

Transcript

No. SCWC-21-0000098, Thursday, October 20, 2022, 10 a.m.
PHILLIP J. BARKER, Petitioner/Plaintiff-Appellant, vs. CHRISTOPHER YOUNG,
ADMINISTRATOR, HAWAII CRIMINAL JUSTICE DATA CENTER,
Respondent/Defendant-Appellee.

E kū i luna. Please rise. 'Auhea 'oukou e ko ka 'Aha. Inā he kuleana i
mua o kēia 'Aha Ho'okolokolo Ki'eki'e Hanohano o ka Moku'āina 'o Hawai'i,
e naue mai, e maliu mai, i lohe 'ia ka leo Here ye, Hear ye, Hear ye. All
persons having any business before this honorable Supreme Court of State
of Hawaii draw nigh, give your attention and you shall be heard. E noho i
lalo. Please be seated.

Please call the case. Case number, SCWC-21-098, Philip J. Barker versus
Christopher Young. Arguing for the petitioner, Philip Barker, Earl
Partington. Arguing for the respondent, Christopher Young, Candace Park.
Argument on the Merits.

All right. Good morning, Mr. Partington and Ms. Park. Are you both ready
to proceed? All right. So, today's proceedings being broadcast live on
our Judiciary YouTube channel. I will say to each of our counsel, if
you'd like to remove your mask when you're at the podium to speak, that's
fine.

It's up to you. Each of you, of course, has 30 minutes. Mr. Partington
will give you a warning with 5 minutes to go. And, Ms Park, you wanted a
warning as well with 5 minutes to go. Very well.

Please proceed.

Yes, Your Honor. Thank you. May it please the court. I had a lot of
trouble when I was preparing for this and where to start? I don't know
why. It's just one of those things. This case to me I think boils down to
basically one simple proposition. And that is that all Mr. Barker is
asking for is that his arrest record be expunged. He is not asking that
the adjudication against him for the violation be expunged.

Now in the answering brief in the ICA, the Attorney General suggested
that if Mr. Barker's position is upheld, this would interfere with the
collecting and keeping and disseminating records. But I submit that's not
the case. HPD will always have the record of the arrest, and the
adjudication will always be available for anyone who wants to view it.
The question is, can he get his mugshot and the arrest record off the
database website?

Can I just ask you if you're he wants the arrest record expunged, but
he's okay with leaving the conviction intact?

Well, yes. And that's because the statute only applies for the arrest
record to be expunged. There's no provision for the adjudication against
him to be expunged.

But that's just if you could explain in practical terms what that means for your client in terms of the arrest record. I'm sorry, the conviction.

Well, I think my client is most concerned about the horrible picture of him that appears on the website. He's a he's a businessman. And obviously, somebody looking at that would not be terribly pleased.

That's the arrest. That's because of the arrest of that picture?

Yes. I would note that I had attached what appears on the Justice Center's website as to my opening brief and asked the ICA to take judicial notice. They refused what I would call the court's attention that H.R. 1101 provides, that the rules of evidence apply in the appellate courts.

And that court and this court has the right to take judicial notice of those records. And I ask the court to do so. Now, I think this case turns on a sentence in the ICA opinion. At 11 where the ICA said a plain reading of subsection two of the expungement statute indicates that expungement applies to violations and for certiorari the term crime must include violations. Now I may be dense, but this makes no sense to me whatsoever. A good example of where a violation, an arrest record for what eventually is a violation would be expunged, is where somebody is arrested for a petty misdemeanor and the prosecutor chooses before it goes to court to reduce it to a violation, and, the defendant in the case fights it and wins. No one can argue that that person is not entitled to an expungement of the arrest record. The statute says so even under the view that the Attorney General takes.

The only question here is do we take the next step where somebody is adjudicated of having committed the acts? Part of the problem we have here is somebody convicted of a violation, normally, the term is not used, convicted.

When you go to court, it's not guilty or not guilty. It's whether you're judged for the state or for the defendant. I don't like using the term convicted for violation because it's not a crime. Violation is a civil offense, of course, under the statute.

And, I think what's really matters here is the attorney general has talked a lot about the legislative intent here. And the legislative intent here seems to be that someone who is adjudicated of a violation should not have an anchor, if you like, hanging around their neck of this arrest record on their record for a civil offense.

That seems to be the whole purpose of decriminalizing violations.

Mr. Partington, can you address the argument? I think this you know, the ICA focused on this, too. The fact that the statute in the exceptions clause section two refers to the five, you know, the circumstance where there's a bail forfeiture for a period of 5 to 5 years and it refers explicitly to violations.

So that seems to contemplate that violations are within, I guess, within the scope of the statute or what what what inference do you draw from that language?

Well, to me, this I was trying to get to this point right now as well. The statute makes it very clear that the legislature understood what a violation was because they put it in subsection two. If that's so, and the legislature understood, understood that clearly, why didn't the legislature then use offense, which includes violations rather than crimes, which does not. I mean, I think the problem here is this statute is absolutely clear on its face. There is no ambiguity in it. The to me, the Intermediate Court of Appeals went out of its way to create an ambiguity that doesn't exist.

You think this statute is really clear?

Oh, yes. I mean, I don't know why. . .

Subsection 2 then please explain to me, It says, all right. So the original act I don't when this law was passed in 1974, I don't think the word violation appeared in the statute. Somewhere along the line violation was added, but it says for a period of five years after arrest or citation in the case of a petty misdemeanor or violation. Now, what? I thought that this statute was just to expunge arrests. So why is citation even mentioned here?

Well, I'm not sure. I think for some reason the legislature wanted the arrest records for those kind of offenses available for five years on the website. That's the only thing I can think of.

Yeah, but have you seen a situation where someone is actually arrested for a violation? Can you be arrested for a violation?

No, someone is not arrested for a violation. But what you have is where people are arrested for petty misdemeanors that are reduced to violations.

And the other big question I have, is it in subsection A? You know, the original act didn't have this language, but. It. It's upon written application from a person arrested for. It originally it said, arrested for comma, but not convicted of a crime.

And then in 1976 it added. Arrested for or charged with but not convicted of a crime. Now, it seems to me that there should be another comma after with. Because otherwise I think that the sentence is nonsensical. But,

they they the legislative history there said, we're trying to make it clear that this statute only applies when someone is actually charged with a crime. Right. And before 1976, it says arrest. It was. What they amended was it said it didn't require a charge, but they added the charged language. So it seems to me now the statute means that. Okay. I'm sorry. So if you're arrested for or charged with. Okay. So if you're arrested for but not charged, it can still be the arrest record can still be expunged, correct?

Yes. I'm just trying to clarify what this. That's correct. Okay. I'm so sorry. I think I misunderstood initially. So-- but I still don't understand how subsection two is clear when it refers to a citation because this is only relating to arrest records.

Well, I think a lot of the problem is the language used. Normally, one is not convicted of a violation. And I think this is important because I agree with you, the statute is not the clearest at that point.

But the fact that the legislature used the word crime, they used the word convicted. All points to me, that civil offenses are not included in that definition.

And basically, this would mean that if a person is had been convicted, like, let's say they're charged with a Class B felony and they're convicted of the petty misdemeanor under lesser included.

That could not be expunged.

That could not be expunged. But if they were convicted of the violation. According to the ICA, it could not be expunged.

Yes, if you put convicted in quotation marks. I think the fairer word to you is if somebody is adjudicated of a violation. Unfortunately, I think the legislature was a little sloppy in the in the language dealing with this, because this statute, I think, has been amended eight or ten times since it was enacted.

And I find it significant. At no point did anyone suggest that the word crime be changed to offense. All these amendments are being made. But to me the legislature is confirming with each amendment that they're talking about crimes.

They're not talking about civil offenses. And this comports with the legislative history. Should someone who's only adjudicated for a violation have to have these horrible mug shots on the Criminal Justice Data Center for life?

Let me ask you and this touches upon your comments about a petty misdemeanor being reduced to a violation. You know, you're a seasoned lawyer. You've been doing this for a long time. Say you're you're defendant gets charged with burglary and that's a B Felony facing ten years jail.

That individual is eligible under Chapter 853 for a deferral of that burglary plea. Now, it's a flimsy case in your view. You're getting ready to go to trial. They say, hey, look, Mr. Partington, I'm going to give your guy a deal, a sweet deal.

We're going to reduce this burglary all the way down to a violation, a wonderful deal, right? But don't you have to go to your client and say, you know what? If you accept that deal, your arrest record, your mug shots are going to be out there forever.

So. But if you get a deferral of your burglary, you can get those records expunged. I mean, would your client be going like, wait, what? What in the world is this wacky system we've got? I mean, given the prominence of deferrals and expungement and or expungement law, in other words, non convictions are entitled to expungement.

Does a violations ineligibility for a deferral play a role in deciding whether we should treat a violation as a crime?

Well, I think we have other expungement statutes in there. I mean, I can imagine a situation where where I could have a client who was so concerned about what the data the data center, he might prefer to go to trial on a petty misdemeanor than accept a plea offer to a violation.

And that, to me, sounds illogical. If someone is is placed in that position, if they get a violation, it's going to be on the Justice Data Center Web site forever. But if he goes to trial on the petty misdemeanor he's charged with, he's got a chance of winning and having the arrest record expunged.

I don't think any defendant should have to make a choice like that.

Could I asked you for your clarification, Mr. Partington, on your position of the definition of crime. Because clearly we have a definition in 701107, right? That says that a violation does not constitute a crime. However, 8031 refers to expungement of a crime.

Right? That seems to be the focus of that statute. And then it includes violation. Now, you might say that there's a bit of a conflict, right? Because there is a reference to violation in a statute, expungement statute that's supposed to apply to crimes, but actually there's a definition, the penal code, that says the violation is not a crime. So help me with that. How do you interpret 831 - 3.2 in terms of whether a violation is a crime in the context of that statute?

Well, I think you have to look at the legislative history of the statute and what it was for. It was for that, that people who were charged with crimes and not convicted of crimes would not have this past. Somebody is young and stupid.

They do something stupid. You got a terrible mug shot. They looked like a punk kid. Then they turned their life around. And the legislative legislative history notes that the purpose of this statute was to prevent that sort of thing following a person through the rest of their life.

Okay. But, how does that relate to whether or not the reference to a violation in 831 is a reference to a crime?

Well, I think that if you look at that history, that's strong evidence that the legislature did not intend violations to be included in the in the word crime. I mean, to me, when you look at the purpose of the statute, to have a violation included in the word crime condemns a lot of

people to having that record in that mug shot on there for the rest of their life. And I can't reconcile that with the legislative intent here.

To be clear, your suggestion is that when the term violation was used for 831, it wasn't meant to refer to a crime. It included violation just to make it clear that arrests for violations also qualify for expungement. Is that your point?

No, I'm suggesting that's in there where people are arrested for crimes and they're reduced to violations.

Okay.

Because that's the only way it makes sense to make. I disagree strongly with the ICA because that subsection two has a reference to violations means that the word crime means offense. I think it just deals with the realistic fact that a lot of people are arrested for crimes but are convicted of violations.

You know what I'm good at? What?

I mean, what is the purpose of subsection two in sort of plain language? Why would the legislature include this provision? What problem were they trying to address? Because, you know, it's sort of sitting there. It's got this reference to violation.

Are they saying that, you know, if you you know, if you didn't show up and your bail was forfeited, you shouldn't get the benefit of this. And this is a category of people who we don't want to give the benefit of this to.

What's what's your read of the purpose of that section?

I think there are concerns where there is no adjudication of any type. Somebody just posts their money. The Court The the statute intends that that record should be there for five years for law enforcement use. That's the only purpose I see it.

Unless you show up and get it resolved.

That's correct. I mean, a bail forfeiture doesn't tell you very much about a case.

We're still going. Let me ask you this, Mr Partington. I mean, because you've talked about, you know, over the years there being sort of this smattering of hodgepodge amendments to this law. And when I look at A1 and A2, it's talking about bail forfeiture, which kind of is a relic of maybe the mid-seventies.

Nowadays, we have a lot of release on our own cognizance. We have supervised release. Those individuals also like might not have bail associated with their case. They abscond, they do not show up. Those individuals then under the law do not seem like they have to wait five years to get their arrest records expunged.

Now, doesn't that present an odd situation where if you actually show up in court, you're not eligible if a violation is treated as a crime? But if you blow it off on an r, o, r, slr, you can get those records expunged.

Does that sort of show again that this is sort of a wackily written law?

Well, I'm not sure I understand your reference to supervised release. Obviously, if you're convicted of a violation there.

There's no bail. There's a lot of people are out there. There's no bail forfeiture, A-1 in A2 directly relate to bail forfeiture. And what I'm saying is, in many situations on release, there's not bail associated.

Well, I'm going to think of the you have large numbers of traffic offenses, some of these that are quite significant that you can post bail and forfeit. And to me, the legislature was concerned that you don't have any record of what went on in that situation other than the the the arrest report itself.

And the legislature wanted to make sure that in those situations, the information is available for five years. That's all I can say. The purpose of that.

Is that there's something concerning about a person who doesn't show up. Again, I'm just trying to understand what the legislature was was trying to address in this section.

Well, I think the problem is where there's no adjudication, there's no record to go back and look at. And I think the legislature's concerned there. I don't know how valid it was. But I think the concern there was that there was an arrest, there was something there of significance, and they want that material available for the immediate

future. That's all I can think of. I mean, to me, it's inconceivable that this statute would be amended 8 to 10 times and the word crime would never be amended. To make it clear, according to the attorney general, that crime includes offense.

And there's a general rule where the legislature doesn't change the statute so that the words in the statute have their normal meaning, or in this case, the meaning of the penal code. And I, I can't understand why why the legislature made this exception other than for that purpose.

If I could follow up on that point, Mr. Partington, I know your view is that the statute is clear that violation was included without any anticipation that the term violation would mean crime. Correct? Correct. On the other hand, you've seen the discussion that suggests that maybe there was an intent to include violation as a crime, since it

follows under the section says that the expungement refers to a crime. So there is the question about whether there's ambiguity. Now, the

intermediate court found ambiguity because it was unclear whether the definition of crime in 701

would actually apply to the expungement statute, too. So assuming that ambiguity that it's not really clear whether violation was meant to be a crime or not. What about the rule of lenity? The idea that if there is ambiguity then the court is inclined to rule in favor of lenity or in this case, in favor of the interpretation of this not being a crime, but being a violation.

Well, I would agree. I would agree with that. I mean, to me, the view that crime includes violations, one violates the rule of lenity, but it also violates the legislative intent. I can't see how it is that people convicted of violations should have this on their record for life.

This is what's the purpose of decriminalizing all of these former crimes and making them civil offenses. If they can haunt you for the rest of your life merely because you were arrested for a petty misdemeanor. And we all know that some police officers are tougher than others.

One police officer might not arrest or bring somebody in on a crime, might just cite them as a violation. Others are going to be tough and give them an arrest for a petty misdemeanor. This is very arbitrary justice and I'm concerned about it and as a criminal defense lawyer, I see things like this. And, I might add, we're not asking for anything terrible. My client's record will be there forever, but we're just asking that that terrible photograph of him and that arrest record come down because he hasn't committed a crime.

You say record you mean to violate the adjudication of the violation, right?

The violation record is there forever, or on the website. Right.

And we don't dispute that, but we don't think he should have to carry that load on his back for the rest of his life, particularly if somebody who got somebody young, 18, 19, did something stupid and now they want to, you know, maybe become a law enforcement officer.

They turn their life around. And what happens when the police say, oh, we looked on the data center and you have an arrest? That's that is contrary to the purpose of this statute.

Mr. Partington, petty misdemeanors and even misdemeanors can also be charged by way of citation, correct?

Well, if there's not guilty findings.

No, they can be. All of those COVID quarantine violations people were being cited with violations, were being issued citations for full misdemeanors.

If they're cited, then there's no arrest and there's no issue.

Right. So that's what I keep saying. I don't understand. It seems to me that the inclusion of the word citation is absurd and illogical. It makes no sense to include citation if this statute only deals with arrests. And if you can't and you cannot be arrested for a violation, so why would violation even be in here?

It doesn't make a lot of sense to me.

Well, I think it makes sense in that a number of cases start out as petty misdemeanors and are reduced to violations. And that's what that's applicable to. I mean, I don't think my client's request is that outrageous. He's a businessman.

He doesn't want that awful picture on the website. And he only had a violation adjudicated against him. And it just it doesn't seem fair in the general context that he should have to have that there for the rest of his life.

Lastly, I would ask if the court should rule in my client's favor. I would ask that the ICA opinion be de-published. Thank you very much.

Alright, Ms. Park.

Well.

Your Honors. May it please the court? Black's Law Dictionary defines crime as an act that makes the law punishable. If you Google definition of crime, the Oxford Dictionary defines it as an action or omission that constitutes an offense that may be prosecuted by the state and is punishable by law.

Under Hawaii law, a violation is prosecuted and punishable by law. Crime in the ordinary common meaning includes violation. The Hawaii Criminal Justice Data Center, which I will refer to as data center, interprets crime in the ordinary sense. The apparent excuse me, the expungement statute applies to persons arrested for or charged with but not convicted of a crime.

It is found in Chapter 831, the Uniform Act on the status of convicted persons. The purpose is to allow a person's record to be expunged where the person is subsequently acquitted or the charges are dismissed. The purpose is to provide relief for persons who are not convicted.

Plaintiff's interpretation would result in the inconsistent application of the law because under plaintiff's interpretation, persons are arrested for or charged with a violation would not be eligible for expungement. This contradicts the purpose of the statute and goes against the rule that statutory language be construed in a manner consistent with its purpose.

Ms Park, let me ask you this and I sort of ask this to Mr. Partington. Let's say there's an arrest for burglary. The police officer comes out arrest somebody for burglary because the prosecutor's office, they're looking at the case.

They decide we're not going to charge burglary, but, you know, we're going to charge a seven or seven, 715 simple trespass. How does make and the person then pleads to that violation. How does making the burglar burglary arrest records not expungible comport with the purpose you just described as to the law?

The purpose of the law is to protect persons who are not convicted, who have an extraneous arrest record out there isn't.

One purpose of the law is almost all call it a rehabilitative type of purpose. I mean, the whole idea of the law is to remove arrest records, mug shots, to allow a person a so-called second chance. Isn't that one of the purposes of the law?

A Yes, Your Honor. But as the law is written today, it is written to protect persons who are not convicted. There may be reasons why we need to amend the law, but as it stands today, the purpose is to prevent persons who are not convicted.

You think it's something that the legislator wanted? And that same burglary hypothetical I gave, let's say it was a burglary where the it was a bad burglary. You know, a person breaks in, steal somebody's Christmas presents, takes their advent calendar.

That person, if they get a deferred acceptance of their guilty plea, has the right to get their records expunged. But in the simple trespass case, they don't. Right? So doesn't that is that really something the legislature intended?

Well, I think as the law is written, if that was an intent, that may have been an unintended consequence. But the the law, as written in 1974, was to protect those who are not convicted, who have an arrest record out there.

They weren't convicted. It was pretty simple back in 1974. There were not other instances, as you describe now, which I think that the legislature did not anticipate.

Could I ask you about that comment part that you made about how it's pretty simple what the legislature did when it created 831-3 because prior to 831-3, I think. As was pointed out by Justice McKenna, the Legislature had defined whether or not a violations of crime right it had passed 701107.

Yes.

And so later when 831-3 was passed, the legislature obviously didn't clarify whether or not a violation was a crime. The definition continued in the penal code, right?

It did.

So in that sense, 701107, we can agree does define violation as not being a crime. And 831-3, doesn't seem to provide a specific contrary definition.

It does. It does.

Okay. Is there someplace where a violation is defined as a crime in 831-3?

Well, again, the common sense of the term crime is how the expungement statute defines crime. That's the way the data center defines crime.

Okay. That is a pretty good answer. But it does mean that we can agree that 831 doesn't provide a specific definition of violation as a crime. You might say common sense if you apply it would suggest that the violations a crime.

But on the other hand, that the common sense that's being discussed here is that maybe the legislature's common sense was, we know, violations, not a crime, because we previously defined that it wasn't and we're going to put violation in here so that we make it clear that there can be an expungement for a violation, particularly

where five years have passed after the arrest.

Uh, I if you. Okay, first of all, I'd like to say that this court has, in fact, indicated that uh. There is no reason to conclude warrantless arrests for violations are prescribed so you can get arrested for a violation.

Okay. So if when did we say that? And in one sentence it was in State v. Kapoi in 1981. Is that a published opinion? It is a published opinion. 64, Hawaii three zero. But is that really consistent with the arrest statutes?

I was just looking, I think is chapter 803. It does seem like it has to be a crime. It actually has to be a crime for arrest. So. And is that a holding or is that is a dicta?

Well, it it it it led to the decision because the the issue of the case was fruit from the poisonous tree. So they did arroant list arrest for trespassing at a party and they arrested the gentleman. And then one of the persons at the party said, oh, you know what he has?

We think he has a gun. So the gentleman's car was there was the arrest for trespassing. Which type of trespassing? He was on in someone's backyard at a party and they didn't want him there. Okay. We'll take a look at that case, but I have another question.

Okay. Ms.. Justice Wilson.

Oh, fine.

Thank you. Did the law in 1972 say that under 701 107, that a violation is not a crime? Yes. All right. Then in 1974, the legislature passes what is now 831-3.2, and it says that

on written application from a person arrested for but not convicted of a crime. Right? Yes. So the legislature is presumed to know that it had already said that a violation is not a crime. In the Hawaii Penal Code.

But that doesn't necessarily apply to the expungement statute. They address different subject matters. Okay. But the penal code does talk about what grades of offenses are, not just with respect to the penal code, but in other statutes. Right.

In other statutes. So if this is if this is not a crime under the statute, if this is not the legislature says it's not a crime, but under subsection six, an offense declared by law to constitute a crime

without specification of the grade thereof or the center sentence authorized upon conviction is a misdemeanor. You're arguing that this violation is a crime, right? As in under the expungement statute. Right. So but under then under 701107 since it's a crime under the expungement statute, it's now a misdemeanor.

Under subsection six of 701127. Is that isn't that absurd? Well, I think what's absurd is if you're under plaintiff's interpretation, if you're arrested for a violation but not convicted youth. . . under plaintiffs interpretation, the expungement statute wouldn't even apply to you, so you would not be able eligible to get your record expunged.

Under the statute. Under the statute. Let me ask you this. 831-3.2 Subsection A2. Does that where the word violation appears? Does that situation have anything to do or does it apply to this petitioner? No, it does not.

But. The general statute says if you're charged with but not convicted of a crime. Right. Yes. All right.

Now, I want to ask you, Ms. Park, because you keep talking about the language of the statute and the way I see the language of the statute as Justice McKenna mentioned, it's somewhat inartful. It's, you know, a person arrested for or charged with but not convicted of a crime.

So you're arrested for you're charged with a crime. You're not convicted of any crime. So can you explain to me why 831 3.2 should be read as applying to the crime or should not be read as applying to the crime that the person was actually arrested for or charged with in Mr. Partington case, the charge, what he was arrested for and charged with that crime was harassment. So could the plain meaning of the statute support the notion that because a person is charged for or with a crime, that doesn't mean any crime. It would mean a situation where the person is charged with murder and the case gets reduced down to assault third. So that's the plain language of the statute. Can you tell me why the plain language of the statute doesn't mean you know any crime because it says a crime.

I'm sorry, Your Honor. I'm not sure I understand. I apologize.

I think. Well, under the plain language, under the reading of the statute. Arrested. Arrested for charged with the crime. Wasn't Mr. Partington his client arrested for or charged with the crime initially?

Yes.

Why wouldn't that be expungible under the plain language of the statute?

But because if you read further, he was arrested for or charged with, but not convicted of a crime. And under the interpretation applied by the data center.

The violation was a crime.

Yes.

What's your read of section two? I mean, that's I see a really Pindar analysis on section two. Sorry. One of my glasses and I the. Section 830 13. 2a2. I asked Mr. Partington, what is this trying to address?

And isn't it plausible at least that the Legislature was trying to, for those people who post bail but don't show up, not allow them to have the benefit of the statute, but that from that relatively narrow intent, how is it that you infer an intent to treat, all violate or to treat all violations as crimes?

Well, okay. For several reasons. And one I've I've indicated already was that if a violation is not considered a crime, then we're going to have a bunch of people who are arrested for violations but not convicted of anything.

And unfortunately, they will not be able to get their record expunged because they don't fit under the narrow technical definition of the Hawaii Penal Code. But that's only if you construe the violation as a crime. But if you.

So I did want you to repeat that. You're saying that under Mr. Partington view, if a person is arrested for a violation. And not convicted. Isn't that what happened to his client? Oh, he got arrested for Petty. How does that differ in treatment under the expungement?

Because why would the person who got arrested and not convicted? Why would a if we construe crime not to include a violation, how does that person not be eligible for expungement? Because the statute says arrested for a crime or charged with the crime, but not convicted of a crime.

If violation is not included in the definition of crime, then you have violators out here who are not covered by that language in the statute under plaintiff's interpretation. Miss Park. I'm going to have to go back and look at Kaiapoi.

But I'm I'm looking again at Chapter eight or three regarding arrests. And it's pretty clear that. Under 803-3, or 803-4, or five arrests are only allowed for crimes, not for violations. If you look at 803-6, it says be able to get six arrests.

How made? Section B in any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor or violation, the police officer may but need not issue a citation in lieu of the requirement, etc. etc..

So. But but I understand what you're getting at. So if you would allow me to explain that what we are expunging is a record of arrest. If you look at arrest record, the definition means any existing photographic and fingerprint cards relating to the arrest.

So, if the person and and, excuse me, sorry, I'm getting excited. The um, if the person. An arrest. Here is a 1997 published Hawaii Supreme Court case, which says an arrest equals taking a person into physical custody or issuing a citation.

Okay. So if you issue someone a citation, they are not, but they don't go to the mugshot and fingerprints. If it when they go to court, if they are sorry. Is that that's a case or is that a statute?

I'm so sorry. Was that a statute?

If it's a case, could you give us a sense? Oh, I'm.

Sorry. It's State V Ballesteros 84, Hawaii 295, 1997. 1997. Yes. So what happens is a police officer issues a citation for a violation and the person goes to court and is found guilty of the violation and is convicted.

According under the law, the person the court will order, then order the convicted person to go to the police station and get photographed and fingerprinted. So even if you are not initially taken in and booked, you will get that arrest record because you will get photographed and fingerprinted.

So that's. That covers. The situation where the police officer did not arrest you for a violation, but yet you're charged with a violation and you do have an arrest record, which doesn't mean, as we all see on TV, the person gets arrested and hauled into jail.

But the arrest record means you have that booking information.

I'm sorry.

Go ahead. How do you know that? Oh, it's in the law. It's in the statute who orders the defendant to go to the police station. Judges don't order it.

What's the stick site? Give us the statute first, if you could. And sir, if it's going to take to go. I don't want to throw you off your argument, but you haven't if you haven't handed it.

I do, but I'm a little. Okay, look, I think.

There's a statute that says when somebody is adjudicated as Mr. Partington or adjudicated of a violation, they are ordered as part of that adjudication to go to the police station to be fingerprinted and booked. Yes, that's true. For not decriminalize traffic offenses as well.

No.

And that's because the statute says that or.

Well, I, I, I don't, I don't want to misquote the statute, but I know it does not include traffic infractions.

Sorry we didn't throw you off your.

Okay. And I'm sorry, I. I don't have the statute handy. But he's still continuing.

So your point there is that the category of people who are going to be disadvantaged by Mr. and read of the statute is actually going to be broader than just those who got arrested in the first instance. It's also going to include people who are adjudicated responsible for non traffic violations because they're going to be ordered to go get booked. That's that's what your point was, if I understand.

Yes. Yes. And so I think where I left off was the inconsistent application of the law, which you just rephrased. Your Honor, I apologize. And so courts must give effect to all words in the statute. So giving effect to all words in the statute.

It does not make sense under plaintiff's interpretation to have a general rule which does not include violations at all, but then have an exception to that general rule for this violation.

The question I asked earlier is that how does it not make sense if perhaps what they were trying to do is address and disadvantage people who don't show up? So that perhaps is not at least a plausible reading of what subsection two does.

We're not going to give you if you post post bail and you don't show up, you're not going to get the benefit of the statute for five years. It's not a path, at least a plausible reading. Do you have to back it all the way up to say, well, that must mean that they include violations?

I'm just asking because that was my question to him.

Well is and I, I respectfully disagree because that person who got a violation would would not be eligible for expungement anyway. Under Mr.. Under Mr. Partington interpretation. Because the rule, the general rule

doesn't apply to violations. So not allowing someone to have their record expunged for violation in two is superfluous.

Because nobody who who gets arrested for a violation, whether you're convicted or not, would be would fall under the general rule, under plaintiff's interpretation. So again, the the rule is to give effect to all language in the statute.

So it would not make sense. I'm sorry, Your Honor.

I know you're providing us a complete explanation, but maybe for my purposes, you could be a little more specific about how you analyze whether or not there's an expungement available for somebody that's arrested for a violation. And maybe I can help in explaining what I think your position is.

Your position is that since a violation essentially is a crime, if somebody is arrested for a violation, they are eligible for expungement. Unless they abscond the jurisdiction, they have to wait five years. Is that your view?

Yes.

Okay.

You know, Ms Park, Mr. Partington mentioned that for citations or violations, rather, that a person really isn't found guilty, they're adjudicated. Is there a determination of guilt when there is a plea to a violation?

Well, Your Honor, I. I'm referring to something that's not in the record, and it's. It's it's this is. Taken from the Grindley case. This is a document that.

It's a nonspecific precedential case that this court did.

Right. But if I and I'm not I'm not bringing it up for that reason. But I am showing that there is. This is what his for better terms rap sheet looks like and.

Are you talking about, Mr. Grindley?

Yes. And and because that's what I had had you. So we're talking about violation. Subject was found guilty. But, you.

Know, you're kind of like you're. I'm sorry, this isn't in the record.

Okay. Okay.

And I'm sorry. And the reason why I asked you that about really what happens is an adjudication or is it a determination of guilt is because 830 1-3.2 has a definition of conviction. And that definition, a conviction is either a verdict or a determination of guilt by the court.

So if there's no determination of guilt by the court and it's just an adjudication, then violations would be expunged, wouldn't they?

Well, it's my understanding that the adjudicate the determination is guilty.

Is there a full colloquy on this guilty plea on violations, or is that you just admit or deny?

I'm sorry, Your Honor. I don't know. Ms Park, I have a question. Your interpretation of 831 Dash. 3.2 is that if we exclude violations as a crime, then persons who are arrested for a violation could not get it expunged even if they were not not convicted.

But suppose somebody under your interpretation is suppose somebody was arrested for something and never charged with anything. So are you saying under this that under this that if he's not ever charged with anything or a crime, then that person can also get it expunged.

The arrest expunged? No. What happens for that person and the statute under your interpretation of the statute, if. If a person is arrested for and charged with but not convicted of a crime. But if the person is never charged with anything.

So he's not convicted of a crime, but it's either arrested or charged. Right. So he could be arrested but not charged? Yes. And you would still you would still be applicable. The statute would apply to you. Arrested for or charged with what?

You're saying that. But I, I appreciate your arguments in Ms Park. And I've reviewing the case that you cited. And it does appear that this court has distinguished between traffic offenses and non traffic offense violations, and this court has held that police officers can arrest.

Oh. Can arrest or cite a person for a violation if they think, you know, if they think the person is going to show up in court, they don't have to arrest the person like for a simple trespass and can issue a citation.

And you're indicating that under those circumstances, when they first they do show up in at the police station and are have mug shot mug shots taken. Is that what happens? Okay. So for that person, if they are found guilty, then the.

And I and I. If they're found guilty. Yes. Of the violation. Yes. Then they will be ordered to report to a criminal justice agency where they get. Booked with for the mugshot and the fingerprint and and the way your the.

Organization is treating those cases there. They're allowing expungement of those. Also, even though they were never arrested. No, they're charged. No, I'm just saying. Can they get those? Are you allowing Expungements for those right now? I'm sorry. What is the full question?

Like what if someone is cited with simple trespass and then convicted of simple trespass? You're saying that then there they have to report and their photos are taken. Is your organization allowing expungements of those photos at those at this time?

No, because that that's a violation. And in the end, when the ordinary sense of the term crime violation is included, so when that that person is then considered arrested for or charged with a crime. So they would not be eligible for expungement.

But the felony person, the misdemeanor person, the petty misdemeanor person who was eligible for a deferral, they can get their records expunged. But a violations is a violation is not eligible for deferral. They cannot. Is that right?

The the person who who who accepts a deferred acceptance of guilt upon the conditions being met the and and he's deemed not guilty at that certain point then he can he or she may get expungement.

Do you think it's an absurd result that this expungement statute allows expungements for felonies, misdemeanors, petty misdemeanors, yet not violations? In the case of a deferral. Because you can't get a deferral for a violation.

Well, I'm sorry, Your Honor. I, i whether that is absurd or not, I think the question is what the statute says today. And if if we need to make some changes to it to bring it up to date, you know, then I understand that. But if you're looking at the language of the statute itself, there's one more thing. If you don't mind. I'd like to point out.

You can finish your thought.

Okay. But this is in this is included in the uniform status of convicted persons is 831-3, which protects convicted persons from severe disabilities and it provides that except as otherwise provided by law, a person convicted of a crime does not sustain loss of civil rights, but retains all of the person's rights, including the right to hold public office and the right to vote. So this, again, would be an inconsistent application because it applies to persons convicted of a crime. And under plaintiff's attorney protection, that would not include persons convicted of a violation. I'm sorry, what statute is that again?

I'm sorry. It's 831, dash three. I'm. I see. I see.

So they would not have the benefit of the protections provided by that statute if they were convicted of a violation.

Yes, Your Honor.

Unless a violation was not a crime.

No. Unless your violation is a crime, then you would get that protection.

Right. But if it's not a crime, if a violation is not a crime, why would that be considered to be a. Matter that would in any way affect your civil rights? It's not a.

Crime. No, it shouldn't. It shouldn't because in 701, dash 107. It does say that there should be no civil abilities attached to a violation. So there is that projection in 71127. But I'm just looking at 831. You know, if you're just looking at 831, then it would be that.

I think that would be absurd if you provided this protection in the statute for everyone except the least serious of crimes, which is violations, insist on an opinion that they don't need to include it because a violation is not a crime.

All right.

Pardon me. Do you think they don't think it evinces an intent that they don't need to include violations because a violation is not a crime? No, it's under 701, right? No, I do not.

I do not a crime. Why included. It's just a non criminal action. It's been taken. I mean, they don't say that if there is a finding of liability because somebody is engaged in negligence, that it their civil rights can't be affected.

It's not necessary.

Well, if it wasn't included in 831, dash three, that that same word crime is used in 831, dash 3.2. So we we're not going to have the word crime used differently in the seeing chapter. You know, I appreciate your various arguments, but I think in terms of focusing on the facts of this case and the issues that

have been specifically raised in this case, you would concede that he was arrested for a crime, correct? Yes. And he was not convicted of a crime. Correct. And incorrect, according to the way that data said. But you knew this all stems on the definition whether or not a violation is a crime.

For purposes of this statute. That's the big that's the issue. Yes. And you're saying that if we find that a violation is not a crime for purposes of this statute, then a person who is cited for a violation and then later

booked. Well. But I thought you said that if someone is cited for a violation currently and then they're convicted of the violation, you're not allowing expungement. Right. But what we're. But yes, but I that data it's not like I thought you're taking the position that a violation is a crime.

No. Right. So if I can back up what the unprotected group here under plaintiff's interpretation is the person who is arrested or charged with a violation, but not convicted of a violation, which is the person the statute is intended to protect.

Under plaintiff's interpretation, this statute will not protect that person. Right now, if someone is charged, cited for simple trespass and they are convicted of simple and they are not convicted of simple trespass. You the CDs, your organization is allowing expungement.

Yes. Because that person was charged or charged with a violation, but not convicted of a violation. He was not convicted. That's the focus. Arrested or charged, but not convicted. So, yes, it appears that there is some, I understand, for purposes of the statute.

I understand. But when we consider the definition of a crime under the penal code, we're starting to get some ambiguities here. Yes, I understand that. But I. The Penal Code 701-107. The purpose of of of that portion, the definition section is to cover offenses that show up in different parts of the Hawaii Revised Statutes.

They want consistency in the classification of the pun of the offense and consistency in the punishment. But what the the expungement statute is dealing with data, the expungement statute is not it's not criminalizing anybody's behavior. It so it's it's not under it does not have to be under the definite narrow technical definitions of the Hawaii Penal Code. It works under the common, ordinary use of the definition of crime.

What's your response to Mr. Partington arguments about the legislative intent behind the statute? So if there is an ambiguity, there's sort of an attempt to not burden somebody in his client's position with the stigma of an arrest. What's your response to that argument?

Well, the act was passed in 1974 and in the Hawaii Session Laws Act 92, section one at page 65. It says the purpose of the statute is to minimize or abolish extrajudicial penalties, which may confront a person who has a record of arrest, even though such arrest did not lead to a conviction.

Period. It is to allow a person's record to be expunged where the person is subsequently acquitted or the charges are dismissed. So that's what the focus is on. Were you acquitted? Were the charges dismissed? If so, we don't want the stigma of your arrest to be attached to you.

They do not mention, although this came after the Hawaii Penal Code definition of crime and violation, they know where in the legislative history do they discuss the narrow technical definition provided by the Hawaii Penal Code? So they don't come in, say 701-107 does not apply to this.

But if you look at the language of the statute, the only way that it makes sense to protect all persons, including those arrested of of of violations, are charged violations, but not convicted is to include violation in the definition of crime.

Let me ask you about that because I see or you're making the point that you exclude from the possibility of expungement everybody that's convicted of a violation if you are taking the position that violations are not a crime?

Oh, no, Your Honor.

Because from what I understand, you're saying, unless it's a crime. You can't get a expungement.

Well, okay.

Is that correct?

I. Yes.

Okay. So let's just stick with that for a sec. So, accepting your proposition that you can't get an expungement unless it's a crime. Let's assume that when the legislature said that violation is not a crime. It then rendered that category of procedure non-criminal. If it's noncriminal, does that mean that there's no remedy from the point of view of a citizen who's facing a non-criminal action that they feel has created a prejudice to them? In other words, you're saying that no action can be brought in the court to remove what would be considered to be, at least in the criminal context, something that is not worthy of being kept in terms of a record for the citizen? Couldn't they bring an action to just remove the the record of the violation if it's not civil in the sense of arrest, in sense of a mug shot?

I don't understand that they're without a remedy completely. If it's non-criminal.

Are you asking me if there is another remedy for the person who is arrested for a violation but not convicted or convicted of a violation, and they take the position, well, this isn't a crime. So I want to make sure that my arrest record, including my mug shot, is is removed.

So if the person was arrested, or arrested and charged and convicted of a violation?

Yeah. And they take the position it's not a crime. And they say, look, people get expungement for a Class B felony where they enter a deferral. Why shouldn't I be able to get this erased from my record? Like, as if it was an expungement.

Why can't I get that erased from my record? Because I've just paid a fine on a simple trespass.

Well, so what happens is that that is Mr. that is plaintiffs situation where we the data center denied his request for expungement and he appealed the decision to the circuit court. And and that that's where we are today.

Because I wonder if the court's got some equitable power to take action where you've got a non-criminal offense that's being treated as though it's criminal. And what's a mug shot in an arrest record on some in a in a database for the state for the rest of their life?

I, I don't know that. But I can tell you what I actually have witnessed in dealing with these cases. It was a situation where the person was convicted of a violation. And it was years ago. Years ago. And, you know, naturally, he wanted his record expunged and we denied it.

And it was appealed and. What the judge did was change some things so that it turned it turned into a deferral and the judge ruled the deferral was satisfied and they changed the outcome of the case. And then, that that's what happened.

Interesting.

That was interesting. Ms Park.

Creative?

Yes. I'm sorry. You know, I'm looking at 803. A31 3.2 Subsection A2. And it says you can't get an expungement for a period of five years after arrest or citation in the case of a petty misdemeanor violation where a conviction has not been obtained because of a bail forfeiture.

So, in other words, if you are charged with a petty misdemeanor or a violation. And. And you forfeit bail. Bail was set and you forfeit bail. And you're still around and nothing happens. After five years, you can get an expungement.

Yes. So, in other words, people that actually show up to court are being penalized. Well under. Mr. under plaintiff's interpretation.

Now under your you wouldn't be able to. I'm sorry.

It would. It wouldn't be able to seek the expungement.

Right. I'm sorry. Until. Isn't that an absurd result? Isn't it absurd to say that you're better off forfeiting bail and skipping out and not showing up in court? No, because if you are convicted, if you're convicted and if you show up, if you show up and you're not guilty and you for a violation, you can get it expunged. If you show up and you're guilty for a violation, you can't get it expunged. But if you don't if you don't show up, I'm sorry. But if you're arrested for a petty misdemeanor, punishable with up to 30 days imprisonment.

If you don't show it for five years, you can get expunged.

And for release on her own recognizance could be two years.

Okay. If it I mean, that that may not sit well with the court. But again, we. What what we're looking at is if. If you have skipped and so there's no conviction. You have skipped. Five years later,

They're going to let you get an expungement. Right? You're better off not showing up. You're better off forfeiting \$25 bail and not showing up and hoping that they don't come back. Yeah. I don't know what your life would be like in those five years.

I don't know what kind of who's going to be searching for you or anything. I'm sorry. I can't speak to if you're better off or not, but I think I think we have to go back to the general rule, which under Mr. under plaintiff's interpretation would leave that the least serious offenders without a remedy for expungement.

It depends on how the law is construed by this court, correct? Yes. But the way the data center construe it is. We include the violators. So that's the best outcome and that does appear to be consistent with the intent of the statute.

Yes. Your honor.. which is to not require people to continue life under a cloud of doubt placed over him by prospective employers, fraternal organizations and the public in general. Yes, Your Honor. So under plaintiff's interpretation, all of those nice things would would would not apply, would not be available to the class of persons who are arrested are cited for violation but not convicted. The most innocent of the whole group. All right, then again, I'm sorry.

I don't know anything further.

No.

Thank you. Ms Park, any final thoughts? We've been going for a while, but I need to know what to do in wrapping up.

Not able to find that citation where after the person is convicted, they are ordered by the court to go get their mugshot and fingerprints. And if you want me to submit a supplemental brief, I can do that.

But you know, if you find the citation and you want to send it provided to the court simply by letter to Mr. Partington without argument. That's okay.

Okay. Is there anything else that I.

I think that was it. So anything further at this time?

No, Your Honor. But thank you very much. This is my first appearance before the Supreme Court, so it's an honor. I appreciate it. Thank you.

All right. We'll hear from Mr. Partington. Up in a moment.

I will try to answer some questions quickly that have been asked. First one is not convicted of a violation. One is adjudicated.

That's for the. That's for purposes of the.

Well, I know I find that there's some sloppy drafting in the statutes on dealing with that because in a violation, judgment is entered for the state for the amount of the file that.

Is for civil traffic infractions. But when you look at 701107 subsection section five, it does after saying that an offense shall not constitute a I'm sorry, a violation does not constitute a crime, the legislature says, and conviction of a violation shall not give rise to any civil disability based on conviction of a criminal offense.

The problem with that word, it's used in a different it has a different meaning in that context, because normally in a conviction, you are judged guilty. In violations, you're not. There's just judgment for the state or judgment for that.

Is that true for simple trespass also? Is that true for simple trespass? Seven one, seven, seven, seven or eight 815?

Well, I just think the legislature was sloppy in using the word. No,

I'm just saying, if somebody is convicted of seven or eight, 815, are they not adjudicated guilty? Are they just found?

Well, I think they're adjudicated the violation judgments entered for the state, but the word conviction is used loosely in the penal code to have two meanings. In one place, it means that adjudication of guilt in another, it means under due to case of guilt or judgment and or for the state in a violation.

And I think that context is confusing.

Mr. Partington, could you address the argument that we were wrapping up with Ms. Park on, which is that under your position you are advocating for, there'll be a class of persons, those who are arrested for a violation but not convicted or adjudicated, whatever it is, who will not have the benefit of this statute if we go the way you're suggesting we should go. What's your response to that?

Well, the problem I have with the argument is I don't believe there's any authority that permits the police to arrest for a violation. They may only cite. Our case law as pretty clear, a Vasconcelos as Ms. Park cited it was very clear that you can be arrested for simple trespass, Vasconcelos and Kaiapoi.

I don't understand that. I mean, to me, you are cited for a violation. And if you look at the said subsection two, if you're cited for a violation, there's no bail. So I don't understand the reference in there to a citation.

So you're given a citation, you go, no bail is ever posted. And I might add, when people are adjudicated on violations, unless my brain is fried, they don't go to the police for fingerprinting and photographing. I can't remember that ever happening on a client of mine.

But, Mr. Partington, do you concede from your argument that an individual who is convicted of a violation, who is actually charged with a violation, would not be eligible for expungement.

Uh huh.

That's an interesting question. Because the statute says charged or arrested for a crime. If you are not arrested for a crime, then the statute is not applicable. I mean, one, you can't be arrested for a violation.

It's not applicable and you get convicted. How do you get an expungement?

Well, I don't think you are a violation if you are adjudicated on a violation and there's no arrest. There's no expungement. It's on your record. But if there.

Is an arrest, you think you do get expunged?

Well, this statute.

Even if you're charged, the original charge you arrested for is a violation. If so, I'm not sure about that analysis.

Well, I don't think you can be arrested for a violation. And the purpose of this statute is to get arrest records off.

I'm with you on that argument, but let's just assume that you can be arrested for a citation. In that case, if you are arrested and you are convicted in your view. You wouldn't be able to get an expungement? Because, the reason I'm asking this is we were having this discussion about is a citation non-criminal.

I mean, if you follow the definition that says that a citation is not a crime, if it's you're convicted of a non-criminal offense or a non-criminal act, do you have some remedies that allow for an equitable remedy that allows for the removal of your record of arrest?

Well, I don't think the statute is applicable in that situation. In other words, if someone is taken in by the police for a violation, then they have a civil remedy against the police for an illegal arrest.

But if you're convicted and it's not criminal, do you have any remedy to remove the records from.

Other than a civil suit? I would say no.

Okay. But the civil suit is a possibility, right? If it's a non-criminal act?

That's correct.

Mr. Partington, what about the other part of the statute upon if you are say not arrested, but if you are charged with but not convicted of. What you if a violation, is not a crime. Can the person?

How is a person supposed to get that expunged?

Well, if you've been adjudicated of a violation, there is no provision in law to have that expunged. Let there is on your not adjudicated.

If you're not adjudicated guilty. So if you are charged with a violation but not convicted, if we exclude violation from different a definition of crime, how is that person?

Well, this statute only applies to arrests or charges. Yes. So and I would say in that situation, there's no record at the criminal justice data center to be expunged.

If the person is arrested or not arrested, but the person is charged.

If they're just charged, the violation. The Criminal Justice Data Center has no record.

But what Ms. Park is indicating is that upon conviction, there are times when people are ordered to appear and have and be photographed. So that can become a part of, I guess, the state and or national system record be records and they are currently treating that as an arrest and allowing expungement for violations.

Well, if it's an arrest for a violation, I submit the only remedy is in civil court. If they're arrested for a crime, the problem is if they're arrested for a violation, I'm not sure the Criminal Justice Data Center has that on record.

Because the Criminal Justice Data Center only records arrests for crimes. I'm not aware of violations are or are on their records. If they are. That's news to me.

She wanted to address Mr. Partington?

I think that's all I have, Your Honor.

Very well. Thank you very much, Mr. Partington and Ms. Park. The court will take this matter under advisement. Thank you.

Thank you very much.

E kū i luna, please rise. Ua ho'oku'u 'ia mai nei kēia 'Aha Ho'okolokolo Ki'eki'e Hanohano o ka Moku'āina 'o Hawai'i. This honorable Supreme Court of the state of Hawaii is now adjourned.