

SUPREME COURT OF WISCONSIN

No. 09-07

**In the matter of amendment of Chapter 72 of the
Supreme Court Rules relating to expunction.**

FILED

JUL 19, 2016

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On June 30, 2009, the Board of Governors of the State Bar of Wisconsin (State Bar) filed a rule petition seeking changes to Supreme Court Rules (SCR) Ch. 72 (Retention and Maintenance of Court Records). The petition asked the court to: (1) amend SCR 72.06 on expunction and (2) create SCR 72.015 on record retention. The State Bar amended its petition on October 27, 2009. The petition explained that information contained on the Wisconsin Circuit Court Access (WCCA) website "is regularly misused" and facilitates using court records for improper purposes. The goal of the rule petition was to "codify the inherent authority of Wisconsin courts to manage their own files and determine when they ought be made public." That is, the proposed rule would, inter alia, allow circuit courts to expressly order that court records be sealed, i.e. not be accessible on WCCA, when a case is dismissed or if someone is acquitted and allow circuit courts to order expunction after the "minimum retention period" for

the type of case represented by the final disposition. Letters were sent to interested persons on December 15, 2009, seeking input and informing them of the public hearing scheduled for February 24, 2010.

The court conducted a very lengthy public hearing on February 24, 2010, and received written submissions and heard compelling testimony from many interested persons. The court discussed the petition at an ensuing open rules conference and expressed interest in exploring ways to provide limited relief to individuals harmed by the online availability of cases that have either been dismissed or that ended in outright acquittal. Ultimately, however, the court took no action on the petition, in part because the court was aware that the Wisconsin State Legislature was then planning to establish a committee to study the same issues.

In the ensuing years, a number of legislative proposals have been advanced, including a bill drafted with the assistance of the Director of State Courts' Office, Assembly Bill 1005. AB 1005 was introduced March 21, 2016, but was not considered during the session.

On April 13, 2016, the court briefly discussed the pending petition and a motion to dismiss the petition failed. The court again discussed the long pending petition at an open rules conference on May 12, 2016. The court noted that since the 2009 rule petition was filed, relevant statutes and rules have changed. For example, Wis. Stat. § 973.015 (Special Disposition) has been amended several times and Ch. 72 has twice been amended. Moreover, the State Bar has

indicated that it is prepared to file a new rule petition. Given the passage of time and the statutory, rule, and case law developments that have occurred since the petition was filed in 2009, a majority of the court determined that it was most efficient to dismiss Rule Petition 09-07 and allow the State Bar to advance new initiatives.

Ultimately, the court voted 5-2 to dismiss the petition and await anticipated legislative action and the filing of a new rule petition by the State Bar. Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley opposed the motion to dismiss the petition, stating they favored retaining the petition. Therefore,

IT IS ORDERED that Rule Petition 09-07 is dismissed.

Dated at Madison, Wisconsin, this 19th day of July, 2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). The Board of Governors of the State Bar of Wisconsin, acting pursuant to the recommendation of the Criminal Law Section and the Individual Rights and Responsibilities Section, proposed this Rule Petition and amended version thereof. I would hold this petition, not dismiss it.

¶2 The principal objective of the State Bar's petition was to allow circuit courts to remove from public view records of cases that were dismissed or that ended in a judgment of acquittal.¹

¶3 The court's order departs from the substance of the petition, conflating the expungement of records in cases that were dismissed or ended in an acquittal with cases in which an individual was convicted of a crime. The order references Wis. Stat. § 973.015 as a "relevant statute" that has been amended since this rules petition was filed. That statute, however,

¹ The petition also creates SCR 72.015, setting forth the time periods for retention of case files. This provision relates to retention; it does not refer to "expungement."

SCR 72.015 Retention of original felony, misdemeanor, forfeiture and ordinance records. The time periods for retention of case files, court records and minute records referred to in rule SCR 72.01 concerning felony, misdemeanor, forfeiture and ordinance cases 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. For any felony, misdemeanor, forfeiture and ordinance cases with multiple counts, the longest retention period of any one count after final disposition applies to all counts in that case.

deals solely with expungement of convictions, which is not the subject of this petition.

¶4 The legislature has been considering changes in the statutes relating to expungement of civil and criminal convictions. I recognize that one legislative proposal also expunges records in cases in which no conviction resulted. See 2015 A.B. 1005 (referenced in the order). The legislature has not acted on this proposal.

¶5 I focus on the text and objective of the petition.

¶6 The amended petition creates a brand new SCR 72.06(1), entitled "Expunction." The new section would read as follows:

- (1) 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.

¶7 The amended petition also renumbers SCR 72.06(1) as 72.06(2) and amends it as follows (the underlining and strikethrough reflect changes to the existing language of the rule):

(2) When ~~required by statute or court order to expunge~~ expunging a court record, the Clerk of Court shall do all the following:

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

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

~~(3)~~ (c) Seal the entire case file.

~~(4)~~ (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).

¶8 Although the proposal raises difficult legal and policy issues, the court can and should make the effort to resolve the legal and policy issues presented.

¶9 Some of these difficult legal and policy issues weigh in favor of granting the petition. For example, individuals whose charges were dismissed or resulted in acquittal testified regarding the hardships they experience as a result of the availability of information regarding their cases. These individuals spoke about lost employment and difficulties in housing, education, and social interactions.

¶10 Other legal and public policy issues weigh against granting the petition. For instance, the court heard testimony about public records law, the public's right to know, and the difficulty of creating different databases within the court system.²

¶11 Despite the tough legal and public policy issues, I would not dismiss the petition. The petition should remain on the court's radar to ensure that we tackle these issues, not bury them. The file on the petition is chock full of important and helpful information. This information and the efforts of the people who testified should not be abandoned.

¶12 The State Bar promises that it will file an amended petition. That's good. This (non-binding) promise, however, does not require or even militate in favor of the court's dismissing the existing amended petition. The court can address any amended petition.

¶13 The Interim Director of State Courts has stated that he plans to reconstitute the WCCA Oversight Committee, which will consider "expungement" of records. The last such committee

² See, e.g., Memo from John Voelker, Director of State Courts, Feb. 3, 2010, at 4-5 (illuminating, among other things, the difficulties in balancing privacy concerns and the possible misuse of court records with "the openness that engenders public trust in the justice system" and numerous "details" posed by the petition that have to be addressed); Letter from Wis. Freedom of Information Council, Feb. 4, 2010, at 1-2 (arguing that the problems the petition seeks to address and the solutions it proposes are vague and "ill-defined" and will lead to uneven results and the denial of information to the public).

reported in March 2006 on a very broad range of CCAP issues.³ If a committee is needed to assist the court in tackling this petition, shouldn't the court appoint such a committee and state its mission? The Interim Director's appointment of a committee dealing with "expungement" generally, like the State Bar's promised amended petition, does not require or even militate in favor of the court's dismissing the existing amended petition.

¶14 Although the court dismisses this rules petition, the court recently granted a petition for review in a case raising issues about the public records law and constitutional questions in a challenge to the Department of Justice's management of a criminal history database. See Teague v. Van Hollen, 2016 WI App 20, 367 Wis. 2d 547, 877 N.W.2d 379, review granted (June 15, 2016). The materials filed in the petition for review detail significant concerns of people whose names or other identifying information appear in government records.

¶15 No harm is done by holding the proposed rule petition. Harm is done by dismissing it.

¶16 For the reasons set forth, I dissent from the order dismissing the amended petition.

¶17 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

³ A copy of the report appears at <https://www.wicourts.gov/courts/committees/docs/wccafinalreport.pdf>.

