subject was acquitted.[49]

Although most statutes require record subjects to petition a court, the statutes differ greatly in the amount of discretion that they give courts. Some statutes give the courts enormous discretion to take into account such subjective factors as the extent of the subject's rehabilitation, or his "good moral character."[50] For example, Nevada permits courts to seal conviction records if certain conditions are met and the court is satisfied that the subject is "rehabilitated."[51]

By contrast, many other states sharply limit the extent of a court's discretion.

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[47] 132 Cal. Rptr. 831 (1976).

[48] 132 Cal. Rptr. at 833.

[49] S.Carolina Code 17-1-40.

[50] See, Idaho Statute 19-2604(1); Kansas Statute 21-4617; Michigan Statute 780.621; Minnesota Statute 638.01 subd. 2; Utah Statute 77-35-17.

[51] Nev. Rev. Stat. 453.336(d)(5).

For example, some statutes stipulate that the courts must seal records, upon the subject's request, if the subject has completed parole or probation. Other statutes require courts to seal or purge records if the subject has completed a specified period of years without criminal involvement. Still other statutes make sealing or purging mandatory upon the occurrence of a particular event such as dismissal of charges and the subject's petition.[52]

Texas, for example, requires courts to grant requests for purging orders if the subject can show that charges were never filed; or if charges were dropped because of a mistaken arrest; or if there is no disposition and no charges pending and the subject was not convicted of a felony for at least five years prior to the arrest in question.[53] Colorado goes further. It almost completely eliminates the court's discretion by requiring courts to grant a request for a sealing order unless the attorney general files an objection.[54]

Third, a substantial number of statutes authorize a record subject who has obtained a seal or purge order to deny subsequently the occurrence of the criminal event to which the record relates. This immunity almost always covers employment applications and may cover licensing applications, as well as other governmental requests for information.[55] However, virtually every state, no matter how generous its grant of immunity, permits the sealed or purged record to be pleaded and proved in a subsequent criminal prosecution.[56]

Other Statutory Mechanisms

In addition to sealing and purging statutes, agency maintenance policies are regulated in many jurisdictions by basic recordkeeping and record retential and archival statutes. In many jurisdictions these statutes identify the types of records that an agency can create or maintain, and/or the length of time that such records can be maintained.

Although such statutes may have the same effect as sealing or purging statutes, they differ from such statutes in that their customary purpose is to promote cost-effective, efficient record management rather than to protect the interests of record subjects. Thus, such statutes never require action by the criminal record subject to initiate the record destruction or the transfer to an archives.

Numerous other statutory and regulatory provisions give criminal record subjects a right to update, amend and correct records that are judged to be incomplete or inaccurate. These statutes are discussed in some detail in the chapter that concerns the maintenance of inaccurate or incomplete records.

Judicial Remedies

Even in the absence of a statute or regulation, some courts have been willing to set policies for criminal history record maintenance based on their interpretation of Constitutional standards or on their own inherent authority to police the activities of administrative agencies. Until 1976, the courts seemed to be about evenly split between those that were willing to set maintenance policies without a statute and those that believed that maintenance policies could only be authorized by statute.

[52] See, for example, Delaware Statute 11 Sect. 4332(i); Maine Statute Tit. 15 Sect. 2162-A; Oklahoma Statute Tit. 22 Sect. 991C.

[53] S.B. No. 374 entitled "Expunction of Criminal Records - Procedures and Fees."

[54] Colorado Rev. Statute 24-72-308.

[55] See "Expungement in Ohio: Assimilation Into Society for the Former Criminal", Akron L. Rev. 8:480 (Sp. '75); and see, for example, Kansas Statute 21-4616(b) and 26-2617(d); Ohio Statute 2953-33(B); Oklahoma Statute 2-410.

[56] See, for example, Arizona Statute 13-807; Minnesota Statute 638.02; North Dakota Statute 12-53-18-19; Ohio Statute 2953.32(e); Oklahoma Statute 2-410.

However, the trend in recent decisions, sparked, no doubt, by the Supreme Court's decision in Paul v. Davis, is to reject constitutional and other court authored maintenance requirements, and instead, refuse to provide relief unless authorized by legislation.

At best, it is difficult to generalize about the several dozen decisions that have purged or sealed records on constitutional grounds. These courts have differed in the criteria or conditions that they use in determining that a criminal record is sufficiently flawed to permit purging or sealing. They differ in their analysis of the constitutional rights that are at stake--although the term privacy is often used. And when the term privacy is used the courts certainly differ in their analysis of the scope and nature of a constitutional right of privacy. However, the courts largely agree that when a court-authorized remedy for a constitutional violation is appropriate, that remedy should be purging rather than sealing.

In addition to a constitutionally based remedy, many decisions, including several that have been decided since Paul v. Davis, hold that the judiciary has inherent equitable powers to right governmental wrongs, correct governmental errors, and insure that individuals receive just treatment. The courts have said that, on occasion, the exercise of those powers requires that the courts set maintenance policies for criminal history records.

In order to convince a court that it should use its equitable powers to purge, seal or simply order a correction or amendment, a record subject, ordinarily, must show that the records are flatly inaccurate; or that a criminal justice event (such as an arrest or conviction) was achieved by improper or illegal means; or that the maintenance of the record is otherwise improper or illegal.

In contrast to those cases that recognize a non-legislative basis for setting maintenance policies, many courts maintain that only the legislatures, or legislatively authorized administrative agencies, can set such policies.[57] According to these courts, nothing in the Constitution limits a criminal justice agency's authority to retain and/or use criminal history records.

A few other courts acknowledge that the Constitution may be offended by retention and use of criminal history records in some extreme circumstances, but conclude that the subject's constitutional interests are almost always outweighed by the state's interest in maintaining such data. They admit that the judiciary has the power to set maintenance standards, but conclude that, absent truly extraordinary circumstances, such relief should be avoided absent legislative authorization.[58]

This sentiment was expressed by the court in Kolb v. O'Connor.[59] The opinion stated that if there was even a "minute possibility" that retention and use of a person's arrest record might help to prevent a crime or apprehend an offender, that interest outweighs any "conjectural harm" to the subject that might result from dissemination.

Pardons

Finally, record maintenance policies may be affected by gubernatorial pardons. A full pardon is a grant of absolution to an

[57] See, "Constitution Does not Protect an Individual From Being Labeled a Criminal," S.W.L.J. 30:781 Fall '76; and see, "Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response," Seton Hall L. Rev. 5:864 (1974) and their list of citations with capsule descriptions at p. 870, ftnote 28.

[58] See, Alexander and Walz, "Arrest Record Expungement in California: the Polishing of Sterling," Univ. of S. Fran. L. Rev., 9:299 (1974).

[59] 142 N.E. 2d 818, 822 (Ill. 1957); and, see also, United States v. Dooley, 364 F.Supp. 75 (E.D. Pa. 1973); Sterling v. Oakland, 24 Cal. Rptr. 969 (1962).

individual which relieves him of most of the legal consequences of his crime.[60] Most states vest the pardon power in their governors and permit the granting of pardons at the governor's discretion, both to those thought to be guilty and those thought to be innocent.

With the exception of a couple of states, most jurisdictions do not automatically seal or purge the record of an event for which the subject receives a pardon.[61] However, pardons are generally treated as a favorable disposition. Thus in states that permit subjects to seek a purging or sealing order on the basis of a favorable disposition, the pardon provides such a basis.

Organization of Record Maintenance Chapters

The decisions have been organized into chapters that, with a few exceptions, group cases according to the alleged "defect" that makes unrestricted maintenance of the record inappropriate. Part II is comprised of the following chapters:

- Maintenance of Records: Innaccurate or Incomplete
- Maintenance of Records: Illegal or Improper Arrest or Conviction
- Maintenance of Records: Arrests Ended in Acquittal or other Demonstration of Innocence
- Maintenance of Records: Arrests Ended in Dismissal or Not Pursued
- Maintenance of Records: Juvenile Offenses, First Offenses, or Special Category Offenses
- Maintenance of Records: After Subject Established Clean Record Period
- Maintenance of Records: After Subject Received Gubernatorial Pardon

[60] Humbert, The Pardoning Power of the President, American Council on Public Affairs, pp. 22-27 (1941).

[61] See, for example, Connecticut Statute 54-90(d) and Maine Statute 2161-A.

Chapter 1

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Statutory and Regulatory Standards

If one generalization about maintenance standards can be made with safety, it is that the law requires criminal justice agencies to adopt procedures and practices that are reasonably designed to insure that their criminal history records are accurate and compiete. The LEAA Regulations require state and local agencies covered by the regulations to maintain accurate records (meaning records that do not contain erroneous information). Furthermore, the Regulations require the state repository to maintain complete records (meaning that the record must contain any dispositions occurring within the state within 90 days after the disposition has occurred.[62] As will be noted in Part III of this book, the LEAA Regulations provide subjects with access to their records largely for the purpose of permitting them to challenge their record's accuracy and completeness.

In instances where these LEAA standards do not apply (because the local agency did not receive LEAA monies or because the LEAA completeness standard applies only to the state repository) state and local agencies, in most states, are covered by similar state statutory or regulatory provisions. Most state statutes authorize subjects to request criminal justice agencies to correct, amend or delete inaccurate or incomplete information. If the criminal justice agency agrees with the subject's requested changes, it must delete the objectionable entries or make other changes.

Massachusetts' Criminal Offender Record Information Act, for instance, permits subjects to see their criminal history data and petition the agency to "purge, modify or supplement" inaccurate or incomplete information.[63] Statutes in some jurisdictions authorize record subjects to bring a court action if the criminal justice agency refuses to make the requested changes.

Federal statutes and regulations apply similar accuracy and completeness standards to federally held criminal history records. The Department of Justice's Regulations, for example, authorize criminal history subjects to petition the Department of Justice for the correction or updating of records that they believe are inaccurate or incomplete.[64]

Several federal statutes also provide criminal history subjects with certain rights to contest allegedly inaccurate or incomplete information. For example, criminal history subjects can use the All Writs Statute to bring an action for a writ of coram nobis to require federal agencies to correct, amend or delete erroneous facts in criminal history records.[65] The Federal Privacy Act of 1974 may, in some circumstances, give subjects of federal criminal history records a right to review, amend or delete inaccurate or incomplete information.[66]

Judicial Standards

In the absence of a statutory duty to maintain accurate and complete records (and a corollary right belonging to criminal history record subjects to obtain the correction or amendment of such records), the

[62] 28 C.F.R., Sect. 20.21(a).

[63] Mass Criminal Offender Record Information Act, Sect. 175.

[64] 28 C.F.R., Sect. 20.34(b).

[65] 28 U.S.C., Sect. 1651.

[66] 5 U.S.C., Sect. 552a.

courts have been, and continue to be, willing to impose such a duty. In the view of many courts, the Constitution will not tolerate the government's maintenance of inaccurate or incomplete information about individuals, at least in circumstances where the information may be used to make decisions about the individuals.

Thus in Tarlton v. Saxbe,[67] a federal court of appeals panel held that the FBI may have a duty to take reasonable measures to insure the accuracy and completeness of information in its files. Although the decision was based primarily on statutory grounds, the court noted constitutional implications:

> (G)overnment collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment.[68]

Another federal district court opinion, Maney v. Ratcliff,[69] found potential constitutional violations when criminal justice agencies maintain out of date and therefore inaccurate records. The plaintiff was subjected to repeated arrests because a fugitive warrant entry in the FBI's National Crime Information Center had not been updated to indicate that Louisiana officials had declined to pursue extradition.

In the case of the United States v. Kalish,[70] involving a motion to expunge an arrest record created by a mistaken arrest, a United States district court granted a motion to expunge the record on the grounds that preservation of such a record constituted an "unwarranted attack upon his (the record subject's) character and reputation and violated his right of privacy as well as his dignity as a human being..."

This chapter includes several other cases in which courts have held that it is a violation of record subjects' constitutional rights for a criminal justice agency to maintain inaccurate or incomplete records.[71]

The courts, as noted earlier, have also been willing to impose maintenance standards as an exercise of their inherent powers to police governmental activities and insure that citizens are not treated unfairly or improperly. In Bradford v. Mahon,[72] the record subject was involved in a one-car accident and was arrested for reckless driving. The subject alleged that the arresting officer, in filling out the accident report, falsely indicated that the subject was under the influence of alcohol. The Kansas Supreme Court held that the courts have the power to order correction or purging of inaccurate criminal history record information when the harm to the record subject outweighs any benefit to society from the maintenance of the information.

Special Accuracy and Completeness Problems

Several of the court decisions in this chapter deal with one or the other of two accuracy and completeness issues that often reach the courts: (1) what standard must the subject meet to convince an agency that his record must be corrected; and (2) when more than one criminal justice agency maintains the same criminal history record, which agency has the duty to insure that the records are accurate and complete?

[67] 507 F.2d 1116 (D.C. Cir. 1974).

[68] 507 F.2d at 1124.

[69] 399 F.Supp. 760 (E.D. Wisc. 1975).

[70] 271 F.Supp. 968, 970 (D.C.P.R. 1967).

[71] Shadd v. United States, 389 F.Supp. 721 (W.D. Pa. 1975) aff'd 535 F.2d 1247 (3rd Cir. 1976) cert denied 431 U.S. 919 (1977); United States v. Mackey, 387 F.Supp. 1121 (D. Nev. 1975).

[72] 548 F.2d 1223 (Kan. 1976).

The courts have set a high standard for record subjects to meet in order to convince agencies that their records must be corrected. In White v. State,[73] the California Supreme Court held that there is no duty on an agency's part to alter a subject's criminal history record on the basis of the subject's unsubstantiated claim that the record contains inaccurate or incomplete information.

In Pruett v. Levi,[74] a federal appeals panel held that a simple claim by the record subject that a file is inaccurate, without more, and without identification of specific inaccurate entries, is too vague to create a duty on the part of a criminal justice agency (in this case the FBI) to correct criminal history records. Moreover, and importantly, the court indicated that in order to have a cause of action the record subject would have to be able to show that the record had been used or disseminated. Mere maintenance of even inaccurate records without use or dissemination does not violate the FBI's duties. Most other courts have not required such a showing. Normally mere maintenance and the potential for future use is sufficient.

In regard to the question of which criminal justice agency has primary responsibility for accuracy and completeness when more than one agency maintains a record, the courts have not provided a definitive answer. Some courts, for example, have ruled that criminal justice repositories, such as the FBI, do not have a constitutional duty to check the accuracy of the records which they receive from state and local agencies.[75]

This view, often called the "passive recipient theory," has been criticized by other courts. Tarlton v. Saxbe[76] and Menard v. Saxbe[77] both hold, partly on statutory grounds and, at least as to Tarlton, partly on constitutional grounds, that the FBI--and implicitly other repositories--have a duty to have procedures in place to assure that all of the records being maintained are accurate and complete.

More recent decisions suggest that the prevailing judicial view is that repositories have a duty to assure the accuracy and completeness of all of the records maintained by the repository regardless of source. Indeed, at least one recent decision held a repository liable to a recipient criminal justice agency for damages caused to the recipient agency after that agency used inaccurate information provided by the repository.[78]

Certainly as a matter of prudence, repositories are well advised today to have procedures in place that are reasonably designed to insure that all of their criminal history records, including records received from other states or jurisdictions, are up to date, accurate and complete.

[73] 95 Cal. Rptr. 175 (Cal. 1971).

[74] Civ. Act. No. 78-1089 (6th Cir. 1980).

[75] Crow v. Kelley, 512 F.2d 752 (8th Cir. 1975).

[76] 507 F.2d 1116 (D.C. Cir. 1974).

[77] 498 F.2d 1017 (D.C. Cir. 1974).

[78] Testa v. Winguist, 451 F.Supp. 388 (D.R.I. 1978) but see, Walkowski v. Macomb County Sheriff, 236 NW.2d 516 (Mich. 1975).

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

CASE SUMMARIES

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Pruett v. Levi
622 F.2d 256
(6th Cir. 1980)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought suit against the Attorney General seeking expungement or correction of allegedly inaccurate and incomplete entries in his FBI file. He claimed that these erroneous entries had hindered him in obtaining a court review of his case or a favorable review by the pardon and parole board, and that the entries violated his right of privacy. The lower court dismissed for failure to exhaust administrative remedies, and he appealed.

HOLDING

Where, prior to suit, a record subject merely told the FBI that his record was inaccurate without challenging particular entries, the failure of the FBI to act on his complaint did not give the subject grounds for bringing suit. The subject must first exhaust his administrative remedies by affording the FBI the opportunity to consider a specific complaint, and by also directing requests for expungement or correction to the appropriate state and local law enforcement agencies. Also, a simple claim that a file is inaccurate, without alleging improper use or dissemination in the face of a request for correction, does not state a legally sufficient cause of action (citing Paul v. Davis).

BACKGROUND

The record subject had received a copy of his FBI file and apparently sent a general challenge of its accuracy to the FBI. The FBI stated that his letter did not specify any particular entries as those challenged. He then brought this suit seeking to force the FBI to act.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Crow v. Kelley
512 F.2d 752
(8th Cir. 1975)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject sought an order requiring the FBI Director to remove all false, illegal, and unconstitutional information regarding him from the FBI files. He based his request on the due process clause of the fourteenth amendment of the constitution.

HOLDING

Relief denied. Although the FBI has a limited duty to prevent the dissemination of inaccurate criminal records, the FBI has no affirmative duty to check the underlying constitutional validity of arrests and convictions set out in records transmitted to it. Therefore, when a criminal record subject challenges the underlying validity of arrests and convictions recorded in his FBI criminal record file, the challenge should be made to the local law enforcement agencies that submitted the entires, not to the FBI.

BACKGROUND

Possibly worried about his parole opportunities, the criminal record subject, while in prison, brought this suit against the FBI Director. He had not previously requested relief from any of the state or local authorities involved in the challenged arrests.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Tarlton v. Saxbe
507 F.2d 1116
(D.C. Cir. 1974)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought suit seeking expungement from his FBI file of certain arrest entries without dispositions, and of other arrests and convictions which he alleged had been unconstitutional. His action was dismissed in the lower court for failure to state a cause of action, and he appealed that dismissal.

HOLDING

Reversed and remanded. The FBI does have a duty to ensure that records which it maintains and disseminates are reasonably accurate. This duty arises both as a corollary of the statute empowering the FBI to collect and maintain records, and from the constitutional rights of criminal record subjects. A cause of action therefore does exist where an FBI criminal record subject charges that the FBI has violated its duty to prevent dissemination of inaccurate arrest and conviction records.

BACKGROUND

The subject's FBI criminal record file contained a number of arrests without dispositions; he also alleged that certain of the arrests and convictions had occurred in violation of his constitutional rights. He claimed that this inaccurate information had caused him sentencing and parole problems in the past, and could do so in the future.

SPECIAL NOTE

The court observed that a number of practical factors would have to be considered in setting out the exact extent of the FBI's duty of accuracy. The court did not define the duty, but remanded the case to the District Court for a determination, after hearing, of the appropriate standard of reasonable care within the FBI's capacity. (See Tarlton v. Saxbe, 407 F.Supp. 1083 (D.D.C. 1976), in which the District Court on remand spelled out some aspects of the FBI's duty and ordered a feasibility study of other aspects.)

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Menard v. Mitchell
430 F.2d 486
(D.C. Cir. 1970)
(Menard I)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court denied relief and plaintiff appealed.

HOLDING

Reversed and remanded. In view of the possible adverse effects on the plaintiff of maintenance of the record of his arrest and detention, including the possibility of dissemination of the record, the mere fact of the arrest did not justify maintenance of his fingerprints and arrest record. Since the record in the district court was insufficient to warrant summary judgment for either party, the matter was remanded for further proceedings, including a determination of whether the arrest was based on probable cause, whether the arrested subject was later completely exonerated and what further dissemination of the record might be possible.

BACKGROUND

The record subject was taken into custody in Los Angeles and held for two days at which point the complaint against him was determined to be groundless and he was released without being formally charged. Under a California statute the incident was required to be classified as a "detention" rather than an arrest. The record subject argued that the detention record was not a criminal record and thus could not legally be maintained in the FBI's criminal identification files, where it had been routinely forwarded by the local police. After being notified of the reclassification of the subject's police encounter, the FBI changed its records to show that the subject had been detained, not arrested. However, it refused to expunge the record.

Cross Reference: Page 237

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Menard v. Mitchell
328 F.Supp. 718
(D.D.C. 1971)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court denied relief and the plaintiff appealed to the U.S. Court of Appeals for the District of Columbia, which reversed and remanded. This is the remand decision.

HOLDING

Expungement denied. Injunctive relief against certain disseminations granted. Arrest records, even without convictions, are of value to law enforcement agencies and may be maintained and disseminated to other law enforcement agencies for law enforcement purposes. Hence, the FBI may retain such records and disseminate them for law enforcement purposes. It may also disseminate such records to federal agencies for employment purposes. However, the FBI is without authority to disseminate arrest records outside of the federal government for employment, licensing or related purposes, whether or not the record reflects a conviction.

BACKGROUND

The record subject was taken into custody by Los Angeles police and held for two days. He was then released without being formally charged after it was determined that the complaint against him was groundless. Under California law, the incident was required to be classified as a "detention" instead of an arrest. Los Angeles police notified the FBI of the subject's release and the FBI changed its records to show that he had been detained, not arrested. But the FBI refused to expunge the file.

SPECIAL NOTE

The record subject argued that, in the absence of a conviction, the maintenance and use of his arrest record for any purpose violated constitutional guarantees-- including the presumption of innocence, due

process, the right to privacy and freedom from unreasonable search. The court concluded that the constitutionality of the FBI's practices should turn on a balancing of the potential harm to record subjects against the public necessity of maintaining and using the records. Since this balancing judgment should be made by the Congress, the court declined to decide the case on the constitutional issues, but instead reached a decision on the basis of its interpretation of the statute under which the FBI maintains and disseminates criminal and other records.

Cross Reference: Page 238

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Menard v. Saxbe
498 F.2d 1017
(D.C. Cir. 1974)
(Menard II)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court originally denied relief and the Court of Appeals reversed and remanded (Menard I). On remand, the District Court declined to order expungement but did issue an order limiting dissemination of the record. The plaintiff again appealed.

HOLDING

Remanded to the District Court with instructions to enter an order directing the FBI to expunge the record. The FBI has no statutory authority to retain an arrest record after it has been informed by the contributing police agency that the police encounter was not deemed an arrest but only a detention.

The court found that: (1) the record subject had alleged a cognizable legal inquiry; (2) the courts have power to expunge arrest and criminal records; (3) generally, actions to expunge such records should be brought against the local law enforcement agencies involved; but (4) the record subject's suit against the FBI was proper insofar as it attacked alleged abuses unique to the FBI role as recordkeeper.

BACKGROUND

The record subject was taken into custody by Los Angeles police and held for two days. He was then released without being formally charged after it was determined that the complaint against him was groundless. Under California law, the incident was required to be classified as a "detention" rather than an arrest. California authorities advised the FBI of this change and the FBI changed its files to show that the subject had been detained, not arrested. The plaintiff requested the FBI to totally expunge his arrest record and fingerprints. The FBI refused and the plaintiff brought suit.

SPECIAL NOTE

The court set out a detailed description of the operations of the FBI criminal identification division and concluded that the FBI is more than a mere passive recipient of records from local law enforcement agencies. Rather, the FBI has a duty to carry out its operations in a reliable and responsible manner, without unnecessary harm to record subjects whose rights may be invaded. The court declined to rule on the extent of the FBI's duty under the constitution, but based its decision on an interpretation of 28 USC, Sect. 534, the federal statute under which the criminal identification division operates. It found that this statute does not authorize the FBI to maintain in its criminal files an arrest record on encounter with the police that has been established not to constitute an arrest. However, the record may be maintained in the FBI's neutral non-criminal files, provided there is no means of cross reference.

Cross Reference: Page 240

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Sullivan v. Murphy
478 F.2d 938
(D.C. Cir. 1973)

RELIEF SOUGHT

This class action was brought on behalf of all persons arrested without evidence of probable cause during the May Day demonstrations in Washington, D.C., in 1971, alleging that the arrests were invalid and seeking as partial relief the expungement of their arrest records under the Fourth and Fifth Amendments to the Federal Constitution. The trial court declined to issue an expungement order and the plaintiffs appealed.

HOLDING

An order limiting the maintenance and dissemination of arrest records of presumptively invalid arrests would be a proper remedy, though actual physical destruction of the records might not be called for. (Since this was an interlocutory appeal the court did not grant specific relief but only indicated to the lower court that the general type of relief requested should be granted.)

BACKGROUND

During the week of May 3, 1971, thousands of people were arrested during massive demonstrations in Washington, D.C. The bulk of these arrests were made after the D.C. Metropolitan Police Chief suspended normal field arrest procedures in response to the size of the demonstrations. Consequently, field arrest forms were filled out by persons other than arresting officers, or not at all, and no photographs of arrestees and arresting officers were taken at the time of arrest. The class claimed that these arrest procedures constituted a denial of due process and that the District of Columbia would be unable to prosecute many or most of the arrestees due to an inability to show probable cause for the arrests.

Cross Reference: Page 158

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Varona Pacheco v. Federal Bureau of Investigation
456 F.Supp. 1024
(D.P.R. 1978)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought suit under the Freedom of Information Act (the Act) seeking in part to have certain allegedly false entries in his FBI Central Records System file deleted.

HOLDING

Denied. Since the FBI had, under the authority of the Act, exempted the FBI Central Record System from the Act's correction and amendment provisions, the subject had no right to request any change in those files.

BACKGROUND

After exhausting his administrative remedies the subject brought suit to compel the FBI to delete information in his Central Record System file which he claimed was inaccurate.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Testa v. Winquist
451 F.Supp. 388
(D.R.I. 1978)

RELIEF SOUGHT

In this very complex case, arrestees had originally sued the arresting officers for damages on a number of constitutional and state grounds, including arrest without probable cause, false imprisonment, libel and slander, and trespass. The arresting officers brought suit in turn against the persons who furnished them with the criminal record information upon which they based their actions. The arresting officers argued that these persons (the state administrator of the National Crime Information Center and a Warwick, Rhode Island police officer) were liable to the arresting officers for any damages which they might be forced to pay to the arrestees. The arresting officers based their claim on the grounds that the information furnished to them was inaccurate. The administrator and officer sought in this suit to be dismissed from the case, on the basis that the arresting officers had not stated a legally cognizable claim against them.

HOLDING

Dismissal denied. First, the administrator and officer had a duty to maintain reasonably accurate and current records. This duty was owed to the arrestees, so if the duty was breached the administrator and officer could be liable for any resulting injury to the arrestees. Second, while reliance by an officer in the field on record information furnished by a computer service and another officer might be reasonable, the court would not so find as a matter of law, but would leave the issue for the jury. Third, a jury could find that the administrator and officer should have reasonably foreseen that the arresting officers would rely on the information furnished to them; the administrator and officer could then be liable for the acts of the arresting officers following their receipt of the information. And fourth, although there is usually no liability for one who in good faith gives inaccurate information which leads to an arrest, the special position of expertise and authority held by the administrator and officer justified holding them to a stricter duty of accuracy than a private citizen.

BACKGROUND

Officers of the East Providence, Rhode Island police force, observing suspicious activities at the arrestees' auto body shop, stopped a car the

arrestees were driving. When the arrestees were unable to show ownership the officers ran a check with the NCIC, and were told that the car was reported as stolen out of Warwick. The officers then checked with the Warwick officer, who confirmed that the car was stolen. One arrestee was charged with possession of a stolen vehicle, both arrestees were detained overnight even though their attorney came to the station house with the title to the car, their shop was searched, and other actions injurious to their property and reputations were taken. It turned out that the car had been stolen, but was recovered by the insurance company and sold to the arrestees. The arrestees sued the arresting officers; the arresting officers sued the administrator of the Rhode Island division of the NCIC and the Warwick officer.

SPECIAL NOTE

Since this opinion was given on a motion to dismiss, the court was not ruling on the merits of the case, but only on whether the facts and law were so clear that no trial was necessary. Since the court found that liability was possible, it denied dismissal.

Cross Reference: Page 19

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Rizzo v. Tyler
438 F.Supp. 895
(S.D.N.Y. 1977)

RELIEF SOUGHT

A federal criminal record subject who brought suit (unsuccessfully) to compel the Department of Justice to honor his Freedom of Information Act (FOIA) request without charge also made a motion during that case to compel correction or expungement of certain of the records concerning him.

HOLDING

Denied. A motion to correct or expunge criminal record information made as part of a suit to obtain FOIA documents free of charge is inappropriate and will not be heard.

BACKGROUND

The subject was a federal prisoner who requested all files relating to a criminal investigation of him from the Department of Justice. He was told that the search would cost at least $2,500 and was requested to make an advance deposit of $625. After his claim of indigency brought no administrative relief, he sued to obtain the documents free of charge. He also filed a motion to correct or expunge certain of the records.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Tarlton v. Saxbe
407 F.Supp. 1083
(D.D.C. 1976)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought suit seeking expungement from his FBI file of certain arrest entries without dispositions and other arrests and convictions which he alleged had been unconstitutional. His action was dismissed initially; on appeal the Circuit Court said that the FBI did have a duty to maintain reasonably accurate files and remanded the case for the lower court to set the exact limits of that duty. (See Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).) This is the decision on remand.

HOLDING

First, although a record subject should address his first challenge to local and state authorities, when the FBI receives such a challenge it must be forwarded to the appropriate criminal justice agencies and courts for further consideration. Second, while a challenge is pending the FBI does not have to so indicate on the subject's record, since to do so would seriously impair the credibility of FBI criminal records, and could provide criminals with a way to improperly lessen the impact of their records by making frivolous challenges. Third, non-serious offenses are to be deleted from all FBI criminal records, either when the records are converted to computerized form or when a dissemination request is honored. And finally, while the FBI for practical reasons may still disseminate for law enforcement purposes arrest records more than one year old without dispositions, it must conduct a feasibility study to see if some practical way can be found to keep dispositions more up to date.

BACKGROUND

The subject's FBI criminal record file contained a number of arrests without subsequent dispositions and some arrests and convictions that he claimed had occurred in violation of his constitutional rights. He alleged that this inaccurate information had caused him sentencing and parole problems in the past and could do so in the future.

Cross Reference: Page 23

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Maney v. Ratcliff
399 F.Supp. 760
(E.D. Wis. 1975)

RELIEF SOUGHT

A National Crime Information Center (NCIC) record subject brought this action under the federal civil rights laws seeking an injunction to restrain Baton Rouge, Louisiana law enforcement officials from prosecuting him, and to force them to remove his name from the NCIC and not re-enter it.

HOLDING

That an injunction would issue against the Baton Rouge authorities directing them to remove the subject's "fugitive from justice" entry from the NCIC and prohibiting them from re-entering it when they had failed to pursue his extradition on three previous occasions following the subject's arrest out of state. The court found that it had jurisdiction over the Baton Rouge officials due both to their use of the NCIC to list the subject and various communications transmitted by them to Wisconsin law enforcement authorities regarding the subject.

BACKGROUND

The subject was listed on the NCIC as a fugitive from justice following a 1973 narcotics arrest. On three occasions over the next year he was arrested, twice in Wisconsin and once in New York. Each time he was checked on the NCIC and held for extradition, for periods of four weeks, thirty days, and two days, respectively. The first time the Louisiana officials never responded to the arresting agency's inquiry regarding extradition; the second time they said they would request extradition but never sent the necessary papers; and the third time they decided not to request extradition.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Shadd v. United States
389 F.Supp. 721
(W.D. Pa. 1975)
aff'd, 535 F.2d 1247 (3d Cir. 1976),
cert. denied, 429 U.S. 887 (1976),
cert. denied, 431 U.S. 919 (1977)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject brought this action to compel the FBI to expunge certain entries from his record and to correct others.

HOLDING

Relief denied in part, granted in part. When it is not claimed that an arrest was illegal or unconstitutional, and the FBI criminal record entry accurately reflects dismissal of the case, the subject is not entitled to expungement of the entry. However, where the FBI had duplicitously listed a charge against a record subject and one listing did not reflect an acquittal entered 27 months earlier, the FBI had violated its duty to maintain accurate files and the court would order correction of the entry.

BACKGROUND

The criminal record subject claimed that certain entries in his FBI file regarding charges which had been dismissed should be expunged, and that others were inaccurate and should be corrected. He alleged that the inaccuracies in his record had impaired his standing with the parole board.

SPECIAL NOTE

The court did not say whether the duty of the FBI to maintain accurate records derived from the Constitution or from the FBI enabling statute. It said it did not feel a need to define the nature or extent of the duty because the records involved violated "even a minimal definition of FBI responsibility."

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

United States v. Mackey
387 F.Supp. 1121
(D. Nev. 1975)

RELIEF SOUGHT

A National Crime Information Center (NCIC) subject indicted for illegal possession of a shotgun moved to suppress the shotgun as evidence on the basis that his arrest, made pursuant to an inaccurate NCIC arrest warrant entry, was therefore illegal as a denial of due process under the federal constitution.

HOLDING

An arrest made solely on the basis of an NCIC entry which was incorrect and had gone uncorrected for five months was a deprivation of liberty without due process of law, and any evidence seized as a result of such an arrest must be suppressed. The nature and duration of the computer inaccuracy amounted to a capricious disregard of defendant's constitutional rights.

BACKGROUND

Seeing the subject hitchhiking, two North Las Vegas police officers spoke to him and ran his name through the NCIC. Upon being told that there was an outstanding fugitive warrant on the subject the officers arrested him, which they would not have done otherwise. While booking the subject an unregistered shotgun was found in his duffle bag and he was subsequently indicted on a federal firearms charge. It later turned out that the fugitive warrant had been satisfied five months before the subject's arrest, but had not been removed from the NCIC system.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

United States v. Kalish
271 F.Supp. 968
(D.P.R. 1967)

RELIEF SOUGHT

A federal arrest record subject who was never prosecuted asked that his arrest records, including fingerprints and photographs, be destroyed.

HOLDING

When a subject has never been prosecuted or convicted there is no public interest in retaining his arrest record or criminal identification data. Moreover, retention does seriously injure the individual's privacy and personal dignity. The United States Attorney General was ordered to destroy the subject's arrest record and criminal identification file in his custody, and those in the Identification Division of the Federal Bureau of Investigation. He was further forbidden from disseminating the records to any governmental agency or to any person.

BACKGROUND

The subject, on the advice of counsel, refused induction into the Army on the good faith argument that he was constitutionally entitled to reclassification or to a hearing before his local Selective Service board. He was arrested contrary to an agreement reached with the Assistant U.S. Attorney, at which time he was fingerprinted and photographed. He submitted to induction half an hour later and was never prosecuted on the arrest.

Cross Reference: Pages 28, 200 & 251

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

White v. State
95 Cal. Rptr. 175
(Ct. App. 1971)

RELIEF SOUGHT

A state criminal record subject brought this damage suit against various state officials alleging negligent posting of entries to his record and negligent dissemination thereof. He sued for, among other things, defamation and invasion of privacy.

HOLDING

Relief denied. There is no duty on the part of the state to alter a subject's criminal record on the basis of his unsubstantiated claim that it contains inaccurate or incorrect information. The court also found that dissemination of the subject's record on request to authorized recipients was conditionally privileged, and that the subject failed to show the malice on the state's part necessary to overcome that privilege.

BACKGROUND

The subject was arrested in 1939 for grand theft auto. In 1941 he was identified by photograph as the passer of a forged check in a chain store. That same year a notation was added to his file reflecting the passed check charge and listing a number of aliases, presumably derived from bad checks traced to the subject. From 1951-1962 the subject encountered his record a number of times as a result of his applications to and employment by various police departments. In 1967 he visited the state's Bureau of Criminal Identification and Investigation, was shown his file, and denied that it was his. This suit was the culmination of his subsequent efforts to change his records.

Cross Reference: Page 30

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Bradford v. Mahan
548 P.2d 1223
(Kan. 1976)

RELIEF SOUGHT

A record subject arrested for careless driving sued the arresting officer and the city for defamation, claiming that the officer had falsely and maliciously stated in his accident report that the arrestee's alcohol intake had contributed to the accident. As partial relief the subject requested correction or expungement of the allegedly libelous portion of the accident report. He also sought damages against the officer. The lower court dismissed, and he appealed.

HOLDING

Reversed and remanded. The court does have power to order correction or expungement of inaccurate police records when the harm to the record subject outweighs any benefit to society from maintenance of the records. However, this power should be used only in exceptional circumstances, such as when an arrest has been made without probable cause for harassment purposes. As regards damages, the police officer could be liable if the subject could show that the statements were false and were made with actual malice.

BACKGROUND

The subject was involved in a one-car accident and was arrested for careless driving. He alleged that the arresting officer, in filling out the accident report form, indicated that alcohol was a factor in the accident, that this would constitute accusation of a crime under Kansas law, that it was false, and that the officer acted willfully and maliciously in making the notation. The subject claimed his reputation had been injured and his car insurance rates had increased substantially as a result.

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Walkowski v. Macomb County Sheriff
236 N.W.2d 516
(Ct. App. Mich. 1975)

RELIEF SOUGHT

The subject of a computerized criminal record brought suit against officers from three police departments following her incarceration based on inaccurate information. She sued for battery, assault, false arrest, unlawful imprisonment, and defamation. The Director of the Michigan State Police Department, which maintained the computer service, appealed in this case from the lower court's refusal to drop him from the action.

HOLDING

Reversed. The actions of the executive head of the state police in overseeing the operations of a computerized criminal record system are clearly discretionary. The Director was therefore immune from this suit by operation of state law.

BACKGROUND

The subject was stopped for running a red light by officers of the Macomb County Sheriff's Department. A warrant check on the Michigan State Police Department's Law Enforcement Information Network (LEIN) mistakenly indicated an outstanding warrant on the subject for perjury, a felony. There was admittedly a bench warrant outstanding against the subject for contempt of court due to failure to appear for a traffic ticket, a misdemeanor. (Apparently the LEIN "charge code" for perjury and contempt was identical.) The subject contended that if the officers had been correctly informed that the warrant was for a misdemeanor they would not have taken her into custody.

Cross Reference: Page 36

MAINTENANCE OF RECORDS: INACCURATE OR INCOMPLETE

Di Malfi v. Kennedy
213 N.Y.S.2d 886
(Sup. Ct. 1961)

RELIEF SOUGHT

A subject whose name was in a "known gamblers" file maintained by the police brought this action to have it removed, alleging that he was a law-abiding citizen who had nonetheless been subjected to periodic police harassment deriving from the presence of his name in the gamblers file.

HOLDING

Relief granted. In light of the subject's single 1946 conviction and $25 fine for bookmaking, his arrest later that year on the same charge which resulted in acquittal, affidavits attesting to the subject's good character, the police commissioner's admission that he had no information with which to reply to the subject's claims of law-abiding behavior since 1946, and since the police department rules required the police to compile a report on the subject at least once a year, subjecting him to periodic investigation and embarrassment, maintenance of the subject's name in the "known gamblers" file was arbitrary, capricious, and unreasonable. His name was therefore ordered expunged from the file.

BACKGROUND

The subject was arrested in 1946 for bookmaking, pled guilty, and paid a $25 fine. Later that year he was arrested again on the same charge, but was acquitted. Based on this record his name was placed in the "Known Gamblers File" kept by the New York City Police Department; under department regulations, a report had to be made on each known gambler at least once a year. The subject had no other record besides the two 1946 charges.

Cross Reference: Page 41

Chapter 2

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Statutory Standards

Statutes in almost 30 states provide for the sealing or purging of an arrest record upon the dismissal of charges, failure to prosecute or an acquittal.[79] However, in many of those states the statutory authorization to seal or purge is limited to those instances in which the subject can show that the arrest itself was illegal or improper.

Most of the cases in this chapter do not involve an interpretation of statutory sealing and purging rights.[80] Rather, the cases involve an exercise of the courts' inherent powers to police agency wrongdoing or involve the courts interpretation and application of the record subject's constitutional rights.

[79] Alaska Statute 6AAc 60.100; Arkansas Statute 5-1109; California Statute 851.8; Connecticut Statute 54-90(a); Delaware Statute 11-3904 (if first offender); Florida Statute 901.33 (sealed); Hawaii Statute 831-32; Idaho Statute 19-4813; Illinois Statute 38-206-5; Indiana Statute 35-4-8.1 (only if charges dropped or dismissed and only if no record of prior arrests); Iowa Statute 749B.1d (arrests over a year old with no disposition); Louisiana Statute 44.9; Maine Statute 16.600; Maryland Statute 27,736 & 737; Massachusetts Statute 1000; Mississippi Statute 610.100; Montana Statute 44-2-204; Nevada Statute 179.255; New York Statute 160.50; Rhode Island Statute 12-1-12; South Carolina Statute 17-1-40; Tennessee Statute 40-202109; Utah Statute 77-35-175(2)(a); Virginia Statute 19.2-392.2; Washington Statute 2608 Sect. 6 (2 years elapses).

[80] But see, State v. Hammond, 580 P.2d 556 (Ore. 1978).

Judicial Standards

Arrests Made Without Probable Cause

The cases stand, almost without exception, for the proposition that if a "factually innocent" record subject can show that his arrest was made without probable cause the courts will find a basis on which to purge the record.[81] Menard v. Mitchell[82] provides a good example of a court's constitutional analysis of the legality of retaining a record of an arrest made without probable cause. Menard was arrested for suspicion of burglary, but two days later charges were dropped. Menard brought an action against the FBI to purge his arrest record. A federal court of appeal's panel concluded that if the arrest was made without probable cause there is a real question as to "whether the Constitution can tolerate any adverse use of information or tangible objects obtained as a result of an unconstitutional arrest..."[83]

Many of the cases concerning arrests made without probable cause involve dramatic fact situations--mass, indiscriminate arrests of hippies, demonstrators, Blacks and civil rights workers, for example. In these instances, the courts' purpose for purging the records is aimed at least as much at penalizing or deterring illegal or improper police conduct as it is at remedying the invasion of the record subjects' rights.

[81] See, for example, Schanbarger v. District Attorney of Rensselaer County, 547 F.2d 770 (2nd Cir. 1976) cert. denied 430 U.S. 968 (1976); Urban v. Breier, 401 F.Supp. 706 (E.D. Wisc. 1975).

[82] 460 F.2d 480 (D.C. Cir. 1970).

[83] 460 F.2d at 491.

In United States v. Rosen,[84] a federal district court attempted to state a general rule for expungement of arrest records. The court's rule gave principal emphasis to the occurrence of an improper or illegal arrest. Rosen was indicted for importing human hair without a license. Some of the charges were dismissed and he was acquitted as to the others. The opinion concluded that courts should not order arrest records purged unless: (1) a statute so provides; or (2) the arrest was made without probable cause or was otherwise improper; or (3) the police engaged in an illegal search or some other illegal activity leading to the arrest.

A few of the cases in this chapter were decided after the Supreme Court's 1976 decision in Paul v. Davis. As discussed earlier, Paul v. Davis makes clear that a criminal justice agency can maintain an arrest record, even if the record does not have a disposition (and later cases indicate that agencies can maintain records of arrests that end in an outright acquittal). However, the post 1976 decisions in this chapter suggest that if the record subject can show that he is not only innocent but, in addition, the victim of an illegal arrest, the courts will provide relief, notwithstanding Paul v. Davis.[85]

In a number of these cases the relief not only includes purging of the agency's records, but an order to the agency to notify other criminal justice agencies to which they had disclosed the record to return the record for destruction.[86]

However, in at least one case, a federal court of appeals panel held that the proper remedy for the maintenance of records of illegal mass arrests (associated with the May Day 1971 demonstrations in Washington, D.C.) was not destruction, but a sealing type of order placing certain restrictions upon the maintenance and dissemination of the records.[87]

In cases where the record subject is successful in demonstrating that illegal or improper government conduct was involved, the courts have been willing to purge even conviction records. For example, in United States v. Benlizar[88] a federal district court held that federal courts have inherent, discretionary power to order expungement of criminal justice records, notwithstanding statutes requiring their maintenance, acquisition and dissemination. The defendant had been convicted of distributing a controlled substance; however, the court found that the defendant had not received a fair trial because agents of the Drug Enforcement Administration illegally destroyed discoverable evidence that could have been introduced at the trial and that may have helped the subject. The court concluded that the case presented "extreme violations by the government of defendant's rights." Furthermore, it noted that the "defendant is facing an extraordinary degree of harm which will be inflicted upon him and his family by virtue of the record of arrest and illegal conviction."[89] In view of all this the court ordered the record expunged and explained that courts "have a duty to redress an injury and have the inherent power to expunge criminal records."[90]

Arrests and Convictions Pursuant to Unconstitutional Statutes

Several of the cases in this chapter concern arrests that are illegal, not because of improper police conduct, but because the arrests were made pursuant to an unconstitutional statute.[91] In these cases, the courts have usually concluded that if the government did not have authority to make the arrest, then the government does not have authority to maintain a record of that event.

A few of the cases in this chapter involve requests to purge records of convictions made under statutes later declared unconstitutional. Surprisingly, these court decisions are split. Some of the decisions hold that a record subject convicted under an unconstitutional statute is entitled to a purge order.[92] These courts reason that if the state lacks authority to convict the individual, then the state also lacks authority to maintain a record of such a conviction.

On the other hand, and somewhat surprisingly, at least a couple of courts have not wholly accepted this analysis.[93] A review of the facts of these cases suggests that the courts may have ruled against a purge order because the subject appeared to be guilty or because the basis on which the statute was found to be unconstitutional amounted to little more than a technicality. Perhaps for this reason these courts gave emphasis to the state's important interest in maintaining the records of convictions, even for violations of unconstitutional statutes.

[84] 343 F.Supp. 804 (S.D.N.Y. 1972).

[85] See, for example, Dean v. Gladney, 451 F.Supp. 1313 (S.D. Tex. 1978).

[86] See, for example, Urban v. Breier, 401 F.Supp. 706 (E.D. Wis. 1975).

[87] See, Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) cert. denied 414 U.S. 880 (1973).

[88] 459 F.Supp. 614 (D.D.C. 1978).

[89] 459 F.Rd. at 615.

[90] 459 F.Rd. at 622.

[91] See, for example, United States v. Michigan, 471 F.Supp. 192 (W.D. Mich. 1979).

[92] See, for example, Ship v. Todd, 568 F.2d 133 (9th Cir. 1978); Severson v. Duff, 322 F.Supp. 4 (M.D. Fla. 1970).

[93] See, for example, Carter v. Hardy, 543 F.2d 555 (5th Cir. 1976); and Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977) cert. denied 435 U.S. 908 (1978).

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

CASE SUMMARIES

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Paul v. Davis
424 U.S. 693 (1976)
(Rehearing denied 425 U.S. 985 (1976))

RELIEF SOUGHT

An individual arrested for shoplifting brought this action, based on the federal civil rights laws, against county and city police chiefs for circulating his name and photograph to local businessmen in a compilation of "known shoplifters" while the charge against him was still unresolved. He asked for damages as well as declaratory and injunctive relief.

HOLDING

Distribution of the flyer did not deprive the plaintiff of his constitutional rights of liberty and due process and there is no constitutional privacy interest that is violated by dissemination of arrest records under the circumstances involved. Injury to reputation alone is not sufficient to establish a violation of the constitution.

BACKGROUND

While a shoplifting charge against the subject was still outstanding, his photo and name were included in a flyer of "active shoplifters" prepared and distributed to local businessmen jointly by the chiefs of the Jefferson County and Louisville, Kentucky police departments to help minimize holiday losses. The charge against the subject was dismissed shortly thereafter, but his supervisor saw the flyer and reprimanded him.

SPECIAL NOTE

This is the landmark constitutional dissemination case which, in the words of a subsequent federal court opinion, "snuffed out the constitutional privacy interest in the confidentiality of arrest records."

Cross Reference: Pages 15 & 79

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Wolff v. McDonnell
418 U.S. 539
(1974)

RELIEF SOUGHT

A state prison inmate brought a class action under the federal civil rights laws challenging, among other practices, the prison's disciplinary procedures, which he alleged violated constitutional due process. The lower court found that due process rights had been infringed, and as partial relief ordered expungement of any findings of misconduct entered on the prison records, where such findings had been arrived at through constitutionally defective procedures. The Supreme Court granted certiorari and in its decision ruled on the propriety of the ordered expungement.

HOLDING

The finding of denial of due process would have effect only on future proceedings. Both under prior case law and due to the practical administrative problems which would flow from a contrary result, the Court held that expungement of records from past proceedings was improper.

BACKGROUND

The subject, an inmate of the Nebraska Penal and Correctional Complex, brought suit on behalf of himself and other inmates challenging several practices at the Complex. Among these was the manner in which disciplinary proceedings were conducted, which he alleged violated the inmates' due process rights.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Cavett v. Ellis
578 F.2d 567
(5th Cir. 1978)

RELIEF SOUGHT

A state criminal record subject brought suit in an attempt to have five state convictions, for which he had completed the sentences, declared invalid and the resulting records expunged. He based his action on the federal civil rights laws.

HOLDING

Relief denied. In the absence of special circumstances not present here a federal court will not direct the editing of state records. Further, the federal civil rights laws cannot be used to attack the validity of completed state criminal convictions.

BACKGROUND

The subject brought this action against the clerks of a number of state courts, seeking an order declaring five state convictions invalid and directing the clerks to expunge the corresponding records. He had served out the sentences for the five convictions, and had apparently made no earlier attempt to appeal or attack them.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Ship v. Todd
568 F.2d 133
(9th Cir. 1978)
(per curiam)

RELIEF SOUGHT

A criminal record subject who had served out his sentences sued a state court clerk under the federal civil rights laws, asking that his conviction be declared invalid on constitutional grounds and that the clerk be ordered to expunge the subject's criminal records in his custody. The lower court dismissed the case, apparently reasoning that since the subject had completed his sentences he was no longer being injured by his criminal record, as well as ruling that the clerk was immune from suit.

HOLDING

Reversed and remanded. Even after the completion of sentence a criminal record may continue to harm an individual, so the subject had a valid interest in having his records expunged. While state court clerks may not be sued for damages, their immunity does not extend to suits for injunctive relief. The subject should therefore be allowed to present his case.

BACKGROUND

The record subject was convicted in 1965 of burglary and served out his sentences. He later brought an action to overturn his conviction on constitutional grounds and clear his record.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Bromley v. Crisp
561 F.2d 1351
(10th Cir. 1977)
cert. denied, 435 U.S. 908 (1978)

RELIEF SOUGHT

The state appealed a federal district court order which vacated an unconstitutional conviction pursuant to the subject's habeas corpus petition and ordered expungement of all public, official, and quasi-official records relating to the conviction. The state claimed expungement was an abuse of discretion.

HOLDING

Reversed and remanded. The lower court had wrongly felt bound to order expungement under a prior decision of the appeals court. The case was therefore remanded so that the lower court could balance the interest of the state against the rights of the subject and properly exercise its discretion.

BACKGROUND

The subject was a minor tried as an adult under a statute which was subsequently held unconstitutional due to the different treatment it prescribed for male and female minor defendants. He sought federal habeas corpus relief from his conviction.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Schanbarger v. District Attorney of Rensselaer County
547 F.2d 770
(2d Cir. 1976)
(per curiam)
cert. denied, 430 U.S. 968 (1976)

RELIEF SOUGHT

An unlawfully arrested record subject brought an action against municipal police seeking, in part, the return or expungement of his arrest and prosecution record. The lower court dismissed his case for failure to state a claim and he appealed.

HOLDING

Reversed and remanded. An unlawfully arrested subject may be able to present a case which would justify a federal court in ordering the return or expungement of his criminal records. The case should be reheard on this issue.

BACKGROUND

The subject was unlawfully arrested by the New York police for loitering.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Carter v. Hardy
543 F.2d 555
(5th Cir. 1976)

RELIEF SOUGHT

A state arrest record subject brought suit under the federal civil rights laws seeking expungement of the records of two state convictions, alleging that the statute under which he was convicted was unconstitutional.

HOLDING

Relief denied. An allegation that a subject was convicted under an unconstitutional statute does not set forth facts unusual or extreme enough to justify a federal court in ordering expungement of state records.

BACKGROUND

In 1963 and 1965 the subject was convicted in Texas state courts of passing worthless checks. He had brought an earlier case claiming that his convictions were unconstitutional because he was indigent and was denied counsel. That case was dismissed on identical grounds.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Hill v. Johnson
539 F.2d 439
(5th Cir. 1976)
(per curiam)

RELIEF SOUGHT

An imprisoned state record subject brought suit under the federal civil rights laws to have an earlier conviction declared invalid and the corresponding court records expunged.

HOLDING

Relief denied. The subject failed to allege facts sufficiently extreme or unusual to justify expungement.

BACKGROUND

The subject was convicted of a felony in 1956 in a Louisiana court. He served the resulting sentence and in this suit against the clerk of that court he did not claim that he was still under any kind of restraint traceable to that conviction. The court relied on Carter v. Hardy, 526 F.2d 314 (5th Cir. 1976).

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Carter v. Hardy
526 F.2d 314
(5th Cir. 1976)
cert. denied, 429 U.S. 838 (1976)

RELIEF SOUGHT

An imprisoned criminal record subject brought suit under the federal civil rights laws to have two earlier unrelated state court convictions, for which he had already served the sentences, declared invalid and expunged from his criminal record.

HOLDING

Since the convictions complained of were obtained in good faith under an apparently constitutional statute, the subject had not alleged that the records were inaccurate, and the convictions complained of had had no effect on his present sentence, he had not set forth facts which would justify expungement under the "exceedingly narrow scope" of the federal courts' power to order expungement of matters of public record.

BACKGROUND

In 1963 and 1965 the subject was convicted in Texas state courts of passing worthless checks. He claimed he was indigent and was denied counsel at the time, and that this rendered the convictions invalid. He had completed the sentences for those convictions and they were not used to enhance his current sentence.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Sullivan v. Murphy
478 F.2d 938
(D.C. Cir. 1973)

RELIEF SOUGHT

This class action was brought on behalf of all persons arrested without evidence of probable cause during the May Day demonstrations in Washington, D.C., in 1971, alleging that the arrests were invalid and seeking as partial relief the expungement of their arrest records under the Fourth and Fifth Amendments to the Federal Constitution. The trial court declined to issue an expungement order and the plaintiffs appealed.

HOLDING

An order limiting the maintenance and dissemination of arrest records of presumptively invalid arrests would be a proper remedy, though actual physical destruction of the records might not be called for. (Since this was an interlocutory appeal the court did not grant specific relief but only indicated to the lower court that the general type of relief requested should be granted.)

BACKGROUND

During the week of May 3, 1971, thousands of people were arrested during massive demonstrations in Washington, D.C. The bulk of these arrests were made after the D.C. Metropolitan Police Chief suspended normal field arrest procedures in response to the size of the demonstrations. Consequently, field arrest forms were filled out by persons other than arresting officers, or not at all, and no photographs of arrestees and arresting officers were taken at the time of arrest. The class claimed that these arrest procedures constituted a denial of due process and that the District of Columbia would be unable to prosecute many or most of the arrestees due to an inability to show probable cause for the arrests.

Cross Reference: Page 129

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Rogers v. Slaughter
469 F.2d 1084
(5th Cir. 1972)
(per curiam)

RELIEF SOUGHT

Municipal authorities appealed a court order directing the expungement of all records relating to the arrest, trial, and conviction of a subject whose conviction was overturned on constitutional grounds.

HOLDING

Reversed. Where a conviction is overturned on grounds that the arrestee was not told of his right to counsel, but the arrestee did commit the crime charged of, expungement is not warranted and the issue of retention of the arrest, trial, and conviction records should be left to the discretion of the authorities.

BACKGROUND

The subject, a public school teacher, accidentally fired a pistol he brought to school. He was convicted of discharging a firearm, without having been advised of his right to a lawyer. He obtained relief from the conviction on this ground, and the court granting relief went on to order expungement of his criminal records.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Wilson v. Webster
467 F.2d 1282
(9th Cir. 1972)

RELIEF SOUGHT

Residents of a community consisting largely of college students brought a class action under the federal Civil Rights Act seeking, in part, expungement of the arrest records of those class members who had obtained acquittals or dismissals following arrests made during a period of violent student unrest. The district court dismissed the case and the class appealed.

HOLDING

Vacated and remanded for further proceedings. Since there were indications that the class could support its request for expungement, and since a federal court may rule on a matter involving state records, the dismissal was improper.

BACKGROUND

As a result of several violent incidents by the Santa Barbara, California student community, a state of emergency was declared and a curfew imposed. Police made hundreds of arrests in the days following, which the plaintiffs alleged were unlawful.

SPECIAL NOTE

The court did not define the jurisdictional basis on which a federal court might order expungement of state records, but it did say that the continued existence of the records may seriously impair fundamental rights of the persons to whom they relate. Apparently the court referred to constitutional due process rights.

Cross Reference: Page 192

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

United States v. McLeod
385 F.2d 734
(5th Cir. 1967)

RELIEF SOUGHT

The United States brought suit against a county and its officials seeking, in part, expungement of the arrests and convictions of Negroes who were allegedly arrested as a means of intimidating them from registering to vote, such arrests being in violation of the federal civil rights laws.

HOLDING

Relief granted. When arrests had been made and prosecutions carried out for the purpose of interfering with voting rights, in violation of the federal civil rights laws, the remedy would include expungement of all arrests and convictions arising from the illegal prosecutions.

BACKGROUND

During 1963 a large campaign was organized to register Negroes to vote in Selma, Alabama. Local law enforcement authorities arrested large numbers of Negroes on charges ranging from vagrancy to driving with improper license-plate lights. The persons arrested were generally either voting drive organizers or attending registration meetings. Many arrestees were prosecuted, convicted, and fined.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

United States v. Michigan
471 F.Supp. 192
(W.D. Mich. 1979)

RELIEF SOUGHT

This extremely complex case involved resolution of the fishing rights of Indian tribes in Michigan. Indians who had been arrested under the state fishing statutes during the course of the dispute sought expungement of the records.

HOLDING

Since the State had in fact always been without power to arrest the Indians for violation of state fishing laws, the State was also without power to maintain the resulting records. The State was ordered to expunge all such records and provide relief as necessary, including damages, to compensate the Indians affected.

BACKGROUND

This case involved the historical, legal, and tribal rights of certain Michigan Indian tribes to fish in the waters of the Great Lakes. The arrest record issue was a small by-product of the overall disposition.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Dean v. Gladney
451 F.Supp. 1313
(S.D. Tex. 1978)

RELIEF SOUGHT

Record subjects who were illegally arrested for exercising their constitutional rights brought suit under federal civil rights laws seeking as partial relief expungement of their arrest records.

HOLDING

Where the subjects had been arrested without probable cause and only because of their exercise of constitutional rights the court would grant expungement.

BACKGROUND

The record subjects were bystanders at a confrontation between police officers and a large number of persons using a local beach. One of the subjects was arrested for taking pictures of the incident. The other subject was told to leave the area by an officer, gave him a military salute as he turned to leave, and was promptly arrested.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Gauthreaux v. Illinois
447 F.Supp. 600
(N.D. Ill. 1978)

RELIEF SOUGHT

An imprisoned state criminal record subject sought habeas corpus relief on the ground that an earlier plea bargain, to which he had agreed and which he had served out, was constitutionally defective.

HOLDING

Since the subject was currently properly imprisoned on a subsequent offense, habeas corpus relief would be denied. - However, where the subject's record reflected a parole violation in connection with a constitutionally defective sentencing procedure the court would order the parole violation charge and all entries stemming from it expunged from his record.

BACKGROUND

The subject was sentenced for robbery in 1974 after entering into a plea agreement without being advised that his sentence would necessarily include a mandatory three-year parole provision under state law. He was duly paroled but then was arrested for another robbery, and a parole violation warrant was issued. At the time he sought habeas corpus relief he was serving time on the second robbery charge, not for the parole violation.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Farber v. Rochford
407 F.Supp. 529
(N.D. Ill. 1975)

RELIEF SOUGHT

An arrest record subject sought to bring a class action on behalf of all persons arrested under an allegedly unconstitutional city code section. She requested that any arrest records of the class related to the challenged code section be expunged. The city opposed her effort to represent the class, and in ruling on that issue the court also commented on the expungement remedy.

HOLDING

Where a municipal code section is unconstitutional on its face, expungement is available to those arrested under it. The court did not actually order expungement, but found that the subject could represent the class of arrestees and that the possible relief to the class should include expungement.

BACKGROUND

The subject was arrested under a Chicago municipal code section apparently designed to keep undesirables from associating together or from hanging out in bars. The subject was arrested while having a drink in a hotel, apparently on the mere basis of her appearance.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Urban v. Breier
401 F.Supp. 706
(E.D. Wis. 1975)

RELIEF SOUGHT

This class action was brought against a city police chief under the federal civil rights laws on behalf of 54 arrest record subjects named as dangerous motorcycle gang members by the city police department. The suit alleged that the subjects had been arrested for murder without probable cause, and asked that all resulting arrest records be expunged. The suit also asked that the court order the police department to recall and destroy leaflets it had prepared which displayed each subject's name and photograph, labelled him as a known gang member, and stated that many of the subjects were armed and used drugs. It was also requested that any further printing of the leaflets be prohibited.

HOLDING

Relief granted. Where arrest record subjects were arrested for murder without probable cause the unlawfulness of the arrests and the extreme infamy of the charge justified expungement on due process grounds. The police chief was ordered to expunge his department's own records on the subjects, and to recall and expunge any arrest or identification information disseminated to any agencies or persons, state or federal, governmental or private. The recall requests were to include notice that the arrests were made without a legally sufficient basis. The police chief was also ordered to retreive all the leaflets, from his own force as well as from any other law enforcement authorities, agencies, or persons, public or private, who received them, and forbidden from printing more.

BACKGROUND

A Milwaukee newspaper carrier was killed by a bomb which was apparently set in retaliation against a member of a motorcycle gang who had recently testified against members of a rival gang. In the following days the Milwaukee police arrested 54 known or suspected members of the gang which the police believed set the bomb. These persons were booked for murder and interrogated. The police later printed the leaflets and distributed them to area law enforcement agencies as well as within the Milwaukee Police Department.

SPECIAL NOTES

1. The court's order to expunge the arrest records was based on its inherent powers. The order to recall the leaflets was based on constitutional due process considerations.

2. Part of the court's reasons for directing recall of the leaflets appeared to be that it felt public access to some of the leaflets was otherwise inevitable in view of their widespread distribution.

3. In reaching its decision concerning the leaflets, the court relied in part upon a United States Circuit Court case which was later reversed by the Supreme Court (Paul v. Davis, 424 U.S. 693 (1976)). Paul v. Davis repudiates the rationale of the court's holding on the leaflets (damage to reputation alone as amounting to a violation of due process).

4. The court denied a request that the Milwaukee Police Department be allowed to transfer the subjects' fingerprints and photographs to a neutral, non-criminal identification file. The court expressed a very strong desire to ensure that no subject could ever be connected with the highly improper murder arrests, and that the department had no such existing files, suggesting that the "neutral" files might begin and end with the records of the 54 arrestees.

Cross Reference: Pages 24 & 85

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Bilick v. Dudley
356 F.Supp. 945
(S.D.N.Y. 1973)

RELIEF SOUGHT

Criminal record subjects brought suit under the federal constitution and civil rights laws alleging that their mass arrests were unconstitutional and asking for expungement of all arrest records.

HOLDING

Relief granted. Where mass arrests were concededly made without probable cause, and were in violation of the subjects' first and fourth amendment rights of freedom of assembly and speech and freedom from unreasonable searches and seizures, and in light of the ill effects which can flow even from an arrest record which reflects dismissal, such as impairment of reputation and loss of employment opportunities, the court would order expungement. The Police Department had already voluntarily expunged its records, so the order was limited to the Judge and Chief Clerk of the criminal court in which the charges were dismissed. (Those parties claimed immunity but were found not to be immune from an injunctive suit which would have no effect on the exercise of the judicial function.)

BACKGROUND

The subjects were 86 persons, many of them minors, attending a party in support of retaining the New York City Civilian Complaint Review Board for the Police Department. There were signs, leaflets, and buttons in plain view advocating retention of the Board, which led the court to conclude that the police were aware of the political nature of the gathering. Testimony was conflicting, but the police said some plainclothes officers entered the apartment looking for a missing boy, accompanied by the father. After an unsuccessful search the officers were forcefully shoved out of the door by about 10 people. Half an hour later, uniformed officers arrived and arrested all 87 persons present at the party, 86 on charges of congregating for the purpose of using narcotics and disorderly conduct, and one for possession of narcotics. The possession charge was dismissed and the record sealed. The other charges, for which the Assistant Attorney General admitted there was no probable cause, were dismissed.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

United States v. Rosen
343 F.Supp. 804
(S.D.N.Y. 1972)

RELIEF SOUGHT

Federal arrest record subjects sought return of their arrest and identification records on the ground that all charges against them resulted in acquittal or dismissal.

HOLDING

Denied. In the absence of extreme or unusual circumstances, such as an illegal arrest or public display of arrest records in a Rogue's Gallery, and where there has been no claim of injury such as harrassment, lost job opportunities, or improper dissemination, expungement is not justified. The legitimate law enforcement value of retaining arrest and identification records outweighs an individual's simple right of privacy.

BACKGROUND

The subjects were indicted and charged with unlawful importation during a National Emergency, a violation of federal law. A set of charges against one subject resulted in acquittal; further charges against both subjects were dismissed after the corporate defendants in the case pled guilty.

Cross Reference: Pages 26 & 199

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Severson v. Duff
322 F.Supp. 4
(M.D. Fla. 1970)

RELIEF SOUGHT

An imprisoned state record subject convicted under a disorderly conduct statute petitioned for a writ of habeas corpus, alleging that the statute was unconstitutional.

HOLDING

The challenged statute violated the first, fifth, and fourteenth amendments of the constitution, and the relief due the petitioner would include expungement of her record of conviction. The court also ordered the trial court clerk to forward copies of that order to any persons or agencies notified of the petitioner's arrest or conviction.

BACKGROUND

The subject was convicted in a Florida county court of violation of the state's disorderly conduct statute and sentenced to 90 days in jail.

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

Wheeler v. Goodman
306 F.Supp. 58
(W.D.N.C. 1969)
vacated on other grounds, 401 U.S. 987 (1971)

RELIEF SOUGHT

Minor criminal record subjects arrested for vagrancy sued under the federal civil rights laws alleging that the state vagrancy statute was unconstitutional, and asking as partial relief expungement of their arrest records.

HOLDING

The challenged statute violated the due process clause of the fourteenth amendment, and in light of the extreme police misconduct involved in the arrests, the age of the subjects, their innocence of any crime, and the complete lack of law enforcement value in maintaining these records, expungement would be ordered.

BACKGROUND

The minor subjects were hippies living in a run-down communal house which several of them rented. In a successful effort to break up the group and get them out of the neighborhood, the Charlotte, North Carolina police systematically harassed them for a period of several weeks, using unlawful threats, interrogation and searches. This harassment also included the mass arrest of 18 persons for vagrancy without probable cause to support the arrests.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Hughes v. Rizzo
282 F.Supp. 881
(E.D. Pa. 1968)

RELIEF SOUGHT

Arrest record subjects brought an action under the federal civil rights laws on behalf of all those allegedly arrested illegally by city police in an apparent attempt to discourage hippies from frequenting a city park.

HOLDING

Where mass arrests were made with no legal justification the court would order the destruction of all resulting arrest records, including the destruction of any arrest records disseminated to other law enforcement agencies, and the return or destruction of all photographs taken in connection with the arrests, including negatives and any copies.

BACKGROUND

In June and July of 1967 Philadelphia police made mass indiscriminate arrests in a city park known as Rittenhouse Square. Those arrested consisted of hippies, anyone seen associating with them, and those who objected to or inquired about the arrests. This action seemed designed to discourage the hippies from using the park, which was located in a wealthy area. The first group of arrestees were photographed; no charges were ever filed against any of the arrestees.

Cross Reference: Page 27

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Kowall v. United States
53 F.R.D. 211
(W.D. Mich. 1971)

RELIEF SOUGHT

After a federal criminal record subject's conviction for failure to report for induction had been ruled invalid and his record expunged, the government brought this action to revoke the expungement order, arguing that the court had no authority to expunge federal records, and that the public interest in maintenance of criminal identification information outweighed the subject's privacy rights.

HOLDING

Denied. Under prior federal case law federal courts do have inherent power to expunge federal records. The serious potential economic and reputational harm to the subject arising out of maintenance of his arrest record justified the initial expungement; any objections the government had should have been presented at the time of the expungement hearing.

BACKGROUND

The subject had been convicted of failure to report for induction, but a later case rendered his conviction invalid. On motion by the subject, this court had vacated his sentence, set aside the conviction, quashed the indictment, and ordered the arrest record expunged. The government had not opposed the subject's motion and did not appeal it. In this action the government was essentially asking the court to re-open the case.

Cross Reference: Page 201

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

District of Columbia v. Hudson
404 A.2d 175
(D.C. 1979)
(en banc)

RELIEF SOUGHT

This appeal involved the consolidation of 5 lower court actions in which arrest record subjects who were not prosecuted on the charges against them were granted expungement of their arrest records.

HOLDING

Affirmed. Relief granted in the nature of sealing. When a subject shows by clear and convincing evidence either that he did not commit the crime charged or that no crime in fact was committed, relief shall be granted. The relief shall consist of the collection of all records reflecting the arrest, including the return of any disseminated records, and their sealing by the court. The court shall seal only upon an affidavit representing that all the records are before the court. As part of its sealing order the court shall make findings of fact setting forth the details of the case and the court's conclusion of innocence. This statement will then be available to the subject in the event he has to admit his arrest to any third party. (The court refused to reclassify the arrests as detentions and thus permit the subjects to legally deny their arrests.) The court finally requested the parties to jointly prepare a plan providing for the secure sealing and indexing of arrest records.

BACKGROUND

The first subject was arrested for murder, but the Deputy Medical Examiner concluded that the case was actually a suicide. Also, the accusing witness recanted and the police received other information that the victim was alone at the time of the shooting.

The second subject was arrested for failure to attend driving school after having been ordered to do so because of his driving record. In fact the school records were in error and he had attended.

The third subject was arrested on a firearms charge, but in court the Assistant United States Attorney admitted that he was the wrong man.

The fourth subject was arrested for grand larceny and receiving stolen property after moving a motorcycle which had been parked at the curb

for a long time to a neighbor's property. The prosecutor decided not to file charges, citing the subject's "credible" explanation that he was just trying to protect the motorcycle for the true owner.

The fifth subject was arrested for grand larceny, but his prosecution was dismissed when the government was unable to locate its witnesses.

Cross Reference: Pages 205 & 256

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

District of Columbia v. Sophia
306 A.2d 652
(D.C. 1973)

RELIEF SOUGHT

In this consolidated action three arrestees who were not prosecuted and who affirmatively demonstrated their innocence sought to have their arrest records sealed or expunged.

HOLDING

Relief denied. When an arrest is shown to be mistaken and nonculpability has been shown, neither sealing nor expungement are appropriate remedies. Rather, the records should be modified to reflect the fact of innocence. Similarly, dissemination of such records should not be restricted, and disseminated records need not be returned. The police need merely inform those agencies or persons already in possession of the records of the subject's innocence and include such notation in any future disseminations.

BACKGROUND

The subjects were arrested near a civil disturbance in Georgetown. Charges against them subsequently were dropped. The subjects filed motions to expunge and judicially established their innocence. The lower court prohibited dissemination of the records and ordered them sealed; the District appealed.

Cross Reference: Pages 31, 207 & 258

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Irani v. District of Columbia
272 A.2d 849
(D.C. 1971)

RELIEF SOUGHT

A record subject with a federal security clearance brought suit to expunge his arrest record where the prosecution was dismissed for lack of evidence. The lower court held that this did not constitute facts unusual enough to support expungement.

HOLDING

Reversed and remanded. Where the subject had affirmatively established his innocence it was error for the lower court to deny all relief.

BACKGROUND

The subject was a federally-employed student with a security clearance. He was arrested at a civil disturbance for parading without a permit, but proved that he was innocently present at the scene and in fact had simply been leaving a canceled class at a local university.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Diorio v. City of Utica
380 N.Y.S.2d 583
(Utica City Ct. 1976)

RELIEF SOUGHT

An arrest record subject who was able to prove that his arrest was a mistake and was therefore not prosecuted brought this action seeking expungement of his records, stating his belief that a recent rejection of an employment application he made may have stemmed from his arrest record.

HOLDING

Relief granted. Where the subject's arrest was unquestionably a mistake and he was completely innocent, the court would order expungement even without specific legislative authority. The court ordered destruction of its own records and the records of the city police department, erasure of the subject's name from the police arrest book, and return of all identification information.

BACKGROUND

The subject, a school teacher, was arrested for unauthorized use of a motor vehicle. It turned out that he had mistakenly driven off in a friend's car similar to his own and parked next to it. He was in the process of returning the car to his friend when he was arrested.

Cross Reference: Page 224

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

City School District v. Schenectady Federation of Teachers
375 N.Y.S.2d 179
(App. Div. 1975)
appeal dismissed, 382 N.Y.S.2d 1033 (1975)

RELIEF SOUGHT

In a small part of this case, the court addressed the issue of whether conviction records should issue upon a finding of contempt of court.

HOLDING

That while the court was inclined to agree with the teachers that records of conviction should not be issued for contempt, the subjects would have to request expungement directly from the trial court under the facts of this case.

BACKGROUND

The subjects were teachers who went on strike in defiance of a court order. The court found them in contempt. Apparently, however, the order issued by the court, which was appealed from in this case, did not explicitly impose criminal records on the subjects. It was for that reason that they were told to direct any expungement petition to the lower court.

CONTINUED

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MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

People v. De Gaugh
374 N.Y.S.2d 253
(City Ct. 1975)

RELIEF SOUGHT

A criminal record subject who was not prosecuted on baseless charges against him sought the return of all identification records and expungement of arrest records pertaining to the charges, one for rape and one for criminal mischief.

HOLDING

Relief granted in part. Where the rape complainant had admitted to a false complaint and the charge against the defendant was therefore completely baseless, the requested relief would be granted as to that charge. However, since the subject had failed to set forth facts showing that he was innocent of the criminal mischief charge, he was entitled only to return of those identification records under the state civil rights law and not to destruction of the arrest records.

BACKGROUND

In 1969 the subject was charged with first degree rape based on a complaint which was later withdrawn and admitted to be false. The rape charge was therefore dismissed. Also in 1969 he was charged with criminal mischief, but that complaint was also withdrawn and the charge dismissed.

SPECIAL NOTE

The subject requested relief against the city court, city police, New York State Identification and Intelligence System, and the Federal Bureau of Investigation. To the extent relief was granted it was, without explanation, limited to the city court and city police, presumably because the city court issuing the order felt that it had no jurisdiction over the state and federal agencies.

Cross Reference: Page 225

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Godfrey v. Preiser
363 N.Y.S.2d 463
(Sup. Ct. 1975)

RELIEF SOUGHT

A state prison inmate whose parole release date was unconstitutionally revoked and who had subsequently been transferred away from a minimum security work-release correctional facility, losing many rights and privileges, sought to have that transfer expunged from his records.

HOLDING

Relief denied. Even though the subject had been denied constitutional due process and was entitled to a rehearing on his parole release date, the need to keep accurate records showing the location of persons in the custody of the Department of Correctional Services required denial of expungement.

BACKGROUND

The subject had been an inmate of the minimum security Albion Correctional Facility, where he was participating in a work-release program. One week before he had been scheduled to be released, the Parole Board held a hearing on charges against him and revoked his parole release date, imposing another year of imprisonment. He was then transferred to the Attica Correctional Facility, which involved the loss of rights and privileges he had enjoyed at Albion. In the first part of this case the court held that he had been denied due process at the Parole Board hearing.

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

Henry v. Looney
317 N.Y.S.2d 848
(Sup. Ct. 1971)

RELIEF SOUGHT

When charges against him were withdrawn a juvenile arrest record subject sought to have his surname obliterated from his arrest records, his arrest declared null and void, and the records of the case sealed. He based his request on due process, equal protection, and his allegation that his educational and employment opportunities would be harmed by maintenance of the records.

HOLDING

Relief granted in part. Where the subject was unquestionably innocent of any wrongdoing and his records could be of no benefit to society, he was entitled to have his surname obliterated from his records. The records of the case were also ordered sealed, to be reopened only by court order or upon the subject's request. However, the court declined to intrude into the sphere of police decisionmaking by declaring the arrest null and void.

BACKGROUND

The 15-year-old subject, with two companions, arrived by boat at the house of a friend with whom they expected to spend the day water-skiing. He and one companion swam to shore and knocked at the door of the house. Upon receiving no answer they tried other doors without luck and looked through several windows. While returning to the boat the subject was arrested for attempted burglary. The charge was later withdrawn.

Cross Reference: Page 226

MAINTENANCE OF RECORDS:
ILLEGAL OR IMPROPER ARREST OR CONVICTION

State v. Allen
394 N.E.2d 1025
(Ohio C.P. 1978)

RELIEF SOUGHT

In this action a person arrested due to mistaken identity moved for expungement of his arrest records.

HOLDING

Relief granted. Although the state expungement statute was by its terms applicable only to conviction records, where the subject was totally innocent the court would grant expungement.

BACKGROUND

An individual arrested while stripping a car was released on bond after being fingerprinted and photographed, giving his name as Gary Allen. He failed to appear for arraignment and a capias was issued for his arrest. The subject here, a paraplegic since birth, was arrested after being involved as a passenger in a minor automobile accident. Comparison of photographs and fingerprints confirmed that the subject was not the actual criminal.

Cross Reference: Page 228

MAINTENANCE OF RECORDS: ILLEGAL OR IMPROPER ARREST OR CONVICTION

State v. Hammond
580 P.2d 556
(Ore. Ct. App. 1978)

RELIEF SOUGHT

A criminal record subject whose conviction had been set aside following a determination that the statute under which he was prosecuted was unconstitutional appealed a lower court's refusal to expunge his records. The lower court had reasoned that since the subject's convictions were set aside, he no longer had any convictions to expunge, and that the subject had failed to prove that his prior offenses would still be crimes under current law, which it felt the expungement statute required.

HOLDING

Reversed and remanded. Both invalid and valid convictions were subject to expungement under the statute. The statute gave the court discretion to treat the subject's convictions as expungeable. The case was remanded for further proceedings.

BACKGROUND

In 1967 the subject pled guilty to three charges of contributing to the delinquency of a minor. In 1969 the statute under which he was convicted was held unconstitutional, and in 1970 the subject was granted post-conviction relief. In 1977 he brought an action to set aside his convictions and expunge his records. The court did set aside the convictions, but refused expungement.

Chapter 3

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Statutory Standards

As previously noted, 30 states have statutory provisions which seal or purge an arrest record upon dismissal of charges, failure to prosecute, or an acquittal. In most of these states the subject can only obtain the seal or purge order through a court action.

The number of state statutes that authorize sealing or purging on these grounds is somewhat surprising. Criminal justice officials have sharply criticized statutes that authorize the sealing or purging of such non-conviction records. Furthermore, as will be discussed in the next section, the courts have not been very receptive to constitutional arguments for sealing or purging non-conviction records unless the subject can show more than a "simple" acquittal.

However, the effect of statutes that authorize the sealing or purging of non-conviction type data is often limited in several respects:

- coverage may be limited to records maintained in statewide central repositories;
- courts may be given discretion to reject record subjects' purging requests on the basis of subjective factors such as the "public interest;"
- the sealing or purging remedy may be limited to those instances in which the subject can show more than a simple acquittal--such as illegal police conduct, an improper or mistaken arrest or some other extraordinary event;
- a sealing or purging order may be available only to subjects who have no prior conviction or arrest history or, at least, no recent history.

Legislatures that accept the proposition that arrest records that end in acquittal should be sealed or purged usually give emphasis to two policy considerations. First, many legislatures have been receptive to the notion that there is little utility for criminal justice agencies in the retention of a record that does not indicate guilt or culpability.

Second, many legislatures have been receptive to the argument that the retention and use of non-conviction information unfairly and inappropriately harms record subjects. The small amount of empirical research that has been done on this topic suggests that employers and other decisionmakers discriminate against individuals with arrest records to virtually the same extent that they discriminate against individuals with conviction records. In consequence, many legislatures have concluded that individuals with non-conviction records only should not have to run the risk of "record punishment."[94]

Only a few of the cases in this chapter interpret and apply statutory maintenance restrictions for records of arrest that end in acquittal. Most of those cases involve New York's broad sealing statute enacted in 1976 which provides for the sealing of all arrest records that end in a disposition "in favor of" the record subject. Not surprisingly, New York courts have been

[94] See, SGI Technical Report No. ___, Private Employer Access to Criminal History Records (1981).

busy settling disputes about the types of dispositions that are "in favor of" record subjects.[95]

Judicial Standards

A great many of the cases in this chapter concern the question of whether, in the absence of a statute, an acquittal or other demonstration of innocence entitles a record subject to a court order on constitutional or equitable grounds, sealing, purging, or otherwise restricting the maintenance of his record.

Record Maintenance Relief on the Basis of Simple Acquittal

Prior to the Supreme Court's decision in Paul v. Davis, a minority, but still substantial number of courts, held that an acquittal entitled record subjects to a seal or purge order. These courts reasoned that the state has little or no interest in retaining a record about an individual unless it has been determined by a court that the individual committed a crime. On the other hand, retention is likely to do the subject real harm. Thus these courts conclude that the balance weighs in favor of purging or sealing.

In United States v. Kalish,[96] for instance, the court made the following argument for expunging a record of an arrest and acquittal.

> ...when an accused is acquitted of a crime or he is discharged without a conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded.[97]

In Davidson v. Dill[98] the Colorado Supreme Court found that the Constitution mandates the purging of any arrest record that results in an acquittal unless the state can show a compelling interest in retention. Mrs. Davidson was arrested for loitering and subsequently acquitted by a jury. The court, which was perhaps influenced by the petty nature of the crime for which she was arrested, granted her motion for expungement. The opinion concluded:

> A court should expunge an arrest record or order its return when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files.[99]

Interests Served by Providing Record Maintenance Relief for Acquittals

Courts that accept the argument that the constitutional rights of criminal record subjects can be violated, in some circumstances, by retention and/or use of arrest records, have not been very specific or consistent in identifying the constitutional rights on which they rely. Generally, courts that grant expungement use a simple balancing approach that weighs the subject's interest in due process, liberty and privacy against the state's interest in retaining and/or using the record.

In Kowall v. United States[100] the court concluded that maintaining an exonerated arrestee's record was an "impermissible impingement" on an individual's "inalienable right to life, liberty and the pursuit of happiness."[101] Other courts refer to "basic legal rights;"[102] or to "constitutional rights;"[103] or to the "right to fair treatment;"[104] or to a "constitutional right of privacy;"[105] or to the "right to be let alone."[106]

It is possible to identify at least four distinct personal interests served by the purging or sealing of arrest records: (1) an interest in being let alone, in being free of harrassment or other types of surveillance or regulation that may flow from retaining arrest records; (2) an interest in the confidential treatment of arguably non-public information; (3) an interest in being treated in a fair manner and avoiding inappropriate harm; and (4) an interest in preserving one's reputation.

The Constitution only indirectly protects these interests. The Fifth Amendment's due process clause, for example, mandates that the government use fair and regularized procedures before taking action that directly affects a citizen. The Fourth Amendment gives citizens limited protection from government intrusion and may give citizens limited protection against government dissemination and misuse of personal information. The courts' failure to specifically and consistently identify the interests protected by purging and to link these interests to constitutional doctrines probably sapped the vitality of the constitutional sealing and purging doctrine and made it vulnerable to the kind of analysis and rejection that occurred in Paul v. Davis.

Record Maintenance Relief on the Basis of a Demonstration of Factual Innocence

Even before Paul v. Davis, and especially after it, the majority of courts have been unwilling to seal or purge an arrest record (in the absence of a statutory authorization) merely because the subject is acquitted. Some courts, of course, are unwilling to provide such a remedy because they believe that the courts lack the power, in the absence of a statute, regardless of the merits of the record subject's arguments.[107] Most courts, however, affirm that they have the power to provide relief but decline to do so if the subject's claim relies on a simple acquittal. Many of these courts take the perplexing--and constitutionally suspect--position that they should discriminate among "types" of acquittals.

For example, where the record subject can show that he is "totally" innocent or "factually" innocent the courts are likely to provide relief, even in the wake of Paul v. Davis. Thus in State v. Allen[108] a state court ordered the expungement of an arrest record where a paraplegic was mistakenly arrested for skipping bond on a vandalism charge. The real vandal had the same name. The court said that the record subject was "totally innocent."

In other cases where record subjects can convince courts that their arrests were a result of a mistaken identity or some other factual mistake or misunderstanding by the police, the courts have said that this kind of affirmative demonstration of factual innocence entitles the record subject

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[95] See, for example People v. Miller, 394 N.Y.S.2d 1006 (Crim. Ct. 1977); People v. Casella, 395 N.Y.S.2d 909 (Crim. Ct. 1977); and People v. Blackman, 396 N.Y.S.2d 982 (Crim. Ct. 1977).

[96] 271 F.Supp. 968 (D.P.R. 1967).

[97] 271 F.Supp. at 970.

[98] 503 P.2d 157 (Colo. 1972).

[99] 503 P.2d at 161.

[100] 53 F.R.D. 211 (W.D. Mich. 1971).

[101] 53 F.R.D. at 214.

[102] Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).

[103] Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

[104] Carr v. Watkins, 177 A.2d 841 (Md. Ct. App. 1962).

[105] United States v. Kalish, 271 F.Supp. 968 (D.P.R. 1967).

[106] Davidson v. Dill, 503 P.2d 157 (Colo. 1972).

[107] See, for example, Spock v. District of Columbia, 283 A.2d 14 (D.C. 1971).

[108] 394 N.E.2d 1025 (Ohio 1978).

to relief.[109]

By contrast, record subjects who can rely only upon a mere acquittal without being able to affirmatively demonstrate to a court that they are factually innocent have usually (and especially recently) gotten a cold reception. These courts have offered several rationales for refusing relief: that the state has a legitimate law enforcement interest in maintaining arrest records, even with an acquittal;[110] that the record subject has no privacy interest in an arrest record that ends in acquittal;[111] or that in the absence of extreme or unusual circumstances, simple acquittal is not sufficient to justify purging.[112]

In United States v. Linn,[113] for example, a federal court of appeals panel rejected the argument that an acquittal, standing alone justifies a court, in the absence of a statute, to order the arrest record purged. Linn was an attorney who was indicted on stock fraud and related charges. After his acquittal Linn based his purging request on four arguments: (1) the arrest record would be likely to be misused; (2) the arrest record would cause him professional and other harm; (3) retention of his record would not benefit society; and (4) expungement of the record would be necessary to insure his privacy.

The court noted that expungement on constitutional grounds is an available remedy for arrestees in some circumstances. However, the court found that the arrest itself, which was made pursuant to a grand jury indictment, was lawful and that there was no evidence that the record would be misused. The court concluded that although retention of the record might, in fact, violate Linn's constitutional right of privacy, that interest is outweighed by the government's interest in retaining the record. The opinion cites several decisions that support its conclusion that acquittal alone does not provide a basis in the Constitution for purging.[114]

Although any generalization in this area is risky, a review of the cases in this chapter certainly prompts the conclusion that the critical factor for the courts is the "true" nature of the acquittal. If the acquittal is obtained on the basis of a legal technicality, or even on the basis of a close factual decision, a record subject is unlikely to receive record maintenance relief from the courts, unless a statute so provides. However, if the acquittal was obtained on the basis of a demonstration of factual innocence, a record subject is likely to receive judicial record maintenance relief, whether or not a statute provides for such relief.

[109] Henry v. Looney, 317 N.Y.S.2d 848 (Sup. Ct. 1971); People v. DeGaugh, 374 N.Y.S.2d 253 (City Ct. 1975); Diorio v. City of Utica, 380 N.Y.S.2d 588 (City Ct. 1976).

[110] United States v. Rosen, 343 F.Supp. 804 (S.D.N.Y. 1972).

[111] Herschel v. Dyra, 365 F.Supp. 17 (7th Cir. 1966) cert. denied 385 U.S. 973 (1966).

[112] United States v. Linn, G13 Fed 925 (10th Cir. 1975).

[113] 513 F.2d 925 (10th Cir. 1975) cert. denied 423 U.S. 836 (1975).

[114] United States v. Seasholtz, 376 F.Supp. 1288 (N.D. Okla. 1974); United States v. Dooley, 364 F.Supp. 75 (E.D. Pa. 1973); and United States v. Rosen, 343 F.Supp. 804 (S.D.N.Y. 1972).

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Linn
513 F.2d 925
(10th Cir. 1975)
cert. denied, 423 U.S. 836 (1975)

RELIEF SOUGHT

An arrest record subject who was acquitted on federal criminal charges in a jury trial asked the trial court to expunge his arrest record. He based his motion on his right of privacy, the lack of public interest in maintaining his record, what he called "likely" future misuse of his record, and the fact that most of the charges against him were dismissed before trial and he was acquitted on the other charges.

HOLDING

Denied. In the absence of extreme or unusual circumstances, such as a harrassment arrest or arrest under an unconstitutional statute, simple acquittal is not enough to justify expungement of an arrest record.

BACKGROUND

The subject, an Oklahoma attorney, was indicted and arrested on a number of securities fraud charges. Nine counts against the subject were eventually submitted to a jury, which acquitted the subject on all counts.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Wilson v. Webster
467 F.2d 1282
(9th Cir. 1972)

RELIEF SOUGHT

Residents of a community consisting largely of college students brought a class action under the federal Civil Rights Act seeking, in part, expungement of the arrest records of those class members who had obtained acquittals or dismissals following arrests made during a period of violent student unrest. The district court dismissed the case and the class appealed.

HOLDING

Vacated and remanded for further proceedings. Since there were indications that the class could support its request for expungement, and since a federal court may rule on a matter involving state records, the dismissal was improper.

BACKGROUND

As a result of several violent incidents by the Santa Barbara, California student community, a state of emergency was declared and a curfew imposed. Police made hundreds of arrests in the days following, which the plaintiffs alleged were unlawful.

SPECIAL NOTE

The court did not define the jurisdictional basis on which a federal court might order expungement of state records, but it did say that the continued existence of the records may seriously impair fundamental rights of the persons to whom they relate. Apparently the court referred to constitutional due process rights.

Cross Reference: Page 160

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Herschel v. Dyra
365 F.2d 17
(7th Cir. 1966)
cert. denied, 385 U.S. 973 (1966)

RELIEF SOUGHT

An arrest record subject sued a police record supervisor under federal civil rights law to obtain expungement of all records of his arrest after charges against him were dismissed, basing his request on his right of privacy.

HOLDING

The maintenance of arrest records of even those individuals who are subsequently acquitted does not infringe on any right of privacy under the constitution.

BACKGROUND

The subject was arrested under an anti-litter ordinance for distributing handbills which were apparently non-commercial. The City of Chicago later dropped charges against the subject. Prior to the arrest, the police officer had been advised by the defendant that the material he was distributing was religious in nature and not covered by the anti-litter ordinance according to opinions by the corporation counsel.

Cross Reference: Page 244

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Thorne
467 F.Supp. 938
(D. Conn. 1979)

RELIEF SOUGHT

In this action the federal government sought to compel state officials to give testimony concerning a state criminal proceeding in which the subject had been acquitted and his records then erased under state law. The testimony was sought in connection with a federal prosecution of the subject.

HOLDING

Under the Supremacy Clause of the United States Constitution the federal court had a constitutional duty to do justice in the federal criminal trial, and the court had the power to order the state officials to furnish the requested testimony.

BACKGROUND

The subject had been charged with a criminal offense by the state. A search warrant was issued in connection with that charge and evidence was seized under the warrant. The subject was acquitted and state law mandated that his records then be automatically expunged and forbade any disclosure of any information contained in the expunged records.

The subject was then charged with a federal offense arising out of the state-conducted search. He moved to suppress the seized evidence. In preparation for the suppression hearing the government subpoenaed the state court clerk (for a copy of the search warrant), the chief court reporter (for a portion of the state trial transcript), and the state police officer who had conducted the search. They refused to testify, citing the erasure statute.

Cross Reference: Page 18

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Singleton
442 F.Supp. 722
(S.D. Tex. 1977)

RELIEF SOUGHT

A group of police officers who had been acquitted on all charges of illegal wiretapping petitioned the court to order the expungement of their arrest records.

HOLDING

Denied. The courts do have the inherent power to order the expungement of arrest records that end in acquittal, but the power is a narrow one and should be used only in the unusual or extreme case.

BACKGROUND

The court found that each of the police officers still had an exemplary reputation in both the general community and the law enforcement community. Thus, they could not allege any actual harm resulting from the retention or dissemination of their records. Also, there was nothing illegal or unconstitutional about their arrest.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Coleman v. Department of Justice
429 F.Supp. 411
(N.D. Ind. 1977)

RELIEF SOUGHT

A federal criminal record subject sued to obtain expungement from his Federal Bureau of Investigation (FBI) rap sheet of various arrests and convictions. He based his action upon the court's general power to expunge.

HOLDING

Relief denied. In the absence of extraordinary circumstances, expungement will not be granted. Since the subject sought expungement of certain arrest entries only because he was not convicted and gave no grounds supporting expungement of the challenged convictions, expungement was denied.

BACKGROUND

The subject brought suit in an effort to expunge a number of arrests and convictions from his FBI rap sheet. He failed to respond to a motion by the Department of Justice to dismiss, leaving the court with little basis on which to consider his request.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Seasholtz
376 F.Supp. 1288
(N.D. Okla. 1974)

RELIEF SOUGHT

An acquitted criminal record subject, alleging damage to his reputation from the continued existence of his criminal record, moved for expungement of all arrest, prosecution, and identification data.

HOLDING

Denied. In the absence of extreme or unusual circumstances, such as an illegal arrest, a court will not order expungement on the basis of an acquittal alone, especially in light of the great practical difficulty in locating all the governmental records which result from an arrest and prosecution.

BACKGROUND

The subject, a surgeon, was acquitted of the criminal charges against him by dismissal at trial. He complained that the arrest, but not the acquittal, appeared in his files with the Retail Credit Bureau, Hooper Homes, and the American Service Bureau, and that this was damaging to his reputation.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN ACQUITTAL
OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Dooley
364 F.Supp. 75
(E.D. Pa. 1973)

RELIEF SOUGHT

A federal arrest record subject who was acquitted of various charges and against whom other charges were dismissed sought expungement of his arrest and identification records, on grounds that their existence caused him irreparable harm and constituted an unwarranted invasion of his privacy.

HOLDING

Denied. Although records of charges which terminate in acquittal or dismissal possess no law enforcement value, have great potential for injury to reputation, can unjustifiably restrict employment opportunities, and unfairly prejudice the rights of the record subject, the court, for practical administrative reasons, is not justified in ordering expungement in the absence of extreme or unusual circumstances.

BACKGROUND

The subject was indicted twice by a federal grand jury, each indictment charging him with the same crimes. He voluntarily appeared at the United States Marshall's office to post bond and was photographed and fingerprinted at that time. He was acquitted by a jury in the trial resulting from the first indictment, and the government consequently dismissed the second indictment.

Cross Reference: Page 250

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN ACQUITTAL
OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Rosen
343 F.Supp. 804
(S.D.N.Y. 1972)

RELIEF SOUGHT

Federal arrest record subjects sought return of their arrest and identification records on the ground that all charges against them resulted in acquittal or dismissal.

HOLDING

Denied. In the absence of extreme or unusual circumstances, such as an illegal arrest or public display of arrest records in a Rogue's Gallery, and where there has been no claim of injury such as harrassment, lost job opportunities, or improper dissemination, expungement is not justified. The legitimate law enforcement value of retaining arrest and identification records outweighs an individual's simple right of privacy.

BACKGROUND

The subjects were indicted and charged with unlawful importation during a National Emergency, a violation of federal law. A set of charges against one subject resulted in acquittal; further charges against both subjects were dismissed after the corporate defendants in the case pled guilty.

Cross Reference: Pages 26 & 169

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

United States v. Kalish
271 F.Supp. 968
(D.P.R. 1967)

RELIEF SOUGHT

A federal arrest record subject who was never prosecuted asked that his arrest records, including fingerprints and photographs, be destroyed.

HOLDING

When a subject has never been prosecuted or convicted there is no public interest in retaining his arrest record or criminal identification data. Moreover, retention does seriously injure the individual's privacy and personal dignity. The United States Attorney General was ordered to destroy the subject's arrest record and criminal identification file in his custody, and those in the Identification Division of the Federal Bureau of Investigation. He was further forbidden from disseminating the records to any governmental agency or to any person.

BACKGROUND

The subject, on the advice of counsel, refused induction into the Army on the good faith argument that he was constitutionally entitled to reclassification or to a hearing before his local Selective Service board. He was arrested contrary to an agreement reached with the Assistant U.S. Attorney, at which time he was fingerprinted and photographed. He submitted to induction half an hour later and was never prosecuted on the arrest.

Cross Reference: Pages 28, 138 & 251

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Kowall v. United States
53 F.R.D. 211
(W.D. Mich. 1971)

RELIEF SOUGHT

After a federal criminal record subject's conviction for failure to report for induction had been ruled invalid and his record expunged, the government brought this action to revoke the expungement order, arguing that the court had no authority to expunge federal records, and that the public interest in maintenance of criminal identification information outweighed the subject's privacy rights.

HOLDING

Denied. Under prior federal case law federal courts do have inherent power to expunge federal records. The serious potential economic and reputational harm to the subject arising out of maintenance of his arrest record justified the initial expungement; any objections the government had should have been presented at the time of the expungement hearing.

BACKGROUND

The subject had been convicted of failure to report for induction, but a later case rendered his conviction invalid. On motion by the subject, this court had vacated his sentence, set aside the conviction, quashed the indictment, and ordered the arrest record expunged. The government had not opposed the subject's motion and did not appeal it. In this action the government was essentially asking the court to re-open the case.

Cross Reference: Page 173

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN ACQUITTAL
OR OTHER DEMONSTRATION OF INNOCENCE

People v. White
144 Cal. Rptr. 128
(App. Dep't Sup. Ct. 1978)

RELIEF SOUGHT

An arrest record subject who was acquitted on all charges sued to obtain retroactive application of a state sealing statute to his case.

HOLDING

Relief granted. Under the statutory language and purpose the sealing remedy was intended to be available to all persons in the subject's position, not just those placed there after the date of enactment.

BACKGROUND

The subject was acquitted on two misdemeanor charges in 1972. In 1975 the state legislature enacted a Penal Code section which provided for sealing of the records of acquitted persons shown to be factually innocent. In 1977 the subject brought suit seeking to use that sealing provision, and in a lower court proceeding he was found factually innocent of the misdemeanor charges and his records ordered sealed. This appeal by the state resulted.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN ACQUITTAL
OR OTHER DEMONSTRATION OF INNOCENCE

Davidson v. Dill
503 P.2d 157
(Colo. 1972)
(en banc)

RELIEF SOUGHT

An arrest record subject acquitted on loitering charges brought suit seeking expungement or return of her arrest records. She based her action on her right of privacy. The lower court dismissed and she appealed.

HOLDING

Reversed and remanded. When a subject requests destruction or return of an arrest record the court should use a balancing test to decide the case, weighing the individual's right of privacy and the adverse effects of an arrest record against the public interest in maintaining the criminal record. The action was remanded to the lower court to allow the subject to present her case.

BACKGROUND

The subject, who had no prior record, was arrested by the Denver, Colorado police for loitering and acquitted by jury trial. She requested the return of her arrest and identification records from the police, who refused. She then brought suit against the chief of police and the police records custodian in charge of her records.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

McCarthy v. Freedom of Information Commission
402 A.2d 1197
(Conn. Sup. Ct. 1979)

RELIEF SOUGHT

In this action by present and former police officers seeking to stay release of records of complaints and disciplinary actions against them, the subjects argued that a criminal record erasure statute should be extended to apply to their internal police records.

HOLDING

The erasure statute, which provided for expungement of criminal records in the event of acquittal, nolle pros., or absolute pardon applied in criminal cases only and could not be extended to cover internal complaints against police officers and records of disciplinary proceedings.

BACKGROUND

A Hartford, Connecticut newspaper obtained an order from the Freedom of Information Commission directing the city of New London to release various records concerning complaints lodged against New London police officers and reflecting the resulting disciplinary proceedings. A number of present and former police officers brought suit in an effort to block disclosure.

Cross Reference: Page 91

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

District of Columbia v. Hudson
404 A.2d 175
(D.C. 1979)
(en banc)

RELIEF SOUGHT

This appeal involved the consolidation of 5 lower court actions in which arrest record subjects who were not prosecuted on the charges against them were granted expungement of their arrest records.

HOLDING

Affirmed. Relief granted in the nature of sealing. When a subject shows by clear and convincing evidence either that he did not commit the crime charged or that no crime in fact was committed, relief shall be granted. The relief shall consist of the collection of all records reflecting the arrest, including the return of any disseminated records, and their sealing by the court. The court shall seal only upon an affidavit representing that all the records are before the court. As part of its sealing order the court shall make findings of fact setting forth the details of the case and the court's conclusion of innocence. This statement will then be available to the subject in the event he has to admit his arrest to any third party. (The court refused to reclassify the arrests as detentions and thus permit the subjects to legally deny their arrests.) The court finally requested the parties to jointly prepare a plan providing for the secure sealing and indexing of arrest records.

BACKGROUND

The first subject was arrested for murder, but the Deputy Medical Examiner concluded that the case was actually a suicide. Also, the accusing witness recanted and the police received other information that the victim was alone at the time of the shooting.

The second subject was arrested for failure to attend driving school after having been ordered to do so because of his driving record. In fact the school records were in error and he had attended.

The third subject was arrested on a firearms charge, but in court the Assistant United States Attorney admitted that he was the wrong man.

The fourth subject was arrested for grand larceny and receiving stolen property after moving a motorcycle which had been parked at the curb for a long time to a neighbor's property. The prosecutor decided not to file charges, citing the subject's "credible" explanation that he was just trying to protect the motorcycle for the true owner.

The fifth subject was arrested for grand larceny, but his prosecution was dismissed when the government was unable to locate its witnesses.

Cross Reference: Pages 175 & 256

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

District of Columbia v. Sophia
306 A.2d 652
(D.C. 1973)

RELIEF SOUGHT

In this consolidated action three arrestees who were not prosecuted and who affirmatively demonstrated their innocence sought to have their arrest records sealed or expunged.

HOLDING

Relief denied. When an arrest is shown to be mistaken and nonculpability has been shown, neither sealing nor expungement are appropriate remedies. Rather, the records should be modified to reflect the fact of innocence. Similarly, dissemination of such records should not be restricted, and disseminated records need not be returned. The police need merely inform those agencies or persons already in possession of the records of the subject's innocence and include such notation in any future disseminations.

BACKGROUND

The subjects were arrested near a civil disturbance in Georgetown. Charges against them subsequently were dropped. The subjects filed motions to expunge and judicially established their innocence. The lower court prohibited dissemination of the records and ordered them sealed; the District appealed.

Cross Reference: Pages 31, 176 & 258

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Spock v. District of Columbia
283 A.2d 14
(D.C. 1971)

RELIEF SOUGHT

Record subjects who were arrested during large demonstrations and either acquitted or not prosecuted brought suit attacking the maintenance of their arrest records. They asked that dissemination be prohibited, their records expunged, and notification of such action be sent to anyone who had already been sent the records.

HOLDING

In the absence of express statutory authority local courts could not order expungement of local police records. This result is also supported by the public policy in favor of retention and maintenance of arrest records. However, any subject who could affirmatively show nonculpability would be entitled to a court order directing that all police records of his arrest be modified to reflect that fact, and further directing that notice of the subject's innocence be sent to any recipient of the records. The standard set by the court was that a subject must show, not merely that he was acquitted or not prosecuted, but that he was in fact not culpable, such as having been mistakenly arrested.

BACKGROUND

The subjects were arrested during large demonstrations in May of 1970. The charges were minor, usually disorderly conduct. Six arrestees were tried and acquitted and charges against all of the others were dropped.

SPECIAL NOTES

1. In a later case the United States Court of Appeals for the District of Columbia ruled that courts do have the inherent power to order expungement when such action is necessary to vindicate constitutional rights. Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973). See Part II, Chapter 2.

2. The court in this case observed that the subjects did not request destruction of court records, and that in any event records of the arrests in the arrest books should not be destroyed, to avoid the evils of secret arrests.

Cross Reference: Page 259

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Lewerenz
192 N.E.2d
(Ill. App. 1963)

RELIEF SOUGHT

Defendant, who was acquitted on narcotics charges, petitioned the criminal court to order the return to him of all fingerprints, photographs and other identification data related to his arrest and prosecution maintained by the state Department of Public Safety, the Chicago Police Superintendent or the Cook County Sheriff. He relied on a state criminal statute requiring the state Department of Public Safety to return identification data upon acquittal or release without conviction. The trial court granted the petition.

HOLDING

Reversed as to the Cook County Sheriff and the Chicago Police Superintendent. The statute applies only to the state Department of Public Safety. The court therefore had no jurisdiction to order the county sheriff or the city police chief to return identification data.

Absent the statute, the relief sought would be in the nature of a right to privacy. This is a civil right and is no basis for assumption of jurisdiction by a criminal court.

BACKGROUND

Defendant was convicted on four counts of violation of narcotics laws. The state Supreme Court reversed the convictions on two counts and ordered a new trial on the other two counts. On re-trial defendant was acquitted.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Kolb v. O'Connor
142 N.E.2d 818
(Ill. 1957)

RELIEF SOUGHT

Petitioners, all of whom were acquitted of criminal charges or released without being charged, sought a declaratory judgment ordering the Chicago Police Superintendent to return to them fingerprints, photographs and other identification data. They based their petition on a state statute and on an allegation of invasion of their right of privacy. The trial court granted relief.

HOLDING

Reversed. The statute requiring the state Department of Public Safety to return identification records upon acquittal or release without conviction did not apply to city police chiefs. In view of the utility of the identification records to the police, the fact that they were kept in the files of the police department subject only to limited exhibition for investigation and identification purposes, and the absence of a legislative policy to the contrary, the right of the public to effective police protection outweighs the petitioners' right to privacy.

BACKGROUND

Petitioners were all first offenders and contended that their photographs would be exhibited to victims of crimes and that this would embarrass them. The court acknowledged that Illinois had recognized a right of privacy, but concluded that, in the absence of a specific legislative mandate, the right of the individual to privacy must be subordinate to the safety of the public.

Cross Reference: Page 264

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Doe v. Commander, Wheaton Police Department
329 A.2d 35
(Md. 1974)

RELIEF SOUGHT

An arrest record subject, who claimed he could demonstrate complete innocence after charges of committing an unnatural sexual act were dropped, brought suit seeking to have further dissemination of his record restrained, his file expunged, any computer files erased, an explanatory note inserted in the court files, and any records transmitted to the Federal Bureau of Investigation returned. He based his action on his constitutional right of privacy. The lower court dismissed, and he appealed.

HOLDING

Reversed and remanded. The subject should be allowed to present his case, in light of the possible applicability of the constitutional right of privacy. The fact that there was a statute explicitly authorizing expungement did not prohibit granting expungement in cases falling outside the provisions of that statute.

BACKGROUND

The subject, an employee of Georgetown University Law Center, was arrested by a store security guard and charged with committing an unnatural and perverted sexual act. The prosecution against him was dropped and he subsequently filed suit to have his records expunged. He alleged invasion of his constitutional right of privacy and irreparable harm from the continued existence of his files.

Cross Reference: Pages 34 & 268

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Carr v. Watkins
177 A.2d 841
(Md. 1962)

RELIEF SOUGHT

An individual brought this action for money damages against two county police officers based on their allegedly having told his employer of his having been charged several years previously with molesting a minor and drunkenness. He claimed he had been fired on the basis of that information, and sued on a number of counts, including slander, invasion of privacy, and divulgence of information without legal right. His case was dismissed and he appealed.

HOLDING

Reversed. The officers did not have an absolute privilege or immunity against liability. If it could be shown that the officers had acted with malice and outside the scope of their duties in communicating the information, they would be liable.

BACKGROUND

While working in the Naval Ordnance Laboratory in 1954 the subject was charged with molesting a minor and drunkenness. Apparently the only hearing on the charges took place before officials of the Laboratory. The individual was cleared and continued in his position. In 1960, while he was employed as a shopping center security guard, he alleges that two Montgomery County Police Department officers told his employer of those charges and that he was consequently fired.

The court disagreed with the trial court's finding that there is no tort of invasion of privacy in Maryland. It stated that recognition of the right had been rapid in recent years, and it saw no reason why there should not be compensatory redress for a wrongful invasion of privacy in a proper case.

SPECIAL NOTE

This case sought money damages against the police officers personally rather than against their police agencies. The court's ruling makes it clear that personal liability may result if public officials act outside the scope of their duties and with malice.

Cross Reference: Page 95

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

City of St. Paul v. Froysland
246 N.W.2d 435
(Minn. 1976)

RELIEF SOUGHT

A criminal record subject sought return of identification records and expungement of arrest records. Her request for return of identification records was based on a statute which directed such action whenever criminal actions terminated in favor of the accused. She asked for expungement mainly under her constitutional right of privacy.

HOLDING

Denied. When a conviction is vacated following the subject's successful completion of a six-month period without further incident, that does not constitute termination in favor of the accused. There was then no statutory ground for return of identification records. Expungement was found to be inappropriate since the subject was guilty of the crime charged, giving society an interest in the maintenance of her record.

BACKGROUND

The subject pled guilty to disorderly conduct, but the court stayed sentencing for six months on condition that the subject behave lawfully during that period. The subject succeeded and the conviction was accordingly vacated.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Application of Jascalevich
404 A.2d 1239
(N.J. Super. Ct. 1979)

RELIEF SOUGHT

In this case the record subject, a medical doctor, had been tried for murder, sued by the estates of the decedents and investigated by the State Board of Medical Examiners, all during the same period. After his acquittal on the murder charges he requested expungement of all the related criminal records, as authorized by state statute. This case arose to resolve the issue of the availability of the various records arising out of the subject's arrest and trial to the civil litigants and to the State Board.

HOLDING

Since there was law enforcement objection to expungement of the subject's record, he was by terms of the statute limited to sealing as a remedy. The court ordered the sealing of all records as to which the subject had requested expungement, with two exceptions. First, there was to be no sealing of the public and hospital records in the prosecutor's files since the civil litigants were entitled to these by way of discovery. Second, despite the sealing order the State Board was to have full access to all records for use in its administrative proceeding in regard to the subject's license to practice medicine. As to all other records, access was to be granted to the civil litigants only upon a showing that their need to know outweighed any harm to the subject. And finally, the court ordered that once the State Board concluded its proceeding any material in the prosecutor's file which belonged to the subject was, upon request, to be returned to him.

BACKGROUND

The subject was indicted and tried on several murder counts. He was simultaneously sued by a number of decedents' estates, presumably on wrongful death actions. Those civil suits were stayed pending the outcome of the criminal trial. Upon being acquitted the subject asked that his criminal records be expunged. The civil litigants opposed his request, desiring access to those files for use in their suits.

Cross Reference: Pages 50 & 67

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Ulinsky v. Avignone
372 A.2d 620
(N.J. Sup. Ct. App. Div. 1977)

RELIEF SOUGHT

This case involved the issue of whether an acquitted criminal record subject who obtains expungement and then brings an action for malicious prosecution against those responsible for his arrest may deny the persons he is suing access to his records.

HOLDING

As a condition to maintaining a malicious prosecution suit a subject who has obtained expungement must consent to the request of those he is suing for inspection and copying of the expunged records. The subject must authorize the court to order the records custodian to make the records available to the defendants. The court in which the subject brings his suit will have jurisdiction to order disclosure, if consented to by the subject. If the subject does not consent his suit will be dismissed.

BACKGROUND

The subject was arrested for indecent exposure based on a complaint filed by the defendants in this case. He was acquitted and requested expungement of all records. Since there was no law enforcement opposition expungement was ordered. Several months later the subject brought suit against the defendants, alleging that the complaint had been filed falsely and maliciously. The defendants brought a motion before the judge who had ordered the subject's records expunged, requesting that he now order production of the records. The judge refused on the basis that he lacked jurisdiction to grant such an order.

SPECIAL NOTE

Under New Jersey law at this time, "expungement" consisted of removing records from the main files and placing them in the custody of a person who would see to it that the records were not disclosed to anyone, for any reason. While technically this is a strict form of sealing, the term "expungement" was used since New Jersey law also provided a lesser statutory remedy designated as "sealing."

Cross Reference: Page 68

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

State v. E.B.R.
353 A.2d 118
(N.J. Sup. Ct. App. Div. 1976)
(per curiam)

RELIEF SOUGHT

The state appealed a lower court's expungement order under a state statute of records reflecting a subject's arrest, trial, and discharge without conviction on a charge of murder. The state argued that the statute was unavailable to one charged with murder, and that in any event the subject was limited to sealing as a remedy since there had been law enforcement opposition to the expungement petition.

HOLDING

Vacated and remanded. Although the expungement statute on its face applied only to records concerning misdemeanors or high misdemeanors, the legislative purpose justified extending its provisions to murder records. However, the statute did limit a subject to sealing when there was law enforcement opposition to expungement. The case was remanded for entry of a sealing order.

BACKGROUND

The subject was initially charged with murder and was convicted of second degree murder. That conviction was reversed, and on retrial the subject was found not guilty by reason of insanity. She filed a petition to expunge her criminal records shortly after being adjudged sane and released from the State Hospital.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Maxie v. Gimbel Brothers Inc.
423 N.Y.S.2d 802
(Sup. Ct. 1979)

RELIEF SOUGHT

In this case the defendants in a malicious prosecution suit moved that the plaintiff be required to consent to the unsealing of her earlier criminal records concerning the incident which gave rise to this action.

HOLDING

Relief granted. While the subject of sealed records will not be forced to waive the statutory sealing privilege, the subject may not in the interests of justice assert that right while simultaneously maintaining a civil suit based on the sealed incident. The court ordered the subject to either authorize release of the sealed records to the defendants or be marked off the court calendar, subject to restoration if she later obtained the records and delivered them to the court.

BACKGROUND

In 1976 the subject was arrested on a larceny complaint lodged by the defendants in this case. She was acquitted, and her records were sealed pursuant to state statute. She then sued the defendants for false imprisonment and malicious prosecution based on her larceny arrest.

Cross Reference: Page 69

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Jarnot
420 N.Y.S.2d 481
(Buffalo City Ct. 1979)

RELIEF SOUGHT

A criminal record subject moved for an order sealing his criminal records following his acquittal on a misdemeanor traffic charge. He argued that his acquittal justified protecting him from the adverse effects of his record.

HOLDING

Denied. Since a finding of not guilty in the criminal context does not establish innocence and since the court found that the evidence in this case would satisfy the lesser civil burden of a preponderance of the evidence, it would be against the interests of justice to seal these records.

BACKGROUND

The subject was tried on a misdemeanor traffic violation charge and acquitted by a jury. After the verdict was rendered, the court notified the subject that it was, on its own motion, considering denying him a sealing order.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Blackman
396 N.Y.S.2d 982
(Crim. Ct. N.Y. 1977)

RELIEF SOUGHT

A criminal record subject who was allowed to plead guilty to a lesser offense sought sealing of her records and return of identification data. She based her request on state statute.

HOLDING

Denied. Being allowed to plead to a lesser offense does not fall within any of the specific statutory definitions of termination of a criminal proceeding in favor of the subject. The subject was therefore denied all relief.

BACKGROUND

The subject was originally charged with driving while intoxicated, a misdemeanor. A charge of disorderly conduct, a "violation," was later added and she pled guilty to the lesser offense in satisfaction of the misdemeanor charge.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Casella
395 N.Y.S.2d 909
(Crim. Ct. N.Y. 1977)

RELIEF SOUGHT

Criminal record subjects who were allowed to plead guilty to lesser offenses sought sealing of their records and return of identification data. They based their requests on a state statute.

HOLDING

Denied. Being allowed to plead to a lesser offense does not fall within any of the specific statutory definitions of termination of a criminal proceeding in favor of the subject. The subjects were therefore denied all relief.

BACKGROUND

The first subject was originally charged with petit larceny and possession of burglar's tools, both misdemeanors. He pled guilty to trespass and disorderly conduct, both violations. The other two subjects were charged with petit larceny and pled guilty to disorderly conduct.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Miller
394 N.Y.S.2d 1006
(Crim. Ct. N.Y. 1977)

RELIEF SOUGHT

A criminal record subject who was arrested for a misdemeanor but pled guilty to a violation sought the sealing of her arrest records and return of all identification data pursuant to state statute.

HOLDING

Granted in part. Although the sealing statute was enacted after the subject's arrest and conviction, it was by its terms still available to her. Second, although the statute did not specifically authorize return of her identification data, in that it did not include pleading to a lesser charge as a termination in favor of the accused, the subject was nonetheless entitled to that relief in the interests of justice and fairness. (This was apparently based on the fact that there was no statutory authority for taking photographs and fingerprints pursuant to the charge for which the subject was actually convicted.) However, neither the statute nor the interests of justice required sealing the subject's arrest record.

BACKGROUND

The subject was arrested in 1974 for prostitution, a misdemeanor, but pled guilty to the lesser charge of disorderly conduct, a violation. In 1976 the legislature enacted that portion of the Criminal Procedure Law which provides for sealing of records and return of identification data when criminal proceedings terminate in favor of the subject.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. Flores
393 N.Y.S.2d 664
(Crim. Ct. N.Y. 1977)

RELIEF SOUGHT

A record subject who was charged with a felony and a number of traffic infractions arising out of the same incident, but who eventually pled guilty only to traffic violations, sought to have his records sealed and identification data returned pursuant to state statute.

HOLDING

Granted. Since the subject was only convicted of traffic violations, the criminal charges against him having been dismissed, all criminal proceedings against the subject had terminated in his favor. The court found that the legislature intended the sealing statute to erase all indicia of any arrest which did not result in a criminal conviction. Since this subject's convictions were not criminal, his motion was granted.

BACKGROUND

The subject was originally charged with the felony of reckless endangerment and with various traffic infractions after driving his car onto the sidewalk. He later pled guilty to three traffic charges, which covered all charges against him, including the felony charge; all other charges were dismissed.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Diorio v. City of Utica
380 N.Y.S.2d 588
(Utica City Ct. 1976)

RELIEF SOUGHT

An arrest record subject who was able to prove that his arrest was a mistake and was therefore not prosecuted brought this action seeking expungement of his records, stating his belief that a recent rejection of an employment application he made may have stemmed from his arrest record.

HOLDING

Relief granted. Where the subject's arrest was unquestionably a mistake and he was completely innocent, the court would order expungement even without specific legislative authority. The court ordered destruction of its own records and the records of the city police department, erasure of the subject's name from the police arrest book, and return of all identification information.

BACKGROUND

The subject, a school teacher, was arrested for unauthorized use of a motor vehicle. It turned out that he had mistakenly driven off in a friend's car similar to his own and parked next to it. He was in the process of returning the car to his friend when he was arrested.

Cross Reference: Page 178

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

People v. De Gaugh
374 N.Y.S.2d 253
(City Ct. 1975)

RELIEF SOUGHT

A criminal record subject who was not prosecuted on baseless charges against him sought the return of all identification records and expungement of arrest records pertaining to the charges, one for rape and one for criminal mischief.

HOLDING

Relief granted in part. Where the rape complainant had admitted to a false complaint and the charge against the defendant was therefore completely baseless, the requested relief would be granted as to that charge. However, since the subject had failed to set forth facts showing that he was innocent of the criminal mischief charge, he was entitled only to return of those identification records under the state civil rights law and not to destruction of the arrest records.

BACKGROUND

In 1969 the subject was charged with first degree rape based on a complaint which was later withdrawn and admitted to be false. The rape charge was therefore dismissed. Also in 1969 he was charged with criminal mischief, but that complaint was also withdrawn and the charge dismissed.

SPECIAL NOTE

The subject requested relief against the city court, city police, New York State Identification and Intelligence System, and the Federal Bureau of Investigation. To the extent relief was granted it was, without explanation, limited to the city court and city police, presumably because the city court issuing the order felt that it had no jurisdiction over the state and federal agencies.

Cross Reference: Page 180

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Henry v. Looney
317 N.Y.S.2d 848
(Sup. Ct. 1971)

RELIEF SOUGHT

When charges against him were withdrawn a juvenile arrest record subject sought to have his surname obliterated from his arrest records, his arrest declared null and void, and the records of the case sealed. He based his request on due process, equal protection, and his allegation that his educational and employment opportunities would be harmed by maintenance of the records.

HOLDING

Relief granted in part. Where the subject was unquestionably innocent of any wrongdoing and his records could be of no benefit to society, he was entitled to have his surname obliterated from his records. The records of the case were also ordered sealed, to be reopened only by court order or upon the subject's request. However, the court declined to intrude into the sphere of police decisionmaking by declaring the arrest null and void.

BACKGROUND

The 15-year-old subject, with two companions, arrived by boat at the house of a friend with whom they expected to spend the day water-skiing. He and one companion swam to shore and knocked at the door of the house. Upon receiving no answer they tried other doors without luck and looked through several windows. While returning to the boat the subject was arrested for attempted burglary. The charge was later withdrawn.

Cross Reference: Page 182

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Peabody v. Francke
168 N.Y.S.2d 201
(App. Div. 1957)
cert. denied, 357 U.S. 941 (1958)

RELIEF SOUGHT

A record subject sought to expunge her disorderly conduct conviction, which had been reversed and never retried. The lower court denied an expungement order.

HOLDING

Affirmed. Where the entry sought to be expunged was made pursuant to statute and there was apparently no statute granting a right to have it expunged, the court had no authority to order expungement.

BACKGROUND

The record the subject wished to expunge was a return filed by a police justice sitting as a court of special sessions, certifying to the subject's conviction. She was convicted by the justice, obtained reversal on appeal, and was never retried, the proceedings being dismissed.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

State v. Allen
394 N.E.2d 1025
(Ohio C.P. 1978)

RELIEF SOUGHT

In this action a person arrested due to mistaken identity moved for expungement of his arrest records.

HOLDING

Relief granted. Although the state expungement statute was by its terms applicable only to conviction records, where the subject was totally innocent the court would grant expungement.

BACKGROUND

An individual arrested while stripping a car was released on bond after being fingerprinted and photographed, giving his name as Gary Allen. He failed to appear for arraignment and a capias was issued for his arrest. The subject here, a paraplegic since birth, was arrested after being involved as a passenger in a minor automobile accident. Comparison of photographs and fingerprints confirmed that the subject was not the actual criminal.

Cross Reference: Page 183

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

State v. Pinkney
290 N.E.2d 923
(Ohio C.P. 1972)

RELIEF SOUGHT

A criminal record subject who was discharged after other persons confessed to the crime charged sought in this suit to expunge all records of his case.

HOLDING

Relief granted. Given that the subject was innocent there was no public interest in the maintenance of his records. Since the subject could suffer personal and economic harm from his record, expungement was appropriate. The court apparently acted under its inherent powers, and cited the subject's fundamental right of privacy. The city police department was ordered to destroy all records in its possession, including identification data, the records of the case were ordered sealed, and the county sheriff was ordered to destroy his files. The court also recommended that the subject request the state Bureau of Criminal Identification and Investigation and the Federal Bureau of Investigation to expunge their records.

BACKGROUND

The subject was tried for first-degree murder, and was discharged following a jury deadlock. While he was awaiting retrial other persons confessed to the crime, and the charges against the subject were nolled.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Chase v. King
406 A.2d 1388
(Pa. Sup. Ct. 1979)

RELIEF SOUGHT

A record subject brought this suit seeking expungement of two arrest records on the grounds that one of the charges against him had been dismissed and he had been acquitted on the other. The lower court denied relief and he appealed.

HOLDING

Reversed in part, affirmed in part. As to the first arrest, the Commonwealth had failed to show any compelling reason justifying retention of the record of an arrest made pursuant to a complaint filed by the subject's wife after a domestic quarrel, but later withdrawn. The record in that case was ordered expunged. As to the second arrest, however, the Commonwealth had made out a prima facie case against the subject, who was later acquitted in a jury trial. Since the subject had not affirmatively demonstrated his innocence, and had not shown any harm resulting from that record, it was not ordered expunged.

BACKGROUND

The first arrest was made following a complaint filed against the subject by his wife after a domestic quarrel. She then withdrew the complaint. The second arrest was for theft. The subject was identified by an eyewitness but a jury found him not guilty.

SPECIAL NOTE

The court observed that although the subject was suspended from his job during his trial for theft, he was reinstated immediately upon acquittal. This aided the court in finding that the public interest in favor of retention of the theft arrest record outweighed the interests of the subject.

Cross Reference: Page 284

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Commonwealth v. Rose
397 A.2d 1243
(Pa. Sup. Ct. 1979)
(per curiam)

RELIEF SOUGHT

A record subject arrested for shoplifting, a petty offense, and acquitted at trial appealed a lower court's denial of her expungement petition.

HOLDING

Reversed. Where the subject was acquitted and retention of her arrest record would impair her employment opportunities and harm her reputation, expungement would be granted in light of the Commonwealth's failure to present compelling evidence in favor of retention. The Commonwealth had argued only that retention would inhibit retail theft and that the subject's actions were "odious."

BACKGROUND

The subject was apprehended in a department store for shoplifting and charged with retail theft. She was acquitted at a trial before a District Justice of the Peace.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN ACQUITTAL OR OTHER DEMONSTRATION OF INNOCENCE

Commonwealth v. Mueller
392 A.2d 763
(Pa. 1978)

RELIEF SOUGHT

An arrest record subject whose case was dismissed by the court for failure to prosecute within the statutory deadline obtained an expungement order, and the Commonwealth appealed.

HOLDING

Reversed. Where, as here, the Commonwealth has made out a prima facie case against a subject, the burden then shifts to the subject to affirmatively show his nonculpability. If the subject cannot show innocence, expungement will be denied. If he can, the court must then weigh the Commonwealth's interests in the retention of the records against the subject's interest in having them destroyed.

BACKGROUND

The subject was charged with theft and a magistrate found that a prima facie case against him existed. The Commonwealth failed to prosecute him within 180 days of the date of the complaint, which by statute entitled the subject to dismissal. After his motion to dismiss was granted, he filed a petition for expungement, which was also approved.

Cross Reference: Page 285

Chapter 4

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

This chapter examines cases in which courts are asked to purge or provide other record maintenance relief for records of arrests that end in dismissal of charges or a similar disposition. However, this chapter does not consider those cases that have dealt with dismissals where the arrest was made without probable cause, or was tainted with other governmental illegal conduct, or was made on the basis of an unconstitutional statute. (See Part II, Chapter 2.) Furthermore, none of the cases in this chapter concern instances in which the record subject has been formally acquitted. (See Part II, Chapter 3.)

A review of the cases in this chapter indicates that when the state fails to pursue prosecution of charges after an arrest, difficult record maintenance policy issues are raised for courts and legislatures. The cases in Part II, Chapter 3 indicate that the legislatures and the courts have largely accepted the notion that if a record subject is factually innocent, a record of his arrest (or conviction) is of little utility to criminal justice agencies and may do substantial unfair harm to the record subject. Furthermore, the cases in Part II, Chapter 2 indicate that legislative and judicial policymakers also accept the argument that it is neither fair nor legally justifiable for the state to maintain a record of an arrest or conviction that was accomplished on the basis of illegal and improper police conduct or an unconstitutional statute.

However, the difficulty for courts in instances where the state fails to follow up on an arrest is to determine the significance of that failure. Does it mean that the subject was clearly and manifestly innocent and thus charges were promptly dropped? Or, does it mean that the prosecutor had other priorities, or a heavy case load, or that there were technical legal problems or evidentiary or witness problems?

Statutory Standards

Because of the different circumstances and reasons that may cause the state's failure to pursue arrests, few legislatures have adopted statutes that purge or otherwise restrict the maintenance of arrest records simply because the state fails to pursue the matter. Perhaps the closest the legislatures have come is to authorize the purging of records of arrests that end in a dismissal or similar disposition unless a criminal justice agency expresses its opposition to a court of appropriate jurisdiction. In that event the court must weigh the state's interest in retention against the subject's interest in a purge.[115]

Judicial Standards

The courts, when not acting pursuant to legislative direction, treat dismissals much as they treat acquittals--the issue is whether the subject is factually innocent or there is some other consideration, such as police misconduct, to justify the imposition of maintenance restrictions. If there is one difference between the courts' approach to dismissal cases and their approach to acquittal cases, it is their greater resistance in dismissal cases to arguments for record restrictions.

Thus, in People v. Michael L.,[116] a New York State court refused to purge an arrest record even though the assault charges against the subject had been dismissed after the complainant never appeared to sign an accusatory instrument. The court concluded that in the absence of facts indicating that the subject was "completely innocent" expungement would not be

[115] See, for example, State v. San Vito, 337 A.2d 624 (N.J. 1975).

[116] 362 N.Y.S.2d 989 (Dist. Ct. 1975).

granted.[117]

Indeed, even when the record subject comes close to demonstrating factual innocence or police misconduct, some courts recently have been reluctant to purge on the basis of a dismissal. The California Supreme Court, for example, recently held that even the express right of privacy provision contained in California's state constitution is not violated by police retention of a record of an arrest where charges are summarily dropped.

In Loder v. Municipal Court,[118] a husband came to the aid of his wife who was being beaten by a San Diego policeman. The husband was arrested, but two days later charges were dropped. In denying Loder's purge request the court concluded that the state has a compelling interest in retaining the record: (1) for identification purposes; (2) for prompt and accurate public reporting; (3) for future police work; and (4) for use at pre- and post-trial proceedings. The court also noted that California's statutory scheme provides ample confidentiality and recordkeeping safeguards. The opinion said that where this is the case, courts should be extremely reluctant to impose constitutional remedies.[119]

Interestingly, at least one court faced with the dilemma of setting record maintenance policies for records of arrests that have been dismissed concluded that even if the arrest is shown to be mistaken and the subject's innocence is clearly established, a purge or seal order is not the proper remedy. Instead, the subject's records should simply be corrected to reflect not only that the charges were dismissed, but, as well, that the subject is innocent. The court ordered the police agency to correct its records, and furthermore, to notify other agencies or parties that had received the record to correct their records to show the subject's innocence.[120]

It should also be noted, that several of the cases reported in this chapter flatly deny that the courts have power, absent a statute, to seal or purge criminal history records.[121] Indeed, most of these decisions in which courts have decided that they lack authority to prescribe record maintenance policies have occurred when the courts have dealt with records of arrests that have led to a dismissal, but the arrest was made with probable cause and on the basis of a constitutional statute.

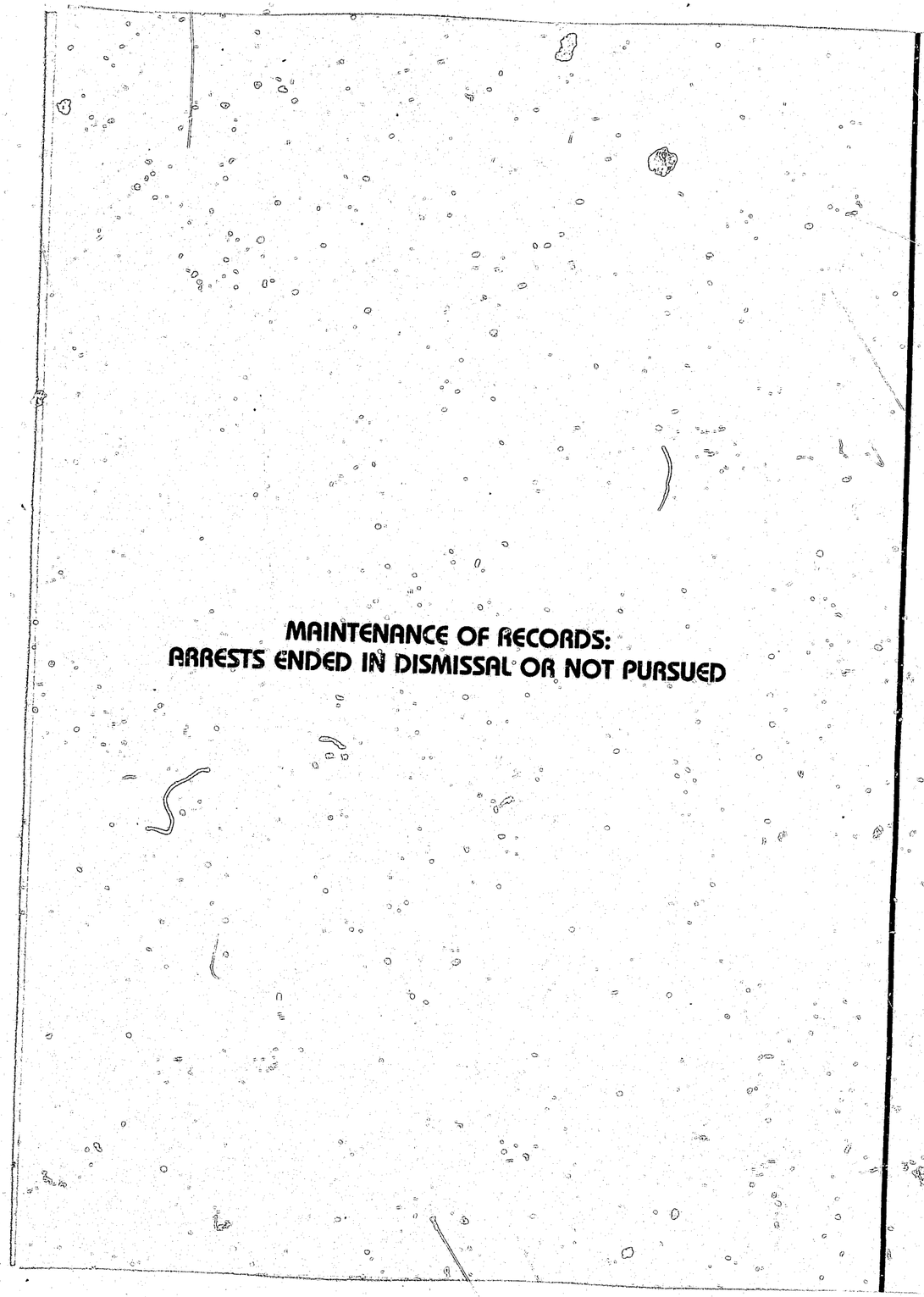
[117] See also, United States v. Schnitzer, 567 F.2d 536 (2nd Cir. 1977) cert. denied 435 U.S. 907 (1978).

[118] 553 P.2d 624 (Calif. 1976).

[119] See also, United States v. Dooley, 364 F.Supp. 75 (E.D. Pa. 1973).

[120] District of Columbia v. Sophia, 306 A.2d 652 (D.C. 1973).

[121] See, for example, Weisberg v. Police Department, 260 N.Y.S.2d 554 (Sup. Ct. 1965) and Peasley v. Glenn, 520 P.2d 310 (Ariz. 1974).



MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Menard v. Mitchell
430 F.2d 486
(D.C. Cir. 1970)
(Menard I)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court denied relief and plaintiff appealed.

HOLDING

Reversed and remanded. In view of the possible adverse effects on the plaintiff of maintenance of the record of his arrest and detention, including the possibility of dissemination of the record, the mere fact of the arrest did not justify maintenance of his fingerprints and arrest record. Since the record in the district court was insufficient to warrant summary judgment for either party, the matter was remanded for further proceedings, including a determination of whether the arrest was based on probable cause, whether the arrested subject was later completely exonerated and what further dissemination of the record might be possible.

BACKGROUND

The record subject was taken into custody in Los Angeles and held for two days at which point the complaint against him was determined to be groundless and he was released without being formally charged. Under a California statute the incident was required to be classified as a "detention" rather than an arrest. The record subject argued that the detention record was not a criminal record and thus could not legally be maintained in the FBI's criminal identification files, where it had been routinely forwarded by the local police. After being notified of the reclassification of the subject's police encounter, the FBI changed its records to show that the subject had been detained, not arrested. However, it refused to expunge the record.

Cross Reference: Page 124

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Menard v. Mitchell
328 F.Supp. 718
(D.D.C. 1971)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court denied relief and the plaintiff appealed to the U.S. Court of Appeals for the District of Columbia, which reversed and remanded. This is the remand decision.

HOLDING

Expungement denied. Injunctive relief against certain disseminations granted. Arrest records, even without convictions, are of value to law enforcement agencies and may be maintained and disseminated to other law enforcement agencies for law enforcement purposes. Hence, the FBI may retain such records and disseminate them for law enforcement purposes. It may also disseminate such records to federal agencies for employment purposes. However, the FBI is without authority to disseminate arrest records outside of the federal government for employment, licensing or related purposes, whether or not the record reflects a conviction.

BACKGROUND

The record subject was taken into custody by Los Angeles police and held for two days. He was then released without being formally charged after it was determined that the complaint against him was groundless. Under California law, the incident was required to be classified as a "detention" instead of an arrest. Los Angeles police notified the FBI of the subject's release and the FBI changed its records to show that he had been detained, not arrested. But the FBI refused to expunge the file.

SPECIAL NOTE

The record subject argued that, in the absence of a conviction, the maintenance and use of his arrest record for any purpose violated constitutional guarantees-- including the presumption of innocence, due

process, the right to privacy and freedom from unreasonable search. The court concluded that the constitutionality of the FBI's practices should turn on a balancing of the potential harm to record subjects against the public necessity of maintaining and using the records. Since this balancing judgment should be made by the Congress, the court declined to decide the case on the constitutional issues, but instead reached a decision on the basis of its interpretation of the statute under which the FBI maintains and disseminates criminal and other records.

Cross Reference: Page 125

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Menard v. Saxbe
498 F.2d 1017
(D.C. Cir. 1974)
(Menard II)

RELIEF SOUGHT

Plaintiff record subject brought suit to compel the U.S. Attorney General and the Federal Bureau of Investigation (FBI) Director to remove from FBI criminal identification files plaintiff's fingerprints and a notation regarding his arrest and release without prosecution by California authorities. The District Court originally denied relief and the Court of Appeals reversed and remanded (Menard I). On remand, the District Court declined to order expungement but did issue an order limiting dissemination of the record. The plaintiff again appealed.

HOLDING

Remanded to the District Court with instructions to enter an order directing the FBI to expunge the record. The FBI has no statutory authority to retain an arrest record after it has been informed by the contributing police agency that the police encounter was not deemed an arrest but only a detention.

The court found that: (1) the record subject had alleged a cognizable legal inquiry; (2) the courts have power to expunge arrest and criminal records; (3) generally, actions to expunge such records should be brought against the local law enforcement agencies involved; but (4) the record subject's suit against the FBI was proper insofar as it attacked alleged abuses unique to the FBI role as recordkeeper.

BACKGROUND

The record subject was taken into custody by Los Angeles police and held for two days. He was then released without being formally charged after it was determined that the complaint against him was groundless. Under California law, the incident was required to be classified as a "detention" rather than an arrest. California authorities advised the FBI of this change and the FBI changed its files to show that the subject had been detained, not arrested. The plaintiff requested the FBI to totally expunge his arrest record and fingerprints. The FBI refused and the plaintiff brought suit.

SPECIAL NOTE

The court set out a detailed description of the operations of the FBI criminal identification division and concluded that the FBI is more than a mere passive recipient of records from local law enforcement agencies. Rather, the FBI has a duty to carry out its operations in a reliable and responsible manner, without unnecessary harm to record subjects whose rights may be invaded. The court declined to rule on the extent of the FBI's duty under the constitution, but based its decision on an interpretation of 28 USC, Sect. 534, the federal statute under which the criminal identification division operates. It found that this statute does not authorize the FBI to maintain in its criminal files an arrest record on encounter with the police that has been established not to constitute an arrest. However, the record may be maintained in the FBI's neutral non-criminal files, provided there is no means of cross reference.

Cross Reference: Page 127

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Schnitzer
567 F.2d 536 (2d Cir. 1977)
cert. denied, 435 U.S. 907 (1978)

RELIEF SOUGHT

Defendant, a rabbinical student, was arrested for filing a fraudulent claim against the Federal Insurance Administration. The criminal indictment returned against him was ultimately dismissed and the matter was referred for civil prosecution. He petitioned the trial court to order the expungement of his arrest record and the return of his fingerprints and photograph. The trial court denied the motion.

HOLDING

Affirmed. Courts have the inherent power to expunge arrest records where harm to the arrested person outweighs the government's need to maintain the records. But the power is narrow and should be reserved for unusual or extreme cases. This is not such a case.

BACKGROUND

The defendant alleged that the arrest record would create a problem because of his status as a rabinnical student and the likelihood that he would be asked to explain the circumstances surrounding the arrest. But he had not alleged any actual harm or imminent misuse of the arrest record. The court noted that the dismissal had not established the defendant's innocence and having to explain circumstances would be a normal situation, not a harsh or unique one.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Morrow v. District of Columbia
417 F.2d 728
(D.C. Cir. 1969)

RELIEF SOUGHT

A criminal record subject brought this appeal in order to resolve the issue of whether the trial court in which his case was heard had the authority to issue an order directing the police not to disseminate his arrest record.

HOLDING

It is within the power of a criminal trial court to issue an order directed to an entire municipal authority, including the arresting police agency, prohibiting dissemination of the criminal record of a subject brought to trial in that court.

BACKGROUND

After the trial judge dismissed the case against the subject because it was brought by the Corporation Counsel rather than the U.S. Attorney, the subject moved for expungement of the arrest. The judge issued an order prohibiting the District of Columbia and all its agencies, including the police department, from disseminating the subject's arrest record to anyone, even other law enforcement agencies. The District obtained an order from a higher court forbidding the trial judge from enforcing his order on the ground that it exceeded his authority, and both the subject and the judge appealed.

The U.S. Court of Appeals declined to say whether the trial court's order was appropriate in the circumstances, but left that issue to be determined on remand to the D.C. Appeals Court. The court noted that the Duncan Report rules would appear to be a good rule of thumb, but conceded that unusual circumstances, such as an unjustified invasion of privacy, might justify expungement. (For the decision on remand, see In the Matter of Alexander.)

Cross Reference: Page 17

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Herschel v. Dyra
365 F.2d 17
(7th Cir. 1966)
cert. denied, 385 U.S. 973 (1966)

RELIEF SOUGHT

An arrest record subject sued a police record supervisor under federal civil rights law to obtain expungement of all records of his arrest after charges against him were dismissed, basing his request on his right of privacy.

HOLDING

The maintenance of arrest records of even those individuals who are subsequently acquitted does not infringe on any right of privacy under the constitution.

BACKGROUND

The subject was arrested under an anti-litter ordinance for distributing handbills which were apparently non-commercial. The City of Chicago later dropped charges against the subject. Prior to the arrest, the police officer had been advised by the defendant that the material he was distributing was religious in nature and not covered by the anti-litter ordinance according to opinions by the corporation counsel.

Cross Reference: Page 193

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Cook
480 F.Supp. 262
(S.D. Tex. 1979)

RELIEF SOUGHT

In this action the government sought to set aside a lower court order expunging the criminal record of the defendant after the indictment against him was dismissed on the motion of the government. The government alleged that the Assistant Attorney General who agreed to the expungement order was without authority to enter into such an agreement, and acted contrary to Department of Justice guidelines in so doing.

HOLDING

Expungement order affirmed. Since the United States Attorney General does have authority to agree to expungement orders and the government had presented no evidence to indicate that the Assistant Attorney General did not share that power, the court would assume that the Assistant Attorney General could enter into expungement agreements. The court further held that it was not the role of the courts to vacate orders in the interest of enforcing agency policy guidelines.

BACKGROUND

The criminal record subject's indictment was dismissed in the light of new information showing that he was not criminally culpable. He moved to have his record expunged. The Assistant Attorney General agreed, and the court signed an Agreed Order granting (the subject's) Motion to Expunge Criminal Records. The local United States Attorney then brought suit to set aside that order, not contesting its merits, but arguing that the Assistant Attorney General did not have authority to enter into the agreement and that it ran contrary to a Department of Justice memorandum setting out a general policy of opposition to expungement motions.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Rowlett v. Fairfax
446 F.Supp. 186
(W.D. Mo. 1978)

RELIEF SOUGHT

An imprisoned federal arrest record subject brought this action seeking to compel the Federal Bureau of Investigation (FBI) to expunge two entries in his FBI record reflecting an arrest where the resulting charges had been dismissed. He alleged that these entries affected his status in prison. In support of his motion the subject argued that by statute the FBI can only maintain records of convictions for offenses punishable by imprisonment for one year or more, and then only upon receipt of a certified copy from the trial court.

HOLDING

Denied. The FBI is empowered to collect and maintain even arrest records with no known dispositions. Pursuant to the Supreme Court decision in Paul v. Davis, 424 U.S. 693 (1976), the subject had no interests, such as in privacy or reputation, sufficient to justify the requested expungement.

BACKGROUND

The subject, imprisoned in Leavenworth federal penitentiary, had been arrested many years earlier for interstate transportation of counterfeiting tools. He claimed that the charges growing out of the arrest were dismissed, but that his FBI record still carried two entries reflecting the arrest.

Cross Reference: Page 21

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Hirsch
440 F.Supp. 977
(E.D.N.Y. 1977)

RELIEF SOUGHT

A Vietnam War era draft evader who later participated in the clemency program established by Presidential Proclamation for draft evaders, brought this action seeking the sealing of his draft evasion indictment and the return of all identification records made when he surrendered to the United States Attorney. He based his request on his constitutional right of privacy.

HOLDING

That in the absence of extreme or unusual circumstances, such as illegal government conduct, expungement will not be granted. There was no allegation of governmental misconduct here, and there is no indication that the Proclamation was intended to authorize expungement.

BACKGROUND

The record subject was indicted for draft evasion in 1973 and a bench warrant was issued for his arrest. In 1974 a clemency program for Vietnam War draft evaders was set up by Presidential Proclamation. In 1975 the subject surrendered, and prosecution was deferred so he could enter the clemency program. He completed it successfully and the charges were dismissed.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Hammons v. Scott
423 F.Supp. 618
(N.D. Cal. 1976)

Hammons v. Scott
423 F.Supp. 625
(N.D. Cal. 1976)

RELIEF SOUGHT

A record subject brought this action challenging the maintenance, use, and dissemination by state (423 F.Supp. 618) and federal (423 F.Supp. 625) officials of the arrest records of persons never in any way found responsible for the crime charged, alleging violation of constitutional due process and privacy rights and seeking an order ending such practices.

HOLDING

(Pursuant to the United States Supreme Court ruling in Paul v. Davis) The use, maintenance, and dissemination of arrest records of persons who have never been convicted of or pled guilty or nolo contendere to the crime charged does not violate any constitutional due process or privacy rights.

BACKGROUND

The subject was arrested by the San Francisco Police Department on the basis of a neighbor's complaint that he had fired a gun at her. The charges were later dropped, but the subject's arrest record was retained by the SFPD and was sent to the state Bureau of Identification and Investigation and to the Federal Bureau of Investigation. The subject claimed that this would adversely affect his employment, licensing, and certification opportunities.

Cross Reference: Page 22

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Bohr
406 F.Supp. 1218
(E.D. Wis. 1976)

RELIEF SOUGHT

A federal criminal record subject brought this action seeking expungement of all records pertaining to his federal indictment and arrest eleven years previously, where the indictment had been dismissed and no prosecution brought.

HOLDING

That where an indictment was dismissed and no prosecution brought, the United States Attorney did not oppose expungement, there was no indication that the records were needed in the interests of law enforcement, and the criminal record subject had apparently committed no crime in the 11 years since the indictment and was an attorney seeking bar admission and was therefore unusually susceptible to injury from the arrest record, expungement would be granted pursuant to the court's inherent powers to do complete justice in cases before it.

BACKGROUND

The subject was a Wisconsin attorney who had moved to Arizona and wished to take the bar examination and apply for Civil Service positions there. While living in Wisconsin in 1964 he had been indicted by a federal grand jury for mail fraud. The indictment was later dismissed, and there was no evidence that the subject had been involved in any criminal activity during the intervening 11 years.

Cross Reference: Page 349

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Dooley
364 F.Supp. 75
(E.D. Pa. 1973)

RELIEF SOUGHT

A federal arrest record subject who was acquitted of various charges and against whom other charges were dismissed sought expungement of his arrest and identification records, on grounds that their existence caused him irreparable harm and constituted an unwarranted invasion of his privacy.

HOLDING

Denied. Although records of charges which terminate in acquittal or dismissal possess no law enforcement value, have great potential for injury to reputation, can unjustifiably restrict employment opportunities, and unfairly prejudice the rights of the record subject, the court, for practical administrative reasons, is not justified in ordering expungement in the absence of extreme or unusual circumstances.

BACKGROUND

The subject was indicted twice by a federal grand jury, each indictment charging him with the same crimes. He voluntarily appeared at the United States Marshall's office to post bond and was photographed and fingerprinted at that time. He was acquitted by a jury in the trial resulting from the first indictment, and the government consequently dismissed the second indictment.

Cross Reference: Page 198

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

United States v. Kalish
271 F.Supp. 968
(D.P.R. 1967)

RELIEF SOUGHT

A federal arrest record subject who was never prosecuted asked that his arrest records, including fingerprints and photographs, be destroyed.

HOLDING

When a subject has never been prosecuted or convicted there is no public interest in retaining his arrest record or criminal identification data. Moreover, retention does seriously injure the individual's privacy and personal dignity. The United States Attorney General was ordered to destroy the subject's arrest record and criminal identification file in his custody, and those in the Identification Division of the Federal Bureau of Investigation. He was further forbidden from disseminating the records to any governmental agency or to any person.

BACKGROUND

The subject, on the advice of counsel, refused induction into the Army on the good faith argument that he was constitutionally entitled to reclassification or to a hearing before his local Selective Service board. He was arrested contrary to an agreement reached with the Assistant U.S. Attorney, at which time he was fingerprinted and photographed. He submitted to induction half an hour later and was never prosecuted on the arrest.

Cross Reference: Pages 28, 138 & 200

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Beasley v. Glenn
520 P.2d 310
(Ariz. 1974)
(en banc)

RELIEF SOUGHT

An arrest record subject brought a special action seeking to compel expungement or return of all arrest records, after the charge against him was dismissed. The lower court granted expungement and this appeal resulted.

HOLDING

Reversed. Since the legislature had made it a criminal offense for any public officer to destroy criminal records it was up to the legislature to make any provisions for expungement, and the lower court was wholly without authority to order destruction or return of the records.

BACKGROUND

The subject was arrested for aggravated battery on a charge filed by his wife. She later requested dismissal of the complaint. The subject then obtained a court order directing the justice of the peace who had dismissed the complaint, the county sheriff, and the county attorney to destroy all records reflecting the charge and arrest.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Loder v. Municipal Court
553 P.2d 624
(Cal. 1976)
cert. denied, 429 U.S. 1109 (1977)

RELIEF SOUGHT

An arrest record subject who was not prosecuted on the charges against him brought this action seeking an order directing the erasure of any records resulting from his arrest and the notification of any agencies to which such records had been sent that they had been erased and that the agencies should do likewise.

HOLDING

Denied. In light of the compelling public interest in the maintenance of criminal records and the extensive statutory protection given to record subjects to prevent improper use or dissemination of their files, the individual's interest in preventing misuse of his record does not outweigh the factors in favor of retaining it.

BACKGROUND

The record subject was arrested for battery, obstructing an officer, and disturbing the peace after he attacked a San Diego, California police officer who was beating his wife with a nightstick. The officer was later suspended, the city attorney declined prosecution, and the charges were dismissed. The subject requested expungement of his record at the time of dismissal, but the municipal court denied the request on the basis that there was no statutory authority for expungement. The subject then wrote to the chief of police and the records custodian of the police department requesting expungement. When he received no reply, the subject brought this suit against the municipal court judge, the police chief, and the records custodian.

Cross Reference: Page 29

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Sterling v. City of Oakland
24 Cal. Rptr. 696
(Dist. Ct. 1962)

RELIEF SOUGHT

The subject in this action, after obtaining dismissal of the charges against her, sought to enjoin the city police department from maintaining her identification records or any record of her arrest.

HOLDING

Denied. In the absence of any statutory authority, the court could not grant the requested relief. In so holding the court noted that the charge was so trivial that no ill effects were likely to result, and that the subject could point to a civil case in which she won damages based on the unlawful arrest as proof of her innocence.

BACKGROUND

The subject tried to pay a $1.90 cab fare with a $20 bill. The cabbie refused, and against the subject's wishes drove her to a cafe to get change. Once there he refused to let her out of the cab until the additional fare for the ride to the cafe was paid. When she refused he called the police and made a citizen's arrest. The charges were dismissed when the cabbie failed to appear in court to testify, and the subject won damages in a civil suit against the cab company.

SPECIAL NOTE

While initially stating that the subject was suing to restrain maintenance of her arrest as well as identification records, the court then proceeded to discuss the case only in terms of the identification records; presumably the court felt the legal issues were identical.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

People v. Wright
598 P.2d 157
(Ct. App. Colo. 1979)

RELIEF SOUGHT

An arrest record subject who successfully completed a period of deferred prosecution and obtained dismissal of the charges against him sought expungement or return of his arrest records. His motion was granted and the chief of police appealed.

HOLDING

Reversed. Since the legislature had passed a comprehensive statute dealing with criminal records, it intended the remedies in that statute to be exclusive. Because the statute provided only for sealing and limits on release of criminal records, neither expungement nor return were available to the subject.

BACKGROUND

The subject was arrested for theft. Prosecution was deferred for one year, but the complaint was dismissed after four months.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

District of Columbia v. Hudson
404 A.2d 175
(D.C. 1979)
(en banc)

RELIEF SOUGHT

This appeal involved the consolidation of 5 lower court actions in which arrest record subjects who were not prosecuted on the charges against them were granted expungement of their arrest records.

HOLDING

Affirmed. Relief granted in the nature of sealing. When a subject shows by clear and convincing evidence either that he did not commit the crime charged or that no crime in fact was committed, relief shall be granted. The relief shall consist of the collection of all records reflecting the arrest, including the return of any disseminated records, and their sealing by the court. The court shall seal only upon an affidavit representing that all the records are before the court. As part of its sealing order the court shall make findings of fact setting forth the details of the case and the court's conclusion of innocence. This statement will then be available to the subject in the event he has to admit his arrest to any third party. (The court refused to reclassify the arrests as detentions and thus permit the subjects to legally deny their arrests.) The court finally requested the parties to jointly prepare a plan providing for the secure sealing and indexing of arrest records.

BACKGROUND

The first subject was arrested for murder, but the Deputy Medical Examiner concluded that the case was actually a suicide. Also, the accusing witness recanted and the police received other information that the victim was alone at the time of the shooting.

The second subject was arrested for failure to attend driving school after having been ordered to do so because of his driving record. In fact the school records were in error and he had attended.

The third subject was arrested on a firearms charge, but in court the Assistant United States Attorney admitted that he was the wrong man.

The fourth subject was arrested for grand larceny and receiving stolen property after moving a motorcycle which had been parked at the curb

for a long time to a neighbor's property. The prosecutor decided not to file charges, citing the subject's "credible" explanation that he was just trying to protect the motorcycle for the true owner.

The fifth subject was arrested for grand larceny, but his prosecution was dismissed when the government was unable to locate its witnesses.

Cross Reference: Pages 174 & 206

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

District of Columbia v. Sophia
306 A.2d 652
(D.C. 1973)

RELIEF SOUGHT

In this consolidated action three arrestees who were not prosecuted and who affirmatively demonstrated their innocence sought to have their arrest records sealed or expunged.

HOLDING

Relief denied. When an arrest is shown to be mistaken and nonculpability has been shown, neither sealing nor expungement are appropriate remedies. Rather, the records should be modified to reflect the fact of innocence. Similarly, dissemination of such records should not be restricted, and disseminated records need not be returned. The police need merely inform those agencies or persons already in possession of the records of the subject's innocence and include such notation in any future disseminations.

BACKGROUND

The subjects were arrested near a civil disturbance in Georgetown. Charges against them subsequently were dropped. The subjects filed motions to expunge and judicially established their innocence. The lower court prohibited dissemination of the records and ordered them sealed; the District appealed.

Cross Reference: Pages 31, 176 & 207

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Spock v. District of Columbia
283 A.2d 14
(D.C. 1971)

RELIEF SOUGHT

Record subjects who were arrested during large demonstrations and either acquitted or not prosecuted brought suit attacking the maintenance of their arrest records. They asked that dissemination be prohibited, their records expunged, and notification of such action be sent to anyone who had already been sent the records.

HOLDING

In the absence of express statutory authority local courts could not order expungement of local police records. This result is also supported by the public policy in favor of retention and maintenance of arrest records. However, any subject who could affirmatively show nonculpability would be entitled to a court order directing that all police records of his arrest be modified to reflect that fact, and further directing that notice of the subject's innocence be sent to any recipient of the records. The standard set by the court was that a subject must show, not merely that he was acquitted or not prosecuted, but that he was in fact not culpable, such as having been mistakenly arrested.

BACKGROUND

The subjects were arrested during large demonstrations in May of 1970. The charges were minor, usually disorderly conduct. Six arrestees were tried and acquitted and charges against all of the others were dropped.

SPECIAL NOTES

1. In a later case the United States Court of Appeals for the District of Columbia ruled that courts do have the inherent power to order expungement when such action is necessary to vindicate constitutional rights. Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973). See Part II, Chapter 2.

2. The court in this case observed that the subjects did not request destruction of court records, and that in any event records of the arrests in the arrest books should not be destroyed, to avoid the evils of secret arrests.

Cross Reference: Page 208

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In the Matter of Alexander
259 A.2d 592
(D.C. App. 1969)

This is the decision on remand in Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969)

RELIEF SOUGHT

The record subject in this case petitioned for an order prohibiting the dissemination of his arrest record after the trial court had dismissed a disorderly conduct charge because it had been brought by the corporation counsel instead of the U.S. Attorney. The trial court granted the order.

HOLDING

Trial court order vacated. The Duncan Report rules on dissemination of police records (which permit dissemination of arrest records only if they have resulted in conviction on forfeiture of collateral) are adequate to protect arrest record subjects except in rare cases where unusual facts might justify expungement. No such facts are present in this case.

BACKGROUND

This is the second time the D.C. Court of Appeals considered this case. The first time it reversed the trial court on the ground that it lacked authority to issue an order prohibiting dissemination of an arrest record. The U.S. Court of Appeals reversed and remanded. It held that the trial court did have ancillary jurisdiction to issue the order to effectuate its decision in the case. But the appeals court refused to rule on the appropriateness of the trial court's order, leaving that to be decided by the D.C. Court of Appeals on remand. This is the remand decision.

Cross Reference: Page 32

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Honolulu Advertiser, Inc. v. Takao
580 P.2d 58
(Hawaii 1978)

RELIEF SOUGHT

A newspaper brought this suit challenging a judge's action in sealing a preliminary hearing transcript of a controversial criminal case.

HOLDING

Sealing order affirmed. Since the hearing had been open to the public and the newspaper had had a reporter present, there were no constitutional issues involved. Further, given the judge's reasonable desire to minimize publicity in the interests of a fair trial, he had not abused his discretion in sealing the transcript.

BACKGROUND

In the underlying criminal case a great deal of controversy had arisen following the hearing judge's dismissal of a rape charge against the defendant. The newspaper apparently wished to publish the transcript to allow the public to see on what basis the hearing judge had acted. The judge issued the sealing order, fearing that publication would stimulate even greater publicity over the case, making it difficult to obtain a fair trial for the defendant on remaining charges.

Cross Reference: Page 93

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Young v. Keefe ex rel. People
381 N.E.2d 1047
(Ill. App. Ct. 1978)

RELIEF SOUGHT

A criminal record subject brought this appeal protesting the lower court's refusal to expunge those of his arrests that had not resulted in convictions. He based his suit on state statute, adding on appeal a request for the return of all identification records taken as a result of the arrests.

HOLDING

Affirmed. The state expungement statute did not mandate expungement but gave the trial judge the power to grant expungement in the exercise of his discretion. In light of the subject's record the court found no abuse of discretion in the denial of expungement. It did, however, find that the statute required the return of all identification information taken in connection with the arrests involved.

BACKGROUND

The subject alleged that he had been arrested 17 times. Charges were dismissed in 13 cases, the subject pled guilty to lesser offenses in three cases, the original charges being dismissed, and the subject was convicted in one instance. He sought in this action to have the records of the 13 unprosecuted arrests expunged.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Kolb v. O'Connor
142 N.E.2d 818
(Ill. 1957)

RELIEF SOUGHT

Petitioners, all of whom were acquitted of criminal charges or released without being charged, sought a declaratory judgment ordering the Chicago Police Superintendent to return to them fingerprints, photographs and other identification data. They based their petition on a state statute and on an allegation of invasion of their right of privacy. The trial court granted relief.

HOLDING

Reversed. The statute requiring the state Department of Public Safety to return identification records upon acquittal or release without conviction did not apply to city police chiefs. In view of the utility of the identification records to the police, the fact that they were kept in the files of the police department subject only to limited exhibition for investigation and identification purposes, and the absence of a legislative policy to the contrary, the right of the public to effective police protection outweighs the petitioners' right to privacy.

BACKGROUND

Petitioners were all first offenders and contended that their photographs would be exhibited to victims of crimes and that this would embarrass them. The court acknowledged that Illinois had recognized a right of privacy, but concluded that, in the absence of a specific legislative mandate, the right of the individual to privacy must be subordinate to the safety of the public.

Cross Reference: Page 211

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. Fish
265 N.W.2d 737
(Iowa 1978)

RELIEF SOUGHT

A criminal record subject who had had charges against him dismissed brought this appeal from a lower court's denial of his expungement petition. The subject based his appeal on his constitutional right of privacy and his right to seek gainful employment, as well as on the state Code. The lower court had held that it was without authority to grant expungement.

HOLDING

Affirmed. First, the subject had lost the right to assert his constitutional claims; and second, the cited Code provision gave the court authority only over court records, not police records.

BACKGROUND

The subject, an accountant, was arrested for burglary, but the information against him was later dismissed for insufficient evidence to convict on the recommendation of the county attorney's office.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. Nettles
375 So.2d 1339
(La. 1979)

RELIEF SOUGHT

In this consolidated case, two criminal record subjects who had been charged with felonies but not prosecuted obtained an expungement order from a lower court. They had based their expungement request on the existence of a statute prohibiting expungement of records of subjects who were convicted of felonies; by implication, they argued, it must be permissible to expunge records of subjects who have not been so convicted. In this action the state appealed the lower court's expungement order.

HOLDING

Reversed. There was no statutory authority for expunging the subjects' felony arrest records. The subjects' alternative argument, that they should be granted expungement under the equal protection clauses of the state and federal constitutions, was found to be without merit.

BACKGROUND

The first subject was arrested on four felony charges; the second, on one felony and one misdemeanor charge. In both cases the district attorney refused to prosecute the charges.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. Boniface
369 So.2d 115
(La. 1979)

RELIEF SOUGHT

A criminal record subject who was not prosecuted on the charges against him brought this suit seeking to compel state law enforcement officials to obtain return of his records from the Federal Bureau of Investigation (FBI) and to then have his arrest record sealed. The lower court refused on the ground that the state expungement statute applied only to misdemeanors, while the subject had been arrested on a charge which at the time was classified as a felony.

HOLDING

Reversed and remanded. In light of the remedial nature of the expungement statute it would be unduly harsh to deny relief simply because the subject's alleged crime, currently defined as a misdemeanor, was at the time of his arrest classified as a felony. The court remanded the case for the lower court to issue an order directing destruction of the subject's arrest and disposition records pursuant to the statute and also requesting return of the subject's FBI records.

BACKGROUND

The subject was arrested in 1969 for possession of marijuana, but the charge against him was dropped. In 1977 the subject learned that this arrest appeared on his FBI file and brought suit to seal it, alleging irreparable harm arising out of use of that record by the United States Bureau of Prisons and the United States Parole Commission. There was a state statute which provided for expungement in appropriate cases, but by its terms it was limited to misdemeanor cases; possession of marijuana, though a misdemeanor in 1978, had been a felony in 1969.

Cross Reference: Page 33

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Doe v. Commander, Wheaton Police Department
329 A.2d 35
(Md. 1974)

RELIEF SOUGHT

An arrest record subject, who claimed he could demonstrate complete innocence after charges of committing an unnatural sexual act were dropped, brought suit seeking to have further dissemination of his record restrained, his file expunged, any computer files erased, an explanatory note inserted in the court files, and any records transmitted to the Federal Bureau of Investigation returned. He based his action on his constitutional right of privacy. The lower court dismissed, and he appealed.

HOLDING

Reversed and remanded. The subject should be allowed to present his case, in light of the possible applicability of the constitutional right of privacy. The fact that there was a statute explicitly authorizing expungement did not prohibit granting expungement in cases falling outside the provisions of that statute.

BACKGROUND

The subject, an employee of Georgetown University Law Center, was arrested by a store security guard and charged with committing an unnatural and perverted sexual act. The prosecution against him was dropped and he subsequently filed suit to have his records expunged. He alleged invasion of his constitutional right of privacy and irreparable harm from the continued existence of his files.

Cross Reference: Pages 34 & 212

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In re R.L.F.
256 N.W.2d 303
(Minn. 1977)

RELIEF SOUGHT

The state appealed three cases in which a lower court granted a subject's expungement request, two based on statutory grounds and one based on the court's inherent powers.

HOLDING

Affirmed in two cases, reversed in one. A statute providing for the return of identification records to subjects whose criminal proceedings were terminated in their favor also implicitly authorizes the destruction of their arrest records. This construction was partially based on another statute which explicitly authorized arrest record expungement for subjects who were convicted but obtained dismissal of charges upon successful completion of an educational program. The court reasoned that subjects never convicted must have been intended to receive at least the same relief. Another statute directing the "purging," under certain circumstances, of the convictions of youthful offenders is also a direction for expungement. However, where there is no statutory authority for expungement, the court should use its inherent power to expunge only when the subject's constitutional rights would otherwise be seriously infringed. Since no such infringement was shown in the third case, that expungement order was reversed.

BACKGROUND

The first subject was arrested for possession of marijuana, but the evidence was suppressed and the state dismissed the charges. The second subject, a minor, pled guilty to a felony charge, served time in a reformatory, and received an order of discharge and restoration of his civil rights. The third subject pled guilty to a misdemeanor and was released before completion of his 90 day sentence in the County Workhouse. He then served 6 years in the Air Force and was honorably discharged. He requested expungement on the ground that his record could impair his chances of being accepted for employment by the Bloomington Police Department.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In re Applegate
398 A.2d 574
(N.J. 1979)
cert. denied, 404 A.2d 1160
(N.J. 1979)

RELIEF SOUGHT

An arrest record subject whose criminal case was dismissed sought in this action an order requiring the trial court judge to grant the subject's statutorily authorized expungement request, on the ground that there had been no law enforcement opposition to his expungement motion.

HOLDING

Denied. In light of the statutory language stating that a trial court judge may grant expungement in the absence of law enforcement opposition, the judge may also, in the exercise of his discretion, deny expungement.

BACKGROUND

The subject was charged by complaint with assault and battery and larceny. The complaints were later withdrawn and the case dismissed. The subject then moved for expungement pursuant to state statute and was denied.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. King
383 A.2d 443
(N.J. Sup. Ct. App. Div. 1978)
(per curiam)

RELIEF SOUGHT

A state prison inmate sought the sealing or expungement of records of two arrests on the grounds that the indictments had been dismissed. His request was summarily denied and he brought this appeal.

HOLDING

Reversed and remanded. Where a subject is requesting the sealing or expungement of arrest records the procedure to be followed by the hearing court is clearly laid out in the applicable statutes. The procedure includes a determination of whether there is law enforcement opposition to the petition, and an appropriate weighing of the interests involved on both sides. Since the hearing court in this case had made no findings and expressed no reasons for its denial, the case was remanded for a full consideration.

BACKGROUND

The subject was seeking to have the records relating to two arrests sealed or expunged, alleging that the resulting indictments against him had been dismissed. A hearing on his petition was held, but neither the court nor the State seemed aware of the controlling law.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. San Vito
337 A.2d 624
(N.J. Sup. Ct. App. Div. 1975)

RELIEF SOUGHT

In this action the subjects obtained an expungement order pursuant to state statute despite the Attorney General's formal objection, and the state appealed.

HOLDING

Reversed. By the terms of the state expungement statute, when there is law enforcement opposition to expungement the court is limited to ordering sealing as a remedy. The expungement order was vacated.

BACKGROUND

The subjects were indicted on narcotics charges, but the grand jury returned a vote of "no bill." The subjects then petitioned for expungement, and were informed by the Attorney General that he would not object if the subjects would agree never to sue the law enforcement officers involved in their case. They refused, and the Attorney General lodged a formal objection to expungement.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

State v. Davies
321 A.2d 286
(N.J. Union County Ct. 1974)

RELIEF SOUGHT

An arrest record subject appealed a lower court's denial of his expungement motion made pursuant to state statute. The lower court judge had interpreted the statute as stating that when a subject obtains dismissal of his case after having evidence suppressed, he thereby waives his right to expungement.

HOLDING

Reversed. The portion of the statute which directed denial of expungement if the subject had suppressed highly probative evidence comes into play only if there has been law enforcement opposition to the subject's expungement petition. Since there had been no such objection here, the court ordered expungement.

BACKGROUND

The subject was arrested on a narcotics charge. He was successful in suppressing certain evidence and the complaint against him was dismissed. He then petitioned for expungement under the state statute. The statute directs the court to deny expungement if there is law enforcement opposition and if certain enumerated grounds for denial exist, such as that dismissal resulted from the exclusion of highly probative evidence.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In re Fortenbach
290 A.2d 315
(N.J. Essex County Ct. 1972)

RELIEF SOUGHT

After charges against him were dismissed, an arrest record subject requested expungement of the record under authority of a statute which by its terms was limited to expungement of conviction records under appropriate circumstances.

HOLDING

Granted. In light of the general legislative concern over the ill effects of arrest and conviction records, the statute would be presumed to include authorization for the destruction of arrest records since this interpretation would be justified under the terms of the statute. Owing to the obvious disabilities faced by this subject in connection with his arrest on an extremely sensitive charge and the subject's unblemished record since his arrest in 1960, expungement would be granted. The court also prohibited all dissemination of any information concerning the arrest.

BACKGROUND

The subject was arrested in 1960 for lewdness and indecent dress. He pled not guilty and the charges were dismissed. He was subsequently fired from his construction job when his employer learned of the arrest; apparently he was let go largely because of the nature of the offense charged.

Cross Reference: Page 368

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

People v. A
415 N.Y.S.2d 919
(N.Y. Local Crim. Ct. 1978)

RELIEF SOUGHT

In this unusual case, two anonymous subjects, apparently cadets at the United States Military Academy, sought to avoid any possible ill effects flowing from their arrests on narcotics charges which had been dismissed in the interest of justice. The subjects here requested that all records reflecting their arrest and prosecution be sealed, and that the court prohibit any village police officers, West Point military police, officers of the Criminal Investigation Division at West Point, and any other police agency involved in the case from giving any testimony, information, or evidence against the subjects at any disciplinary proceedings held by the Corps of Cadets at the Academy, the Academy itself, the Department of the Army, or any other federal agency. They based their request on state statute.

HOLDING

By statute the court was required to seal all records of the case, making them unavailable to any person or public or private agency except as provided for in the statute. The court found no specific authority empowering it to enjoin testimony against the subjects, but noted that anyone doing so would not be given access to any official records. The court did emphasize the rehabilitative purpose of the sealing statute to the officials of the U.S. Military Academy and federal government who had filed affidavits on the subject's motion. And finally, the court ruled that the Federal Bureau of Investigation should, upon being notified of the court's order, return any records in its possession.

BACKGROUND

Few facts are given due to the anonymous nature of the case. The two subjects were arrested for possession of marijuana, but on motion of the district attorney the charges were dismissed in the interests of justice.

Cross Reference: Pages 39 & 51

CONTINUED

3 OF 5

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

People v. Bell
407 N.Y.S.2d 944
(Crim. Ct. N.Y. 1978)

RELIEF SOUGHT

A criminal record subject brought this suit seeking to seal his arrest records and obtain return of identification data after the information against him was dismissed with the notation "People not ready."

HOLDING

Relief denied. The proceeding was in effect dismissed for failure to prosecute, and that such a dismissal does not fall within any of the statutorily enumerated dispositions which are deemed to be "in favor" of a subject. Since the charges were not dismissed in favor of the subject, the sealing statute was not available to him.

BACKGROUND

The subject was arrested for rape, sodomy, and unlawful imprisonment, but the charges were later reduced to sexual misconduct, sexual abuse, and unlawful imprisonment. The case was eventually dismissed with the notation "People not ready." The subject sought to invoke a statute which provided for sealing when an action is terminated "in favor of" a subject. The statute also enumerates which specific dispositions are deemed to be favorable.

SPECIAL NOTE

The court expressly ruled that a dismissal for failure to prosecute is not based on denial of the right to a speedy trial, which would invoke the sealing statute.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Schwartz v. Schwartz
406 N.Y.S.2d 253
(Fam. Ct. 1978)

RELIEF SOUGHT

In this case an arrest record subject sought return of identification data and sealing of all arrest and prosecution records where the complaint against him, after being transferred to Family Court, was dismissed for failure to prosecute. At issue was whether the sealing statute was applicable to a civil Family court proceeding.

HOLDING

Relief granted. Although the Criminal Procedure Law, of which the sealing statute is part, is by its terms applicable to criminal proceedings only, it would constitute a denial of due process not to extend it to defendants in Family Court proceedings. The case was ordered sealed and all identification data returned.

BACKGROUND

The subject was charged with assault by his wife. She filed the charge in the county District Court, which transferred the matter to Family Court. After several adjournments the petition was dismissed for failure to prosecute.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

People v. Michael L.
362 N.Y.S.2d 989
(Dist. Ct. 1975)

RELIEF SOUGHT

In this action an arrest record subject sought to have his arrest declared null and void, his arrest records expunged, and all identification records returned, after charges against him were dismissed.

HOLDING

Relief granted in part, denied in part. In the absence of facts indicating the subject was completely innocent, expungement would not be granted. The court granted the motion for return of identification records, which was unopposed by the police. It refused to declare the arrest null and void because it was based on probable cause. However, it ordered the records of the case sealed, subject to reopening only upon court order or the subject's request.

BACKGROUND

The subject was arrested by Nassau County police and charged with assault, but the complaining witness never appeared to sign an accusatory instrument. The charge was accordingly dismissed, but on his motion to expunge the subject did not deny the allegations in the complainant's initial deposition.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In re J.
353 N.Y.S.2d 695
(Fam. Ct. 1974)

RELIEF SOUGHT

The criminal record subject in this suit, a minor, obtained a lower court order directing expungement of his name and those of his parents from court and police records after the case against him was dismissed at trial. The state sought an order vacating the expungement decree, arguing that the court was without authority to expunge its own or police records.

HOLDING

Denied. The trial court had explicit statutory authority over the police records involved, as well as inherent authority over its own. Maintenance of the records would have an unquestioned serious ill effect on the minor, while being of no social benefit.

BACKGROUND

The subject was charged with unlawful assembly, acting in a manner to cause a riot, and possession of dangerous weapons. At trial the case was dismissed for failure to present a prima facie case.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Richard S. v. City of New York
347 N.Y.S.2d 54
(1973)

RELIEF SOUGHT

In this suit a minor, who had obtained reversal and dismissal of a lower court proceeding in which he had been found to be a "person in need of supervision," sought to also have all records relating to his arrest, trial, and adjudication expunged. He based his request on due process and equal protection, alleging that maintenance of the records would impair his educational and employment opportunities.

HOLDING

Denied. Where an arrest terminates in an adjudication other than a finding of complete innocence, the court has no authority to order expungement.

BACKGROUND

The 10-year old subject had originally been tried and found to be a "person in need of supervision." On appeal that determination was reversed and the proceeding against him was dismissed.

SPECIAL NOTE

The court observed that it was within the authority of the Family Court to seal its own records, and in dismissing the subject's request left open the possibility of a new application to the Family Court requesting sealing.

MAINTENANCE OF RECORDS: ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

In re Foster
340 N.Y.S.2d 758
(Erie County Ct. 1973)

RELIEF SOUGHT

After charges against him were dismissed, a criminal record subject sought return of all identification records under the state civil rights law. He also requested expungement of court and police records reflecting his arrest, based on the court's inherent powers and the subject's right of privacy.

HOLDING

Relief granted in part. Although the subject was entitled to the return or destruction of his identification records, there was no statutory authority for expungement of the arrest records. The court ruled that since there was an explicit legislative enactment dealing with the identification records of unprosecuted arrestees, this preempted the court from using its inherent powers to dispose of arrest records. The court also observed that, as a county court, it had no administrative authority over the city officials being sued.

BACKGROUND

The subject was arrested in 1971 by the Buffalo Police Department for loitering for purposes of soliciting or engaging in deviate sexual behavior. The charge was later dismissed. He brought this action against the city court and police department.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Weisberg v. Police Department
260 N.Y.S.2d 554
(Sup. Ct. 1965)

RELIEF SOUGHT

In this case a criminal record subject sought to have his arrest card removed from police department records following withdrawal of the charges against him. He alleged that the existence of the arrest record could harm him professionally and in his efforts to obtain government employment.

HOLDING

Denied. There is neither statutory authority nor inherent power in the courts to order destruction of police department records.

BACKGROUND

In 1959 the subject entered a grocery store in a diabetic fit, looking for something sweet to eat. He was arrested, but the charge was withdrawn when he explained the circumstances. He filed this suit against the village and county police departments.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Wert v. Jennings
378 A.2d 390
(Pa. Sup. Ct. 1977)
aff'd per curiam, 411 A.2d 218
(Pa. 1980)

RELIEF SOUGHT

An arrest record subject appealed in this case from a lower court's denial of his expungement request after charges against him were dropped. The lower court had denied relief without a hearing on the basis that it had no authority to grant expungement.

HOLDING

Reversed and remanded. The court does have the inherent power to order expungement. The case was therefore remanded for a hearing, at which the lower court was directed to balance the Commonwealth's interest in maintaining the record against the subject's interest in avoiding the ill effects of an arrest record.

BACKGROUND

The subject, who had been a defense witness in a criminal trial, was indicted along with the defendant in that trial for perjury and conspiracy on the basis of the testimony which he gave. However, since the defendant from the criminal trial was acquitted on charges of suborning the perjury of the subject, the Commonwealth sought to drop its perjury prosecution against the subject in the belief that it would be unable to present a case. The subject then requested expungement of his record from the files of the State Police and the Federal Bureau of Investigation.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Chase v. King
406 A.2d 1388
(Pa. Sup. Ct. 1979)

RELIEF SOUGHT

A record subject brought this suit seeking expungement of two arrest records on the grounds that one of the charges against him had been dismissed and he had been acquitted on the other. The lower court denied relief and he appealed.

HOLDING

Reversed in part, affirmed in part. As to the first arrest, the Commonwealth had failed to show any compelling reason justifying retention of the record of an arrest made pursuant to a complaint filed by the subject's wife after a domestic quarrel, but later withdrawn. The record in that case was ordered expunged. As to the second arrest, however, the Commonwealth had made out a prima facie case against the subject, who was later acquitted in a jury trial. Since the subject had not affirmatively demonstrated his innocence, and had not shown any harm resulting from that record, it was not ordered expunged.

BACKGROUND

The first arrest was made following a complaint filed against the subject by his wife after a domestic quarrel. She then withdrew the complaint. The second arrest was for theft. The subject was identified by an eyewitness but a jury found him not guilty.

SPECIAL NOTE

The court observed that although the subject was suspended from his job during his trial for theft, he was reinstated immediately upon acquittal. This aided the court in finding that the public interest in favor of retention of the theft arrest record outweighed the interests of the subject.

Cross Reference: Page 230

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Commonwealth v. Mueller
392 A.2d 763
(Pa. 1978)

RELIEF SOUGHT

An arrest record subject whose case was dismissed by the court for failure to prosecute within the statutory deadline obtained an expungement order, and the Commonwealth appealed.

HOLDING

Reversed. Where, as here, the Commonwealth has made out a prima facie case against a subject, the burden then shifts to the subject to affirmatively show his nonculpability. If the subject cannot show innocence, expungement will be denied. If he can, the court must then weigh the Commonwealth's interests in the retention of the records against the subject's interest in having them destroyed.

BACKGROUND

The subject was charged with theft and a magistrate found that a prima facie case against him existed. The Commonwealth failed to prosecute him within 180 days of the date of the complaint, which by statute entitled the subject to dismissal. After his motion to dismiss was granted, he filed a petition for expungement, which was also approved.

Cross Reference: Page 232

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

Commonwealth v. Malone
366 A.2d 584
(Pa. Sup. Ct. 1976)

RELIEF SOUGHT

An arrest record subject against whom charges were dismissed filed an expungement petition in which he requested a hearing to present his claim. His petition was denied without a hearing and he appealed.

HOLDING

Reversed and remanded. Pennsylvania courts do have inherent authority to order expungement in appropriate cases. The case was accordingly remanded for a hearing, at which the lower court was instructed to balance the public interest in retention and maintenance of the subject's arrest record against the subject's interest in having it expunged.

BACKGROUND

The subject was arrested and charged with solicitation to commit involuntary deviate sexual intercourse. The charge was dismissed at the preliminary hearing.

MAINTENANCE OF RECORDS:
ARRESTS ENDED IN DISMISSAL OR NOT PURSUED

S.P. v. Dallas County Child Welfare
Unit of the Texas Department of Human Resources
577 S.W.2d 385
(Civ. App. Tex. 1979)

RELIEF SOUGHT

A criminal record subject who was released without prosecution on child abuse charges brought this appeal from a lower court's order limiting expungement of his records to those held by criminal justice agencies and officials. The subject argued that under the state expungement statute any records in the possession of the Department of Human Resources should also be destroyed. The lower court had held that the statute did not apply to the Department.

HOLDING

Reversed. The statute, which authorized expungement as to "all records and files relating to the arrest," did include the Department within its scope.

BACKGROUND

The subject was arrested in 1977 on charges of child abuse, but the county grand jury failed to return a true bill against him. He then moved for expungement of the resulting records and the lower court found him entitled to relief, though limiting it as stated. The Child Welfare Unit of the Department of Human Resources wanted to keep its records for use in a pending petition to terminate the subject's parental rights over his children.

SPECIAL NOTE

The court observed that the expungement order did not cover certain non-accusatory and investigative reports, except for any references to police records contained therein.

Cross Reference: Page 54

Chapter 5

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Statutory Standards

The cases in this chapter, with few exceptions, deal with statutory provisions. These cases apply and interpret statutes that authorize courts to purge, seal or otherwise restrict the maintenance of records that concern juvenile offenses, first offenses, adult "victimless" offenses and other "special category" offenses.

A substantial number of state statutes authorize sealing or purging of records pertaining to a first offender's conviction of particular crimes, especially drug offenses.[122] Many of these statutes make the record maintenance relief dependent on the type of sentence that the subject receives. They provide, for example, that subjects who have been physically incarcerated as a penalty for the first offense are not subsequently eligible for record maintenance relief.

Although most of the cases in this chapter concern the application of statutory provisions, a few general observations about the courts' attitude toward record relief for juvenile offenders and other special category offenders can be made. For example, the courts customarily interpret rehabilitative statutes, such as those at issue in this chapter, liberally to provide maximum benefit to parties covered by the statutes. Thus, in State v. Penn,[123] an Ohio court said that it would liberally interpret a state statute to find that the subject was a first offender and thus entitled to a purge order. In that case the subject had been convicted of robbing two different individuals within 15 minutes and the court had to decide whether the second offense destroyed the subject's first offender status.

In addition, the cases indicate that courts are receptive to record maintenance relief for juvenile offenders because of the rehabilitative purpose of the juvenile justice system.[124] This theme runs through most of the cases in this chapter that deal with juvenile record issues.

However, most of the juvenile justice statutes at issue in this chapter limit the recordkeeping relief available to juvenile record subjects to a seal order. A purge order is generally not available.[125] At least one court explained the bias in favor of sealing rather than of purging as a response to the fact that the statute does not authorize juvenile subjects to deny the occurrence of the criminal event in filling out employment applications or other written requests for information. Therefore, the records must continue to exist so that they can be used, if need be, by the subjects to help them explain the event.[126]

Another theme that runs through many of the cases in this chapter is the lack of law enforcement value in criminal history records of certain types of offenses. Many

[122] Florida Statute 893.14 (drug offense); Hawaii Statute 7121256 (drug offense); Massachusetts Statute 34; Michigan Statute 335.347 (drug offense); Oklahoma Statute 63-2-410 (drug offense); Arkansas Statute 43-1231 and 43-1232; Ohio Statute 2953.32.

[123] 369 N.E.2d 1229 (Ohio 1977).

[124] See, for example, T.N.G. v. Superior Court, 484 P.2d 981 (Calif. 1971).

[125] See, for example, In re Antonio, 389 N.Y.S.2d 213 (Fam. Ct. 1974); Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979).

[126] See, In re Smith, 310 N.Y.S. 2d 617 (Fam. Ct. 1970).

courts do not ascribe much law enforcement value to records of juvenile offenses, victimless offenses or first offenses.[127]

Judicial Standards

Interestingly, research identified few cases in which courts create a record maintenance remedy for juvenile offenders, victimless offenders or first offenders. A few courts, for example, have held that family court or juvenile court judges have inherent authority to purge or seal juvenile records, but the courts have differed about whether that authority reaches police records.[128] Two New York State family court decisions have held that the Constitution's due process and equal protection provisions require that the same degree of record maintenance relief that the legislature makes available to adults must also be made available to juveniles.[129] As a practical matter, these decisions are likely to have little influence outside of New York because the statutory scheme in most states provides at least as much, if not more, record maintenance protection for juveniles than it does for adults.

[127] See, for example, T.N.G. v. Superior Court, 484 P.2d 981 (Cal. 1971); In re Smith, 310 N.Y.S.2d 617 (Fam. Ct. 1970).

[128] Police Commissioner v. Municipal Court, 374 N.E.2d 272 (Mass. 1978); In re Antonio, P.389 N.Y.S.2d 213 (Fam. Ct. 1974); and In re Smith, 310 N.Y.S.2d 617 (Fam. Ct. 1970).

[129] In re Kenneth M., 399 N.Y.S.2d 843 (Fam. Ct. 1977); In re Tony W., 398 N.Y.S.2d 528 (Fam. Ct. 1977).

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Doe v. Webster
606 F.2d 1226
(D.C. Cir. 1979)

RELIEF SOUGHT

A minor convicted of a federal narcotics violation who was discharged from probation before the end of his maximum term and whose conviction was therefore set aside under the Federal Youth Corrections Act (FYCA) brought this action to expunge any records reflecting his arrest and conviction.

HOLDING

Relief granted. In the absence of any unusual circumstances, such as flagrant violation of constitutional rights, a properly arrested and convicted record subject is not entitled to expungement of his arrest record. However, to fully carry out the strong rehabilitative purpose of the FYCA the phrase "set aside the conviction" must be construed as meaning that all records showing the subject's conviction are to be physically removed from the central criminal files, and access to them granted only when necessary in the context of a bona fide criminal investigation.

BACKGROUND

The minor record subject was convicted of a federal marijuana offense. After serving time he was placed on probation, but was later discharged before the end of the maximum probationary period. Under the FYCA such a discharge automatically sets aside the underlying conviction, but the meaning of "set aside" is not explicit in the Act. The subject sued the Director of the Federal Bureau of Investigation, the U.S. Attorney General, and the Secretary of the Treasury seeking destruction of his files.

SPECIAL NOTE

1. The court referred to this physical segregation of criminal records from the general criminal files as "expungement," though noting that traditionally expungement refers to physical destruction.

2. See United States v. Heller, 435 F.Supp. 955 (N.D. Ohio) where the court held that the FYCA term "set aside" does not require expungement. United States v. McMains, 540 F.2d 387 (8th Cir. 1976) also held against expungement, as did 386 F.Supp. 1045, aff'd 537 F.2d 384 (9th Cir. 1976). The court in Doe v. Webster referred to those cases, and others going the other way, and concluded that the issue is unresolved since the Supreme Court has not ruled on what "set aside" means, and the Circuits have disagreed. The remedy fashioned by the court is less than total expungement, more like sealing.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

United States v. Doe
556 F.2d 391
(6th Cir. 1977)

RELIEF SOUGHT

A minor convicted of federal embezzlement who was discharged from probation before the end of his maximum sentence and whose conviction was therefore set aside under the Federal Youth Corrections Act (FYCA) was denied his request for expungement of all records relating to the set-aside conviction, and he appealed.

HOLDING

Affirmed. The FYCA provision which refers to setting aside convictions does not mean expunging the underlying records. No unusual circumstances were shown to justify expungement on other grounds.

BACKGROUND

The minor record subject pled guilty to embezzlement from a federally-insured bank. He was sentenced under the FYCA to two years probation, but his motion for discharge after 17 months of probation was granted. Under the FYCA, discharge before the expiration of the maximum sentence results in the conviction being automatically set aside, but the meaning of "set aside" is not explicit in the Act. The subject's discharge motion therefore also contained a request for expungement.

SPECIAL NOTE

The court did say that if the Federal Bureau of Investigation's files did not reflect the setting-aside, the minor could force correction (citing Tarlton v. Saxbe).

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

United States v. Fryer
545 F.2d 11
(6th Cir. 1975)

RELIEF SOUGHT

Defendant was convicted and sentenced on a plea of guilty to violations of the federal firearms law, specifically possession of firearms by a convicted felon and failure to reveal a prior felony conviction when purchasing a firearm. He sought to withdraw the guilty plea and have the sentence vacated on the ground that the prior felony coviction which was the underlying basis for the firearms charges had been set aside under the Federal Youth Corrections Act (FYCA). The district court vacated the sentence and dismissed the charges and the Government appealed.

HOLDING

Affirmed. A felony conviction set aside under the FYCA cannot constitute a prior felony conviction under the federal firearms laws.

The court stated that the district court had correctly determined that the FYCA set aside provision (which provides for the setting aside of the conviction if the defendant is unconditionally discharged from probation prior to expiration of the maximum period of treatment) is an expungement statute and should be read to give the youthful offender a second chance free from any record of conviction.

BACKGROUND

Defendant had been convicted of a federal smuggling violation in 1971 and had been sentenced to a period of probation under the FYCA. When he was unconditionally discharged upon successful completion of the probationary period, the conviction had been set aside and vacated under another provision of the FYCA.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

United States v. McMains
540 F.2d 387
(8th Cir. 1976)

RELIEF SOUGHT

A minor convicted of concealing a federal felony, who was discharged from probation before the end of his maximum sentence and whose conviction was therefore "set aside" under the Federal Youth Corrections Act (FYCA), was denied his request for expungement of all records relating to the set-aside conviction, and he appealed.

HOLDING

Affirmed. The language of the FYCA does not authorize expungement, and there were no extraordinary circumstances to justify expungement on other grounds.

BACKGROUND

The minor subject pled guilty to concealing a robbery of a federally-insured bank. He was given three years on probation and was later unconditionally discharged before the end of his probation term. Under the FYCA such a discharge results in the conviction being automatically "set aside." About one and one-half years after his discharge the subject requested expungement of his record, arguing that such action is authorized under the set-aside clause of the FYCA.

SPECIAL NOTE

This case agrees with the weight of authority. But see Doe v. Webster (D.C. Cir. 1979) which grants a form of sealing under the FYCA set-aside provision, calling it "expungement."

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Mestre Morera v. United States Immigration and Naturalization Service
462 F.2d 1030
(1st Cir. 1972)

RELIEF SOUGHT

An alien sought review of an INS deportation order which was based on his conviction of conspiring to possess illegally imported marijuana. He sought to have the order vacated on grounds that he was sentenced as a youthful offender and had received a certificate that his conviction had been set aside under the Federal Youth Corrections Act (FYCA).

HOLDING

Deportation order vacated. The purpose of the FYCA's provision for "setting aside" conviction records upon successful completion of the treatment period is to free the youthful offender from the disabilities of a criminal record and give him a second chance free of the taint of a criminal record. Deportation would be a complete deprivation of any second chance.

BACKGROUND

The deportation act provides that neither an executive pardon nor judicial recommendation of leniency should prevent deportation of aliens convicted of narcotics offenses. The court concluded that the FYCA "set aside" procedure is more than a "technical erasure" and thus is superior to either a pardon or leniency recommendation and that the policy of the Congress to give youthful offenders a second chance free of all taint of the conviction overrides the Congressional concern with narcotics violations.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Stevenson v. United States
380 F.2d 590
(D.C. Cir. 1967)

RELIEF SOUGHT

Defendants appealed from convictions on charges of housebreaking and robbery. One defendant argued in part that his conviction was obtained by fingerprint comparisons with earlier fingerprints improperly retained after the earlier conviction had been set aside under the Federal Youth Corrections Act (FYCA).

HOLDING

Retention of the fingerprints after the FYCA conviction had been set aside was proper and the fingerprints could be used for comparison with prints found at the scene of the crime in the present case.

The court reasoned that the FYCA requires only the setting aside of the conviction in the earlier case. But this does not eliminate the fact that the accused had been arrested, booked, photographed and fingerprinted. The government may properly retain and use the fingerprints under the authority of 5 U.S.C. 300 which authorizes the Department of Justice to acquire, collect, classify and preserve identification and other records for use in the detection and prosecution of crime.

BACKGROUND

Two defendants were convicted of housebreaking and robbery. The government's case relied heavily upon fingerprint evidence based upon comparisons of fingerprints lifted from the crime scene with known fingerprints of the two defendants. The known fingerprints of Stevenson had been retained on file after an earlier conviction which had been set aside under the FYCA.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

United States v. Hall
452 F.Supp. 1008
(S.D.N.Y. 1977)

RELIEF SOUGHT

A minor who pled guilty to a federal bomb threat charge but who was discharged from probation before the end of his maximum sentence and whose conviction was therefore set aside under the Federal Youth Corrections Act (FYCA) asked the court to order the expungement of his Federal Bureau of Investigation (FBI) arrest records.

HOLDING

Denied. The FYCA clause which refers to convictions does not mean expunging the criminal records. No unusual circumstances were shown to justify expungement on other grounds.

BACKGROUND

The minor record subject pled guilty to making bomb threats by telephone to an airline, a violation of federal law. He was discharged from probation before the end of his maximum sentence. Under the FYCA such a discharge results in the conviction being automatically set aside, but the meaning of "set aside" is not explicit in the act. The minor wrote to the FBI requesting expungement, which was denied on grounds that the FBI was without authority to destroy records except upon court order. He accordingly brought this action.

SPECIAL NOTE

See Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979) which orders what amounts to "sealing" in FYCA "set aside" cases.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

United States v. Heller
435 F.Supp. 955
(N.D. Ohio 1976)

RELIEF SOUGHT

A minor convicted of a federal offense brought this action under the Federal Youth Corrections Act (FYCA) seeking discharge from probation, the setting aside of his conviction, and the expungement of all his arrest, trial, conviction, and identification records.

HOLDING

Expungement denied. The FYCA clause which refers to setting aside convictions does not mean expunging the criminal records. No unusual circumstances were shown to justify expungement on other grounds.

BACKGROUND

None were given beyond those noted above.

United States v. Glasgow
389 F.Supp. 217
(D.D.C. 1975)

RELIEF SOUGHT

The defendant was convicted of illegally using the mails for importation of marijuana and was sentenced to three years' probation. He filed a motion for reconsideration and sentencing under the Federal Youth Corrections Act (FYCA).

HOLDING

Motion granted. The court, in discussing the FYCA set aside provision (which provides that the conviction may be set aside if the youthful offender is unconditionally discharged prior to expiration of the maximum period of treatment) said in dictum:

> "Although Sec. 5021 does not provide for the sealing of the offender's records when his conviction is set aside, that section may be read as an expungement provision. * * * In order to effectuate the purposes of the FYCA, the court, under its inherent powers as an Article III court having equitable jurisdiction, may, in the appropriate situation, order the expungement and sealing of the offender's records."

BACKGROUND

Upon conviction, the defendant had been sentenced to probation as an adult. He sought reconsideration and sentencing under the FYCA on the grounds that the "set aside" provision of the FYCA constituted "treatment" that would benefit him by removing the stigma of a felony conviction.

Fite v. Retail Credit Company
386 F.Supp. 1045
(D. Mont. 1975)
aff'd, 537 F.2d 384
(9th Cir. 1976)

RELIEF SOUGHT

A federal criminal record subject sentenced under the Federal Youth Corrections Act (FYCA) who was discharged from probation before the end of his maximum sentence and whose conviction was therefore set aside sued a credit reporting agency to enjoin it from disseminating his criminal records and to prohibit further maintenance of those records by the agency.

HOLDING

There is no evidence that either the FYCA or the Fair Credit Reporting Act were intended to conceal the existence of a set-aside conviction. General public policy does not support concealment, and since court records are traditionally public and the credit report was complete and accurate the subject was denied all relief.

BACKGROUND

The subject pled guilty to theft of government property and received a suspended sentence and one year's probation under the FYCA. He was discharged before the end of his probation period, resulting in his conviction being automatically set aside. He then procured employment as an insurance salesman, but was fired when his employer obtained a credit report on him which included records of his arrest, sentence, and the setting-aside of his conviction.

SPECIAL NOTE

Ths court disagreed with the cases that have said that a FYCA "set aside" amounts to expungement. The case was affirmed by the 9th Circuit Court of Appeals which noted that the issues had been adequately covered by the District Court.

Cross Reference: Page 87

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Chapman
577 P.2d 1012
(Cal. 1978)
(en banc)

RELIEF SOUGHT

The record subject in this action, convicted of possession of marijuana, was sentenced to three years' probation and immediately sought to have his conviction records expunged.

HOLDING

Denied. Under the state statute, the subject was not entitled to expungement until he had fully served out his sentence.

BACKGROUND

The subject pled guilty to possession of marijuana and judgement was entered on December 31, 1975, imposing three years' probation. On January 2, 1976, the subject moved for destruction of his conviction records.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Younger v. Superior Court
577 P.2d 1014
(Cal. 1978)
(en banc)

RELIEF SOUGHT

This action involved the resolution of two suits brought by the same record subject to obtain expungement of his conviction for marijuana possession. One suit was brought under a state statute empowering the court, upon petition, to order expungement. Before that case could be resolved the subject brought another suit pursuant to a new statue which replaced the first statute and which directed the Department of Justice to destroy all marijuana arrest and conviction records upon application of a record subject. The Attorney General, who was opposing the subject in his first suit, had refused to act on the subject's application under the second statute. The subject therefore brought the second suit to compel compliance with the new statute.

HOLDING

Relief granted. Since the first suit was based entirely upon the authority of the first statute, that case could not continue once the statute was repealed. However, because the subject had complied with the procedures set forth in the second statute the Attorney General had to honor his application and destroy his files.

BACKGROUND

The record subject first brought a motion to expunge a four-year-old conviction for marijuana possession, acting under a state statute which authorized the court, on motion, to order the destruction of such records. The court granted his motion but the Attorney General petitioned the state supreme court to have that order vacated. While the case was still unresolved the legislature replaced the expungement statute with another, which provided that upon application from a record subject the Department of Justice must destroy all marijuana arrest or conviction records. The subject made an appropriate application for expungement, the Attorney General refused to act on it, and the subject filed a second suit seeking an order compelling the Attorney General to destroy his files. The two cases were consolidated for a single disposition.

SPECIAL NOTES

1. The court held that the second statute requiring the Attorney General to destroy records upon application did not violate the separation of powers doctrine by encroaching upon the executive.

2. The court also ruled that the statute did not authorize destruction of records of any conviction which had not completely run its course; the subject must have completed his punishment and the conviction must not still be subject to review on appeal.

3. The court also held that the statute did not authorize destruction of anonymous statistical data which might derive from the criminal records involved.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Rosenquist
147 Cal. Rptr. 84
(Ct. App. 1978)

RELIEF SOUGHT

A trial court ordered expungement of a subject's marijuana arrest and conviction records and, on the basis of that expungement, denied the state's petition to modify the subject's probation. The state appealed.

HOLDING

Reversed. Under the amended statutory scheme the court no longer had authority to order destruction of the records. Instead, the procedure was for the subject to apply to the Department of Justice for expungement. In any case the subject was not entitled to expungement so long as any aspect of his punishment was not completed, and so the court had jurisdiction to consider the state's petition to modify the subject's probation.

BACKGROUND

The subject, who was convicted of a marijuana offense, obtained the lower court order under the then-existing statutory procedure. After the state appealed, the statute was changed, giving qualified subjects the right to expungement upon application directly to the Department of Justice. In the lower court proceeding the state had also sought to modify the subject's probation based on his alleged involvement with stolen property during probation, but the lower court dismissed the petition based on its belief that in granting expungement it had nullified the subject's conviction. Under prior case law, however, the subject's conviction could not be expunged until he had fully served out his sentence.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Pruett
124 Cal. Rptr. 273
(Ct. App. 1975)

RELIEF SOUGHT

The record subject in this action, a minor arrested on two marijuana misdemeanor charges which were later dismissed, challenged the constitutionality of the state sealing statute. He argued that the statute, in denying sealing to marijuana arrestees, violated the equal protection guarantee of the constitution.

HOLDING

The challenged statute was unconstitutional on equal protection grounds. The court noted that the statute made sealing available to convicted minors, but would exclude this subject who had obtained dismissal of all charges.

BACKGROUND

The subject was arrested as a minor on two marijuana misdemeanor charges. On motion of the prosecuting attorney the charges were withdrawn and the case dismissed. The subject's original sealing petition was dismissed. On appeal the lower court reversed, based on a ruling on a similar statute by the state supreme court.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Ryser
114 Cal. Rptr. 668
(Ct. App. 1974)

RELIEF SOUGHT

A criminal record subject convicted as a minor of a marijuana misdemeanor challenged the constitutionality of the state sealing statute, under which he was denied sealing as a marijuana offender. He alleged that his exception from sealing eligibility invaded his right of privacy, constituted a denial of due process and equal protection, and subjected him to cruel and unusual punishment.

HOLDING

Relief granted. Only the subject's equal protection argument had any merit. And second, that since the subject's misdemeanor record could serve no real future law enforcement purpose (such as providing a basis for enhancement of sentence in event of a subsequent narcotics conviction, or being of use with respect to probation determinations or a later determination of addiction), but could cause the subject considerable harm, the statutory scheme denying him sealing was unconstitutional.

BACKGROUND

The subject pled guilty to a misdemeanor charge arising out of his possession of a bag of marijuana. Under the state sealing statute, his conviction was one of a number excepted from sealing eligibility. The other exceptions were grounded on reasons such as the recidivism of sex offenders and the need by the police to identify hard-core drug addicts and users, but the state was unable to show any equally rational reason for not sealing misdemeanor marijuana convictions.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

T.N.G. v. Superior Court
484 P.2d 981
(Cal. 1971)
(en banc)

RELIEF SOUGHT

Two juveniles brought suit asking that all records of their detention by the police be sealed. They based their action on two grounds: first, that their detention would subject them to nearly the same stigma as an arrest record; second, that the statutory scheme allowing juveniles treated as adults to obtain immediate sealing of their records, but requiring all others to wait five years (or until their majority), is a denial of equal protection and due process.

HOLDING

Sealing granted. In order to carry out the intent of the legislature and the juvenile justice system, a juvenile who was merely detained need not disclose that fact to third parties. The juvenile court, which has exclusive authority over release of juvenile records to third parties, also need not reveal a simple detention to any inquiring third parties. But the five-year waiting period for juveniles does not violate equal protection or due process.

BACKGROUND

Three juveniles aged 15, 16, and 18, respectively, were taken into custody under an anti-loitering statute while distributing anti-war leaflets outside a high school. The police detained them at the police station for several hours and filled out an incident report. The 18-year old was charged and taken to jail. His charges were dismissed by the municipal court and his application to seal his records was granted pursuant to statute. The two younger juveniles were simply released from detention without being charged. This different treatment restricted them to the sealing statute which imposed a five-year waiting period.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Taylor
3 Cal. Rptr. 186
(Dist. Ct. App. 1960)

RELIEF SOUGHT

In this case the court considered whether a subject may be charged with possession of a firearm by a convicted felon, where the underlying felony conviction had been set aside and the information dismissed.

HOLDING

In light of statutory language that upon the setting aside of a conviction the subject shall be freed of all "penalties and disabilities" resulting therefrom, a set-aside conviction could not be used to prosecute a subject for possession of a firearm by a convicted felon.

BACKGROUND

Los Angeles Police Department officers found a handgun in the subject's possession while interrogating her. Since the subject had previously been convicted of attempted robbery, she was charged with possession of a firearm by a convicted felon. Her prior conviction had been set aside and the information against her dismissed upon her successful completion of a probationary period.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Anonymous
378 A.2d 528
(Conn. 1977)

RELIEF SOUGHT

A minor charged with murder argued that the anonymity accorded juvenile offenders should survive the transfer of his case from Juvenile Court to Superior Court, and thus prevent the unsealing of his records.

HOLDING

Records ordered unsealed. The privacy given to juvenile offenders is statutory only, and therefore may be statutorily withdrawn. Here the legislature had provided that minors charged with murder should be transferred to the Superior Court, at which time the Juvenile Court loses all jurisdiction. As a result of the transfer the minor loses all benefits accorded to juvenile status, including the right to have his case sealed.

BACKGROUND

The subject was taken into custody at the age of 15 for murder. After a hearing, the Juvenile Court transferred his case to Superior Court. The Superior Court ordered the case files sealed pending the grand jury's decision on the charges. The grand jury returned an indictment charging the subject with murder, and the Superior Court then granted the state's motion to unseal the files.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Sobie
343 So. 2d 73
(Dist. Ct. App. Fla. 1977)
(per curiam)

RELIEF SOUGHT

The state appealed a trial court's expungement order, granted under a "first offender" expungement statute, where the case record showed a previous conviction.

HOLDING

Reversed. The trial court failed to follow the explicit statutory requirements in granting expungement. Since the case record affirmatively showed that the subject had a prior conviction, he was not entitled to expungement.

BACKGROUND

The subject was arrested for public drunkenness, unlawful possession of marijuana, and unlawful possession of barbiturates. He pled nolo contendere, and later was granted expungement pursuant to a statute limiting such relief to those with no prior convictions. According to the case record the subject had previously been convicted of public drunkenness.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Village of Homewood v. Dauber
229 N.E.2d 304
(Ill. App. 1967)

RELIEF SOUGHT

Defendant was convicted and fined for a village traffic violation, a misdemeanor. The trial court ordered the village police chief to return to the defendant the fingerprints and photographs taken at the time of arrest. The village and the police chief appealed.

HOLDING

Reversed. The fact that the offense was a misdemeanor would not constitute sufficient grounds for return of identification data.

BACKGROUND

The trial court apparently entered the return order on its own motion. The defendant did not file an appellate brief. The appellate court followed the rule laid down in previous Illinois cases (Kolb v. O'Connor, 142 N.E.2d 818 (Ill. 1957)) that sheriffs or police departments may retain identification data in their files in the absence of a specific legislative mandate to the contrary.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Police Commissioner v. Municipal Court
374 N.E.2d 272
(Mass. 1978)

RELIEF SOUGHT

A police commissioner instituted this appeal challenging the authority of a Municipal Court judge, sitting as a Juvenile Court judge, to order expungement of police records.

HOLDING

Vacated and remanded. The Juvenile Court judge did have the authority to order expungement or sealing of records of juvenile proceedings in order to protect the juvenile's rights. Those rights, however, must be balanced against the law enforcement value of maintenance and dissemination of the records. Since the Juvenile Court judge had apparently performed no balancing test, the case was remanded for reconsideration.

BACKGROUND

In the underlying case a juvenile had been charged with an act of delinquency, namely assault. The victim was unavailable at the time of the juvenile's delinquency hearing and the complaint was dismissed with prejudice. The Juvenile Court judge subsequently granted the subject's request to order expungement of his arrest records.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Commonwealth v. Ferrara
330 N.E.2d 837
(Mass. 1975)

RELIEF SOUGHT

A criminal defendant convicted of manslaughter brought this appeal, alleging in part that the trial court erred in refusing the defendant access to juvenile records of a principle prosecution witness. The defendant wanted the records for use in impeaching the witness; the trial court withheld them on the basis of their statutory confidentiality.

HOLDING

Affirmed. The relevant statute clearly intended to confer broad confidentiality on juvenile records; the trial judge had not erred in denying them to the defendant.

BACKGROUND

The defendant was tried for murder and convicted of manslaughter. The only witness who claimed to have seen the shooting was a fourteen-year old with a significant juvenile record.

Cross Reference: Page 65

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Upshaw
283 N.W.2d 778
(Mich. Ct. App. 1979)

RELIEF SOUGHT

A youth convicted under the Youthful Offender Act sought to have his conviction record expunged. The lower court granted his motion to dismiss the conviction and ordered the record expunged. The state appealed.

HOLDING

Reversed. The subject could not obtain expungement under the Youthful Offenders Act, since the statutory five-year waiting period from the date of conviction had not passed. Also, the subject was not entitled to an order granting a new trial since no facts supporting a new trial had been alleged.

BACKGROUND

The subject was charged at the age of 17 with armed robbery and pled guilty to unarmed robbery. He later moved that his case be dismissed and his record expunged. (The court detailed two possible expungement procedures in reviewing the lower court's actions; either under the Youthful Offenders Act, or by granting a new trial and then dismissing the case.)

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State ex rel. M.B. v. Brown
532 S.W.2d 893
(Mo. Ct. App. 1976)

RELIEF SOUGHT

A youthful offender record subject brought this action protesting the trial court's action in only sealing his records, when the statute under which he had requested relief directed expungement.

HOLDING

Additional relief granted. The statutory language, which used the phrase "expunge from all official records," did not mean that the official records themselves were to be destroyed (based on the use of the word "from"); but in light of that language and the common meaning of "expunge" sealing of the records was also inappropriate. The proper remedy was to physically obliterate, in some permanent manner, the subject's name, address, and all other identifying information from the records, so that he could not be connected with them. Any papers not necessary for the court's files were to be destroyed.

BACKGROUND

The subject was convicted of possession of marijuana. He completed his probationary period, which made him eligible for expungement of his records as a youthful offender. He filed an appropriate motion, which the court granted with the modification that the records were to be sealed subject to access on court order only. In this suit the subject sought a higher court order compelling the lower court to expunge the records.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Doe
372 A.2d 279
(N.H. 1977)

RELIEF SOUGHT

In this action a record subject who had received one sentence of imprisonment followed by probation and had two other cases "continued for sentence" appealed the ruling of a lower court that the state annulment statute was inapplicable to any of his records.

HOLDING

Affirmed. An annulment statute limited by its terms to cases where the subject was sentenced to probation or conditional discharge did not apply to a subject who was imprisoned and only then placed on probation. Also a disposition of "continued for sentence" was not an unconditional discharge so as to entitle the subject to annulment under another provision of the statute.

BACKGROUND

The subject had pled guilty to three indictments. He received a split prison/probation sentence on one indictment, and the other two were "continued for sentence."

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Doe v. State
328 A.2d 784
(N.H. 1974)

RELIEF SOUGHT

A criminal record subject sought to have the record of his conviction and sentence annuled under the provisions of the state's new criminal code, which became effective after the imposition of his sentence. The state opposed, arguing, first, that the statute could not be applied retroactively and second, that even if it could, it was limited to cases where the subject had received probation or a conditional or unconditional discharge, not a fine as in the present case.

HOLDING

Relief granted. Since mitigating (as opposed to punishing) laws may apply retroactively and there was no evidence of contrary legislative intent, the annulment remedy was available to the subject. In the interests of justice a rehabilitative measure available to persons sentenced to imprisonment must be construed to be also available to those who receive the lesser sentence of a fine.

BACKGROUND

The subject pled guilty in 1971 to willful concealment of a ping pong ball worth 79¢ and was fined $25 with $10 suspended. In 1973 a new criminal code became effective which contained an annulment provision available under certain circumstances to subjects sentenced to probation or conditional discharge, or to unconditional discharge. In 1974 the subject went to court in an effort to avail himself of that provision.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. W.J.A.
412 A.2d 1355
(N.J. Sup. Ct. Law Div. 1980)

RELIEF SOUGHT

A criminal record subject who wished to apply for employment in a casino requested expungement of his three juvenile delinquency adjudications, which would allow him to deny their existence on the application form. At issue was whether adjudications of juvenile delinquency fell within the scope of the state expungement statute.

HOLDING

Relief denied. Since the state expungement statute permitted expungement only of convictions of crimes, and an adjudication of juvenile delinquency is not conviction of a crime, the subject's records could not be expunged.

BACKGROUND

The 35-year old subject wished to apply for employment in a casino. In order to apply he would have to fill out the State Casino Control Commission's license application form. That form included, as required by law, a question concerning the applicant's criminal background. This subject had been adjudicated a juvenile delinquent for three separate incidents in 1961. Under state law those juvenile records were sealed, but a license applicant could only deny the existence of expunged records.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. J.C.S.
383 A.2d 455
(N.J. Super. Ct. App. Div. 1978)

RELIEF SOUGHT

A record subject who received a split sentence of incarceration and probation sought expungement of his record under a state statute which authorized expungement for persons who had served out probation sentences. The lower court ruled that the statute was unavailable to subjects who had been imprisoned, and this appeal followed.

HOLDING

Reversed. Given the legislature's rehabilitative intent as expressed by this statute, and since the legislature had also enacted and so was presumably aware of the law allowing split sentences, the expungement statute would be read to allow expungement where a record subject had served time as well as probation.

BACKGROUND

The subject pled guilty to a narcotics charge and was sentenced to an indeterminate term in the Youth Correction Center. The sentence was suspended except for 30 days at 3 days per week, to be followed by 2 years on probation. Although this sentence was illegal under New Jersey law, the subject served it out in full without further incident.

The appeals court also vacated the illegal sentence "for the sake of the record," and substituted a proper sentence.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re R.C.C.
376 A.2d 614
(N.J. Juv. Ct. 1977)

RELIEF SOUGHT

In this case the court considered whether the existence of a sealing statute specifically directed towards juvenile records precluded a juvenile from using a more general expungement statute to obtain destruction of his records.

HOLDING

Expungement granted. The fact that the expungement statute used the term "person" did not exclude juveniles from its coverage. The juvenile in this case, whose motion to expunge was unopposed by any law enforcement authority, was entitled to expungement.

BACKGROUND

The juvenile record subject was charged with soliciting unlawful sexual or indecent acts. The complaining witness was prevented by his father from attending the juvenile hearing, so the subject obtained an order dismissing the case for failure to prosecute.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Roesch v. Ferber
137 A.2d 61
(N.J. App. 1957)

RELIEF SOUGHT

Plaintiff, who was fingerprinted and photographed by the county sheriff while being held awaiting the posting of bail on a speeding charge, brought an action against the sheriff to compel the return of the fingerprints and photograph. The trial court granted the relief and the sheriff appealed.

HOLDING

Reversed. The sheriff had a duty under statute to fingerprint and photograph all persons arrested and committed to the county jail. Where no statute provides for the return of the fingerprints and photograph, the courts may not interfere with the discretion of the sheriff to retain the data in his files for identification purposes, absent equities strongly in favor of the complainant.

BACKGROUND

The plaintiff was a pre-law student when he was arrested for the speeding offense. He was fingerprinted and photographed over his objection while waiting for his father to arrive to post bail. He contended that the offense was a nonserious one and that the taking and retention of the fingerprints caused him considerable embarrassment and might cause him difficulties in the future in connection with admission to the New York bar. The court found these assertions to be tenuous and noted that the plaintiff could not in any case conceal the traffic violation from the bar admission committee.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Gleason v. Hongisto
414 N.Y.S.2d 93
(Sup. Ct. 1979)

RELIEF SOUGHT

In this action a criminal record subject challenged his dismissal as a Corrections Officer Trainee, which was based on a discovery by the corrections department that he had been adjudicated a Youthful Offender on a firearms charge. Youthful Offender records are statutorily sealed. The court was asked to rule on whether they could properly be considered by the corrections department in deciding on the subject's fitness for employment.

HOLDING

Youthful Offender records were not intended to be sealed so completely as to deny access to them by the Corrections Commissioner in evaluating a job applicant whose employment would require him to carry a firearm and work under pressure.

BACKGROUND

The subject received a permanent appointment as a Corrections Officer Trainee with the Department of Correctional Services. He was dismissed shortly thereafter when the Department discovered that he had been adjudicated a Youthful Offender following his involvement in a robbery in which a firearm was used. The Department believed that this would bar the subject from possessing a firearm under federal law, which was a job requirement.

Cross Reference: Page 38

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Robertson
412 N.Y.S.2d 982
(Crim. Ct. N.Y. 1979)

RELIEF SOUGHT

An arrest record subject who pled guilty to a lesser "violation" offense in satisfaction of a misdemeanor charge sought in this action the return of all identification data and sealing of all records in the case. She based her request on equal protection and the presumption of innocence under the state and federal constitutions, and on the state sealing statute.

HOLDING

Relief granted under the state sealing statute. When a subject is charged with a misdemeanor but is allowed to plead guilty to a violation, the misdemeanor is deemed to have been dismissed. Since dismissal is termination "in favor" of the accused under the statute, the misdemeanor arrest record was ordered sealed and the identification data returned. Under this fact pattern the proper sealing procedure was to have the Division of Criminal Justice Services retrieve the computerized misdemeanor arrest record, obliterate it, and substitute the violation arrest and conviction. The Division was ordered to request any agencies to which it had transmitted the misdemeanor arrest record to take similar action. The records room clerk of the court was directed to write out the violation arrest and conviction on a piece of paper and paste it over the original misdemeanor charge entry. The cover of the court papers was ordered revised to show only the violation arrest and conviction.

BACKGROUND

The subject was originally charged with possession of stolen property. Pursuant to plea discussions she was allowed to plead guilty to a charge of disorderly conduct, a violation, in full satisfaction of the stolen property charge.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In the Matter of Dorothy D. (Anonymous)
404 N.Y.S.2d 876
(Sup. Ct. App. Div. 1978)

RELIEF SOUGHT

A minor who had had an unjustified juvenile delinquency petition filed against her, which lacked merit and was subsequently withdrawn, appealed from the refusal of the Family Court to expunge all mention of her name from Family Court records.

HOLDING

Reversed. The Family Court has inherent power over its own records. Failure to order expungement under the circumstances was an abuse of discretion.

BACKGROUND

The groundless juvenile delinquency petition was filed as a result of a family fued between the minor's mother and a neighbor. The dispute was settled and the neighbor subsequently withdrew the petition. The Family Court denied the minor's petition to expunge the records on the ground that the history of the minor's family problems might be useful to the court and the Probation Department if further petitions should be filed.

The Supreme Court resisted a "temptation" to decide the case on the basis of constitutional rights, and based its reversal on the Family Court's discretionary power over its own records. Expungement should have been ordered because, though Family Court records are deemed to be confidential and not open to outsiders, the reality is that employers and others do gain access to such records and use them as the basis for such decisions as rejecting job applicants and rejecting college admission applications.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Kenneth M.
399 N.Y.S.2d 843
(Fam. Ct. 1977)

RELIEF SOUGHT

The record subject in this case, a minor, sought expungement of all court and law enforcement agency records of his arrest, where his case had been adjourned in contemplation of dismissal.

HOLDING

Relief granted. Due process and equal protection require that the same sealing remedy available to adults under the Criminal Procedure Law be made available in all juvenile delinquency cases. Since an adult whose case was adjourned in contemplation of dismissal could obtain sealing, the minor's records were ordered sealed.

BACKGROUND

The subject was arrested on charges of forcible sexual contact with a thirteen-year old girl. His motion for an adjournment in contemplation of dismissal, with consent of the Corporation Counsel and the arresting officer, was granted. The petition was subsequently dismissed, though not on the merits.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Tony W.
398 N.Y.S.2d 528
(Fam. Ct. 1977)

RELIEF SOUGHT

A juvenile who obtained a favorable disposition of his case brought this action seeking to seal his arrest record. At issue was whether or not a new sealing provision of the Criminal Procedure Law (CPL) which was written in terms of adult criminal proceedings should be extended to juveniles.

HOLDING

Sealing granted. Due process and equal protection compel the extension to juveniles of any protective measures contained in the CPL. Since the sealing provision is a favorable one, it must be made equally available to juveniles. The court also found that the power to issue a sealing order resides as a constitutional matter in the Family Court, since requiring the juvenile to petition elsewhere would impose a discriminatory burden.

BACKGROUND

Prior to enactment of the sealing provision at issue (CPL 160.50) the New York courts had rejected a variety of arguments offered in support of efforts to serve orders to seal juvenile arrest records. This case raised the issue of the application of the new law to juveniles.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

People v. Dugan
397 N.Y.S.2d 878
(Dutchess County Ct. 1977)

RELIEF SOUGHT

A record subject who was adjudicated a youthful offender sought to have his records sealed and all identification data returned, claiming that such adjudication constituted a termination of proceedings in his favor under the state sealing statute.

HOLDING

Relief denied. Since adjudication as a youthful offender is not one of the enumerated terminations in favor of the accused, the subject was not entitled to the relief sought.

BACKGROUND

The subject pled guilty to possession of marijuana, was adjudicated a youthful offender, and given an unconditional discharge.

SPECIAL NOTE

Although the subject was not entitled to the sealing and return remedies requested, it appears he was entitled to a lesser sealing remedy under a different provision of the Criminal Procedure Law, since that is what the district attorney argued in opposition to the subject's motion in this case.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Charles S.
395 N.Y.S.2d 110
(App. Div. 1977)

RELIEF SOUGHT

In this very brief decision the court ruled on an appeal from a Family Court order directing the expungement of police records reflecting a subject's arrest.

HOLDING

Reversed. The relevant section of the Family Court Act did not empower the Family Court to expunge police records.

BACKGROUND

The circumstances of the arrest were not given. The Family Court's order was directed against the New York City Police Department and the New York City Transit Authority Police Department.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Hecht
394 N.Y.S.2d 368
(Sup. Ct. 1977)

RELIEF SOUGHT

A state legislative committee investigating the juvenile justice system served a legislative subpoena on a city probation department, seeking Family Court probation records on a certain juvenile. The probation department brought this action in an effort to quash the subpoena, citing the statutory confidentiality given to records of juvenile proceedings.

HOLDING

It was within the power of the committee to inspect the subpoenaed records, on application to the court, since the probation records were relevant and material to the committee's inquiry.

BACKGROUND

The New York State Selective Legislative Committee on Crime, Its Causes, Control, and Effect on Society (the Marino Committee), while in the process of examining the juvenile justice system, became concerned with a highly publicized case in which a teenager who murdered an elderly widow was discovered by the media to have been adjudicated a juvenile delinquent a few months before the murder, based on a charge of rape, and committeed to a youth facility. In the course of its investigation into the matter the Marino Committee subpoenaed the youth's probation records from the New York City Department of Probation.

Cross Reference: Page 52

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Antonio P.
389 N.Y.S.2d 213
(Fam. Ct. 1974)

RELIEF SOUGHT

A record subject requested that all Family Court and police department records reflecting the juvenile delinquency proceedings against him be sealed.

HOLDING

Relief granted in part. The Family Court would seal its own records under its inherent powers, and would also order the Probation Department to seal its records under authority of the Uniform Family Court Rules. However, the court found it had no authority over police records, though it did urge the police department to seal its records voluntarily.

BACKGROUND

No background facts given in case.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Doe v. County of Westchester
358 N.Y.S.2d 471
(Sup. Ct. App. Div. 1974)

RELIEF SOUGHT

The County of Westchester, the County Sheriff and the District Attorney appealed from a lower court ruling enjoining the sheriff from disclosing the petitioner's youthful offender adjudication to the U.S. Army, ordering the county clerk to delete the petitioner's name from all public records and substitute an anonymous title and ordering the sealing of all papers in the proceedings.

HOLDING

Affirmed. The provisions of a state statute (CPL 720.35) mandate the nondisclosure of the youthful offender adjudication to the Army. The issue was not rendered moot by the fact that the Army recruiter already knew of the arrest and youthful offender adjudication when he visited the sheriff's office. Failure of the sheriff to divulge the adjudication would not violate section 1001 of title 18 of the U.S. Code.

BACKGROUND

The petitioner was convicted as a youthful offender and sentenced to a term in prison. He applied to have his sentence modified on the ground that he wished to join the Army. The sentencing court agreed to modify the sentence if the Army accepted the petitioner. The Army accepted him and he enlisted. When the petitioner later learned that the sheriff would disclose the arrest and disposition to the Army, he brought suit to enjoin the disclosure under the New York statute which bars any police agency from making available to any public agency any official records and papers relating to the case of a person adjudicated a youthful offender. Although the Army recruiter apparently already knew of the youthful offender record, neither party pressed the mootness issue because they wanted a decision on the crucial issue of the application of the statute to the Army in these circumstances.

Cross Reference: Page 53

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Brunetti v. Scotti
353 N.Y.S.2d 630
(Sup. Ct. 1974)

RELIEF SOUGHT

In this case a criminal record subject with a juvenile record sought an order prohibiting the district attorney from using Family Court records in bail proceedings. He alleged that such use of juvenile records violated the statutory confidentiality accorded to them.

HOLDING

There is no conflict, in letter or spirit, between the statutory grant of confidentiality to Family Court records and consideration of those records by a court in considering a subject's bail application.

BACKGROUND

None given as to the individual case. This action was a broad suit attempting to end the entire practice involved, brought by the Legal Aid Society on behalf of all criminal subjects with prior Family Court records.

Cross Reference: Page 40

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In the Matter of Donald J. (Anonymous)
325 N.Y.S.2d 235
(Sup. Ct. App. Div. 1971)

RELIEF SOUGHT

A juvenile petitioned to expunge his name from all court and police records, on grounds the petition to adjudge him a juvenile delinquent had been withdrawn. The Family Court denied the petition and the juvenile appealed.

HOLDING

Affirmed, but without prejudice to address a new, more limited petition to the Family Court. The Family Court is without authority to expunge police records. However, it has inherent power over its own records and sealing would be a proper method to ensure confidentiality.

BACKGROUND

No background facts given in this case.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

In re Smith
310 N.Y.S.2d 617
(Fam. Ct. 1970)

RELIEF SOUGHT

Two juvenile subjects who were released without prosecution sought to obtain expungement of their police and court records, citing the potential harm to their future employment opportunities.

HOLDING

Due to the potential harm to the subjects' employment possibilities, the lack of law enforcement value of their records, and the general philosophy of juvenile justice, relief would be granted. The court's power to grant relief extended to police as well as court records. The appropriate remedy was the obliteration of the subjects' last names from all records, the records themselves to be preserved for possible use in statistical surveys. Since the subjects would still have to admit to their arrests if asked by potential employers, the subjects' expungement petitions from this case were ordered sealed, for use by the subjects in explaining their criminal records.

BACKGROUND

The subjects, aged 14 and 15, were taken into custody during a demonstration in front of a public school. Juvenile delinquency petitions were filed against them, but at trial the counsel for the New York City Police Department withdrew the petitions for insufficient evidence.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Marshall
397 N.E.2d 777
(Ohio Ct. App. 1979)

RELIEF SOUGHT

A criminal record subject brought this action appealing the lower court's denial of his expungement petition, which was made pursuant to state statute. The lower court had held that the subject's felony conviction could not be expunged because he had a second conviction on his record.

HOLDING

Reversed. Where the subject's misdemeanor conviction had been procured under a statute later ruled unconstitutional, such conviction could not be counted as a second conviction within the meaning of the expungement statute. The case was remanded to allow the lower court to exercise its discretion as to whether to grant expungement.

BACKGROUND

The subject had two convictions on his record, one on a narcotics felony charge and one for loitering, a misdemeanor. The loitering ordinance was later declared unconstitutional. The subject then sought expungement under a state statute which made expungement available to first offenders; the lower court found that the subject was not a first offender as to his felony record, due to his misdemeanor conviction.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Gebell v. Dollison
386 N.E.2d 845
(Ohio Ct. App. 1978)

RELIEF SOUGHT

This case involved an appeal from a lower court's ruling that the subject's traffic violation record as a juvenile could not be considered in a license revocation proceeding brought against him after he attained his majority.

HOLDING

Reversed. The juvenile records statute rendered confidential only the sentence imposed, not the fact of the conviction itself. Further, juvenile records may properly be used against a subject in a license revocation proceeding.

BACKGROUND

The subject's driving privileges were revoked due to his having accumulated in excess of 12 traffic violation points within two years as a juvenile driver. The revocation proceeding was brought after the subject reached his majority. The lower court held the subject's juvenile records inadmissible, and restored his driving privileges.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Penn
369 N.E.2d 1229
(Ohio Ct. App. 1977)

RELIEF SOUGHT

This case involved the issue of whether a subject petitioning for expungement pursuant to state statute could be defined as a first offender where his record consisted of two convictions on closely related charges.

HOLDING

Expungement granted. Although the statute was not entirely clear, the subject was entitled to a liberal interpretation and thus would be considered as a first offender for expungement purposes.

BACKGROUND

The subject had pled guilty in 1970 to two robbery charges. He and two others had, while hitchhiking, robbed two drivers within a 15-minute time period. Under the statute, a court had to find that a subject was a first offender before expungement could be granted. The statutory definition of "first offender" was not entirely clear.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

State v. Greer
553 P.2d 1087
(Ore. Ct. App. 1976)

RELIEF SOUGHT

In this decision, involving statutory interpretation, the state challenged a lower court's expungement of the record subject's conviction for "failure to perform the duties of a driver at the scene of an accident which resulted in the death of a person." The state argued that such an offense was a traffic offense, explicitly excluded from the expungement statute.

HOLDING

Reversed. The given crime was a state traffic offense and therefore not covered by the expungement statute.

BACKGROUND

In 1972 the subject was convicted on the charge set forth above. He later obtained a court order expunging his conviction pursuant to state statute; although the statute explicitly excluded state traffic offenses from its coverage.

MAINTENANCE OF RECORDS: JUVENILE OFFENSES, FIRST OFFENSES, OR SPECIAL CATEGORY OFFENSES

Monroe v. Tielsch
525 P.2d 250
(Wash. 1974)
(en banc)

RELIEF SOUGHT

Juvenile arrest record subjects who were not convicted of the charges against them sued to obtain expungement of their complete arrest files, including previous arrests as well as the ones giving rise to this action. They based their suit on a constitutional right of privacy and cited impairment of educational and employment opportunities.

HOLDING

Denied. The legitimate uses to which the arrest records of unconvicted juveniles can be put are sufficiently valuable to justify their continued maintenance. The philosophy of the juvenile justice system, rather than supporting expungement, actually argues in favor of retention so that those records may help ensure appropriate treatment of minors in any future contact with the legal system. However, in light of the stigma attached even to mere arrestees, and since the unquestioned impairment of educational and employment opportunities which that stigma causes is directly contrary to the rehabilitative aim of juvenile justice, the court directed that juvenile arrest records may not be disseminated to prospective employers or non-rehabilitative educational institutions under any circumstances.

BACKGROUND

The four minor arrestees, ages 10, 14, 14, and 16, had a total of 25 arrests among them on charges including rape, robbery, and assault. In the case out of which this expungement motion arose they were all charged with indecent liberties, one was also charged with assault, and another with shoplifting, possession of a dangerous weapon, and burglary. They sought to expunge not only the immediate arrests but all prior arrests.

Cross Reference: Pages 55 & 105

Chapter 6

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Statutory Standards

Most of the cases in this chapter deal with the application and interpretation of state statutes which permit and/or require courts to purge or seal criminal history records after the passage of a prescribed period of years during which the record subject has not been incarcerated or under supervision and has been free of criminal involvement.

A typical "clean record" statute permits a court, at its discretion, and upon petition by the record subject, to purge a conviction and arrest record if the subject has been free of supervision for 10 years and during that time has not been arrested or convicted.[130] However, the statutes vary from state to state, and differ on such important elements as: the nature of the crime eligible for a clean record remedy (in some states, for example, felony conviction records cannot ever be sealed, and in some states only arrest records can be purged);[131] the type of remedy available (sealing vs. purging); the length of time required to be eligible; whether a subsequent conviction, or merely an arrest, destroys the eligibility;[132] whether a conviction in another state destroys eligibility;[133] and whether a conviction which occurs after the time that the subject establishes a clean record period, but before he petitions the court, destroys the subject's eligibility.[134]

In a few states the statute does not establish a specific clean record period, but, instead, authorizes the courts to provide maintenance relief based upon the court's judgment of the extent of the record subject's rehabilitation. In these states courts that are asked to purge or seal a record are likely to give heavy emphasis to whether or not the subject has established a clean record period, and for how long.[135]

The cases in this chapter indicate that the legislatures and the courts recognize that several policy interests argue in favor of providing record maintenance relief after a record subject establishes a clean record period. For one thing, the prospect of such relief provides an incentive and reward to record subjects. Second, record relief assists record subjects in obtaining employment and in returning to a full and constructive place in their community. Third, at some point, the extent of a criminal justice agency's interest in main-

[130] See, for example, Alaska Statute 6AAc 60.100 (10 years for felony convictions); Kansas Statute 21-4617 (5 years, except 2 years for municipal ordinances); Massachusetts Statute 100A (10 years); Minnesota Statute 299c.11 (10 years); Nevada Statute 179.245 (15 years, felony; 10 and 5 years, misdemeanor); New Jersey Statute 2A:164-28 (10 years); Oregon Statute 137.225 (3 years for certain types of offenses).

[131] See, State v. Hayes, 580 P.2d 122 (Nev. 1978).

[132] See, State v. Petti, 361 A.2d 108 (N.Y. 1976).

[133] See, State v. Joselyn, 372 A.2d 1184 (N.J. 1977).

[134] See, State v. Tully, 376 A.2d 194 (N.J. 1977).

[135] See, State v. Miller, 520 P.2d 1248 (Kan. 1974).

taining a record of an aged event--even a felony conviction--becomes quite minimal if the subject has been free of criminal involvement for a substantial period of time.

Judicial Standards

In the absence of a clean record statute, courts are unwilling to provide record maintenance relief for offenders with conviction records. The only cases in which courts have provided relief on the basis of a clean record and in the absence of a statute involve individuals with arrest but not conviction records. Even then, the establishment of a clean record period is only one of several factors that courts take into account.

For example, in United States v. Bohr,[136] a federal district court held that where an indictment was dismissed, no prosecution brought, the United States Attorney did not oppose expungement, the criminal record subject had apparently not committed a crime in 11 years, and the subject was an attorney seeking bar admission and therefore unusually susceptible to injury from the arrest record, expungement would be granted.

Where conviction records are involved the courts have flatly refused to provide maintenance relief on the basis of the establishment of a clean record period, without a statutory basis. Thus, in People v. Jones,[137] a Michigan court held that the fact that the record subject had kept a clean record for 10 years and had enormous difficulty obtaining a job because of his criminal conviction record did not provide a basis upon which any relief could be provided.

In United States v. Bush[138] a federal district court said that a subject's request to purge a 1963 record of a federal tax conviction because the record caused him embarrassment and irreparable harm, did not even "remotely" set forth a claim under any constitutional or other federally created right.[139]

Although a court would presumably have authority to purge or seal a conviction record on the basis of the establishment of a clean record period, it appears that few, if any, courts have ever been willing to provide such relief, absent a statutory authorization.

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[136] 406 F.Supp. 1218 (E.D. Wis. 1976).

[137] 288 N.W.2d 411 (Mich. 1979).

[138] 438 F.Supp. 839 (E.D. Pa. 1977).

[139] See also, Commonwealth v. Zimmerman, 258 A.2d 695 (Pa. 1969).

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Hill v. Johnson
539 F.2d 439
(5th Cir. 1976)
(per curiam)

RELIEF SOUGHT

An imprisoned state record subject brought suit under the federal civil rights laws to have an earlier conviction declared invalid and the corresponding court records expunged.

HOLDING

The subject had failed to allege facts sufficiently extreme or unusual to justify expungement.

BACKGROUND

The subject was convicted of a felony in 1956 in a Louisiana state court. He served the resulting sentence. Later imprisoned on another conviction, he brought suit to have the earlier conviction expunged. The trial court treated the action as a petition for habeas corpus and dismissed for failure to exhaust state remedies. The Court of Appeals held that the petition was improperly classed as habeas corpus since the defendant was no longer under restraint on the prior conviction. However, the court refused to order expungement, finding that the circumstances did not justify exercise of the court's discretionary power (citing Carter v. Hardy, 526 F.2d 314 (5th Cir. 1976) which held that the court's exceedingly narrow power of expungement is limited to cases involving potentially unconstitutional arrests on similar extraordinary circumstances).

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

United States v. Bush
438 F.Supp. 839
(E.D. Pa. 1977)

RELIEF SOUGHT

A federal criminal record subject brought an action requesting that all federal records of his 1963 arrest for violation of the Internal Revenue Service code be expunged. He alleged that their maintenance was causing him embarrassment and irreparable harm.

HOLDING

The subject's complaint did not even remotely set forth a claim of infringement of any constitutional or other federally created right, and so did not set forth the jurisdiction of the federal court to hear his case.

BACKGROUND

The subject was arrested in 1963 for violation of the federal statute regulating the maintenance and operation of stills.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

United States v. Bohr
406 F.Supp. 1218
(E.D. Wis. 1976)

RELIEF SOUGHT

A federal criminal record subject brought this action seeking expungement of all records pertaining to his federal indictment and arrest eleven years previously, where the indictment had been dismissed and no prosecution brought.

HOLDING

That where an indictment was dismissed and no prosecution brought, the United States Attorney did not oppose expungement, there was no indication that the records were needed in the interests of law enforcement, and the criminal record subject had apparently committed no crime in the 11 years since the indictment and was an attorney seeking bar admission and was therefore unusually susceptible to injury from the arrest record, expungement would be granted pursuant to the court's inherent powers to do complete justice in cases before it.

BACKGROUND

The subject was a Wisconsin attorney who had moved to Arizona and wished to take the bar examination and apply for Civil Service positions there. While living in Wisconsin in 1964 he had been indicted by a federal grand jury for mail fraud. The indictment was later dismissed, and there was no evidence that the subject had been involved in any criminal activity during the intervening 11 years.

Cross Reference: Page 249

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

People v. Boyd
594 P.2d 484
(Cal. 1979)

RELIEF SOUGHT

A criminal record subject was charged with being an ex-felon in possession of a firearm, on the basis of a 1966 possession of marijuana conviction. The charge was set aside by the court on the ground that by law the subject's prior conviction could not be used against him because it had been nullified by statute.

HOLDING

Under the clear statutory language the subject's prior conviction had no legal existence, and so could not form the basis of an ex-felon offense.

BACKGROUND

In 1966 the subject was convicted of possession of marijuana; that conviction formed the basis of the present charge. In 1976 a statute became effective requiring destruction upon application by the subject, of records of such marijuana convictions. The subject had made no application for destruction, but relied here on a companion statute which nullified any legal effects of such convictions, even though not destroyed.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

People v. McCloud
139 Cal. Rptr. 321
(Ct. App. 1977)

RELIEF SOUGHT

A criminal record subject appealed from an order unsealing his records; the unsealing order was based on the ground that the subject had lied when, in obtaining sealing, he had denied having any other criminal convictions. The subject argued that the second conviction had occurred after he became eligible for sealing, and that in any event it no longer existed legally since it had been expunged.

HOLDING

Unsealing order affirmed. To gain relief under the sealing statute a subject must be free of other convictions at the time of his petition, not just during the statutory waiting period. Under the statutory language, expungement of the second conviction did not nullify its existence, so it was relevant to his sealing application.

BACKGROUND

In 1962 the subject was convicted of forgery. In 1975 he had that conviction sealed, after swearing that he had no other criminal convictions. The state later successfully moved to vacate the sealing order on the basis that the subject was actually convicted in 1969 for battery and had failed to reveal that conviction on his application to seal. The subject had had the 1969 conviction expunged.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Poleski v. State
371 So.2d 548
(Dist. Ct. App. Fla. 1979)

RELIEF SOUGHT

A criminal record subject appealed from an order unsealing his felony arrest record and court files. The original sealing order had been granted pursuant to state statute after the felony information was nolled.

HOLDING

Affirmed. Where the subject had concealed a closely related conviction for driving under the influence in obtaining the sealing order as to his felony arrest, he was actually not eligible for sealing under the statute. The unsealing order was therefore proper.

BACKGROUND

The subject was arrested for driving under the influence. When a search turned up two bags of quaaludes he was also charged by information with their possession, a felony. He was convicted of driving under the influence, but the possession information was nolled after the subject successfully completed a pre-trial intervention program. Some months later he applied to have his felony records sealed pursuant to state statute, but did not reveal his conviction for driving under the influence. The statute prohibited sealing the records of subjects who had committed "several acts" or who had been charged with several related offenses, not all of which had then been nolled; the court found this subject ineligible under either exception.

SPECIAL NOTE

The court's discussion referred exclusively to sealing and unsealing, although the quoted statute used the word "expunge;" presumably this was because, in an earlier case, the state supreme court found expungement of court records unconstitutional and provided for sealing instead.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Murphy v. State
363 So.2d 581
(Dist. Ct. App. Fla. 1978)

RELIEF SOUGHT

A criminal record subject appealed a lower court's refusal to expunge his records pursuant to state statute. The subject had stated that he had no other convictions. The lower court judge denied expungement based on a presentence report on the subject which stated that he had been convicted of some traffic violations.

HOLDING

Reversed. The state had failed to properly plead and prove the alleged traffic violations, so they could not be used to deny expungement. The lower court's reliance on the presentence report, which constituted hearsay evidence by a non-attending witness with no right of cross-examination, was improper.

BACKGROUND

The subject was convicted of manslaughter, but after a successful appeal the state did not re-try him, entered a nolle prosequi, and let the statute of limitations for retrial run. The subject then moved for expungement of his records, swearing that he had no other convictions. The state opposed the motion but offered no evidence; the judge found a presentence report, obtained after the original conviction, which mentioned the subject's traffic violation convictions.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Zawistowski
339 So.2d 315
(Dist. Ct. App. Fla. 1976)

RELIEF SOUGHT

The state appealed a lower court's expungement order entered pursuant to state statute providing for expungement where the subject was released without being adjudicated guilty and had no prior convictions. The state contended that the disposition of the subject's case did not fall within the statutory language, so that he was ineligible for expungement, and that a later conviction also disqualified him.

HOLDING

Relief affirmed, but in the nature of sealing. The subject had been "released without being adjudicated guilty" under the terms of the statute and so was entitled to relief. The statute granted relief to subjects with no prior convictions, so that a subsequent conviction was irrelevant. However, since the state supreme court had found expungement of court records unconstitutional, the proper relief was the sealing of all records.

BACKGROUND

The subject was arrested for possession and sale of marijuana. He pled guilty to possession and the sale charge was dropped. He was then placed on probation "with adjudication of guilt withheld." He completed the probation period, but one month later he was convicted of driving under the influence of alcohol. Still later he filed a motion to expunge the records arising out of his marijuana arrest.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Purdy v. Mulkey
228 So.2d 132
(Fla. App. 1969)

RELIEF SOUGHT

Petitioner, who was convicted of petit larceny and put on probation for six months, sought to have his fingerprints expunged from the county sheriff's files. The trial court granted relief and the sheriff appealed.

HOLDING

Reversed. The discretion to take and retain fingerprints as an incident to arrest lies with the sheriff and, absent statutory provision for expungement on strong overriding equitable considerations, courts cannot order the fingerprints expunged. This would be the case even if the subject had been acquitted.

BACKGROUND

The defendant was 17 years old when he pled guilty and was sentenced to probation. He brought the present action some years later. He alleged that a prospective employer had informed him that he would not be hired unless the record was expunged.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Miller
520 P.2d 1248
(Kan. 1974)

RELIEF SOUGHT

A reformed criminal record subject brought this suit appealing a lower court's denial of his expungement petition, made pursuant to state statute.

HOLDING

Reversed and remanded. Although the statute gave the judge discretion to grant expungement rather than requiring him to do so upon proof of the statutory prerequisites, proof of those prerequisites established a prima facie case for expungement, which should then ordinarily be granted unless compelling reasons for denial exist. In light of the facts of this case, including the subject's commendable post-conviction record, the lower court abused its discretion in denying expungement.

BACKGROUND

In 1965 the subject was convicted at the age of 17 of burglary and grand larceny, on a plea of guilty. Since that time he had served out his sentence, married, had a child, started a business, bought a house, and accumulated no further criminal record beyond one speeding ticket.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Ward v. State
375 A.2d 41
(Md. Ct. Spec. App. 1977)

RELIEF SOUGHT

A criminal record subject whose prosecution was dropped challenged the constitutionality of a state statute under which the trial court refused to order expungement of his records because he had had a conviction entered against him before the passage of three years from the time that the charge was dropped. He alleged that the statutory scheme, under which an acquitted record subject could obtain immediate expungement, denied him equal protection and due process.

HOLDING

Affirmed. Since a subject against whom prosecution has been dropped may still be tried again, while an acquitted subject may not, the legislature had a rationale basis for distinguishing between the two in granting expungement. The statute was therefore constitutional.

BACKGROUND

The subject was charged on a number of counts, including second degree murder and child abuse, in 1973, but the state dropped the prosecution. In 1976 he applied for expungement pursuant to state statute. That statute allowed acquitted subjects to obtain immediate expungement, but required "nolled" subjects to wait three years without any intervening convictions before they could request expungement. Since the subject was convicted in 1974 of larceny the lower court denied his expungement petition.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Rzeznik v. Chief of Police
373 N.E.2d 1128
(Mass. 1978)

RELIEF SOUGHT

In this action an ex-felon whose criminal records had been statutorily sealed appealed the revocation of his firearms licenses by a chief of police. The subject claimed his sealed records should be unavailable to the chief for gun licensing purposes.

HOLDING

Under the language of the sealing statute the chief did have access to the records, either as a member of a "criminal justice agency" or as a member of a law enforcement agency authorized access to the records by law.

BACKGROUND

The subject was convicted of two separate felonies in 1949 and 1953. The subject obtained a sealing order in 1974. He applied to the chief of police for licenses to carry, sell, rent, and lease firearms. The chief knew of the subject's record but was unable to get a firm answer from the district attorney or the Commissioner of Probation as to its legal effect. He therefore issued the licenses. Later that year the Criminal History Systems Board issued a memorandum stating that sealed records were entirely available for purposes such as evaluating firearms license applications; the subject's licenses were revoked some time later.

SPECIAL NOTE

The subject also sued the chief for slander based on his publication of the fact of the subject's felony convictions. He argued that sealing erased the fact of his convictions, so legally they did not exist. Although the subject actually waived the entire issue by admitting to the convictions in a stipulation, the court did comment that sealing does not erase the fact that a conviction occurred.

Cross Reference: Page 35

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

People v. Jones
288 N.W.2d 411
(Ct. App. Mich. 1979)
(per curiam)

RELIEF SOUGHT

A criminal record subject sought to have numerous convictions set aside, new trials granted and charges dismissed. He based his request on the fact that he had had a clean record for ten years. The trial court granted relief and the state appealed, limiting its challenge to one of the subject's convictions on a firearms charge.

HOLDING

Reversed. The subject could not qualify for expungement since the convictions all occurred after his 21st birthday. Second, the lower court erred in setting aside the convictions, granting new trials, and dismissing the charges. The subject's statement that he had kept a clean record for ten years but had great difficulty finding employment was not a legally sufficient basis upon which to grant a new trial, and no valid basis was alleged. Dismissal of charges could be granted only under statute or for lack of evidence, neither of which applied here. The subject's conviction was ordered reinstated.

BACKGROUND

Between 1948 and 1966 the subject accumulated nine convictions, one for possession of an unregistered pistol and the others on misdemeanor gambling charges. In 1977 he moved to set aside his convictions and the lower court granted relief.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Hayes
580 P.2d 122
(Nev. 1978)
(per curiam)

RELIEF SOUGHT

The state appealed a trial judge's order sealing the records of a convicted criminal record subject who had been discharged from probation.

HOLDING

Reversed. Only subjects arrested but not convicted were eligible for sealing under the statute in question. A discharge from probation did not qualify the recipient for such relief.

BACKGROUND

The subject was convicted of cheating while gambling, placed on probation, and later discharged. He then sought an order, pursuant to state statute, sealing his arrest and conviction records. The lower court granted the order.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

In re R
407 A.2d 1263
(N.J. Sup. Ct. App. Div. 1979)

RELIEF SOUGHT

A record subject who was convicted of attempted rape appealed in this case from a lower court's denial of his expungement petition. He had sought relief under a state statute allowing expungement after ten years if the subject had kept a clean record, but excepting from coverage various crimes, including rape. The lower court ruled that since a rape conviction was excepted from coverage, so was attempted rape.

HOLDING

Reversed. The statutory exception is restricted to the named crimes, and all lesser offenses such as attempt or conspiracy may be expunged. The case was remanded for a ruling on the merits.

BACKGROUND

The subject was convicted in 1961 of attempted rape, and applied for expungement in 1978 pursuant to state statute. That statute allowed expungement where the subject had kept a clean record for ten years from the time of the conviction involved.

SPECIAL NOTE

The court observed that expungement was limited to a single conviction. Where, as here, a subject also had earlier convictions, he could not progressively go back requesting expungement on the ground that the later convictions had never occurred because they were expunged.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Josselyn
372 A.2d 1184
(N.J. Monmouth County Ct. 1977)

RELIEF SOUGHT

This case involved the issue of whether, under a statute authorizing expungement only if the subject has had no subsequent convictions for ten years following the conviction sought to be expunged, a conviction in another state would block expungement under the statute.

HOLDING

Expungement denied. In view of the legislative intent underlying the expungement statute it would be absurd to ignore convictions in other states in ruling on an expungement petition. Since this subject had been convicted in another state five years after the conviction he sought to expunge, his petition was dismissed.

BACKGROUND

The subject was convicted in 1959 of petit larceny. He had no further record in New Jersey, but was convicted in Virginia in 1964 for obtaining telephone service by fraud. The New Jersey expungement statute provided for expungement of a conviction only when ten years had passed with no further convictions entered against the subject.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Tully
376 A.2d 194
(N.J. Sup. Ct. App. Div. 1977)
(per curiam)

RELIEF SOUGHT

A record subject with arrest and conviction records in 1966 and 1974 sought to have the 1966 records expunged. He based his request on a state statute authorizing expungement of conviction records five years after a conviction, when the subject can show there have been no intervening convictions. The lower court granted expungement and the state appealed.

HOLDING

Reversed. The lower court judge was in error in interpreting the statute as only requiring five years without another conviction to justify expungement. The subject must show no intervening convictions at the time he requests expungement, not merely for the first five years following the conviction he seeks to have expunged. Since this subject did have a 1974 conviction he was not entitled to expungement. The court also observed that the statute empowered expungement of conviction records only, not arrest records.

BACKGROUND

The subject was convicted of a disorderly persons offense in 1966, and of a federal narcotics violation in 1974. In 1976 he brought suit seeking to expunge the 1966 records.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

In re Fontana
369 A.2d 935
(N.J. Sup. Ct. App. Div. 1976)

RELIEF SOUGHT

A criminal record subject appealed from a lower court's refusal to expunge his records pursuant to a state statute providing for expungement after ten years if the subject had not been convicted of further offenses. The judge had based his denial solely on his belief that the statute, which provided for expungement of "a criminal conviction," was inapplicable to the subject since he had been convicted of charges under six indictments.

HOLDING

Reversed. Where the incidents giving rise to the six indictments against the subject were committed by the same participants is a short period of time, the rehabilitative purpose of the expungement statute justified viewing the subject's record as consisting of one conviction. Since the lower court judge had stated that he would have granted expungement if the statute were applicable, the case was remanded for entry of an order of expungement.

BACKGROUND

In 1962 the subject and two others broke into a delicatessen and stole some beer and soda. About a week later they broke into a television store, a motor vehicle, a market, and a private dwelling, stealing a number of articles. The subject was subsequently charged in six indictments with breaking and entering and larceny, and pled guilty on all counts. In this action he sought expungement based on a statute allowing expungement, after ten years, of "a criminal conviction" if no further convictions had intervened.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Petti
361 A.2d 108
(N.J. Sup. Ct. App. Div. 1976)

RELIEF SOUGHT

A criminal record subject appealed from a lower court's refusal to expunge his records pursuant to a state statute providing for expungement after a ten-year clean record period. The lower court judge based his denial on the subject's recent indictment, to which the subject had pled not guilty. The subject argued that he was entitled to expungement as long as he had completed the statutory ten-year waiting period without another conviction. He also claimed that the indictment had no probative value and should not provide grounds to deny expungement.

HOLDING

Affirmed. The statutory ten-year period is only a limit on the subject's ability to apply for expungement, not a limit on the hearing judge's review of the subject's petition. An indictment is a proper basis upon which to deny expungement, especially since, if the subject is acquitted, he may reapply for expungement.

BACKGROUND

In 1964 the subject pled guilty to a narcotics charge. In 1975 he filed an expungement petition pursuant to state statute. He was indicted that same day on four narcotics charges, to which he pled not guilty. The expungement statute required in part that ten years must have passed from the date of the conviction sought to be expunged, with no subsequent convictions.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. D'Angerio
305 A.2d 827
(N.J. Sup. Ct. Law Div. 1973)

RELIEF SOUGHT

A criminal record subject with two convictions, the second of which had been expunged, sought to also have the first conviction expunged. Although the state statute barred expungement where there was a subsequent conviction within ten years, the subject argued that the expungement of his second conviction rendered it non-existent.

HOLDING

Relief denied. The statute was clearly not intended to allow subjects to start with their latest conviction and work backwards, expunging each conviction in turn on the basis that the later convictions no longer existed. Rather the statute was restricted to instances where a subject had maintained a clean record following the conviction sought to be expunged.

BACKGROUND

The subject was convicted in 1953 of larceny. That conviction was expunged in 1973. In this action the subject requested expungement of a 1938 conviction for stealing a motor vehicle. During the hearing on his motion the 1953 conviction came to light.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Application of Raynor
303 A.2d 896
(N.J. Super. Ct. App. Div. 1973)

RELIEF SOUGHT

A criminal record subject whose conviction record was expunged brought this action seeking expungement of her arrest record as well. She claimed she had had trouble obtaining employment because of her arrest record, and argued that a statute providing for the expungement of convictions for disorderly offenses should be read to include expungement of arrest records.

HOLDING

Denied. In light of the statutory language and other evidence of legislative intent the court would not interpret the statute to include expungement of arrest records.

BACKGROUND

In 1965 the subject was convicted of shoplifting. Her conviction record was expunged, but she argued that statutory language directing expungement of "all evidence of said conviction" included arrest records. The court, in deciding against her, noted that the legislature had recently enacted a bill providing for the expungement of arrest records of persons not convicted, but the Governor had vetoed the bill. The Governor's reasoning was that possible adverse effects of an arrest record can be prevented by sealing without physically destroying the record. The court, therefore, treated the issue as unresolved in New Jersey and declined to decide it as a judicial matter, preferring to leave the issue up to the legislature.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

In re Fortenbach
290 A.2d 315
(N.J. Essex County Ct. 1972)

RELIEF SOUGHT

After charges against him were dismissed, an arrest record subject requested expungement of the record under authority of a statute which by its terms was limited to expungement of conviction records under appropriate circumstances.

HOLDING

Granted. In light of the general legislative concern over the ill effects of arrest and conviction records, the statute would be presumed to include authorization for the destruction of arrest records since this interpretation would be justified under the terms of the statute. Owing to the obvious disabilities faced by this subject in connection with his arrest on an extremely sensitive charge and the subject's unblemished record since his arrest in 1960, expungement would be granted. The court also prohibited all dissemination of any information concerning the arrest.

BACKGROUND

The subject was arrested in 1960 for lewdness and indecent dress. He pled not guilty and the charges were dismissed. He was subsequently fired from his construction job when his employer learned of the arrest; apparently he was let go largely because of the nature of the offense charged.

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MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Blinsinger
276 A.2d 182
(N.J. Sup. Ct. App. Div. 1971)

RELIEF SOUGHT

This appeal involved whether a subject's conviction on a disorderly persons charge barred him from obtaining expungement of an earlier conviction for breaking and entering with intent to steal. The state argued that the state expungement statute prohibited expungement if there was any subsequent conviction, criminal or otherwise, within ten years. The state also contended that breaking and entering with intent to steal was the equivalent of burglary, a crime specifically excepted from the coverage of the statute. The lower court granted relief and the state appealed.

HOLDING

Affirmed. When the statute allowed expungement of a "criminal conviction" unless there was a "subsequent conviction," the subsequent conviction must also be criminal to bar expungement. Since a disorderly persons offense was not regarded as criminal, the subject was not ineligible on that basis. Breaking and entering with intent to steal was not identical to burglary and could be expunged.

BACKGROUND

The subject pled guilty in 1937 to breaking and entering with intent to steal. In 1959 he was convicted of simple assault and battery, a disorderly persons offense. The 1959 conviction was ordered expunged in 1969, and shortly thereafter the subject brought a proceeding to have his 1937 records expunged also.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Chelson
250 A.2d 445
(N.J. Bergen County Ct. 1969)

RELIEF SOUGHT

A criminal record subject instituted this expungement proceeding, seeking expungement of records relating to his 1955 petit larceny and traffic violation convictions. He based his request on the state expungement statute and cited denial of employment due to his record. The state opposed on the ground that the subject also had a 1957 conviction and was therefore ineligible for relief.

HOLDING

Expungement denied. Under the terms of the statute, which allowed relief only where there were no subsequent convictions, the subject could not obtain expungement of his 1955 convictions.

BACKGROUND

On January 19, 1955, the subject was convicted of petit larceny and a traffic violation. In 1957 he was convicted of petit larceny in another county.

MAINTENANCE OF RECORDS: AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Phoenix v. District Attorney
407 N.Y.S.2d 790
(Onondaga County Ct. 1978)

RELIEF SOUGHT

A criminal record subject sought to have his identification records returned and his arrest and prosecution records sealed following favorable termination of the charges against him. He based his suit on state statute. The State opposed on the ground that the statute should be unavailable to a subject with a prior felony conviction.

HOLDING

Relief granted. The statutory language and policy provide no basis for denying relief to a subject simply on the basis of a prior record. While relief may be denied in the interests of justice, and the subject's prior record may be a factor in that determination, this subject's one prior felony conviction and his attempts to rehabilitate himself while imprisoned did not support denial of the relief requested.

BACKGROUND

The subject, who was serving time on his prior conviction, was apparently denied some aid in his rehabilitative attempts due to the "confused" state of his record. He brought this action in an attempt to clear his file of all records reflecting charges which had terminated in his favor.

CONTINUED

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MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

People v. Connor
351 N.Y.S.2d 67
(Dist. Ct. 1973)

RELIEF SOUGHT

A prosecutor sought to unseal the records of subjects who had obtained statutory sealing but, as discovered later, were not actually entitled to it under the terms of the statute.

HOLDING

Sealing orders set aside. In light of the statute's clear intent to seal the records of only those individuals with otherwise clear records, these subjects, who as later discovered did have other convictions, were not entitled to the statutory relief.

BACKGROUND

The subjects were all convicted of marijuana offenses. Pursuant to state statute their convictions were adjourned for twelve months in contemplation of dismissal. Upon the passing of twelve months with no further reported offenses, their records were sealed. After sealing, it was discovered that each subject had in fact been convicted of some other offense during the waiting period, and thus should not have been granted sealing.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

Commonwealth v. Zimmerman
258 A.2d 695
(Pa. 1969)

RELIEF SOUGHT

The commonwealth appealed a lower court's order granting a criminal record subject's expungement petition. The petition had apparently been granted under the court's inherent powers, on the basis of the subject's rehabilitation. The commonwealth challenged the court's power to order such relief.

HOLDING

Reversed. The lower court was without authority to order the expungement of criminal records. There was no statutory or common-law basis for such relief, and the order ran contrary to the legislative directive to the State Police to maintain criminal records.

BACKGROUND

The subject, a former beer distributor, was convicted in 1964 for failing to remit taxes to the City of Phladelphia. In his expungement petition he alleged that he was out of the beer business, working for a life insurance company, and was completely reformed but still hampered by his record.

MAINTENANCE OF RECORDS:
AFTER SUBJECT ESTABLISHED CLEAN RECORD PERIOD

State v. Chambers
533 P.2d 876
(Utah 1975)

RELIEF SOUGHT

The state appealed a lower court's expungement order, which the court had entered on its own motion. The state challenged the statutory basis for the court's order, and claimed that expungement was not in the public interest.

HOLDING

Expungement order affirmed. While the lower court did have authority to expunge the subject's records, it had apparently confused two closely related statutes when issuing orders in support of its expungement ruling. The appellate court found no abuse of discretion by the lower court, and held that expungement could reasonably be said to have been in the public interest. The case was remanded to be altered to eliminate the statutory confusion.

BACKGROUND

The subject was convicted of making a profit of public money and of misusing public funds. After serving out his sentence he was discharged from probation in 1973. In 1974 the trial court expunged his record on its own motion. Under the state statute, the court may expunge on its own motion and issue certain specified orders to carry out its ruling. Another statute gives any qualified person the right to move for expungement, and apparently sets out different supporting orders which the court may issue. The court here seemingly ordered expungement under the first statute, but issued supporting orders contained in the second. (Supporting orders were described as, for example, sealing records and setting aside convictions.)

Chapter 7

MAINTENANCE OF RECORDS:
AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

As noted in the introduction to Part II, a pardon is an absolution of a crime which relieves the guilty party of most of the legal consequences of the conviction. Most states vest the pardon power in their governor pursuant to a grant in either the state constitution or a statute, or sometimes both.

The provisions governing the exercise of the pardon power ordinarily do not provide for the automatic or routine sealing or purging of records of convictions for which the individual has been pardoned. Instead, the customary record maintenance practice appears to be to enter the fact of the pardon on the subject's criminal history record, in the same way that an acquittal is entered onto a subject's record.

Only a few cases have been found that address the recordkeeping effect of a pardon. Oddly, most of these decisions are from the state of Pennsylvania. The decisions are unanimous in holding that a pardon--at least for reasons other than innocence--does not give a subject a right to a seal or purge order. However, the language in these courts' opinions suggest that if the pardon had been given because of the subject's innocence, these courts would have provided record maintenance relief.[140]

The pardon decisions present perhaps another example of the fact that when considering record maintenance relief, courts tend to look to the "bottom line." Did the subject truly commit a crime? If the answer is yes, the record has utility to criminal justice agencies. But if the answer is no, the record is of little utility and retention of it may do an injustice to the subject. It appears then, at least on the basis of the few reported pardon decisions, that the courts treat pardons as no more--but probably no less--supportive of record relief than an acquittal.

[140] See, for example, Commonwealth v. Homison, 385 A.2d 443 (Penn. 1978).

MAINTENANCE OF RECORDS:
AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

CASE SUMMARIES

MAINTENANCE OF RECORDS:
AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

People v. Glisson
372 N.E.2d 669
(Ill. 1978)

RELIEF SOUGHT

A criminal record subject brought his action seeking return of all identification data and expungement of his records, consisting of one arrest with conviction and seven arrests without prosecution. He apparently based his request on both state statute and on his receipt of a gubernatorial pardon for his conviction.

HOLDING

Expungement denied. The granting of a pardon does not entitle the recipient to expungement; and second, that the statute authorized expungement only where the subject had no previous convictions. Since this subject's record began with his one conviction, he was denied all expungement. Pursuant to statute, however, the court did order return of identification information taken in connection with the seven unprosecuted arrests.

BACKGROUND

In 1942 the subject was convicted of contributing to the delinquency of a minor. Between 1950 and 1958 he was arrested seven more times, but was always released without being charged. In 1974 the subject's 1942 conviction was pardoned by the Governor of Illinois.

MAINTENANCE OF RECORDS: AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

Commonwealth v. Binder
407 A.2d 50
(Pa. Sup. Ct. 1979)

RELIEF SOUGHT

A criminal record subject who received a gubernatorial pardon was granted expungement on that basis, and the Commonwealth appealed.

HOLDING

Reversed. A gubernatorial pardon for reasons other than innocence did not entitle the recipient to expungement.

BACKGROUND

The subject pled guilty in 1955 to burglary and related charges, and in 1957 to disorderly conduct and resisting arrest. In 1974 he was pardoned for both offenses by the Governor of Pennsylvania. In 1976 he applied for expungement of his 1957 conviction, and the court issued an order directing the district attorney, court clerks, and state and local police to turn over their records, and requiring the district attorney to request return of records from the Federal Bureau of Investigation.

MAINTENANCE OF RECORDS: AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

Commonwealth v. Homison
385 A.2d 443
(Pa. Sup. Ct. 1978)

RELIEF SOUGHT

This case involved the issue of whether a gubernatorial pardon provides a basis for expungement of a subject's criminal record.

HOLDING

The grant of a pardon by the Governor for reasons other than innocence does not entitle a subject to expungement.

BACKGROUND

The subject pled guilty to a narcotics charge, but was subsequently pardoned by the Governor of Pennsylvania. He then requested expungement, but was denied relief by the lower court after it found that the pardon was not based on the subject's innocence.

MAINTENANCE OF RECORDS: AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

Cohen v. Barger
314 A.2d 353
(Pa. Commu. Ct. 1974)

RELIEF SOUGHT

This case involved the question of whether a convicted criminal record subject is entitled to expungement based on a gubernatorial pardon which was not based on the subject's innocence.

HOLDING

A gubernatorial pardon not based on innocence does not entitle the recipient to expungement.

BACKGROUND

In 1964 the subject pled guilty to assault and battery and indecent assault. He served out his sentence and received a full pardon from the Governor of Pennsylvania. At the time of this case, the Philadelphia Police Department had complied with a lower court's expungement order, but the State Police had refused.

MAINTENANCE OF RECORDS: AFTER SUBJECT RECEIVED GUBERNATORIAL PARDON

Doe v. Salmon
378 A.2d 512
(Vt. 1977)

RELIEF SOUGHT

This action involved a determination of the public's right of access to records of gubernatorial pardons.

HOLDING

Such records are available for public access. A gubernatorial pardon is an official act, of which by law a record must be kept. Such records are public. The court found no statutory authority for withholding the records, and ruled that a determination by the Governor that disclosure would be against public policy is not enough to justify secrecy. The court finally held that even the fact that the Governor had promised some of the pardon recipients that their records would be confidential did not empower him to prevent release of the information.

BACKGROUND

This case originated as a class action brought by a member of the state Parole Board and a recipient of a gubernatorial pardon. They sought, and received, a court order prohibiting the Governor and other state officials from making public any information relating to certain pardons. A number of news media representatives intervened on appeal, asking that the records be declared public. They claimed the right to publish the names of those pardoned and the crimes for which they had been pardoned.

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PART III

SUBJECT ACCESS TO CRIMINAL HISTORY RECORD INFORMATION

Statutory Standards

Today, the right of subjects of criminal history records to inspect their records is nearly universal. The Department of Justice's Regulations authorize subjects to inspect federally held criminal history records.[141] The LEAA Regulations require all criminal justice agencies that have accepted LEAA monies in support of a criminal history records system to permit subjects to inspect their criminal history records.[142] Moreover, about 40 percent of the states have adopted their own legislation which permits criminal history record subjects to inspect their records.

The right of subjects to inspect their records is generally coupled with a right to challenge the accuracy and completeness of their records. Indeed, one of the basic purposes of statutory inspection rights is to permit criminal record subjects to correct and update their records. Not suprisingly then, the federal access scheme, and many of the state schemes, do not give record subjects a right to obtain an actual copy of their records, unless mere review and inspection is insufficient because the subject wishes to challenge the accuracy or completeness of a particular part of the record.

Judicial Standards

The court decisions that have considered the subject access issue make clear that the courts are quite sympathetic to enforcement of statutory access rights. For example, in Ferguson v. Kelley,[143] a federal district court held that the FBI may not avoid or delay compliance with a FOIA/Privacy Act access request merely because of the difficulty of that request (although in Ferguson the court required the subject to make his request more specific).

In Cleaver v. Kelley,[144] a federal district court, although upholding FBI delays in processing FOIA access requests because of the extraordinary volume of requests, was responsive to the subject's claim that some access requests should be given priority treatment because of exceptional need or urgency.

In those relatively rare instances where a statutory access right does not exist, the few courts faced with this situation have usually been willing to find a constitutional basis for an access order. If, for example, the information is used as a basis for taking adverse action against the subject, the courts have said that the Fifth Amendment's due process clause requires a government agency to allow a record subject to examine his file.[145]

In another constitutional case, a federal court of appeals panel ruled that a prisoner has a limited constitutional right to have inaccurate information removed from his corrections file. Naturally, in order to exercise this right a subject must be given at least partial access to his file.[146]

On the other hand, at least one older case held that a subject does not have a right of access to his criminal history files under common law or constitutional

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[141] 28 C.F.R., Sect. 20.34.

[142] 28 C.F.R., Sect. 20.21(g).

[143] 455 F.Supp. 324 (N.D. Ill. 1978).

[144] 427 F.Supp. 90 (D.D.C. 1976).

[145] Gardner v. Florida, 430 U.S. 349 (1977).

[146] Paine v. Baker, 595 F.2d 197 4th Cir. (1979).

theories.[147] The court stated in an advisory discussion that, in the absence of specific statutory authority for subject access, the general rule is that criminal files, in this case charging information, is confidential.

In cases where the information being sought by the subject is not strictly criminal history data, but instead, involves subjective or evaluative information, the courts have resisted subject access attempts. In those instances, the state's interest in maintaining the confidentiality of the records is high (in contrast to the state's interest in withholding criminal history records from record subjects). Thus in Smith v. Flaherty,[148] Ex parte Farley,[149] and Turner v. Reed,[150] the courts rejected subjects' attempts to get access to psychiatric records or other evaluative material. However, in light of the Supreme Court's decision in Gardner v. Florida,[151] these records probably could not be used as a basis for taking adverse action against a subject unless the subject is given a right of inspection.

In sum, if a statute or regulation provides for subject access to his criminal history records, as is the case today in most jurisdictions, or, in the absence of a statute or regulation, if the subject's record is used to make an adverse determination about the subject, or if the subject wishes to challenge the accuracy or completeness of the record, the courts are likely to provide the subject with access.

[147] Whittle v. Munshower, 155 A.2d 670 (Md. 1959) cert. denied 362 U.S. 981 (1960).

[148] 465 F.Supp. 815 (Pa. 1978).

[149] 570 S.W. 2d 617 (Ky. 1978).

[150] 538 P.2d 373 (Ore. 1975).

[151] 430 U.S. 349 (1977).

SUBJECT ACCESS
TO CRIMINAL HISTORY RECORD INFORMATION

SUBJECT ACCESS

Gardner v. Florida
430 U.S. 349
(1977)

RELIEF SOUGHT

A state criminal record subject who received the death penalty challenged the sentence on the grounds that the sentencing judge relied on a confidential pre-sentence report which was not fully disclosed to the subject.

HOLDING

Vacated and remanded. The state violated the subject's constitutional due process rights and right to the assistance of counsel in sentencing him to death on the basis of information which was not disclosed to him or his counsel. In light of the seriousness of the death penalty, the sentencing procedure could not be justified on the grounds that releasing the confidential information would impede pre-sentence investigations, unduly delay the sentencing procedure, disrupt the rehabilitative process or inhibit the discretion of the trial judge. Further, failure of defense counsel to request the deleted portion did not constitute a waiver of the constitutional error. The death sentence was vacated, and the case was remanded to the trial level for re-sentencing.

BACKGROUND

The subject was convicted of first-degree murder by jury trial. After a separate sentencing hearing the jury recommended a life sentence, stating that there had been mitigating factors behind the subject's crime which outweighed the aggravating circumstances. In determining sentence the trial judge used a pre-sentence investigatory report prepared by the Florida Parole and Probation Commission, parts of which had been deleted from the version of the report made available to defense counsel on the grounds that the deleted portions were confidential. Defense counsel did not request access to the full file. The judge sentenced the subject to death, citing aggravating circumstances and factual information contained in the confidential portion of the pre-sentence report that had not been examined by defense counsel or the defendant.

SPECIAL NOTE

Although six justices agreed on the decision, there was no agreement on an opinion. Three justices would have reversed on the grounds that the death penalty is cruel and unusual punishment.

SUBJECT ACCESS

Paine v. Baker
595 F.2d 197
(4th Cir. 1979)
cert. denied, 444 U.S. 925 (1979)

RELIEF SOUGHT

An imprisoned state criminal record subject sought access, pursuant to the federal civil rights law (42 U.S.C.A. 1983), to his state prison file and all interdepartmental memoranda relating to him. He argued, in the alternative, that he should be granted relief based on an inmate's constitutional due process right to have erroneous information expunged from his records.

HOLDING

Relief denied. While a prisoner has no constitutional right of access to his file, he does have a limited constitutional due process right to have inaccurate information removed from his records. To assert that right, the prisoner must specify what part of his record he is disputing; he must allege that the information is false; and he must claim that the challenged information has been relied upon to a constitutionally significant degree. This last requirement has two components: first, the prisoner must show that the type of decision which the information was used to make is constitutionally significant, such as denial of parole or revocation of probation; and second, the prisoner must show that the type of error in his file is significant, such as an inaccurate or incomplete entry in his criminal records, rather than a merely technical mistake which would not influence the administrative decisionmaking process.

The court held that in order to have raised the constitutional issue under the civil rights law, the prisoner must first have asked the prison officials to correct his file and been denied. Since this prisoner had made no request, his complaint was dismissed.

BACKGROUND

The prisoner styled his action as a request for production of documents under Rule 34 of the Federal Rules of Civil Procedure. The district court treated the petition as a complaint under the Civil Rights Laws and granted relief. The Court of Appeals reversed.

SPECIAL NOTE

In holding that a state prisoner does not have a constitutional right to access to his prison file, the court relied on Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) and concluded that an across-the-boards rule of access "would clearly be an overwhelming administrative burden."

SUBJECT ACCESS

Coralluzzo v. New York State Parole Board
566 F.2d 375
(2d Cir. 1977)
cert. denied, 435 U.S. 912 (1978)

RELIEF SOUGHT

In this case an imprisoned criminal record subject sought access to his state prison file under the federal civil rights laws.

HOLDING

Access granted. Under the particular facts of this case, when the subject claimed that the Parole Board, in setting his minimum period of imprisonment, had relied on erroneous information in his file which a state court had ordered stricken from his record, where the issue could only be resolved by granting the prisoner access, and where there would be no prejudice to the state since the subject had already seen most of the file and the state could still withhold material for good cause, access would be granted.

BACKGROUND

The subject pled guilty to a narcotics charge and received an indeterminate sentence, at which time he obtained an order from the state court deleting from his probation report an unsupported statement that he had organized crime connections. The Parole Board set his minimum period of imprisonment at 5 years, although he requested the statutory minimum of 1 year. The Board gave as part of its reason that the subject had "high-level" narcotics connections, suggesting that the stricken information may have still been relied on. The subject brought this suit to gain a rehearing and access to his file.

SPECIAL NOTES

1. Here the court held that New York's statutory Minimum Period of Imprisonment hearing is subject to the due process clause since it involves a liberty interest--i.e., it is an integral part of the parole release process.

2. The court emphasized the "narrow scope of our holding" on the access issue: the only way the issue can be resolved is through disclosure.

SUBJECT ACCESS

Smith v. Flaherty
465 F.Supp. 815
(M.D. Pa. 1978)

RELIEF SOUGHT

An imprisoned federal record subject brought suit under the Freedom of Information Act (FOIA) and the Privacy Act to compel the release of a variety of documents withheld from him by the Federal Bureau of Investigation and Federal Bureau of Prisons (FBP).

HOLDING

Access to some documents withheld. More information requested on other documents. The subject's presentence report and a memorandum from his federal probation officer to the sentencing judge are both court records and thus exempt from disclosure, despite their use by the FBP. Psychiatric and psychological reports loaned to the FBP by the District of Columbia government are exempt from disclosure, since the D.C. government is specifically exempted from the FOIA and that exempt status still applies to documents transmitted to a non-exempt agency. But mere unsupported allegations by the FBP that other documents were exempt from disclosure because they were provided by confidential sources were insufficient and more detailed affidavits must be filed with the court to allow it to rule on their status.

BACKGROUND

The subject had received, on request, a number of documents pertaining to him, but brought this action to compel release of other records which he had been informed would not be given to him.

SPECIAL NOTE

The court stated that the FOIA makes all agency documents available unless specifically exempt by the act. To show the applicability of an exemption, detailed affidavits or oral testimony must be submitted so the trial court can make an independent assessment. In this case, the FBP must submit "a more detailed statement of the nature of the confidential information and a better description of the confidential sources."

SUBJECT ACCESS

Ferguson v. Kelley
455 F.Supp. 324
(N.D. Ill. 1978)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) criminal record subject who, in the course of a Freedom of Information Act (FOIA) suit, learned that the FBI might have records on him in locations other than the Central Records System sought a court order directing the FBI to extend the search he had originally requested to include other FBI recordkeeping systems. The FBI argued that such a search would be burdensome and that the subject should be required to initiate a new request.

HOLDING

Relief denied. Although the FBI may not plead difficulty as a defense to a search request, this subject's original FOIA request had been in such general form as not to impose any duty on the FBI to search its field offices. Also, since the subject should have learned a year ago from an FBI affidavit in the case that only the Central Records System had been searched, he had waited too long to be entitled to a court order expanding the search.

BACKGROUND

After exhausting administrative channels the subject brought a FOIA action against the FBI to compel disclosure of withheld information. During that suit he realized that the FBI, in response to his original general request for his records, had searched only its Central Records System, but that there might be information on him in the FBI's electronic surveillance indexes as well as in records kept by four field offices. He accordingly sought a court order requiring the FBI to search the indexes and the field office systems.

SUBJECT ACCESS

Cleaver v. Kelley
427 F.Supp. 80
(D.D.C. 1976)

RELIEF SOUGHT

A Federal Bureau of Investigation (FBI) record subject brought suit to compel production of documents which he had requested under the Freedom of Information Act (FOIA) after being told that due to the heavy volume of FOIA requests being processed production of the documents would be delayed past the statutory deadline.

HOLDING

Expedited disclosure ordered. Although delays are generally justified in light of the volume of requests and the FBI's first in/first out policy, in some cases exceptional need or urgency may entitle an individual to priority treatment. Since the subject here was facing trial in less than one month for attempted murder and assault with a deadly weapon, and since there was evidence indicating that the FBI may have been closely involved in the activities out of which the charges against the subject arose and therefore might have helpful information not otherwise available to him, the subject's request would be expedited. The FBI was ordered to produce the documents within three weeks.

BACKGROUND

The subject had filed his FOIA request almost ten months prior to bringing this suit. The FBI had refused to process his request within the statutory deadline, citing their "chronological policy" of first in, first out, a procedure which had been judicially approved for ordinary requests.

SUBJECT ACCESS

Ex parte Farley
570 S.W.2d 617
(Ky. 1978)

RELIEF SOUGHT

In this action the commonwealth's Public Advocate sought access to records compiled for use by the state supreme court in reviewing death penalty cases. He based his demand on the state Open Records Law and on the constitutional right of due process.

HOLDING

Access denied. The records in question, as information compiled for use by members of the court in reaching their decisions, was neither subject to the Open Records Law nor obtainable on the basis of due process. They would become public records once examined by the court, but not before.

BACKGROUND

Under Kentucky law the supreme court was required to review all criminal cases resulting in imposition of the death penalty. To aid in this review, the Administrative Office of the Courts was required, also by law, to compile certain information for use by the justices. This information was to include the records of all post-1969 cases in which the death penalty was imposed, as well as data on the criminal defendant in the case under review. Presumably this would, at a minimum, include the prior criminal history of the defendant. The Public Advocate sought access to those files for use in challenging the imposition of the death penalty, and to challenge the constitutionality of the death penalty statute.

SUBJECT ACCESS

Whittle v. Munshower
155 A.2d 670
(Md. 1959)
cert. denied, 362 U.S. 981 (1960)

RELIEF SOUGHT

The administrator of the estate of a deceased record subject brought suit to obtain an order directing the state police to produce any information in their possession relating to criminal charges allegedly made against the decedent. The administrator's purpose was to clear the decedent's name, as well as to "protect" himself.

HOLDING

The court found that procedurally it had as yet no jurisdiction to hear the case. However, in a purely advisory discussion, the court stated that unless there is specific statutory authority for disclosure, the general rule is that police records are confidential. No such authority appeared to support the administrator's request.

BACKGROUND

The decedent allegedly had been charged by co-workers with defective work. The administrator claimed that these charges led to the decedent's demise, that formal charges were made against the decedent for having made defective material, and that the state police had information in their possession reflecting the charge which would help clear the decedent's name.

SUBJECT ACCESS

Hetherington v. Murphy
387 N.Y.S.2d 463
(App. Div. 1976)

RELIEF SOUGHT

In this very brief decision, a record subject appealed the lower court's denial of his request to be furnished with copies of various reports and messages in the possession of the police.

HOLDING

Affirmed. Where the subject had failed to show that inspection of the records would help him assert any of his rights, his application was properly denied.

BACKGROUND

The subject sought to inspect various documents, including his arrest record, in the possession of the New York City Police Department.

SUBJECT ACCESS

Turner v. Reed
538 P.2d 373
(Ct. App. Or. 1975)

RELIEF SOUGHT

A criminal record subject sued to compel release of a wide variety of documents withheld from him as being exempt from disclosure under the state public records law.

HOLDING

Some documents ordered disclosed, others withheld. First, psychiatric and psychological evaluations in the professionals' own words are per se exempt from disclosure. Second, subjective evaluations and recommendations to the parole board are likewise per se exempt, but factual material, such as a report of an arrest while on parole, is not. Third, as to documents where the only ground for confidentiality is that release would subject public officials to criticism, a per se rule of disclosure would apply. The court also criticized the state for its extremely vague discussion of the documents during the trial below, stating that while, admittedly, the contents could be described, at a minimum an explanation of the specific role played within the corrections system by the allegedly exempt documents would aid the court in its deliberations.

BACKGROUND

The subject, who was imprisoned, paroled, or on probation for the greater part of 1958-1973, asked for all prison and parole records concerning him, apparently as material for a book. He received the bulk of the requested documents but the Corrections Division withheld 46 documents, claiming they were exempt, and the subject sued.

ALPHABETICAL INDEX OF CASE SUMMARIES

Note: *Each entry in the Alphabetical Index is followed by a CLD number, indicating the page(s) in the Case Law Digest where that entry is found. Example: In the entry "Bradford v. Mahan, 548 P.2d 1223 (Kan. 1976). CLD, 140", the entry is found on page 140 of the Case Law Digest.*

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