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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALEX OSGOOD, OSAMA QAIYMAH, and ERIC FRITZ, Petitioner-Below, Appellant,	)	
v.	)	Nos. 1, 2023 & 2, 2023 Consolidated
STATE OF DELAWARE	)	
Respondent-Below, Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANTS' CONSOLIDATED REPLY BRIEF

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I. THE SUPERIOR COURT ERRONEOUSLY INTERPRETED THE PLAIN LANGUAGE OF THE DELAWARE EXPUNGEMENT STATUTE TO BAR AN EXPONENTIAL NUMBER OF ELIGIBLE PETITIONERS FROM OBTAINING MANDATORY EXPUNGEMENT OR OBTAINING THE COURT'S CONSIDERATION OF DISCRETIONARY EXPUNGEMENT.

The State's Answering Brief reiterates the disputed arguments it proffered below, generically defends the lower court decisions, and fails to offer any substantive responses to Appellants' multi-layered legal arguments.

The State's Interpretation Is Contrary To The Clear And Unambiguous Language Of The Expungement Statutes

Just as it did below, the State isolates the phrase – "no prior or subsequent conviction" - from the rest of the language within the same sentence that limits the nature of the "prior or subsequent convictions" that are disqualifiers for expungement. It then offers to interpret the meaning of the statute, which it admits is clear and unambiguous, by relying only on a "plain reading" of the isolated phrase. In so doing, the State ignores a significant portion of the plain language in the statute while, at the same time, professing that the "most important consideration for a court in interpreting a statute is the language the General Assembly used in writing the statute." [1]

[1] Ans. Br. at 20 (quoting *Judicial Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1003-04 (Del. 2021)).

The State's approach is rather like cherry-picking to achieve an interpretation that is otherwise inconsistent with the plain meaning of the statute as a whole.

The State next attempts to dismiss, casually and out-of-hand, this Court's analysis in *Fuller v. State*[2] perhaps because *Fuller* highlights the State's distorted approach in this appeal. Even though *Fuller* addressed a legally synonymous issue in the context of the similarly structured juvenile expungement statute, the State urges this Court to ignore the analysis solely because it did not resolve the precise issue for which we seek an answer today. If *Fuller* did address the precise issue, however, we would not be here today.

While the nature of the "prior offenses" at issue in *Fuller* are different, -- whether a motor vehicle offense is a "subsequent adult conviction" that barred eligibility for expungement of a juvenile record, -- the juvenile statute, like the adult expungement statute, simultaneously sets forth which convictions are eligible for expungement and defines the limitations on convictions to be considered as a disqualifier from eligibility. The relevant provision in each of the three expungement statutes, (adult mandatory, adult discretionary and juvenile discretionary), contains language preceding the phrase "prior convictions (or delinquency)" that "delineates the types of offenses that count as [a conviction,] 'adjudications of delinquency' [or

[2] *Fuller v. State*, 104 A.3d 817 (Del. 2014).

offense]" which are eligible for expungement. Thus, just as it did in *Fuller*, this Court must read the provision in its entirety. Doing so results in an interpretation consistent with reading § 4372 (a) as defining the scope of the entire expungement statute, not just one isolated provision.

The State concedes that in drafting § 4372 (a), our Legislature intended to confer subject matter jurisdiction to the Delaware Courts upon consideration only of the criminal cases brought and convictions entered before them here in Delaware. Because the phrase "prior or subsequent convictions" in both § 4373(a) (3) (2019) and § 4374(a) (2019) is limited by language referring to Delaware charges that qualify for expungement, then the "prior or subsequent convictions" language must only contemplate Delaware convictions that could have been expunged. Contrary to the State's assertion, this reading of the language is consistent with the intent by the General Assembly to make "clear through this language that all Delaware courts where a person could be convicted of a crime, not just the Superior Court, were included in the provisions of the subchapter." State Resp. Br. at 13. If the Legislature wanted to consider out-of-state records, it would have specifically said as much, as it has done in the plethora of criminal statutes, including several remedial statutes.

Assuming, Arguendo, The Statute Is Ambiguous, This Court Must Reject The State's Interpretation

If Petitioners cite the enabling provision as "plain language" and "unambiguous" and if the State, simultaneously, cites language which it claims to be "clear" and "unambiguous", then perhaps there is an ambiguity within the statute and the overall legislative intent must be gleaned from the statute itself. First, a review of Delaware's remedial (and other) statutes reveals that, when the General Assembly intends for the court to consider out-of-state convictions, it uses precise language to state as much; that qualifying language is nowhere found in the expungement statute.[3] The absence of such language indicates that the General Assembly did not intend to include out-of-state convictions to be considered for purposes of expungement. It is quite telling that the State ignores the extensive list of these statutes provided by Petitioners. Op Br at 22-23.

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[3] *Evans v. State*, 212 A.3d 308, 315-316 (Del. Super. 2019) (holding that term "another person" for purposes of criminal impersonation required proof the defendant "impersonated a human being who was born and is alive" whereas the language used in crime of forgery was different, thus only requiring proof that defendant purported "to be the act of another person, whether real or fictitious."). *See State v. Croce*, 1997 WL 524070 (Del.Super. May 14, 1997) (finding Legislature's choice to change "chain of custody statute" in one context and not the other indicated that, had it wanted the change in the other statute it would have made it).

An examination of yet another section of the expungement statute provides further overall evidence of the Legislature's intent to limit Delaware expungement considerations to Delaware cases only. 11 Del.C. § 4375 enables previously unavailable opportunities for applicants to obtain an expungement following an unconditional pardon for almost all Delaware criminal convictions: "Notwithstanding any provision of this subchapter or any other law to the contrary, a person who was convicted of a crime, other than those specifically excluded under subsection (b) of this section, who is thereafter unconditionally pardoned by the Governor may request a discretionary expungement under the procedures under § 4374(c) through (h) and (j) of this title." 11 Del.C. § 4375(a)

The language "a person who was convicted of a crime ... who is thereafter unconditionally pardoned by the Governor" specifically contemplates that the Legislature is looking at Delaware criminal convictions only. Next, § 4375(b) only lists 6 types of felony convictions that are ineligible for expungement following an unconditional pardon; each of which is crime specifically listed in the Delaware Criminal Code. Nowhere does the Legislature address out-of-state convictions for misdemeanors or felonies. Finally, the procedures for consideration of a discretionary expungement following a pardon are set forth in § 4374(c) through (h) and (j), which do

not include the language "and the person has no prior or subsequent convictions".

Petitioners submit that § 4375 provides further evidence that, if the legislature wanted to consider an out-of-state record as a predicate for expungement eligibility, it would have said as much. Instead, the Legislature only narrowed the scope of exclusionary criminal convictions to six in the Delaware Criminal Code. Using the absurd result analysis, it would make no sense to allow someone with an unconditional Delaware pardon and an out of state conviction to be eligible for expungement consideration when Fritz and Osgood are not likewise eligible.

The Petition Process Supports The Rejection Of The State's Interpretation

The State's Answer also fails to address the nature of the application process. Prior to applying for an expungement, a petitioner must obtain only his Delaware criminal record and supply only ***that*** record to the court for consideration. Nowhere in the statute does it state that a petitioner must provide out-of-state records or that out-of-state records may automatically exclude an individual from petitioning for either a mandatory or a discretionary expungement. The Legislature knows that Delaware courts cannot and do not regulate the criminal histories elsewhere, but the continued

existence of Delaware records falls squarely within the power and authority of Delaware lawmakers and, by extension, Delaware courts.

If the Delaware Legislature anticipated that out-of-state records would be a part of the consideration, then – consistent with its stated purpose of expanding opportunities for Delaware citizens to obtain a clean slate – it would have (or the SBI would have) provided instructions for citizens to obtain an out-of-state record. As it stands, there is no clarity on how one actually obtains a nationwide criminal history in the first place. Common sense leads to the inescapable conclusion that, if non-Delaware criminal records must be considered prior to determining one's eligibility to apply for a Delaware expungement, first, there would be a mechanism for applicants to obtain an out-of-state record and, second, we will all quickly observe disparities in record-keeping across the country which will, inevitably, lead to inconsistent applications and expungement rulings. Are military adjudications and foreign criminal records likewise fair game? At what point does the foreign record investigation make this process unwieldy and inherently inconsistent? And, if a foreign record disqualifies an applicant from expungement consideration right from the start, then how would one be afforded the opportunity to seek to disprove inaccuracies on the nationwide criminal history that, at this point, only the State has access to - not the Court

and not the petitioners? In fact, when SBI sent Osgood, Qaiymah and Fritz, their respective denials, it stated that it was based on a review of their ***Delaware*** criminal history. Thus, there is no indication or notification that there was any intent to use out-of-state convictions to render Petitioners ineligible.

The State's Interpretation Would Yield Absurd Results

Finally, the State's policy argument about the patent unfairness of allowing individuals with convictions out of the State of Delaware to obtain an expungement assumes a hypothetical applicant with Delaware convictions remaining on her record; if such an applicant existed, then that applicant would need to avail herself of the Delaware pardon and expungement process first before seeking an expungement. So, the State's hypothetical applicant is not a realistic point of comparison. On the other hand, *Amicus* proffers more reasonable hypothetical scenarios pointing to absurd disparities in the State's suggested application of the expungement statute. *Amicus* Brief at pp. 17-18, 20. Moreover, the State's policy argument fails to meaningfully address the fact that Delaware courts and the Delaware Legislature can only consider criminal histories within the State of Delaware. Delaware has no control over the accuracy of record-keeping in other states.

CONCLUSION

Wherefore, for the reasons and upon the authorities cited herein, the Superior Court's decisions must be reversed.

Respectfully submitted,

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