

# Philadelphia DAO Policy on Expungement and Refile



Effective Date: 5/2/2018

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The following statements of policy are presumptions, not absolutes. If an ADA wishes to deviate from these presumptions, he or she must seek permission from the DA, via a First Assistant.

Pennsylvania law allows expungements and redactions of a defendant's criminal history in a very limited set of circumstances.<sup>1</sup> The guiding statute is 18 Pa.C.S. § 9122. The seminal case on expungements in this jurisdiction is *Commonwealth v. Wexler*, 494 Pa 325 (1981), which lays out the balancing test the Court must use in considering a petition for expungement. In light of this, state law, and city ordinances prohibiting the use of non-conviction data and summary convictions for seeking employment, professional, and occupational licenses, the DAO will only oppose motions for redactions or expungements in limited circumstances.

## **A. The DAO Will Agree to Expunge All Acquittals, Summary Convictions and Diversionary Dispositions**

1. The DAO will agree to the expungement of cases or charges where the defendant has been found not guilty or where the Court has granted a motion for judgement of acquittal.<sup>2</sup> Under the law, there can be no exceptions to this rule.
2. The DAO will agree to the expungement of summary offenses if the law allows for their expungement.
3. The DAO will agree to the expungement of a case after a defendant has successfully completed a diversion program.<sup>3</sup>

## **B. The DAO Will Seek Expungement When A Defendant Has Been Wrongly Accused**

4. In cases where the assigned ADA believes that the charges against a defendant were unfounded, or that the defendant is most likely innocent, the ADA should bring the

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<sup>1</sup> Expungement is the process by which the record of a defendant's arrest or, in very limited cases, conviction, is purged from the public record. Redaction is the process by which the record of certain non-conviction data is purged from the record, even as other data from the same arrest may remain.

<sup>2</sup> See, *Commonwealth v. D.M.* 548 Pa 131 (1997)(an acquitted defendant is automatically entitled to expungement of his arrest record).

<sup>3</sup> *Commonwealth v. Armstrong*, 495 Pa. 506 (1981)(holding that unless Commonwealth can demonstrate overriding societal interest in maintain arrest record, a defendant is entitled to have ARD record expunged).

file to the pretrial supervisor, who will consult with the District Attorney or First Assistant.

### **C. The DAO Will Not Oppose Expungement In the Following Circumstances**

5. The mere fact that a defendant is in custody is not grounds to oppose a motion for expungement or redaction.<sup>4</sup>
6. The DAO will not object to a motion for expungement or redaction simply because the defendant has made a similar motion in the past and been denied. The elements of the test laid out in *Commonwealth v. Wexler, supra*, allows for a change in circumstance with the passage of time, and therefore such an objection is improper.
7. The DAO will agree to expungements and redactions even if a defendant has failed to pay all of his fines and costs, absent strong proof that the defendant is able to pay and is refusing to do so. The ADA assigned to the case should note for the record that the office does not oppose such a request, even if the Court system refuses to complete the expungement.

### **D. The DAO Will Agree to the Expungement of Dismissed and Nolle Prossed Cases and Charges, With Limited Exceptions**

8. With the exception of cases or charges involving sexual or domestic violence<sup>5</sup>, the DAO will agree to the redaction of other charges where the defendant has pled to a lesser offense as part of a negotiation agreed to by this office. For example, where a defendant has been charged with aggravated assault, but has pled guilty to simple assault and, in return, the DAO has agreed to dismiss the lead charge, an ADA should not oppose redaction of the non-conviction data.
9. The DAO will agree to the expungement of all non-conviction data (e.g., cases or charges that have been dismissed or where the DAO has nolle prossed) where the case or charge **does not** involve an allegation of domestic violence or sexual assault. There is one exception: the trial division will keep a list of cases that have been held for court and later nolle prossed, where the office is likely to seek to lift the nolle prosee. If a defendant is seeking expungement of these cases or charges and less

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<sup>4</sup> While the law allows a Court to deny an expungement petition simply because a defendant is in custody on another matter, *see Commonwealth v. Wallace*, 45 A.3d 446 (Pa 2014), it is the position of this office that an individual's custody status alone should not determine whether or not he is entitled to have his record expunged on a matter unrelated to his confinement.

<sup>5</sup> For a discussion of how to proceed in a case involving sexual or domestic violence, see paragraph 10.

than six months have elapsed since disposition, the assigned ADA must consult that list and should oppose expungement where the defendant's name appears on the list.

10. In all cases where a defendant is seeking to expunge cases or charges where he was accused of domestic or sexual violence, the assigned ADA must make a case-by-case determination as to whether expungement is appropriate, using the following balancing test:
  - a. The collateral consequences to the defendant of objecting to the expungement;<sup>6</sup>
  - b. The length of time that has elapsed since the defendant's arrest for the offense which the defendant wishes to have expunged or redacted;
  - c. The facts and the strength of the evidence in the underlying charges that the defendant is seeking to have expunged or redacted,
  - d. The defendant's criminal history prior to, and after, his arrest in the case he wishes to have expunged or redacted.<sup>7</sup>
  
11. In any case involving a homicide or alleged homicide, the supervisor of the homicide unit and the DA, via the First Assistant, should be consulted.

## **E. Refiling Procedure**

12. If an ADA believes that a case should be refiled or the defendant should be rearrested, he or she must seek permission from a First Assistant or the District Attorney within two business days of the time that the case has been discharged or withdrawn. Only the District Attorney or a First Assistant can grant permission to refile.

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<sup>6</sup> The ABA provides a list of searchable consequences: <https://niccc.csgjusticecenter.org/search/?jurisdiction=41> For permitted uses of criminal records by state agencies and employers, *See*, 18 Pa CS § 9124.

<sup>7</sup> An assigned ADA should attempt to assess whether or not the alleged conduct that the defendant is seeking to expunge is indicative of a pattern of similar abuse, and whether expungement or redaction would hide that pattern.