Case No. SC86236

IN THE MISSOURI SUPREME COURT

IN RE: THE MATTER OF SCOTT DYER

Respondent,

v.

THE STATE OF MISSOURI, SUB NOM. THE CRIMINAL RECORDS REPOSITORY

Appellant.

BRIEF OF THE STATE OF MISSOURI, SUB NOM. THE CRIMINAL RECORDS REPOSITORY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional and Statutory Provisions:

Other:

JURISDICTIONAL STATEMENT

This appeal is taken by the State of Missouri, sub nom. the Criminal Records Repository, from the June 2, 2004, judgment of the Hon. Patrick Clifford, Associate Circuit Judge, Division 39, Circuit Court of St. Louis County, wherein he ordered the expungement of records related to the guilty pleas of Scott Dyer to the felony offenses of forgery and stealing.

The Supreme Court has exclusive jurisdiction over the appeal in this case because part of the judgment held that the 1995 amendments to the applicable law did not apply to Dyer or, apparently in the alternative, were unconstitutional, and that, "[A]ny legislative attempt to punish [Dyer] by denying his equitable right to expunge because of a suspended imposition of sentence [is unconstitutional]." Mo. Const. Art. V § 3 (as amended 1982).

STATEMENT OF FACTS

On June 6, 1990, Scott Dyer, then 18 years old, was arrested by an officer of the Florissant Police Department. L.F. 21, First Amended Petition, Count I ¶ 4. A complaint charging stealing and two counts of forgery was filed in the case on July 6, 1990, in Associate Division 43 of the Circuit Court of St. Louis County. L.F. 59. According to the complaint, Dyer stole a baseball bag, baseball glove, shoes, wallet and two personal checks from Kevin Enlow on May 31, 1990, (L.F. 59-60, Count 3) then on June 6, 1990, acting with Matthew Meininger, forged two checks on the account of Judith Enlow. L.F. 59-60, Counts 1 and 2. Dyer waived his preliminary hearing on September 27, 1990, and was bound over to the circuit court. L.F. 55. One of the forgery counts was dismissed on April 5, 1991. L.F. 50. That same day Dyer pled guilty to forgery and stealing over $150. L.F. 49. The court suspended imposition of sentence and placed Dyer on probation for three years. L.F. 48.

Dyer filed a Petition for Expungement of Arrest Records on March 26, 2004. L.F. 3. A First Amended Petition for Expungement of Arrest Records was filed on May 6, 2004. L.F. 21. The State of Missouri, sub nom. the Criminal Records Repository, (hereinafter the State) filed various motions attacking the first amended petition and an answer to the amended petition on May 24, 2004. L.F. 27-35. Robert McCulloch, the St. Louis County Prosecuting Attorney, also answered in opposition. L.F. 38.

The trial court took the matter up on June 2, 2004. L.F. 2. No transcript of the proceedings was made. Correspondence of Circuit Clerk by Vinson Raybon, dated September 21, 2004, submitted in lieu of transcript of the proceedings. An affidavit by Dyer

was filed, along with Exhibits 1-8. L.F. 41-81. The trial court entered its Judgment and Order of Expungement of Arrest Records that same day. L.F. 82.

The State filed its appeal in this cause, pursuant to a Special Order of the Supreme Court, on August 30, 2004. L.F. 93.

POINTS RELIED ON

I.

The trial court erred in entering the Judgment and Order of Expungement of Arrest Records because :

1) There is no common law right to expungement in Missouri, in that the courts of this state have never recognized such a right;

2) Equitable expungement has been abrogated by statute, in that the Missouri Supreme Court has held that statutory closure of arrest records displaced equitable expungement, and the current expungement statute specifically forbids equitable expungement; and, in any event, Dyer failed to prove up any element of equitable expungement in that there is no evidence in the record that his prosecution was illegal, he was acquitted, or special circumstances existed; and

3) Dyer can not establish his right to expungement under the expungement law, §§ 610.122 RSMo. et seq. (which requires, inter alia, proof that the arrest was based on false information, proof that no probable cause exists, at the time of the action to expunge, to believe the individual committed the offense, and that the arrested person did not receive a suspended imposition of sentence for the arrest or any offense related to the arrest), in that the records of the St. Louis Count Circuit Court show that A) Dyer pled guilty to forgery and stealing, making it clear that there is no reason to believe that the arrest was based on

false information or that there is no probable cause to believe Dyer committed the offense, and B) Dyer received a suspended imposition of sentence in the case, which is itself a bar to expungement.

Cantrell v. State, 624 S.W.2d 495 (Mo. App. W.D. 1981)

Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667 (Mo. banc 1993)

McNally v. St. Louis County Police Dept., 17 S.W.3d 614 (Mo. App. E.D. 2000)

P.B.S v. Prosecuting Attorney's Office, 998 S.W.2d 835(Mo. App. E.D. 1999)

§ 610.122 RSMo.

§ 610.126.2 RSMo.

II.

The trial court erred in entering the Judgment and Order of Expungement of Arrest Records and therein declaring the expungement law, as amended in 1995, unconstitutional because:

1) an Equal Protection violation requires a showing that Dyer is a member of a protected class, or that a fundamental right is at issue, or that there is no rational basis for the law, and Dyer did not make that showing in that there is no evidence of record showing that Dyer is a member of a protected class, a fundamental right is at issue, or the requirements of the expungement law are not rationally related to the State's interest in maintaining arrest records;

2) the questions related to the amending bill's title and content are barred by the statute of limitations, in that § 516.500 RSMo., requires such an action be brought before the end of the next legislative session, but in any event, no later than five years after the passage of the bill;

3) the amending bill was not an ex post facto or retrospective law, in that it imposes no retrospective liability;

4) the amended statute does not violate the separation of powers doctrine, in that the abolition of equitable expungement in the process of creating a unified statutory criminal records scheme does not affect the magistracy of the judiciary;

5) there is no allegation or evidence supporting a Due Process flaw in the amended statute, in that the statute does not prevent or impair any process due to Dyer;

6) maintenance of criminal records does not violate the double jeopardy clause of the constitution, in that the existence of the records does not impose additional penalties on Dyer.

Riche v. Director of Revenue, 987 S.W.2d 331 (Mo. banc 1999)

Stroh Brewery Company v. State of Missouri, 954 S.W.2d 323 (Mo. banc 1997)

Boersig v. Missouri Department of Corrections, 959 S.W.2d 454 (Mo. banc 1997)

Suffian v. Usher, 19 S.W.3d 130 (Mo. banc 2000)

§516.500 RSMo.

ARGUMENT

I

The trial court erred in entering the Judgment and Order of Expungement of Arrest Records because :

1) There is no common law right to expungement in Missouri, in that the courts of this state have never recognized such a right;

2) Equitable expungement has been abrogated by statute, in that the Missouri Supreme Court has held that statutory closure of arrest records displaced equitable expungement, and the current expungement statute specifically forbids equitable expungement; and, in any event, Dyer failed to prove up any element of equitable expungement in that there is no evidence in the record that his prosecution was illegal, he was acquitted, or special circumstances existed; and

3) Dyer can not establish his right to expungement under the expungement law, §§ 610.122 RSMo. et seq. (which requires, inter alia, proof that the arrest was based on false information, proof that no probable cause exists, at the time of the action to expunge, to believe the individual committed the offense, and that the arrested person did not receive a suspended imposition of sentence for the arrest or any offense related to the arrest), in that the records of the St. Louis Count Circuit Court show that A) Dyer pled guilty to forgery and stealing, making it clear that there is no reason to believe that the arrest was based on

false information or that there is no probable cause to believe Dyer committed the offense, and B) Dyer received a suspended imposition of sentence in the case, which is itself a bar to expungement.

A. Standard of Review

This case presents difficult issues in framing the standard of review. The trial court considered the matter on affidavits and exhibits, and entered judgment apparently without a formal trial. This procedure sounds in summary judgment, Rule 74.04. On the other hand, the procedural requirements of Rule 74.04(c) were not followed, and the docket sheet reflects the case was tried by the court. L.F. 2.

If this case was determined pursuant to summary judgment, appellate review is de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. Id. at 377. The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. Id. at 376. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Id. The State has no objections to the exhibits, with the exception of Exhibit 7 (“Bill

Summaries" for HB 135).[1]

On the other hand, appellate review of a court-tried case is ordinarily governed by Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976), which states that the trial court's judgment is to be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. An exception to that rule may well apply in this case, that allows the appellate court to review the record de novo when the trial court's decision was made on the record without testimony. McNally v. St. Louis County Police Dept., 17 S.W.3d 614, 616 (Mo. App. E.D. 2000).

Under either standard of review, the trial court's judgment should be reversed in this case.

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[1] The State's objection is that the "Bill Summaries" are irrelevant to the issues in this case. As discussed in detail in the argument in support of the second Point Relied On hereof, Dyer claims that the 1995 amendments to §§ 610.122 and .123 are unconstitutional because the title and subject of the bill did not clearly express the legislative intent to eliminate expungement for those who had received a suspended imposition of sentence (Petition, Count II, ¶ 3(b), and that the bill contained more than one subject matter that was not clearly expressed in the title. Id. at ¶ 3(e). Whatever value the Bill Summaries may have, the actual bills, published in accordance with § 2.030 RSMo. and the concurrent resolutions, are determinative. Copies are in the Appendix.

B. "Common Law" Expungement

Dyer was found guilty of forgery and stealing in 1991. At that time Missouri did not have a statutory expungement – that process was adopted in 1993.[2] § 610.122 RSMo. and Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667, 669 (Mo. banc 1993).

In paragraph 14 of the judgment the trial court states that its equitable power to expunge is derived from the common law, generally adopted by § 1.010 RSMo. The courts of this state, however, have never recognized a common law right to expungement of arrest records, and have observed that our sister states are divided on the issue. Cantrell v. State, 624 S.W.2d 495, 496 n. 3 (Mo. App. W.D. 1981); accord Rowlett v. Fairfax, 446 F. Supp. 186 (W.D. Mo. 1978); Theodore A. Bruce, Criminal Records and Confidentiality, 44 J. of the Mo. Bar 243, 244 (1988); Gary D. Spivey, Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted, 46 A.L.R.3d 900 (1972; updated through 2004) (Generally courts are divided, but predominant view is no right to relief. Courts have held that retention of records compiled in the course of a legal arrest in confidential files for use by police as an investigative tool is

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[2] In point of fact, Missouri had a system of statutory expungement between 1973 and 1981. Martin v. Schmalz, 713 S.W.2d 22 (Mo. App. E.D. 1986). Expungement provisions of the law were completely eliminated and records which would have been subject to expungement were declared closed in 1981. Id. at 25. "Modern" expungement was adopted in 1993. § 610.122 RSMo.

justified in the interest of promoting effective law enforcement.).

To the extent that the judgment is premised on a common law right to expungement, it erroneously declares or applies the law.

C. "Equitable" Expungement

Prior to the enactment of § 610.126.2 RSMo., Missouri courts from time to time ordered what was called "equitable expungement" of arrest records in cases of illegal prosecution, acquittal, or extraordinary circumstances. Buckler v. Johnson County Sheriff's Department, 798 S.W.2d 155 (Mo. App. W.D. 1989).

Buckler was accused of rape. He was arrested after he refused to submit to a polygraph test. No charges were ever filed against Buckler. The court held that such circumstances, combined with Buckler's stated desire to be a law enforcement officer, constituted an extraordinary circumstance justifying expungement. Buckler, 798 S.W.2d at 158-159.

The Missouri Supreme Court later said that Buckler was "the most liberal of standards established by the court of appeals," and struck down its law enforcement applicant exception. Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667, 669 (Mo. banc 1993). Kuenzle itself disallowed expungement even though Kuenzle wanted to be a law enforcement officer, the facts clearly showed that his arrest was based on false information, and Kuenzle had never even been charged (much less pled guilty). Id. at 669. The court in Kuenzle did so because it found that exercising equitable powers in Kuenzle's favor would

require it to unsettle or ignore § 610.100 RSMo., which allows access to such records for criminal justice employment purposes. Id.

1. The Record Does Not Support a Judgment of Equitable Expungement

Dyer did not allege, there is no evidence on the record, and the trial court did not specifically find that the criminal proceedings against Dyer involved an illegal prosecution, acquittal, or extraordinary circumstance.

In his first amended petition Dyer claims that his arrest was based on false information, and that there is no evidence at this time to believe he committed the offense. L.F. 21, Count I, ¶¶ 5 and 6. Somewhat cagily,[3] Dyer states in his affidavit, "A person I was walking with took a gym bag away from a tennis court. Such person cashed two checks for less than $200.00 by filling in his name as payee. I did not take the gym bag or cash the

[3] The State's umbrage is because these statements do not even begin to exhaust the ways Dyer may have been criminally involved in the crimes at issue. Even if Dyer did not take the bag does not mean he did not aid or encourage the person that did; the fact that someone wrote their name on the check does not exclude criminal liability for Dyer. See § 562.041.1(2) RSMo; State v. Lager, 744 S.W.2d 453, 456 (Mo. App. W.D. 1987), citing State v. Gonzalez-Gongora, 673 S.W.2d 811 (Mo. App. S.D. 1984) (indicia of aiding and abetting include presence at the scene of the crime, flight therefrom and association with others involved before, during, and after the commission of the crime).

checks." L.F. 41, ¶¶ 3-5. Dyer's attorney described his offense to this Court as, "a high school prank." Petitioner's Response to Motion for Special Order of State of Missouri and Motion to Reconsider or for Expedited Hearing, page 2.

These allegations fail to explain the guilty pleas in the criminal court records, which Dyer submitted to the trial court as Exhibit 1. L.F. 45-60. Indeed, a guilty plea is an admission that the pleader engaged in the conduct alleged. State v. Daniels, 789 S.W.2d 243 (Mo. App. W.D. 1990) (owner of truck could not plead guilty to possession of marijuana in criminal case and then deny possession in CAFA action). In fact, his guilty pleas should estop Dyer from arguing that he is not guilty of the offenses which he seeks to expunge. James v. Paul, 49 S.W.3d 678, 689 (Mo. banc 2001) (insured's guilty plea to first-degree assault collaterally estopped relitigation of issues of intent and the exclusion of liability coverage).

Unlike Dyer, the petitioners in Buckler and Kuenzle were never charged; they did not plead guilty. Equitable expungement requires a showing of illegal prosecution, acquittal, or extraordinary circumstances. There was no such showing in this case. The trial court's judgment should, therefore, be reversed as it is not supported by substantial evidence, and is in fact against the weight of the evidence.

2. Equitable Expungement is Barred by Statute

As noted by the Missouri Supreme Court in Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667, 669 n. 2 (Mo. banc 1993), the General Assembly had then recently acted to allow expungement in certain cases and removed court's jurisdiction outside the statute. In 1993 the General Assembly passed HB 170 and HB 562, which provided for expungement of arrest records under certain circumstances.

The General Assembly amended the expungement law in 1995. The amendment eliminated the time limits on bringing an expungement action, added a specific provision that a suspended imposition of sentence was a bar to expungement, and added § 610.126.2 RSMo., which states:

> Except as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record.

1995 Mo. Session Laws HB 135.

The trial court, at Dyer's behest, entered judgment finding that the 1995 amendments do not apply to him. L.F. 82. The logical question then becomes how does the 1993 statute pertain to him? Dyer, after all, pled guilty and the trial court suspended imposition of sentence in 1991. L.F. 48 and 49.

The 1995 amendments repealed § 610.126 RSMo. (1993 Cum. Supp.), and replaced it with the current version of the law. 1995 Mo. Session Laws HB 135. The 1993 version of the law would apply to Dyer if he had brought this action prior to its repeal in 1995. § 1.180 RSMo. Had he been able to obtain a judgment of expungement under the 1993 version of the

law (a point that the State does not concede, as the 1993 law required a finding that the arrest was based on false information and that there was no probable cause, at the time of action to expunge, to believe the individual committed the offense, § 610.122 RSMo. (Cum. Supp. 1993)) the repeal would not have taken away his rights thereunder.

§ 1.170. Dyer's claim that he is entitled in 2004 to use the statute as it existed between 1993 and 1995 is without precedent in Missouri law, and without a factual basis.

D. "Statutory" Expungement.

As set out in the Statement of Facts, Dyer was arrested for, charged with, and found guilty of forgery and stealing. Before an expungement can be granted, § 610.122 RSMo. requires an affirmative finding that the arrest was based on false information, and that five other statutory conditions exist. McNally v. St. Louis County Police Dept., 17 S.W.3d 614, 616 n.2 (Mo. App. E.D. 2000). The statute requires:

> the court determines that the arrest was based on false information and the following conditions exist:
>
> (1) There is no probable cause, at the time of the action to expunge, to believe the individual committed the offense;
>
> (2) No charges will be pursued as a result of the arrest;
>
> (3) The subject of the arrest has no prior or subsequent misdemeanor or felony convictions;
>
> (4) The subject of the arrest did not receive a suspended

imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest; and

(5) No civil action is pending relating to the arrest or the records sought to be expunged.

§610.122 RSMo.

1. Dyer was found guilty of the offense.

Because Dyer was found guilty of forgery and stealing there is no reason to believe that the arrest was based in false information, or that there is no probable cause, at the time of the action to expunge, to believe he committed the offense.

Dyer pled guilty (L.F. 49). A Missouri criminal court cannot enter judgment on a guilty plea unless it is satisfied that there is a factual basis for the plea. Rule 24.04(e). A guilty plea is an admission that the pleader engaged in the conduct alleged. State v. Daniels, 789 S.W.2d 243 (Mo. App. W.D. 1990) (owner of truck could not plead guilty to possession of marijuana in criminal case and then deny possession in CAFA action). Also see James v. Paul, 49 S.W.3d 678, 689 (Mo. banc 2001) (insured's guilty plea to first-degree assault collaterally estopped relitigation of issues of intent and the exclusion of liability coverage).

The trial court erred in granting a judgment expunging the arrest record because the guilty plea and finding of guilty make it clear that the arrest was not based on false information and that there is probable cause to believe Dyer committed the offenses.

2. Dyer received a suspended imposition of sentence.

After Dyer was found guilty on his plea, the court's options included suspending imposition of sentence, with or without a term of probation. § 577.011.2 RSMo. In this case, the criminal court chose to suspend imposition of sentence and impose a term of probation (L.F. 48). Presumptively, Dyer complied with all of the terms of his probation and was routinely discharged therefrom. These facts do not justify an expungement, however.

Section 610.122(4) specifically requires the court to find, "The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest[.]" Since the trial court could not reasonably make that finding on this record, it erred in granting a judgment of expungement. P.B.S v. Prosecuting Attorney's Office of St. Louis Co., 998 S.W.2d 835 (Mo. App. E.D. 1999).

E. The Record Does Not Support the Judgment.

A judgment must be based on evidence and not speculation. P.B.S v. Prosecuting Attorney's Office, 998 S.W.2d 835, 836 (Mo. App. E.D. 1999). In general, a judgment is invalid when there is no evidence to support it. Id; Wesley v. Crestwood Police Department, ____ S.W.3d ____ (Mo. App. E.D. October 12, 2004).

In this case, there is no transcript of the proceedings. Ordinarily, without an evidentiary record, an appellate court is unable to determine what evidence was admitted, what evidence was rejected, and whether a sufficient case was made. Sellenriek v. Director of Revenue, 826 S.W.2d 338, 342 (Mo. banc 1992). In this case, however, the Court can

review the judgment based on the Legal File. See McNally v. St. Louis County Police Dept., 17 S.W.3d 614, 616 (Mo. App. E.D. 2000) (although no record made of hearing, court reviewed case based on the legal file).

Just as in Wesley v. Crestwood Police Department, ____ S.W.3d ____ (Mo. App. E.D. October 12, 2004), the judgment in this case is contrary to the evidence in the record. The trial court in Wesley found that the petitioner had not received a suspended imposition of sentence, when the only evidence in the record showed the exact opposite – he had received a suspended imposition of sentence.

The trial court in this case attempted to evade that problem by finding that suspended imposition of sentence did not matter – the statute did not have the suspended imposition of sentence language in 1991. But it is just as true that there was no statutory expungement in 1991. Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667 (Mo. banc 1993).

F. Conclusion

In summary, at the time of his guilty plea and suspended imposition of sentence Dyer had no right to an expungement. Dyer did not have any right to an expungement between 1993 and 1995 because (just like today) he could not have shown he was arrested based on false information and that there was no probable cause to believe he committed the offenses. After 1995 Dyer was not entitled to an expungement for those same reasons, and because he had received a suspended imposition of sentence. The trial court erroneously declared or applied the law in entering its Judgment of Expungement of Arrest Records, and the judgment

is unsupported by substantial evidence and is against the weight of the evidence.

II.

The trial court erred in entering the Judgment and Order of Expungement of Arrest Records and therein declaring the expungement law, as amended in 1995, unconstitutional because:

1) an Equal Protection violation requires a showing that Dyer is a member of a protected class, or that a fundamental right is at issue, or that there is no rational basis for the law, and Dyer did not make that showing in that there is no evidence of record showing that Dyer is a member of a protected class, a fundamental right is at issue, or the requirements of the expungement law are not rationally related to the State's interest in maintaining arrest records;

2) the questions related to the amending bill's title and content are barred by the statute of limitations, in that § 516.500 RSMo., requires such an action be brought before the end of the next legislative session, but in any event, no later than five years after the passage of the bill;

3) the amending bill was not an ex post facto or retrospective law, in that it imposes no retrospective liability;

4) the amended statute does not violate the separation of powers doctrine, in that the abolition of equitable expungement in the process of creating a unified statutory criminal records scheme does not affect the magistracy of the judiciary;

5) there is no allegation or evidence supporting a Due Process flaw in the

amended statute, in that the statute does not prevent or impair any process due to Dyer;

6) maintenance of criminal records does not violate the double jeopardy clause of the constitution, in that the existence of the records does not impose additional penalties on Dyer.

In the second count of his amended petition, Dyer again alleged most of the elements of statutory expungement, then set forth claims that the 1995 amendments to the expungement law were unconstitutional. Amended Petition, Count II, L.F. 21.

A. Standard of Review

Statutes are presumed to be constitutional. Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. banc 2002). Statutes should not be invalidated unless they clearly and undoubtedly contravene the constitution and plainly and palpably affront the fundamental law embodied in the constitution. Id. To the extent that the constitutionality of a statute has no bearing on the outcome of a case, the constitutional question should not be decided. M.P. v. Missouri Department of Social Services, No. SC85384 (Mo. banc October 26, 2004).

B. Dyer Failed to Establish an Equal Protection Case

In analyzing equal protection claims, this Court first must determine whether the

alleged classification burdens a "suspect class" or impinges upon a "fundamental right." Riche v. Director of Revenue, 987 S.W.2d 331, 336-337 (Mo. banc 1999)(citations and internal quotations omitted).

"Suspect classes" are classes, such as those based upon race, national origin, or illegitimacy, that for historical reasons "command extraordinary protection from the majoritarian political process." "Fundamental rights" include the rights to free speech, to vote, to freedom of interstate travel, as well as other basic liberties. Id.

The only class identified in Dyer's amended petition and the trial court's judgment is the, "class of persons granted a suspended imposition of sentence[.]" Amended Petition, Count II ¶ 3(e), L.F.21. Nowhere in the amended petition or in the judgment is a fundamental liberty interest identified. When a law burdens neither a suspect class nor impinges upon a fundamental right, this Court considers whether the statute is rationally related to a legitimate state purpose. Riche, 987 S.W.2d at 336-337. Under this analysis, a court will strike down the legislation only if the challenger shows that the classification rests on grounds wholly irrelevant to the achievement of the state's objective. Id.

The State's interest in maintaining criminal history records is reflected in the creation of the Criminal Records Repository (§§ 43.500 RSMo. et seq) and the many statutes that are affected by a person's criminal history (e.g. sentencing of prior and persistent offenders, § 558.016 RSMo., jury service § 561.026(3)RSMo., and voting § 561.026 (1) & (2) RSMo.). These records are even more important today with bio-metric identification. Arrest records, such as Dyer's, are the basis of the Automated Fingerprint

Identification System (AFIS). It can be used to identify people who are in custody but may not be giving their true names, and to identify individuals by comparing fingerprints and the identification of suspects through the use of latent prints found at crime scenes. http://www.mshp.state.mo.us/HP32P001.nsf/0/5711a76a46b81323862568c8006df462?OpenDocument (last accessed November 1, 2004). Even victims of crime and other tragedies are sometimes identified by fingerprints. See Kevin Hoffmann, Fifth Body Identified in Prospect Murders, Kansas City Star, September 14, 2004, Page B2. These and other uses are widely accepted. Gary D. Spivey, Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted, 46 A.L.R.3d 900 (1972; updated through 2004) (courts have held that retention of records compiled in the course of a legal arrest in confidential files for use by police as an investigative tool is justified in the interest of promoting effective law enforcement).

The legislature has provided relief for innocent persons arrested by mistake, and victims of identity theft who are incorrectly named in criminal records. §§ 610.122 RSMo. et seq. and § 575.120.4 RSMo. Even in the case of Dyer's purported class, the legislature has exercised discretion and grace. Members of the class have pled guilty to criminal offenses. Despite Dyer's admission of guilt to two different felonies, the legislature has limited who has access to his record and the records of all of the other people who have likewise admitted guilt, but whom trial court judges have decided should have the special benefit of a suspended imposition of sentence. § 610.100 RSMo.

Dyer claims that he lost his job because of the arrest. Petitioner's Response to

Motion for Special Order of State of Missouri and Motion to Reconsider or for Expedited Hearing, page 2.[4] Reasonable people might disagree about the propriety of barring Dyer from his place of work, but that is an issue to be resolved by the federal government. Dyer has not shown that his purported classification rests on grounds wholly irrelevant to the achievement of the State's objectives.

The trial court erred in declaring the 1995 amendments to expungement law unconstitutional on the grounds of Equal Protection.

C. HB 135 (1995) was Not Constitutionally Defective

Modern expungement proceedings in Missouri began in 1993 with the passage of HB 170 and HB 562, codified in §§ 610.122-.126 RSMo. In 1995 HB 135 amended §§ 610.122 and .126, adding provisions that prohibited expungement in cases involving a suspended imposition of sentence and making it clear that expungement pursuant to the statute was the only recourse under Missouri law. In his amended petition for expungement Dyer attacks the constitutionality of HB 135 (1995).

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[4] The Response also says that this issue was raised in the Petition, without citation. The State cannot find a reference to the job loss in either the Petition (L.F. 3) or the Amended Petition (L.F. 21). Dyer's claim appears to be supported, however, by paragraphs 8 and 9 of his affidavit (L.F. 41), Exhibit 2 (L.F. 61), and Exhibit 8 (L.F. 81).

1. The title and subject of the amending bill were clear, and the bill did not contain more than one subject; alternatively, Dyer's challenged is barred by the statute of limitations in § 516.500 RSMo.

In his amended petition Dyer claims that the 1995 amendments to §§ 610.122 and .126 are unconstitutional because the title and subject of the bill did not clearly express the legislative intent to eliminate expungement for those who had received a suspended imposition of sentence. Petition, Count II, ¶ 3(b), L.F. 22. Further, he claims that the bill contained more than one subject matter that was not clearly expressed in the title. Id. at ¶ 3(e).

The actual content of HB 135 (1995) is not in the record. Exhibit 7, captioned. "Bill Summaries," does not set out the language of HB 135 (1995). The bill is published, however, in the 1995 Session Laws, pursuant to the authority of § 2.030 and Senate Concurrent Resolution No. 20.

The title of the bill was, "An Act to repeal sections 209.265, 610.100, 610.122, 610.123, 610.126, 610.150 RSMo 1994, relating to the confidentiality of certain information, and enacting in lieu thereof nine new sections relating to the same subject, with penalty provisions." 1995 Session Laws HB 135, page 1303. Dyer did not favor the parties or the trial court with any factual allegations related to his claims that the bill did not clearly express its purpose in the title or subject, or that it contained more than one subject. Neither does the judgment inform how HB 135 (1995) was constitutionally defective.

A. Statute of Limitations

As pled in the Answer of the State of Missouri to the First Amended Petition for Expungement of Arrest Records, ¶ 13, L.F. 31, Dyer's claims are time barred by the statute of limitations in § 516.500 RSMo. That section provides:

> No action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law, unless it can be shown that there was no party aggrieved who could have raised the claim within that time. In the latter circumstance, the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any person being aggrieved. In no event shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged becomes effective.

§ 516.500 RSMo.

Dyer did not bring this action before the end of the next legislative session after the adoption of HB 135 (1995). He did not bring it within five years of the effective date of HB 135 (1995). He brought the action in 2004. L.F. 3 and 21. His action is time barred.

B. Article III § 21

Even if the action were not time barred, it is not well founded. "The use of . . . procedural limitations to attack the constitutionality of statutes is not favored." Stroh Brewery Company v. State of Missouri, 954 S.W.2d 323, 326 (Mo. banc 1997).

Article III § 21 of the Missouri Constitution, states:

> The style of the laws of this state shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows." No law shall be passed except by bill, and **no bill shall be so amended in its passage through either house as to change its original purpose**. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.

(emphasis added).

For the purpose of Article III § 21, the original purpose of a bill must be determined at the time of the bill's introduction. Stroh Brewery Company, 954 S.W.2d at 326. There is no evidence of record that informs as to the original title and subject of HB 135. The trial court's judgment must, therefore, be reversed as it is not based on any evidence. Certainly the title and subject of the bill as recorded in the 1995 Session Laws meets the requirements of Stroh: all of the subjects in the bill dealt with the issue of protection of information from public disclosure, and they were identified statute by statute. Id.

C. Article III § 23

Article III § 23 of the Missouri Constitution, states:

> **No bill shall contain more than one subject, which shall be clearly expressed in its title**, except bills enacted under the third exception in Section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which money may be appropriated.

(emphasis added).

Stroh also instructs on the "one subject" test under Article III § 23. It is, "whether all of the provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose." Stroh Brewery Company v. State of Missouri, 954 S.W.2d 323, 326 (Mo. banc 1997). In Stroh the original bill proposed amending a section of the liquor control law. Id. at 324. As ultimately passed, the bill amended eight sections of the law and enacted nine new sections. Id. at 325. Since all of the laws affected were from the liquor act, no constitutional violation was found. Id. at 326.

In contrast, the one subject test was violated when a bill on the subject of elections was amended to allow certain counties to adopt constitutions (subject to popular vote). Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994). This Court held that despite the requirement of a vote, the real purpose of the amendment was to create a new for of county government, previously unknown in Missouri. Id. at 102.

The bill in this case is not so ground breaking. It deals with, "the confidentiality of certain information[.]" 1995 Mo. Session Laws HB 135. It created no new law – all of the statutes pre-existed the bill. Certainly the statutes in question were substantially altered by

the bill, but clearly the legislature was refining already existing laws on confidentiality.[5] Even if Dyer's attack on HB 135 is not time barred by the provisions of § 516.500, it is not well founded in fact.

2. The Amending Bill is Not an Ex Post Facto or Retrospective Law.

The Missouri Constitution, Article I § 10, provides, "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." An ex post facto or retrospective law is one which affects substantive or vested rights, such as judgments of record. Arie v. Intertherm, Inc., 648 S.W.2d 142, 158-159 (Mo. App. E.D. 1983); Doe v. Roman Catholic Diocese, 862 S.W.2d 338 (Mo. banc 1993). As discussed in the first Pont Relied On in this brief, Dyer has never had a right to expungement of the records of his arrest, guilty plea and suspended imposition of sentence. HB 135 thus could not act as an ex post facto or retrospective law.

3. The Amended Statute Does Not Violate the Separation of Powers Doctrine

Paragraph 15 of the Judgment states:

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[5] This is especially significant since the public policy of this state calls for open records. § 610.011 RSMo. Arguably HB 135 (1995) was creating exceptions to this public policy – a single subject.

> Any legislative attempt to punish Petitioner by denying his equitable right to expunge because of a suspended imposition of sentence violates Article II, Section I of the Constitution of Missouri, regarding the separation of powers and Article V, Section 14 which reserves judicial powers to the Circuit Courts.

L.F. 84.

Imposition of punishment for violations of the criminal law is the exclusive province of the judiciary. § 557.011 RSMo. As discussed in Section B of this point, there are also collateral consequences to criminal adjudications. See, e.g., Ch. 561 RSMo. The maintenance of criminal records is not, "punishment," as discussed in Section E of this Point.

Section 610.126.2 RSMo. does not violate the separation of powers doctrine. That doctrine, set out in our Constitution in Article II, Section I, states:

> The powers of the government shall be divided into three distinct departments — the legislative, executive and judicial — each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others, except in the instances in the constitution expressly directed or permitted.

This Court held in Suffian v. Usher, 19 S.W.3d 130, 134 (Mo. banc 2000), that absent a constitutional provision to the contrary, it is not an usurpation of judicial power to change or revoke a power created by statute. A statute may modify or abolish a cause of action that

has been recognized by common law or statute. Kilmer v. Munn, 17 S.W.3d 545, 550 (Mo. banc 2000). In this case the legislature has created the records at issue, and provided for their maintenance, dissemination, and expungement. §§ 43.500-.545, 610.100 and 610.122-.126. The magistracy of the judiciary is not affected.

The judgment's reference to Article V, Section 14, is obscure. This Court has held that Article V, the Judicial Article, is devoted to governing the courts and judges. Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 12 (Mo. banc 1992) (Art. V, § 14 not a constraint upon power of the administrative agencies). Neither the amended petition nor the Judgment identify any substantive right purportedly implicated by Article V, Section 14. This Court has never found a substantive right under the provision. Again, the magistracy of the judiciary is not affected by legislative creation, maintenance, dissemination, and expungement of arrest records.

D. Dyer's Due Process Rights Have Not Been Violated

Just like his equal protection claims, neither Dyer in his pleadings nor the trial court in its judgment has favored the defendants with an explanation of how Dyer's due process rights have been violated.

Generally speaking, to establish a Due Process violation a person must show that they have suffered the deprivation of a liberty interest or a property right. Article I § 10 Missouri Constitution. Boersig v. Missouri Department of Corrections, 959 S.W.2d 454 (Mo. banc 1997). As discussed previously regarding "common law" expungement, there is no common

law or constitutional basis to support Dyer's expungement theories. Cantrell v. State, 624 S.W.2d 495, 496 n. 3 (Mo. App. W.D. 1981); accord Rowlett v. Fairfax, 446 F. Supp. 186 (W.D. Mo. 1978); Theodore A. Bruce, Criminal Records and Confidentiality, 44 J. of the Mo. Bar 243, 244 (1988); Gary D. Spivey, Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted, 46 A.L.R.3d 900 (1972; updated through 2004) (Generally courts are divided, but predominant view is no right to relief. Courts have held that retention of records compiled in the course of a legal arrest in confidential files for use by police as an investigative tool is justified in the interest of promoting effective law enforcement.). One who has no due process interest is not entitled to relief. State Board of Registration for the Healing Arts v. Boston, 72 S.W.3d 260 (Mo. App. W.D. 2002).

As demonstrated in the first Point Relied on in this brief, Dyer has never had a liberty interest or property right in expungement of his criminal record. His due process claim must fail.

E. Maintenance of Records Does Not Punish Dyer

The Double Jeopardy Clause of the Fifth Amendment states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. Amend. V. The provisions of Article I § 19 of the Missouri Constitution are essentially to the same effect. "Three distinct abuses are prevented by the Double Jeopardy Clause: (1) a subsequent prosecution for the same offense after acquittal; (2) a subsequent prosecution for

the same offense after conviction; and (3) multiple punishments for the same offense." State v. Mayo, 915 S.W.2d 758, 759 (Mo. banc 1996).

The maintenance of arrest and court records serves many purposes, as set out in the argument pertaining to the first Point Relied On in this brief. The State has been unable to locate a single case where maintenance of conviction records was held to implicate the double jeopardy clause. Like attorney discipline, maintenance of records is probably so far removed from punishment that attempting to fit it into the concepts set out by Mayo simply fails. In re: Caranchini, 956 S.W.2d 910, 914 (Mo. banc 1997) (attorney disciplinary actions are intended to protect the public and not to punish the individual attorney). Arguably maintenance of records protects a defendant's due process right to be free from double jeopardy, as otherwise the defendant might be unable to prove the violation of his constitutional rights.

F. Absent the 1995 Amendment, Dyer is Barred from Expunging His Record

Assuming that he was eligible for expungement under the 1993 version of the expungement law (a point that the State does not concede, as the 1993 law required a finding that the arrest was based on false information and that there was no probable cause, at the time of action to expunge, to believe the individual committed the offense, § 610.122 RSMo. (Cum. Supp. 1993)), the 1993 expungement law required expungement actions be brought within three years of the date of the arrest. § 610.122(4) RSMo. (Cum. Supp. 1993). If the 1995 amendment to the statute is unconstitutional, that statute of limitations still exists, as

pointed out in the answers of the Criminal Records Repository (L.F. 33 ¶ 8), and the Prosecuting Attorney. L.F. 38 ¶3. If the limitation period still exists, the petition is time barred on its face, as Count I, ¶ 4, the amended petition (filed May 6, 2004) alleges that Dyer was arrested on June 6, 1990. L.F. 21. Even if the amended petition relates back to the original petition in this case, the original petition was time barred when filed on March 26, 2004. L.F. 3.

G. Conclusion

The pleadings of Dyer and the Judgment of Expungement of Arrest Records use the language of constitutional protections without foundation. The judgment of the trial court is without substantial evidence to support its constitutional conclusions, and erroneously declares the law.

CONCLUSION

In view of the foregoing, Appellant respectfully submits that the judgment should be reversed, and the Supreme Court should either remand the case for further proceedings, or in the alternative, vacate the Judgment and Order of Expungement of Arrest Records (L.F. 17) and enter judgment in favor of the Criminal Records Repository.

Respectfully submitted

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FOR THE STATE OF MISSOURI

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this ____ day of November, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,056 words.

The undersigned finally certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____

David F. Barrett

APPENDIX