



OMINBUS MEMORANDUM OF LAW ON EXPUNGEMENTS IN PENNSYLVANIA

INTRODUCTION

Expungement law in Pennsylvania is well settled. The seminal Pennsylvania Supreme Court case *Commonwealth v. Wexler*, 431 A.2d 877 (Pa. 1981), found that **when criminal charges are brought but do not lead to convictions, there is a due process right under the Pennsylvania Constitution to petition for expungement.** *Wexler* also set out the standard for how a trial court should analyze such a petition for expungement. The principles stated in *Wexler* have been followed and refined by a host of cases in both the Superior and Supreme Courts of Pennsylvania.

DISPOSITION OF CHARGES

Charges that result in **acquittal or a finding of not guilty must be expunged as of right.** *Commonwealth v. DM*, 548 Pa. 131, 137 (1997). Consideration of any other factors is “unnecessary, and indeed inappropriate.” *Id* at 136. Furthermore, charges dismissed for lack of evidence are akin to acquittal, and should *rarely, if ever* be denied expungement. *Commonwealth v. Rodland*, 871 A.2d 216, 221 (Sup. Ct. 2005).

For all other non-conviction dispositions, **the burden of proof is on the Commonwealth** to show why an expungement should not be granted. *Wexler*, 431 A.2d at 331. To meet this burden, **the Commonwealth must present compelling evidence** for why the charges at issue must be retained. *Id.*

COMMONWEALTH’S BURDEN

To meet the **compelling evidence** standard, the Commonwealth cannot rest on generalized concerns about maintaining records. *Wexler*, 494 Pa. at 335. In fact, the *Wexler*



Court rejected the Commonwealth's argument that records should be retained so that law enforcement, judges, and others could review what the petitioner had "done throughout her whole life." *Id.* Furthermore, the Commonwealth cannot justify maintaining arrest record where "no analysis of appellant's particular case is made, nor special facts elucidated which show...the necessity of retaining appellant's arrest record." *Commonwealth v. Rose*, 397 A.2d 1243, 1244 (Pa. Super. Ct. 1979).

Moreover, retention of a record to inhibit further crimes of the same type is not a compelling justification for denial of expungement. *Rambo v. Commissioner of Police*, 447 A.2d 279, 282 (Pa. Super. Ct. 1982); *Rose*, 397 A.2d at 1244. In order to justify the retention of an arrest record based on a **pattern of behavior**, the Commonwealth **must present evidence** that there is an identifiable pattern, such as through **expert testimony of a modus operandi or through specific compelling evidence found in the case file**. *See, e.g., Commonwealth v. McKee*, 516 A.2d 6 (Pa. Super. Ct. 1986); *Commonwealth v. Drummond*, 694 A.2d 1111 (Pa. Super. Ct. 1997).

COMMONWEALTH'S INTEREST VERSUS PETITIONER'S RIGHT

When the Commonwealth presents compelling evidence to justify retaining non-conviction charges, the court must **balance the Commonwealth's interest against the right of the Petitioner to have inherently prejudicial non-conviction charges expunged**. In balancing the two, the court should consider the following factors, among others:

- The strength of the Commonwealth's case against the petitioner
- The reasons the Commonwealth gives for wishing to retain the records
- The petitioner's age, criminal record, and employment history
- The length of time that has elapsed between the arrest and the petition to expunge and
- The specific adverse consequences the petitioner may endure should expunction be denied.

(*Wexler*, 494 Pa. at 330).



While evidence that a petitioner has suffered or will suffer specific adverse consequences because of an arrest record may be sufficient to outweigh the Commonwealth's justification for retaining the record, the petitioner is not required to allege or prove specific harm that he is suffering as a result of an arrest record. **An arrest record is considered inherently prejudicial** and must be expunged unless the Commonwealth has met its heavy burden to show why expungement should not be granted. *Wexler*, 494 Pa. at 329-30.

PARTIAL EXPUNGEMENT, OR "REDACTION"

In many cases where multiple charges are brought against an individual, some result in conviction while others do not. A petitioner may seek a "partial expungement," also called a "redaction," to have the non-conviction charges expunged. **Because the charges are non-convictions, they should be analyzed the same as full expungements.** *Wexler*, 431 A.2d at 879; *Commonwealth v. Maxwell*, 737 A.2d 1243 (Pa. Super. 1999).

The one **very narrow exception** is in the case where a petitioner **pled guilty to a charge in exchange for the dismissal of the other charges against him**. An expungement may be denied only when the Commonwealth proves by **clear and convincing evidence** (such as by presenting evidence from the plea colloquy) that the charges were **dismissed** in exchange for the plea. *Commonwealth v. Lutz*, 788 A.2d 993, 1000 (Pa. Super. 2001); [Commonwealth v. Hanna, 2009 PA Super 3, 19 \(Pa. Super. Ct. 2009\)](#).

COURT FINES AND COSTS

In the case of a redaction, the petitioner may owe court fines and costs that are associated with the conviction in the case. **Redacting the non-conviction charges does not impact the conviction or associated fines and costs in any way**, and therefore the existence of such fines and costs does not constitute a compelling justification for retaining non-conviction charges.

In rare circumstances, a petitioner may be eligible for an expungement when there is a balance owed on the case, usually due to a bail judgment. Records of bail judgments are



maintained separately by the court, and there is a separate process to reduce, vacate, or enter into a payment plan to address bail judgments. **Especially since there is a separate mechanism to address bail judgments, a general concern with maintaining records cannot meet the Commonwealth's burden of proof.** *See Wexler*, 494 Pa. at 335.

EXPUNGEMENT OF CONVICTIONS

In addition to the due process right to expungement of non-conviction charges, the Pennsylvania legislature has added **statutory criteria that allow for expungement** in cases that led to participation in diversion programs, or in some cases, convictions.

Diversion Programs

When a petitioner completes the Accelerated Rehabilitative Disposition (ARD) program, the case becomes eligible for expungement. **ARD cases should be analyzed under the same Wexler framework as other non-conviction charges.** *Commonwealth v. Armstrong*, 434 A.2d 1205 (Pa. 1981).

When a *nolo contendere/probation without verdict* plea is entered for an offense under Section 17 or 18 of the Controlled Substance, Drug, Device and Cosmetic Act and **the petitioner successfully completes probation, expungement is mandatory.** *Commonwealth v. Belville*, 711 A.2d 510, 512 (Pa. Super. Ct. 1998).

Summary Convictions

When an individual is convicted of a summary offense, **the conviction may be expunged once the individual has been free of arrest for five years.** 18 Pa.C.S. § 9122. That five year period can either be immediately following the conviction, or preceding the petition for expungement. *Commonwealth v. Wubbe*, 59 Cumb. 34 (2009).

Over 70



When an individual **reaches age 70 and has been arrest-free for a period of ten years, the individual may petition for expungement of misdemeanor and/or felony convictions.** 18 Pa.C.S. § 9122.

Pardons

When an individual received a pardon from the Governor, the conviction(s) that have been pardoned become automatically eligible for expungement, - **the trial court has no discretion and the expungement must be granted.** *Commonwealth v. C.S.*, 517 Pa. 90 (1987).