

## Freeing A Youthful Offender From His Past

by {ga=ejgoodman}

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He was 20 years old and a teller in a branch of the East New York Savings Bank, when he was arrested and pled guilty to the crimes of embezzling \$730 from the bank and misapplying funds. He qualified for adjudication as a youthful offender, a concept in both federal and state laws intended to give eligible youth a "second chance." He received a suspended sentence and 18 months probation. The court terminated his probation three months early and the judgment of conviction was set aside

But three decades later, the crime still haunted the man known in court records only as John Doe, who is now 53 years old, and has had no further contact with the criminal justice system. The criminal record, he says, has been interfering with his current investment and insurance advisor, and so he filed suit to get rid of it.

In an unusual federal decision, Judge Constance Baker Motley of the United States District Court for the Southern District of New York, has granted the motion to expunge all records in the case of United States of America v. John Doe.

Licensed by the National Association of Securities Dealers (NASD) and working as an independent broker with a subsidiary of Wells Fargo, Doe sought to have all records relating to his arrest and subsequent proceedings, removed from the government's central criminal files, and made unreachable for any purpose other than a bona fide criminal investigation involving him.

According to his motion papers, "a stigma attaches to me as a result of the ability of current and/or potential clients to learn of the fact that I was arrested and charged with embezzlement in 1971, nearly a third of a century ago, will impinge upon my ability to earn a living in my chosen field of endeavor." According to Doe's papers, he is often required to submit applications to insurance companies to function as a broker or salesman, as well as to make periodic filings with the National Association of Securities Dealers, the Securities and Exchange Commission and various other agencies, sometimes more than once a month. Full disclosure in these documents must include the record of arrest, embezzlement of bank funds, prosecution by the federal government and the entire history of his case. In some situations, Doe's attorney alleged, he chose not to file applications rather than provide this history.

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The concern of Doe and his attorney was that certain, if not all, of the documentation, is available to the public, some on NASD's website, where members of the public, clients, competitors, co-workers could easily learn of Doe's past. "In an extremely competitive environment," he claimed in an affidavit submitted to the court, "I know that clients utilize this resource to check the qualifications and background of those who propose to represent or advise them in financial matters. I also know that competitors have access to this information, too, and they can and will use any negative information about me to gain an edge as we vie for institutional clients . . . and will continue to be a source of great personal embarrassment; moreover, the nature of the charge obviously raises questions in a current or potential client's mind . . . ."

While the United States Department of Justice must "acquire, collect, classify, and preserve identification, criminal identification, crime and other records," Judge Motley wrote, "No statutory authority exists for the expunction of federal criminal records . . . but lies within the equitable discretion of the court." Such relief, she noted, is "usually granted only in extreme circumstances." The Court adopted the theory of the Youth Corrections Act, that the purpose of Youthful Offender status, is the "rehabilitation of the young persons in this country who have made their first mistake, so to speak." Taken together with the fact that early discharge from probation with an unconditional discharge led to the dismissal of Doe's case, a conclusion, she says that was "compatible with the welfare of society," the Judge wrote that, "The clear purpose for setting aside a youth offender's conviction was to relieve him not only of the unusual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction." Yet, Judge Motley concluded that, "without expunging the record, the decision to set aside the defendant's conviction, would be rendered essentially meaningless."

Finding "sufficient indication of the harm he is exposed to as long as the records in question remain generally accessible," Judge Motley cited a federal appeals case saying that "courts need not wait for substantial damage to occur before taking remedial equitable action," and incorporated the language that, "aside from the ever present possibility that his record will be indiscriminately disseminated, there is the fact that the mere existence of a criminal record looms ominously through one's life."

Judge Motley ordered that John Doe's records "are not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities and only when necessary for such an investigation. These records may not be used by the government or any of its agents for any other purpose, nor may their contents be disseminated to anyone, public or private, for any other purpose." To further make her point, and without opposition from the U.S. Attorney, Judge Motley ordered the records preserved in a separate storage facility, and not where

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criminal records are maintained.

Still, Harvey Fishbein, president of the New York Criminal Bar Association says, "This is not expunging; there is no actual expunging. "The records will not be destroyed; they still exist." While Fishbein believes that convicted persons and even lawyers need to be educated about available remedies such as sealing, and certificates of relief from disability, he says, "You can hide it, camouflage it, segregate it, but it is never really expunged." Fishbein, who has been practicing criminal law for 30 years, says, "It's fundamentally unfair. There's a point where it should no longer be part of a person's history because he or she is no longer the same person." It is unreasonable, he says, "to saddle someone with an isolated incident." Calling expunging "a misnomer," Fishbein says, "statutes have to be enacted that find the balance between the occasional need to know, and a person being able to say, 'Finally, I am free of that past.'"

Emily Jane Goodman is a New York State Supreme Court Justice

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