



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALEX OSGOOD, )  
Defendant Below, )  
Appellant, )  
 )  
v. ) No. 1, 2023  
 )  
STATE OF DELAWARE, )  
Plaintiff Below, )  
Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF DELAWARE

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**APPELLANT'S OPENING BRIEF**

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DATED: February 20, 2023

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## NATURE OF PROCEEDINGS

Through undersigned counsel, Appellant Alex Osgood filed a petition for expungement in Superior Court on August 3, 2021, seeking a discretionary expungement per 11 *Del.C.* §4374(a)(3), as more than 7 years had passed since Mr. Osgood's 2011 Delaware felony conviction for Possession With Intent to Deliver Marijuana. [A-1]. Osgood's petition, Civil Action No. 21X-00167, is contained within the Appendix. [A-4-26]. The State filed its Response on December 14, 2021, opposing the petition asserting that Osgood's prior out-of-state misdemeanor conviction in West Virginia made Osgood ineligible for consideration for a discretionary expungement. [A-1, 27-30]. Osgood filed a Reply on December 21, 2021. [A-1, 31-35]. The State filed a Sur-Reply on January 25, 2022. [A-1, 40-42]. Siding with the State's position that Osgood's 2007 out-of-state misdemeanor conviction made him ineligible to petition for expungement, Commissioner Lynne Parker issued an Order dated June 22, 2022, denying Osgood's Expungement Petition. [A-2, 43-48].

Osgood filed a timely appeal of the Commissioner's Order to a Superior Court Judge. [A-2, 49-59]. Osgood's appeal below was consolidated with two other petitioners – *Eric Fritz*, Civil Action No. 21X-00195, and *Osama Qaiymah*, Civil Action No. 21X-00109, – both of whom are represented by other counsel, and both of whom were likewise declared ineligible for expungement because of

out-of-state convictions. Following additional pleadings submitted by the parties (A-60-75), the Honorable Calvin L. Scott, Jr. denied the appeal of the Commissioner's Order. *Eric Fritz, Alex Osgood, and Osama Qaiymah v. State of Delaware*, ID No's 21X-00195, 21X-00167, 21X-00109, Dec. 6, 2022 (attached as **Exhibit "A"**). Judge Scott's ruling was based upon the pleadings alone. There were no hearings or oral argument below.

Counsel filed a timely notice of appeal in this Court, as did Petitioners/Appellants Fritz and Qaiymah. This is Appellant Osgood's Opening Brief.

## SUMMARY OF ARGUMENT

I. The Superior Court erred in ruling that §4374's caveat that a petitioner have "no prior or subsequent convictions" includes out-of-state convictions. Title 11's subchapter governing expungements only applies to Delaware criminal cases brought in Delaware courts per §4372(a), whereby the phrase "*has no prior or subsequent convictions*" can only refer to prior or subsequent Delaware convictions. Moreover, since §4372(a) is unambiguous on its face and because the General Assembly chose not to address out-of-state records in the expungement subchapter (in contrast to other statutes in Delaware's criminal code), the Superior Court incorrectly adopted the state's unsupported argument that the General Assembly codified a narrower application of its Expungement Policy, whereby out-of-state convictions would impact eligibility for expungement.

## STATEMENT OF FACTS

Appellant Alex Osgood was arrested on August 11, 2010, and charged with Trafficking Marijuana and related Title 16 offenses. [A-24-25]. The case was resolved in Superior Court on January 13, 2011, whereby Osgood pled guilty to single count of Possession With Intent to Deliver Marijuana. The State entered a Nolle Prosequi on the balance of the charges. [A-14, 17]. Following the terms of the plea agreement, the Honorable Richard R. Cooch imposed a 90 day prison sentence, followed by 1 year probation at level II, which was later modified to level I unsupervised probation. Osgood was successfully discharged from probation in March 2012. [A-16, 20-21].

Through undersigned counsel, Osgood filed a “discretionary” expungement petition per 11 *Del.C.* §4374(a)(3) in the Superior Court on August 3, 2021, as more than 7 years had passed since Osgood’s January 2011 felony conviction for Possession With Intent to Deliver Marijuana. [A-1, 4-26]. Osgood’s criminal history contained three other Delaware arrests – Underage Consumption of Alcohol (DNREC, 5/8/2005, #0505012884); Underage Consumption of Alcohol (Newark PD 5/4/2007, #0607012202 ); and two counts of Graffiti (Newark PD, 8/31/2006; #0608018427, #0608018444) – all of which “were terminated in favor of the accused” – all of which were expunged by the State Bureau of Investigation (SBI) on July 9, 2021. [A-12, 25, 28].



Paragraphs # 8 and 9 of Osgood's expungement petition provided the reasons why Osgood sought an expungement of his Delaware arrest record:

8. *Alex Osgood is now 34 years old, engaged to be married, and gainfully employed. Mr. Osgood graduated from Newark High School in 2005 and thereafter from the University of West Virginia in 2010 where he earned a degree in Marketing and Communications. Following graduation from college, Mr. Osgood spent the summer in Delaware living with fellow pothead friends. In August 2010, the State Police entered Mr. Osgood's apartment because they smelled marijuana. Once inside, the police obtained a search warrant based upon plain view observations. The search yielded almost six pounds of marijuana, but the lion's share of the weight consisted of 215 jolly rancher pieces of candy that were sprinkled with marijuana. The plea negotiations resulted in a 90 day prison sentence, followed by probation.*

9. *The experience was enough of a life lesson for Mr. Osgood to fly straight, which he has done ever since. After working in the Vermont ski resort industry for 5 years, Mr. Osgood moved to Colorado in 2016, seeking better employment. His Delaware arrest record and felony conviction has been a huge obstacle, resulting in 50 - 75 lost job opportunities, most notably with Comcast. Mr. Osgood has been employed for the last 4 years with a huge tech company called HomeAdvisor which has recently merged with Angie's List. This company sells Home Contractor leads to consumers. Mr. Osgood works as client tech support for e-mail live chat. It is a good job, but with hopes to raise a family, Mr. Osgood will need more meaningful employment. Over the past eleven years from his arrest and 90 day prison sentence, Mr. Osgood has endeavored to remain a productive and law abiding member of society. He would like to regain his right to vote and to forge a more lucrative career. His criminal record has been following Mr. Osgood "like a dark cloud." Mr. Osgood wishes to remove the taint that this arrest record carries, and allow him to move forward in life.*

[A-7-8].

While a student at the University of West Virginia, Mr. Osgood pled guilty in October 2006 to Possession of Marijuana (a misdemeanor), and was sentenced

to probation in January 2007. [A-36-39]. The State’s initial response opposing Osgood’s petition asserted that Osgood’s “2015” West Virginia misdemeanor conviction disqualified Osgood from the Superior Court’s consideration for a discretionary expungement. [A-28]. The State thereafter acknowledged that Osgood’s West Virginia misdemeanor conviction occurred in 2007, not 2015, per the West Virginia court records provided by undersigned counsel to the State. [A-36-39, 40, 61]. [It is not uncommon for persons (many acting pro se) to be denied the opportunity from moving forward with the expungement process where the State or State Bureau of Identification (SBI) relies upon inaccurate out-of-state data obtained through NCIC checks.<sup>1</sup>]

This appeal involves a “legal” question, not a “factual” question. There is no dispute that at least 7 years have passed since Osgood’s 2011 Delaware conviction for Possession With Intent to Deliver Marijuana. [A-27, 62]. There is no dispute that Mr. Osgood has a 2007 West Virginia misdemeanor conviction for Possession of Marijuana. [A-40, 61]. The “legal” disagreement is whether an out-of-state “prior or subsequent” conviction disqualified Osgood from seeking an expungement of his Delaware arrest record, as §4374(a)(3) contains a caveat that the petitioner “has no prior or subsequent convictions.” The Superior Court agreed

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<sup>1</sup>Hence, persons seeking expungements of their Delaware arrest records receive a cover letter from SBI informing them they are ineligible for consideration, without being provided any reference or court documents governing the “out-of-state” conviction(s).

with the State, writing:

“... had the legislature intended for requirement of no prior and subsequent convictions to only apply to convictions in this State, the legislature would have indicated such requirement in plain language as it did when describing the applicability to the statute in 11 *Del. C.* §4372(a). Additionally, the Court finds the Petitioners misunderstand 11 *Del. C.* §4272(a) as the language “in this state” pertains to the jurisdictional limitations of the Delaware Courts to consider expungement of only Delaware arrests and convictions. The language does not apply to convictions as Petitioners would like this Court to find.”

*Eric Fritz, Alex Osgood, and Osama Qaiymah v. State of Delaware*, ID No’s 21X-00195, 21X-00167, 21X-00109, Order, Del Super., Scott, J, Dec. 6, 2022; **Exhibit “A”** at p. 7.

## **ARGUMENT**

### **I. THE SUPERIOR COURT ERRED IN RULING THAT APPELLANT OSGOOD'S 2007 MISDEMEANOR CONVICTION IN WEST VIRGINIA MADE HIM INELIGIBLE TO BE CONSIDERED FOR A DISCRETIONARY EXPUNGEMENT PER 11 *DEL. C.* §4374(a)(3).**

#### **QUESTION PRESENTED**

Whether the Superior Court erred in ruling that Appellant Osgood's 2007 misdemeanor conviction in West Virginia made him ineligible to be considered for a Discretionary Expungement per 11 *Del. C.* §4374(a)(3)? [This question was raised below throughout the Superior Court pleadings. See A-31-34, 52-56].

#### **SCOPE OF REVIEW**

Questions of statutory interpretation are questions of law, reviewed *de novo* by this Court. *Delaware Solid Waste Authority v. Delaware Department of Natural Resources and Environmental Control*, 250 A.3d 94, 105 (Del. 2021); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020); *Corvel Corporation v. Homeland Insurance Company of New York*, 112 A.3d 863, 868 (Del. 2015).

#### **MERITS OF ARGUMENT**

##### **A) The Expungement Process in Delaware:**

Recognizing that the prolonged existence of a person's criminal record can be socially and economically counterproductive amidst a competitive and

information driven world, Delaware’s 150<sup>th</sup> General Assembly substantially expanded expungement eligibility, passing the “Adult Expungement Reform Act” in 2019 (attached as **Exhibit “B”**). Removing the “ball and chain” provisions of the older versions of Delaware’s expungement statutes that focused upon culpability, the “Adult Expungement Reform Act” announced a substantially broader expungement policy by removing, for example, the prior policy language that limited expungement to innocent people. Hence, the language in 11 *Del.C.* §4371 – “This subchapter is intended to protect innocent persons from unwarranted damage which may occur as the result of arrest and other criminal proceedings which are unfounded or unproven” – was changed to now read: “This subchapter is intended to protect persons from unwarranted damage which may occur when the existence of a criminal history continues indefinitely.” **Exhibit “B”**.

A person seeking to expunge his Delaware arrest record starts the process by obtaining a certified copy of his criminal history, which requires a \$52.00 fee and being fingerprinted at a Delaware State Police troop, consistent with the instructions on their State Bureau of Identification (SBI) website.<sup>2</sup> There are three separate paths to obtain an expungement. Assuming a person qualifies per 11 *Del.C.* §4373(a)(1) and (2), the first path allows for a mandatory expungement whereby SBI processes the expungement without the need for a court petition to be

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<sup>2</sup><https://dsp.delaware.gov/obtaining-a-certified-criminal-history/>

filed. Assuming a person qualifies per 11 *Del.C.* §4374(a), the second path allows for a discretionary expungement, which does require the filing of a petition in either Superior Court or Family Court. 11 *Del.C.* §4374(c). Assuming a person does not qualify for either a mandatory or discretionary expungement, the third path is to seek and obtain a gubernatorial pardon, and if granted, then seek a discretionary expungement following a pardon per 11 *Del.C.* §4375. This third path takes 18-24 months from start to finish.

B) Mr. Osgood is eligible for a Discretionary Expungement per 11 *Del. C.* §4374(a)(3):

Mr. Osgood sought to expunge his Delaware 2010 felony arrest via a Superior Court discretionary expungement per 11 *Del. C.* §4374(a)(3) as a person who “was convicted of a felony and at least 7 years have passed since the date of conviction ... and the person has no prior or subsequent convictions.” Judge Scott correctly framed the legal issue below regarding eligibility: whether §4374’s caveat that a petitioner have “no prior or subsequent convictions mean no prior or subsequent convictions in the State of Delaware or subsequent convictions in any state.” *Eric Fritz, Alex Osgood, and Osama Qaiymah v. State of Delaware*, ID No’s 21X-00195, 21X-00167, 21X-00109, Order, Del Super., Scott, J, Dec. 6, 2022; **Exhibit “A”** at 5-6.

To be clear, Osgood has always maintained that his out-of-state record in

West Virginia is certainly “fair game” for the merits of his discretionary expungement, -- as part of the Court’s calculus in granting or denying his discretionary petition for expungement. However, the State and the Superior Court view Osgood’s out-of-state conviction as a jurisdictional barrier, where he is deemed ineligible to even apply for an expungement. The State and the Superior Court are simply wrong. The General Assembly explicitly elected to not include out-of-state convictions as part of the **eligibility** criteria to file an expungement petition under Subchapter 43. Hence, Mr. Osgood’s petition for a discretionary expungement should have been considered on the merits, as opposed to being deemed ineligible for consideration.

The starting point is *11 Del. C. §4372(a)* which reads: “*This subchapter applies to all criminal cases brought and convictions entered in a **court in this State.***” (emphasis added). The language is clear and unambiguous. The Superior Court interpreted §4372(a) as mere surplusage – specifically, that “Petitioners misunderstand *11 Del. C. §4372(a)* as the language ‘in this state’ pertains to the jurisdictional limitations of the Delaware Courts to consider expungement of only Delaware arrests and convictions.” **Exhibit “A”** at 7. It seems preposterous that such a self-evident proposition would have to be spelled out by the General Assembly. Delaware law always only affects matters within Delaware’s subject matter and personal jurisdiction. Title 21 only regulates motorists on Delaware

roadways; Title 12 only affects Delaware decedents and their heirs; the Landlord-Tenant Code in Title 25 only pertains to Delaware residential contracts, etc., etc.

It makes more sense that §4372 is intended to state more than merely the obvious. “We ... ascribe a purpose to the General Assembly’s use of particular statutory language and construe it against surplusage if reasonably possible.” *Zambrana v. State*, 118 A.3d 773, 776 (Del. 2015) (citing *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex.rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1070 (Del. 2011). “It is presumed that ‘the General Assembly purposely chose particular language and [we] therefore construe statutes to avoid surplusage if reasonably possible.’” *Salzberg v. Sciabacucchi, supra*, 227 A.3d at 117-18 (quoting *Sussex Cty. Dep’t of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013)). The logical takeaway is the General Assembly was fully cognizant that Delaware courts cannot and do not issue orders, expunging criminal records maintained by the other 49 states, in the same spirit that Delaware courts do not set bail in criminal cases in other states. Hence, when the General Assembly wrote in §4372(a), “This subchapter applies to all criminal cases brought and convictions entered in a court in this State,” the language was intended to confer subject matter jurisdiction to the Delaware Courts upon consideration only of the criminal cases brought and convictions entered in Delaware, reflected on the petitioner’s Delaware criminal history maintained by the Delaware State Police



State Bureau of Identification.

Police and practicality dictate why out-of-state arrests ought not enter the calculus, at least as to eligibility to file a discretionary petition for expungement. The process to seek an expungement in Delaware begins with the petitioner getting fingerprinted at a DSP Troop, because the Delaware State Police (SBI) maintains the official database of criminal records governing Delaware arrests. SBI does not maintain records governing out-of-state arrests. Hence, it does not make sense for the State/SBI to divert a petitioner to the Gubernatorial Pardon path, based upon a NCIC record check, which are less than reliable, - often misidentifying the petitioner for someone else, or misstating the disposition.

There are two other reasons that showcase why the General Assembly did not intend to include out-of-state convictions as part of the “no prior or subsequent convictions” eligibility criteria for expungement. First, the General Assembly has never been bashful when they want to include out-of-state convictions, as other criminal statutes such as the habitual offender statute, the DUI statute, and the sex offender registration laws all specify that out-of-state records shall be considered. See, e.g., 10 *Del. C.* §1009(j)(1)(f) (prior adjudications of delinquency); 11 *Del. C.* §2116(a)(2) (revocation of bail upon subsequent arrest); 11 *Del. C.* §1448(a)(1) and (e)(3) (possession of a deadly weapon by a person prohibited); 11 *Del. C.* §4120(e)(1) (failure to register as a sex offender); 11 *Del. C.* §4121(a)(4)(c)

(definition of a “sex offender”); 11 *Del. C.* §4205(a)(1) (additional penalties for sex offenders); 11 *Del. C.* §4214(a) – (d) (habitual offenders); 11 *Del. C.* §4215(a) (sentencing enhancements for prior convictions); 11 *Del. C.* §4218(c)(2)(a) (ineligibility for Probation Before Judgment); 11 *Del. C.* §8550(2)(c) (child sex abuse information repository); 16 *Del. C.* §922(1) (entry upon the Child Protection Registry); 21 *Del. C.* §4177B(e)(1) (definition or prior DUI convictions); 21 *Del. C.* §4711G(f)(1)(d) (Ignition Interlock Device installation).

Second, the entire subchapter governing “Expungement of Criminal Records” is replete with itemized “exclusions” – that is, a list of crimes that knock one out of the batter’s box for eligibility in seeking a mandatory or discretionary expungement. See 11 *Del. C.* §4372(f); 11 *Del. C.* §4373(b); 11 *Del. C.* §4374(b); 11 *Del. C.* §4375(b). There was plenty of opportunity for the General Assembly to inject language governing out-of-state records, yet nowhere in the subchapter does the General Assembly invite scrutiny of out-of-state records when it comes to considerations of expungement.

Well-established precepts of statutory construction control to the extent that there is any uncertainty regarding the application of a criminal statute. The goal of statutory construction is “to determine and give effect to legislative intent.”

*Ramirez v. Murdick*, 948 A.2d 395, 398 (Del. 2008) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)). The well settled rules of statutory construction

are as follows:

[T]he Court must first determine whether the statute is ambiguous, because if it is not, then the plain meaning of the statutory language controls. When the language and intent of a statute are clear, no ambiguity exists and the Court will not engage in construing or interpreting the statute. If however, a statute is reasonably susceptible of different conclusions or interpretations, it is ambiguous. When statutory language is ambiguous, courts turn to the rules of statutory construction, and each part or section of the statute should be read in light of every other part or section to produce a harmonious whole.

*Spintz v. Division of Family Services*, 228 A.3d 691 (Del. 2020) (internal quotations and citations omitted). See also *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007) (“If a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such literal application could not have been intended by the legislature.”)

Because Title 11’s subchapter governing expungements only applies to Delaware criminal cases brought in Delaware courts per §4372(a), the phrase “*has no prior or subsequent convictions*” can only refer to prior or subsequent Delaware convictions. Moreover, since §4372(a) is unambiguous on its face and because the General Assembly chose not to address out-of-state records in the expungement subchapter (in contrast to other statutes in Delaware’s criminal code), the Superior Court incorrectly adopted the state’s unsupported argument that the General Assembly codified a narrower application of its Expungement Policy, whereby out-of-state convictions would impact eligibility for expungement.

## **CONCLUSION**

For the reasons and upon the authorities set forth herein, it is respectfully requested that the ruling below be reversed, and the petition remanded to Superior Court for consideration on the merits.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT  
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,216 words, which were counted by Microsoft Word.

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