



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OSAMA QAIYMAH, )  
ERIC FRITZ, )  
Petitioner-Below, )  
Appellant, )  
)  
v. )  
)  
STATE OF DELAWARE )  
)  
Respondent-Below, )  
Appellee. )

No. 2, 2023

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

/s/Nicole M. Walker  
Nicole Walker, Esq., DE #4012  
Chief, Appellate Division  
Office of Defense Services  
*Office of the Public Defender*  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

/s/Eliza M. Hirst  
Eliza M. Hirst, Esq., DE #4619  
Post Disposition Unit Head  
Office of Defense Services  
*Office of the Public Defender*  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

/s/John Deckers

John P. Deckers, Esq., DE#3085

Office of Defense Services

*Office of Conflict Counsel*

John P Deckers, P.A.

800 N. King St., Ste. 303

Wilmington, DE 19801

(302) 656-9850

*Attorneys for Appellants*

DATED: March 7, 2023

# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
SUMMARY OF THE ARGUMENT.....	2
STATEMENT OF FACTS.....	3
ARGUMENT	
<b>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.....</b>	<b>9</b>
Conclusion.....	26
December 6, 2022 Order Affirming Denial Of Expungements.....	Exhibit A
11 Del. C. §4373 (a) (3) (effective December 29, 2019).....	Exhibit B
11 Del. C. §4374 (a) (3) (effective June 3, 2019).....	Exhibit C

## TABLE OF AUTHORITIES

### Cases:

<i>A.W. Financial Serv. v. Empire Resources</i> , 981 A.2d 1114 (Del. 2009).....	15
<i>Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.</i> , 492 A.2d 1242 (Del. 1985).....	9
<i>Colonial Ins. Co. of Wisconsin v. Ayers</i> , 772 A.2d 117 (Del. 2001).....	12
<i>Doroshov, Pasquale, Krawitz &amp; Bhaya v.</i> <i>Nanticoke Mem'l Hosp., Inc.</i> , 36 A.3d 336 (Del. 2012).....	12
<i>Evans v. State</i> , 212 A.3d 308 (Del. Super. 2019).....	20
<i>FDA v. Brown &amp; Williamson</i> , 529 U.S. 120 (2000).....	13
<i>Fuller v. State</i> , 104 A.3d 817 (Del. 2014).....	16, 17, 18, 19
<i>Hairston v. State</i> , 249 A.3d 375 (Del. 2021).....	12
<i>Ins. Comm'r of Del. v. Sun Life Ins. Co. of Can. (U.S.)</i> , 21 A.3d 15 (Del. 2011).....	21
<i>King v. Burwell</i> , 576 U.S. 473 (2015).....	13
<i>Ryan v. State</i> , 791 A.2d 742 (Del. 2002).....	13, 21
<i>Sackett v. State</i> , 1998 WL 281057 (Del.Super. May 7, 1998) .....	14
<i>State v. Croce</i> , 1997 WL 524070 (Del.Super. May 14, 1997) .....	20
<i>Taylor v. Diamond State Port Corp.</i> , 14 A.3d 536 (Del. 2011).....	15
<i>United Savings Ass'n v. Timbers of Inwood Forest Associates</i> , 484 U.S. 365 (1988) .....	13
<i>Webster v. State</i> , 2016 WL 5939166 (Del. Super. Ct. Sept. 2, 2016) .....	14

*Wiggins v. State*, 227 A.3d 1062 (Del. 2020).....9

*Zambrana v. State*, 118 A.3d 773 (Del. 2015) .....15

**Statutes:**

10 Del. C. § 1018(3) .....16

10 Del. C. § 1024 (c) (1).....21, 23

11 Del. C. § 900A (a).....21, 23

11 Del.C. § 1448 .....23

11 Del.C. § 2116(a)(2).....23

11 Del.C. § 4120(e)(1).....23

11 Del.C. § 4121(a)(4)(c).....23

11 Del.C. § 4205A(a)(1) .....23

11 Del. C. § 4218 .....21, 22

11 Del.C. § 4214(a) - (d).....23

11 Del.C. § 4372 (a).....8, 14, 17

11 Del.C. § 4373(a)(3).....*passim*

11 Del.C. § 4374(a)(3).....*passim*

11 Del.C. § 8550(2)(c).....23

16 Del.C. § 922(1) .....23

16 Del. C. § 4761(a).....22

16 Del. C. § 4763 .....22

16 Del. C. § 4764 .....22

16 Del. C. § 4767 .....21, 22

21 Del. C. § 4177B (e) (1) (a) .....21, 22

**Other Sources**

Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 Fordham L. Rev. 2821 (2018) .....24

## NATURE AND STAGE OF THE PROCEEDINGS

On May 21, 2021, per 11 *Del. C.* §4373(a)(3), Osama Qaiymah filed a petition for *mandatory* expungement of his Delaware criminal record which consisted of only one misdemeanor offense. A Superior Court Commissioner denied the expungement after accepting the State's argument that Qaiymah was ineligible due to two unrelated out-of-state misdemeanors convictions.<sup>1</sup>

On September 21, 2021, per 11 *Del. C.* §4374(a)(3), Eric Fritz filed a petition for a *discretionary* expungement of his Delaware record which consisted of two arrests-December 8, 2009 (three charges, all dismissed) and December 15, 2009 (seven charges, pled to two misdemeanors and one felony). The Commissioner granted the expungement as to the December 8<sup>th</sup> arrest. She denied the expungement as to the December 15<sup>th</sup> arrest finding Fritz ineligible for consideration due to an out-of-state misdemeanor.<sup>2</sup>

Qaiymah and Fritz appealed the denial of their expungement requests. Their appeals were consolidated with that of Alex Osgood and a Superior Court Judge affirmed their respective orders.<sup>3</sup> This is Qaiymah and Fritz's Opening Brief in support of their timely-filed appeal from the Judge's Order.

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<sup>1</sup>A17.

<sup>2</sup>A68.

<sup>3</sup> December 6, 2022 Order Affirming Denial Of Expungements, Ex. A. Osgood appealed as well. See *Osgood v. State*, 1, 2003

## SUMMARY OF THE ARGUMENT

1. Each of the two petitioners followed the required procedures to determine eligibility for expungement and obtained his Delaware Criminal History from the Delaware State Bureau of Identification. Each received a letter from SBI, along with a copy of his Delaware Criminal History, informing him that, based on a review of that history, SBI determined he was not eligible for expungement. The State later claimed the men were ineligible because they each had at least one out-of-state misdemeanor conviction. The State read the requirement that the petitioner have “no prior or subsequent convictions” as requiring the petitioner to have no prior or subsequent convictions in any state, not just in Delaware. The State provided no legal authority and no proof that either man had any out-of-state conviction.

The State’s argument, erroneously adopted by the Superior Court, focused on the phrase “no prior or subsequent conviction” in isolation. In so doing, it read the enabling provision as surplusage, ignored the language preceding the phrase in the same sentence and disregarded the required application process. Assuming, *arguendo*, the language is not plain, the choice of words in this statute, as opposed to those use in other statutes, and the trend toward expanding opportunities for expungement require a conclusion that out-of-state convictions are not an absolute bar to expungement.



## STATEMENT OF FACTS

### *Osama Qaiymah*

Seeking a better life, Osama Qaiymah, came to the United States from Jordan in July 2013. When he arrived, he joined his three sisters and two brothers. Qaiymah and his wife have three young children.<sup>4</sup> Regrettably, on June 12, 2015, he was charged by the Delaware River and Bay Authority Police Department with Possession of Untaxed Tobacco Products (Class A misdemeanor). He pled guilty to that same charge on November 25, 2015.<sup>5</sup>

In pursuit of that better life, he completed his master's degree in International Management of Business Administration in 2019. Yet, not all has panned out as he had hoped. Due to the state of the economy, the only steady employment he has been able to obtain is at a grocery store. To provide for his family, he maintains stable employment at the store, but, unfortunately, it is in a rough area and he has an ongoing fear for his safety. Obviously, his qualifications and potential exceed his current employment status.<sup>6</sup>

On or about November 26, 2020, 5 years had passed since Qaiymah's 2015 conviction of Possession of Untaxed Tobacco Products. So, in his effort to gain employment commensurate with his skills and in a safer environment,

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<sup>4</sup> A32.

<sup>5</sup> A29.

<sup>6</sup> A32.

he went to the Delaware State Bureau of Identification, (“SBI”), and applied, pursuant to 11 *Del. C.* § 4374(a)(3), (“mandatory expungement” statute), to have that conviction expunged. However, on April 7, 2021, he received a standardized letter from the State Bureau of Identification, (“SBI”).<sup>7</sup> Enclosed with the letter was a “certified copy of [his] Delaware criminal history.”<sup>8</sup> Without explanation, the letter stated, “[a] review of the enclosed document has determined that the State Bureau of Identification cannot grant your request for expungement.” The standardized letter next directed the “Expungement Applicant,” to “petition the Superior Court or Family Court selected below to determine if you are eligible for an expungement.”<sup>9</sup>

The only charge contained in the Delaware criminal history enclosed with the letter was the November 25, 2015 conviction of Possession of Untaxed Tobacco Products sought to be expunged.<sup>10</sup> By statute, that charge was required to be expunged. But, SBI did not explain what in Qaiymah’s Delaware criminal history rendered SBI unable to provide an expungement. Further, it did not inform him that it had reviewed any criminal record in any other state.<sup>11</sup>

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<sup>7</sup> A28

<sup>8</sup> A29.

<sup>9</sup> A28.

<sup>10</sup> A29.

<sup>11</sup> A28.

According to the State, Qaiymah was ineligible for expungement due to a conviction of a similar misdemeanor in Pennsylvania in 2018 (Possession of Unstamped Cigarettes) and in Maryland in 2020 (Transport Unstamped Cigarettes).<sup>12</sup>

Notwithstanding the fact that Qaiymah had been directed by SBI to file a \$75.00 petition for expungement in order to determine if he was even eligible for an expungement, no one – not SBI nor the State in any litigation below – has provided him with a copy of his out-of-state arrest record, and nothing was presented to either the Commissioner or the Judge supporting the State’s claim that any out-of-state convictions exist.

***Eric Fritz***

The cases for which Fritz seeks expungement are now more than 13 years old; he has no prior or subsequent Delaware criminal record. He was arrested on two separate occasions in December of 2009 after he struggled to accept that his relationship with an ex-girlfriend had ended.<sup>13</sup> He was 25 years old at the time and relatively inexperienced in relationships. He is legally deaf and, although his ex-girlfriend was a teacher at a school for the deaf, his communication skills and abilities were nevertheless impaired.<sup>14</sup> Some

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<sup>12</sup> A34.

<sup>13</sup> A82.

<sup>14</sup> A86.

allegations against Fritz were serious and concerning, however the two cases ultimately resolved in a guilty plea to a Class B misdemeanor, an Unclassified Misdemeanor, and a Class G felony (failure to abide by a no contact order). He entered guilty pleas to those two charges because he was, in fact, guilty of those two charges.<sup>15</sup> He regrets his conduct and regrets that he handled himself in the manner that he did.<sup>16</sup>

Fritz is now 38 years old and married with two young children. He has had no further contact with his ex-girlfriend. He has been with his wife for about eleven years, although they have not been married for that whole time. One of the primary reasons why he seeks expungement is because the existence of an arrest record is preventing him from being involved in his children's school activities. He would like to be involved by either assisting in classrooms, or going on field trips, or coaching his now nine-year-old daughter in soccer and basketball. Each of those activities, however, requires a background check and a clean criminal history. He has already inquired and has been advised that the existence of a felony criminal conviction will prevent him from engaging in any of those activities.<sup>17</sup>

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<sup>15</sup> A82.

<sup>16</sup> A86.

<sup>17</sup> A86.

In addition, the existence of an arrest record has prevented Fritz from maintaining gainful employment. Prior to his arrest, he was certified to provide EMT services and was so employed. After his arrest, he has applied for and has been denied subsequent opportunities to either serve as an EMT, or to work in emergency medicine services in a hospital setting. In addition, he has applied for custodial and landscaping jobs in both Hilltown Township, Pennsylvania as well as in Chalfont Township, Pennsylvania. In each of those instances, he was offered a position subject to a clean background check and, subsequent to discovering his felony conviction, his prospective employer rescinded the offer. He is currently receiving SSDI benefits, but wishes to seek gainful employment as soon as he is able.<sup>18</sup>

On August 11, 2021, Fritz received a standardized letter from the Delaware SBI.<sup>19</sup> Enclosed with the letter was a “certified copy of [his] Delaware criminal history.”<sup>20</sup> Without explanation, the letter stated, “[a] review of the enclosed document has determined that the State Bureau of Identification cannot grant your request for expungement[.]”<sup>21</sup> The standardized letter next directed the “Expungement Applicant,” to “petition

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<sup>18</sup> A86

<sup>19</sup> A81.

<sup>20</sup> A82.

<sup>21</sup> A82.

the Superior Court or Family Court selected below to determine if you are eligible for an expungement.”<sup>22</sup>

The charges contained in the Delaware criminal history enclosed with the letter were charges stemming from the December 8<sup>th</sup> and 15<sup>th</sup>, 2009 arrests-those Fritz sought to have expunged. By statute, the charges from December 8, 2009 were required to be expunged because they had been *nolle prossed*.<sup>23</sup> Thus, SBI did not so inform Fritz, nor did it take the mandatory expungement steps to ensure that the charges from that arrest would be expunged. Yet, despite SBI’s unilateral decision, those charges were expunged without contest by the State.<sup>24</sup>

The other charges contained in the record were those stemming from an arrest on December 15, 2009. These charges were part of the request for discretionary expungement. The SBI letter did not inform him that it had reviewed his criminal record in any other state.<sup>25</sup> And, like Qaiymah, no one provided Fritz with a copy of his out-of-state arrest record. Further, nothing was ever presented to either the Commissioner or the Judge supporting the State’s claim that any out-of-state conviction existed.

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<sup>22</sup> A81.

<sup>23</sup> 11 Del. C. §§4372, 4373 (a) (1).

<sup>24</sup> A68, 89.

<sup>25</sup> A81.

**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.**

***Question Presented***

Whether, for purposes of Delaware’s expungement statute as enacted at the time each appellant filed his petition, a “prior or subsequent” out-of-state criminal conviction was an absolute bar to mandatory expungement and an absolute bar to the Superior Court’s consideration of discretionary expungement when the plain language and legislative intent in each provision reveal that the phrase “prior or subsequent conviction” refers only to Delaware convictions.<sup>26</sup>

***Standard and Scope of Review***

Questions of statutory interpretation are questions of law, reviewed *de novo* by this Court.<sup>27</sup>

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<sup>26</sup> A3, A52.

<sup>27</sup> See *Wiggins v. State*, 227 A.3d 1062, 1078 (Del. 2020); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

## *Argument*

Qaiymah sought a *mandatory* expungement of a November 2015 misdemeanor conviction per 11 *Del. C.* §4373 (a) (3) (eff. 12/29/19)<sup>28</sup> as a person who was convicted of 1 misdemeanor and “5 years have passed since the date of conviction, and the person has no prior or subsequent convictions.” Not long after, Fritz sought a *discretionary* expungement of one felony and two misdemeanor convictions resulting from his December 2009 arrest per 11 *Del. C.* §4374(a) (3) (eff. 6/3/21)<sup>29</sup> as a person who “was convicted of a felony and at least 7 years have passed since the date of conviction or the date of release from incarceration, whichever is later, and the person has no prior or subsequent convictions.” Despite the absence of any other convictions in Delaware, each man, after requesting a certified copy of his criminal arrest record, received a letter from SBI denying his request for expungement, citing only to his Delaware Criminal Record for the reason of the denial and instructing him to apply to the Superior Court.<sup>30</sup>

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<sup>28</sup> The December 29, 2019 version of 11 *Del. C.* §4373 (a) (3), the version of mandatory expungement under which Qaiymah petitioned, attached as Ex. B.

<sup>29</sup> The June 3, 2019 version of 11 *Del. C.* §4374 (a) (3), the version of discretionary expungement under which Fritz petitioned, attached as Ex. C.

<sup>30</sup> A28, 81.



Each man petitioned his respective denial to the Delaware Superior Court.<sup>31</sup> The only argument the State made in opposition to each petition is that the petitioner was ineligible because he had a subsequent out-of-state conviction.<sup>32</sup> The State claimed that Fritz was ineligible due to a 2011 misdemeanor conviction in Pennsylvania.<sup>33</sup> As to Qaiymah, the State cited 2 misdemeanor convictions, one in Pennsylvania and one in Maryland.<sup>34</sup>

The State's argument was based on its interpretation of the phrase "no prior or subsequent convictions" as requiring the petitioner to have no prior or subsequent convictions in any state, not just in Delaware. However, the State failed to provide legal authority and it failed to provide proof of any kind that either man had any out-of-state conviction.

A Superior Court Commissioner adopted the State's position on the premise that, when the language of the statute is plain, it must be given its "literal meaning." However, she went off track when she concluded that "[t]here are no qualifications or limitations to the plain language 'no prior or subsequent convictions.' These statutory provisions do not provide that the convictions must have occurred in this state to constitute prior or subsequent

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<sup>31</sup> A24, 68.

<sup>32</sup> A34, 89.

<sup>33</sup> A90.

<sup>34</sup> A34.

convictions.”<sup>35</sup> As a result of this erroneous conclusion, she upheld SBI’s unilateral decision, and declined to even consider whether each applicant was worthy of either a mandatory or discretionary expungement.<sup>36</sup>

Both Qaiymah and Fritz appealed the Commissioner’s decision to a Superior Court Judge who issued a short opinion providing no in-depth analysis.<sup>37</sup> Unfortunately, like the Commissioner, the judge accepted the State’s invitation to ignore the well-established principle that the General Assembly “is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.”<sup>38</sup> As a result, the judge erroneously affirmed the Commissioner’s denial of each man’s petition.<sup>39</sup>

***The Superior Court Did Not Follow The Clear And Unambiguous Language of The Expungement Statutes***

While the Superior Court was correct in finding the language of §4373-4374, the eligibility requirements, is plain, it failed to give import to each word

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<sup>35</sup> A18, A71.

<sup>36</sup> A22, 73.

<sup>37</sup> Ex.A.

<sup>38</sup> *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) (quoting *Colonial Ins. Co. of Wisconsin v. Ayers*, 772 A.2d 117, 181 (Del. 2001)). See *Hairston v. State*, 249 A.3d 375, 385 (Del. 2021) (recognizing that it is an elementary rule of statutory construction that “effect must be given, if possible, to every word, clause and sentence of a statute”).

<sup>39</sup> Ex. A.

in the statute. A clear statute needs no interpretation.<sup>40</sup> However, what the State and the Superior Court failed to recognize is that the plain meaning “of certain words or phrases may only become evident when placed in context[.]”<sup>41</sup> and not examined as provisions in isolation.<sup>42</sup> That includes consideration of whether “the same terminology is used elsewhere in a context that makes its meaning clear,” or there can be only one “permissible meaning” that “produces a substantive effect that is compatible with the rest of the law.”<sup>43</sup>

The State’s argument, erroneously adopted by the Superior Court, erroneously focused on the phrase “no prior or subsequent conviction” in isolation.<sup>44</sup> In so doing, it failed to read the phrase in context. This required reading the enabling provision as surplusage, ignoring the language preceding the phrase in the same sentence and disregarding the required process for application.

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<sup>40</sup> *Ryan v. State*, 791 A.2d 742, 743 (Del. 2002) (finding expungement statute unambiguous).

<sup>41</sup> *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 132 (2000)).

<sup>42</sup> *King*, 576 U.S. at 486.

<sup>43</sup> *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

<sup>44</sup> Ex. A .

**The Superior Court erroneously read the plain language of the enabling provision as surplusage.**

As a jumping off point, the Superior Court erroneously read the expungement enabling provision as mere surplusage rather than as a limit on, among other things, the meaning of “prior or subsequent convictions.” Title 11, §4372(a) provides, “[t]his subchapter applies to all criminal cases brought and convictions entered in a court *in this State*.”<sup>45</sup> This language is clear and unambiguous. Delaware’s expungement statute pertains to and considers Delaware criminal cases brought in Delaware courts because the expungement statutes are “*intended to protect persons from unwarranted damage which may occur when the existence of a criminal history continues indefinitely*.”<sup>46</sup> Nowhere in the expungement statutory scheme does the Legislature invite scrutiny of out-of-state records when it comes to considerations of expungement eligibility.<sup>47</sup>

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<sup>45</sup> 11. *Del C.* § 4372 (emphasis added).

<sup>46</sup> 11 *Del. C.* §4371.

<sup>47</sup> With respect to discretionary expungement, once the petitioner meets the threshold for eligibility, out-of-state records may be considered *later* as part of the manifest injustice analysis the Court must undertake when ruling only for a discretionary expungement. 11 *Del. C.* § 4374(e). However, as the Superior Court has noted in the context of a discretionary expungement, “[c]ase law indicates that the bar for proving manifest injustice is not high.” *Webster v. State*, 2016 WL 5939166, at \*2 (Del. Super. Ct. Sept. 2, 2016); *see also Sackett v. State*, 1998 WL 281057, \*4 (Del. Super. May 7, 1998) (finding manifest injustice to adult Petitioner who asserted that her arrest record, which included assaults, could jeopardize her ability to become a

Just before rendering her decision on her interpretation of the enabling statute, the Commissioner stated, matter of factly, “[o]f course, Delaware does not have the power or authority to expunge criminal charges and convictions from any other state.”<sup>48</sup> Yet, she next erroneously concluded that the intent of the provision was to “ma[k]e it clear that the expungement statute is only applicable to expungements of criminal cases brought and convictions entered in a court in this State.”<sup>49</sup> This interpretation runs counter to this Court’s direction that the General Assembly’s statutory language should be construed against surplusage when reasonably possible.<sup>50</sup> It erroneously fails to ascribe purpose to the General Assembly’s use of particular language.<sup>51</sup>

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

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teacher, where that Petitioner had taken responsibility for her actions, sought professional assistance regarding her behavior, and done everything possible to prevent any future violence.).

<sup>48</sup> A19, 70.

<sup>49</sup> A19, 70.

<sup>50</sup> See *Zambrana v. State*, 118 A.3d 773, 776 (Del. 2015) (“We ... ascribe a purpose to the General Assembly's use of particular statutory language and construe it against surplusage if reasonably possible.”); *A.W. Financial Serv. v. Empire Resources*, 981 A.2d 1114, 1131 (Del. 2009) (“[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning.”).

<sup>51</sup> *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

lawmakers and, by extension, Delaware courts. When the Legislature drafted § 4372 (a), it 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.

This Court, in *Fuller v. State*,<sup>52</sup> concluded that a provision in an expungement statute that set forth which convictions are eligible for expungement also defined the limitations on convictions to be considered as disqualifiers from eligibility in a similarly worded statute. In *Fuller*, the issue was whether, for purposes of the discretionary juvenile expungement statute as enacted in 2014,<sup>53</sup> a motor vehicle (or Title 21) offense was a “subsequent adult convictions” disqualifying a petitioner from expungement. One of the factors Court relied upon in concluding that Title 21 offenses were not

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<sup>52</sup> *Fuller v. State*, 104 A.3d 817 (Del. 2014).

<sup>53</sup> In 2014, a juvenile discretionary expungement petition could be granted if:

[a] child has no more than 2 adjudications of delinquency involving separate and distinct cases *where the offenses for which the child was adjudicated delinquent are designated as misdemeanors or violations in Title 4, 7, 11, 16 or 23* ... excepting violent misdemeanors, provided the petitioner has no prior adjudication of delinquency, and *provided the petitioner has no other subsequent adjudication of delinquency or adult conviction*, and provided that the petitioner has no pending criminal charges, and provided that at least 5 years have passed following the date the second adjudication of delinquency was entered in Family Court.

10 Del. C. § 1018(3).

disqualifiers is that such offenses were not themselves eligible for expungement.<sup>54</sup>

Here, to avoid reading § 4372 (a) as surplusage and to give meaning to the words of that provision - “all criminal cases brought and convictions entered in a court in this State” - this Court must take the same approach as it did in *Fuller*. Since § 4372(a) sets out that only Delaware charges can be expunged, then only Delaware charges can be considered as “prior or subsequent convictions.”

**The Superior Court erroneously parsed the phrase “no prior or subsequent convictions” out of the entirety of its sentence.**

In addition to the narrow scope of the court’s authority as provided by §4372(a), the phrase “no prior or subsequent convictions” when read properly within the sentence in which it is contained, offers no justification or intent to refer to out-of-state convictions. The *Fuller* Court also addressed an isolated view of a phrase similar to that at issue in our case - “no other subsequent adult conviction.” The Court noted that the first part of the provision within which the phrase was contained, “delineates the types of offenses that count as ‘adjudications of delinquency’” which were eligible for expungement. Significantly, those offenses “include misdemeanors or violations of ‘Title 4,

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<sup>54</sup> *Fuller v. State*, 104 A.3d 817, 821–22 (Del. 2014).

7, 11, 16 or 23’ or equivalent violations of local ordinances. Importantly, Title 21 violations are not included in the list of offenses that constitute ‘adjudications of delinquency.’”

The Court concluded that the words “other” and “subsequent” refer the reader back to the types of offenses identified earlier. Thus, the Court concluded, the statute “limits the types of “adjudications of delinquency” and “adult convictions” that are relevant for juvenile expungement to those offenses that were previously delineated. Put simply, a “subsequent adult conviction” is best read as referring to a later conviction for a crime in violation of Title 4, 7, 11, 16, or 23. <sup>55</sup>

Here, petitioners sought to have the Superior Court properly interpret the phrase “no prior or subsequent convictions” as referring to only Delaware offenses. With respect to Qaiymah, the entirety of the provision states as follows:

The person was convicted of 1 or more misdemeanors, or a combination of 1 or more misdemeanors and 1 or more violations, relating to the same case, 5 years have passed since the date of conviction, and the person has ***no prior or subsequent convictions***. <sup>56</sup>

With respect to Fritz, the entirety of the provision states as follows:

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<sup>55</sup> *Fuller*, 104 A.3d at 818–19.

<sup>56</sup> 11 Del. C. § 4373(a) (3) (2019), Ex. B.



Was convicted of 1 or more misdemeanors listed in § 4373(b) of this title relating to the same case and at least 7 years have passed since the date of conviction or the date of release from incarceration, whichever is later, and the person has *no prior or subsequent convictions*.<sup>57</sup>

Similar to the provision in *Fuller*, the phrase “no prior or subsequent convictions” refers the reader back to the misdemeanors identified earlier in the sentence. Thus, when read properly, the prior language limits the scope of prior or subsequent convictions to in-state convictions that are of the type that would otherwise qualify for expungement.

**The application process requiring the petitioner to obtain a Delaware criminal record reveals that only Delaware convictions are relevant.**

Finally, the *Fuller* Court also relied on the fact that the petitioner was required to attach to her petition a copy of his criminal history as maintained by SBI. The Court found that this fact reflects the relevant considerations for the reviewing judge are only the offenses contained therein. In other words, because she was not required to attach her motor vehicle record, it was apparent that motor vehicle offenses were not relevant.

Here, Qaiymah and Fritz were required to obtain their Delaware criminal records. Nowhere in the statute does it state that a petitioner must provide out of state records or that out of state records will automatically

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<sup>57</sup> 11 Del. C. § 4374(a) (2019), Ex. C.

exclude an individual from petitioning for either a mandatory or a discretionary expungement. In fact, when SBI sent Fritz and Qaiymah 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 Legislature’s Choice To Use, In The Expungement Statute, More Restrictive Language Regarding “Prior or Subsequent Convictions” Than Is Used In Several Other Remedial Statutes Reveals Its Intent To Limit Review of Convictions To In-State Convictions***

To the extent this Court does not find the language to be plain, 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 that is nowhere found in the expungement statute. The absence of such language indicates that the General Assembly did not intend to include out-of-court convictions to be considered for purposes of expungement.<sup>58</sup> On the other hand, if the statute is ambiguous it will be

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<sup>58</sup> *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).

construed “ ‘in a way that will promote its apparent purpose and harmonize [it] with other statutes within the statutory scheme.’ ”<sup>59</sup>

Delaware has multiple remedial criminal statutes that provide a benefit to certain first-time offenders – i.e., individuals charged with offenses who have no prior offenses. These include probation before judgement,<sup>60</sup> conditional discharge for issuing a bad check,<sup>61</sup> First Offenders Programs in place for alcohol related offenses,<sup>62</sup> controlled substances,<sup>63</sup> and domestic violence.<sup>64</sup> If an individual successfully completes these programs, his/her respective proceedings are discharged and the charges are dismissed<sup>65</sup> without adjudication of guilt; moreover, in each of these programs, the case resolution “is not a conviction for purposes of this section or for purposes of” various “disqualification[s] or disabilities imposed by law upon conviction of a crime[.]”<sup>66</sup>

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<sup>59</sup> *Ins. Comm'r of Del. v. Sun Life Ins. Co. of Can. (U.S.)*, 21 A.3d 15, 20 (Del. 2011).

<sup>60</sup> 11 Del. C. § 4218.

<sup>61</sup> 11 Del. C. § 900A.

<sup>62</sup> 21 Del. C. § 4177B (e) (1) (a).

<sup>63</sup> 16 Del. C. § 4767.

<sup>64</sup> 10 Del. C. § 1024 (c) (1).

<sup>65</sup> *Ryan*, 791 A.2d at 744–45.

<sup>66</sup> *See, e.g.*, 16 Del. C. § 4767 (d). Some still require additional penalties imposed for second or subsequent offenses under 11 Del. C. § 1024(g).

To qualify for each of these respective programs, an individual must not have previously been convicted of:

<p>Probation Before Judgement (2008-current)</p>	<p>“A conviction under the laws of another state, the United States, or any territory of the United States of any offense which is the same as, or equivalent to, any offense specified in paragraph (c)(1) of this section[.]” 11 Del. C. § 4218</p>
<p>First Offenders Program- DUI (2007-current)</p>	<p>“A conviction or other adjudication of guilt or delinquency under § 4175 (b) or § 4177 of this title or a similar statute of any state or local jurisdiction, any federal or military reservation, or the District of Columbia.” 21 Del. C. § 4177B (e) (1) (a).</p>
<p>First Offenders Program – Controlled Substances (2011-current)</p>	<p>“any offense under this chapter or under any statute of the United States or of any state thereof relating to narcotic drugs, marijuana, or stimulant, depressant, hallucinogenic drug or other substance who is charged through information or indictment with possession or consumption of a controlled substance under § 4763, § 4764, or § 4761(a) of this title[.]” 16 Del. C. § 4767</p>
<p>First Offenders Program- Domestic Violence (2016-current)</p>	<p>“a violent felony or any domestic violence offense under Title 11 listed in subsection (a) of this section, or under any statute of the United States or of any state thereof including the District of Columbia relating to a violent felony or acts of domestic violence substantially similar to those criminal offenses listed in</p>

	subsection (a) of this section.” 10 Del. C. § 1024 (c) (1).
Conditional Discharge for Issuing a bad Check (2009-current)	“of issuing or passing a bad check under § 900 of this title or under any statute of the United States or of any state relating to the issuing or passing of bad checks[.]” 11 <i>Del. C.</i> § 900A (a) (2009)

The expansive definitions in each of these remedial statutes is actually how the State erroneously seeks to interpret the much more limited definition provided in the relevant versions of § 4373(a) (3) (2019) and § 4374 (2019). However, if the Legislature wanted the prior convictions to include foreign jurisdictions, it would have used the language used in other remedial statutes. In fact, the legislature has used that same or similar language in other non-remedial statutes.<sup>67</sup>

Over the years, the General Assembly has amended both the mandatory and discretionary expungement statutes multiple times. In the various revisions to the expungement statutes between 2018 and 2022, the Legislature clearly enumerated eligibility requirements, time frames, and specific

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<sup>67</sup> See, e.g., 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. § 4205A(a)(1) (additional penalties for sex offenders); 11 Del.C. § 4214(a) through (d) (habitual offenders); 11 Del.C. § 4215(a) (sentencing enhancements for prior convictions); 11 Del.C. § 8550(2)(c) (child sex abuse information repository); 16 Del.C. § 922(1) (entry upon the Child Protection Registry).

offenses that would be categorically excluded from either a mandatory or discretionary expungement.<sup>68</sup> At no point did it ever seek to broaden the language to include consideration of out-of-state cases, such as that contained in other statutes.

Because the Legislature intended only prior or subsequent convictions in Delaware to be counted, neither Qaiymah nor Fritz were disqualified for expungement consideration due to out-of-state misdemeanor convictions. Remedial statutes should be liberally construed to effectuate their purpose.

***Limiting “Prior or Subsequent Convictions” To Only Delaware Convictions Is Consistent With The Intent To Expand Opportunities For Expungement***

Delaware, like so many other jurisdictions, has followed the general trend toward widening expungement relief. This “includes expanding the types of information, including convictions, that are eligible for expungement; shortening waiting periods; clarifying the legal effect of an expungement with respect to both an ex-offender's history and future activities of an ex-offender; adding private rights of action against those who mishandle expunged information; and lowering the burdens of proof and persuasion when petitioning for expungement.”<sup>69</sup>

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<sup>68</sup> See 11 Del. C. §4372 et seq.

<sup>69</sup> Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 Fordham L. Rev. 2821, 2843–44 (2018).

Discussions of out-of-state convictions are notably absent in legislative history of the various Delaware expungement statutes, and the Delaware Attorney General’s support of the expanded expungement legislation is equally revealing. “Attorney General Jennings firmly believes this is a jobs and anti-crime bill and supports the bill because she has personally seen how expungements have changed people’s lives...Expanding access to expungements will lead to safer communities and second-chances...DOJ is prepared to implement the bill by screening petitions to the court to ensure that applicants are eligible for discretionary [expungements] and will make a recommendation to support or oppose [an expungement] based on the facts of the individual case.”<sup>70</sup> The DOJ neither opposed the expansive expungement legislation nor publicly raised concern about out of state records during legislative negotiations in 2019 and 2021.<sup>71</sup>

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<sup>70</sup> A116.

<sup>71</sup> A107-A119.

## CONCLUSION

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

Respectfully submitted,

/s/Nicole M. Walker

Nicole Walker, Esq., DE #4012  
Chief, Appellate Division  
Office of Defense Services  
*Office of the Public Defender*  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

/s/Eliza M. Hirst

Eliza M. Hirst, Esq., DE #4619  
Post Disposition Unit Head  
Office of Defense Services  
*Office of the Public Defender*  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

/s/John Deckers

John P. Deckers, Esq., DE#3085  
Office of Defense Services  
*Office of Conflict Counsel*  
John P Deckers, P.A.  
800 N. King St., Ste. 303  
Wilmington, DE 19801  
(302) 656-9850  
*Attorneys for Appellants*

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