Understanding the Power of the Court: Obtaining Expungement of Court Records After Dismissal or Acquittal

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Overview

- Negative Implications from a Criminal Charge Follow An Accused Even After Dismissal of All Charges or Acquittal.
- Wisconsin statutes regarding sealing court records.
- Supreme Court Rule Ch. 72.
- *In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules,* No. 09-07 (Oct. 27, 2009).
- The Authority for A Circuit Court Judge to Seal a Court Record Following Dismissal or Acquittal.

Employment Discrimination

- Wisconsin law prohibits discrimination in employment and licensing based upon "arrest record" or "conviction record" in employment or licensing (Wis. Stat. § 111.321) with some exceptions (*see* Wis. Stat. § 111.335).

Wisconsin's Employment Discrimination Doesn't Have Teeth

- Some states have enacted regulations regarding employers and their use of criminal history information for employment decisions. These regulations often go unenforced against the employers and the private criminal history information providers. Initial research suggests these regulations are especially difficult to enforce since, in order for an applicant to know that a rejection was based on the use of prohibited criminal history information, either the applicant would have to sue and obtain subpoena power to see the job application information or the employer would have to freely admit the illegal basis for rejecting the applicant. Furthermore, state and federal administrations are unlikely to face political pressure to devote their scarce resources to enforcement of these laws.

  Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 Cal. L. Rev. 1191, 1199-1200 (2006).

Negative implications of a criminal charge after dismissal or acquittal have been studied.

- Study with four sets of résumés:
  - (1) an applicant who had been convicted and sentenced for assault;
  - (2) an applicant who had been tried for assault but acquitted;
  - (3) an applicant who had been tried for assault, acquitted, *and* had a letter from the judge certifying the applicant's acquittal and emphasizing the presumption of innocence; and
  - (4) an applicant who had no criminal record.

Devah Pager, Marked: Race, Crime, and Finding Work in a Era of Mass Incarceration, 49 – 50 (The University of Chicago Press, 2007)(emphasis supplied).

Negative implications of a criminal charge after dismissal or acquittal.

- Result:
  - Employers' interest in candidates declined as a function of the severity of the criminal record, though in all three criminal conditions – even with a letter from the judge "certifying the finding of not guilty and reaffirming the legal presumption of innocence" – applicants were less likely to be considered by employers than the non-criminal control. **The findings of this study suggest that *mere contact* with the criminal justice system can have significant repercussions, with records of "arrest," "conviction," and "incarceration" conveying a stigma differing in degree but not kind.**

Devah Pager, Marked: Race, Crime, and Finding Work in a Era of Mass Incarceration, 49 – 50 (The University of Chicago Press, 2007)(emphasis supplied).

Wisconsin Statutes Related to Record Retention

- Individuals, under 25 years of age, may have misdemeanor and some felony convictions expunged. Wis. Stat. § 973.015.
- An individual who was adjudicated delinquent may petition the judge for expunction of the juvenile record, once the age of 17 is reached. Wis. Stat. § 938.355.
- Fingerprint records maintained by the Wisconsin Department of Justice may be expunged for individuals arrested "and subsequently released without charge, or cleared of the offense through court proceedings[.]" Wis. Stat. § 165.84.
- Supreme Court Rule 72.06 describes "expunction" and advises what the clerk of court is to do "[w]hen required by statute *or* court order to expunge a court record[.]" (Emphasis supplied.)

The Badger State Is Behind the Curve on Statutory Protection for those Charged, but not Convicted, of a Crime

- Forty states allow the expungement/sealing of records of some or all arrests that did not lead to conviction. Of these, twenty-nine states permit the subject of the expunged/sealed records to deny their existence if asked about them on employment applications or similar forms." Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1509 (2003).

In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules, No. 09-07 (Oct. 27, 2009).

- The State Bar proposed that Chapter 72 of the Supreme Court Rules be modified to create Wis. SCR § 72.015, which would read as follows:

  72.015. The time periods for retention of files referred to in rule SCR 72.01 concerning felony, misdemeanor, forfeiture and ordinance files apply to the type of case at the time of the final disposition of the case, rather than the type of case when the file was opened.

In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules, No. 09-07 (Oct. 27, 2009).

- Wis. SCR § 72.06 currently reads:

  SCR 72.06. Expunction. When required by statute or court order to expunge a court record, the clerk of court shall do all of the following:

  (1) Remove any paper index and non-financial court record and place them in the case file.

  (2) Electronically remove any automated non-financial record, except the case number.

  (3) Seal the entire case file.

  (4) Destroy expunged court records in accordance with the provisions of this chapter.

In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules, No. 09-07 (Oct. 27, 2009).

- The State Bar proposed that Wis. SCR § 72.06 be edited to read:

- 72.06(1). Expunction. A court may order a court record expunged under any of the following circumstances:
- (a) When authorized or required to do so by statute.
- (b) On the motion of any party to a case at or after the expiration of the minimum retention period as found under §72.01 for the type of case represented by the final disposition of the matter.
- (c) Upon dismissal of the case, or in the event of a judgment of acquittal, if a court believes expunction is necessary and appropriate:
  - (1) In the interest of justice; and
  - (2) The court finds, either at the time of the dismissal of the case or within a reasonable period of time thereafter, that a party to the case would benefit and society would not be harmed by expunction, either at the time of the dismissal of the case or within a reasonable period of time thereafter.

In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules, No. 09-07 (Oct. 27, 2009).

- Additionally, it is proposed that Wis. SCR § 72.06 be amended to include Wis. SCR § 72.06(2) reading as follows:

- 72.06(2). When expunging a court record, the Clerk of Court shall do all the following:
- (a) Remove any paper index and non-financial court record and place them in the case file.
- (b) Electronically remove any automated non-financial record, except the case number.
- (c) Seal the entire case file.
- (d) Destroy expunged court records in accordance with the provisions of this chapter.
- (e) Notify the Department of Justice of the expunction of the court record pursuant to Wis. Stats., §165.83(2)(A).

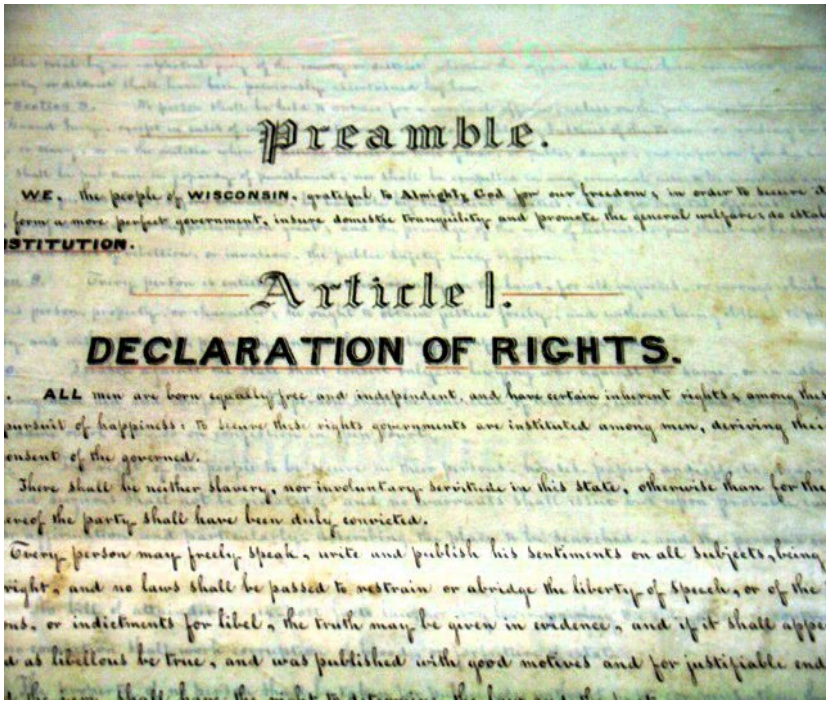
Existing Authority for a Circuit Court Judge to Seal a Case Following Dismissal or Acquittal

- Wisconsin Constitution
- Inherent Authority and Equitable Authority
- SCR §72.06
- My materials outline detail how to make the legal argument to a circuit court judge. They are on the SPD seminar disc.
- In federal court, there is a near-even split among the circuits as to whether a judge has authority to expunge records in the interest of justice. The Seventh Circuit has found such authority but noted such use of interent authority is an "extraordinary remedy." *United States v. Flowers*, 389 F.3d 737, 739-40 (7th Cir. 2004).

Authority for a Circuit Court Judge to Seal a Case Following Dismissal or Acquittal

- Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought obtain justice freely, and without being obligated to purchase it, completely and without denial, promptly and without delay, conformably with the laws.

  Wis. Const., Art. I, § 9


Preamble.

WE, the people of WISCONSIN, grateful to Almighty God for our freedom; in order to secure d
form a more perfect government, insure domestic tranquility and promote the general welfare; do estab
STITUTION.

Article I.

DECLARATION OF RIGHTS.

ALL men are born equally free and independent, and have certain inherent rights; among thes
pursuit of happiness: to secure these rights governments are instituted among men, deriving thei
onsent of the governed.

There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the
ereof the party shall have been duly convicted.

Every person may freely speak, write and publish his sentiments on all subjects, being
right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the
ns, or indictments for libel, the truth may be given in evidence, and if it shall appe
d as libellous be true, and was published with good motives and for justifiable end

Inherent Authority

- A circuit court possess the inherent authority to limit access to records in the interest of justice. *State ex rel. Bilder ex rel. v. Township of Delevan*, 112 Wis. 2d 539, 556-57, 334 N.W.2d 252 (1983).

- "It is uncontested [...] that the right to inspect and copy judicial records in not absolute. Every court has supervisory power over its own records, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

Equitable Authority

- Equitable authority "is a variant of the inherent authority doctrine. It permits a court to grant equitable remedies to private litigants in situations in which there is no explicit statutory authority or in which the available legal remedy is inadequate to do complete justice." *In Interest of E.C.*, 130 Wis.2d 376, 387 N.W.2d 72 (1986).

Current Supreme Court Rule 72

- Supreme Court Rule 72.06 describes “expunction” and advises what the clerk of court is to do “[w]hen required by statute ***or*** court order to expunge a record[.]” (Emphasis supplied.)

Creating a Strong Factual Record is a Must for a Successful Motion

- Describe why the Court ought exercise its inherent and equitable authority to benefit your client.
- Advise your client to document specific harms caused (or inferred) by the presence of the online (and if applicable, paper) court record.
- Keep track of all applications for employment, housing and loans. This *may* mean that the Motion should not be filed for a fair amount of time after conclusion of the case.
- National companies are often unaware of Wisconsin's prohibition on employment discrimination based on arrest record. National companies are more likely to be candid in advising that a client failed a background check.

A Successful Motion to Seal the Record Will Only Seal the Court Record

- *State v. Leitner*, 253 Wis. 2d 449, 472 – 473, 646 N.W.2d 341, 352 – 353 (2002) (expungement applies only to court records and not to records of agencies other than the courts.)
- *In the Interest E.C.*, 130 Wis. 2d 376, 387 N.W.2d 72 (1986)(courts do not have inherent or equitable authority to order expungement of juvenile *police* records when a juvenile delinquency petition was eventually dismissed.)

Now, Go Get ‘Em!

The zealous defense attorney is the last bastion of liberty – the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves.

Alan Dershowitz, The Best Defense 415 (1982).