

Spring 2006

## You're Fired - The Role of State Courts in the Expungement of Criminal Records for Federal Security Clearance Purposes

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### Recommended Citation

Megan Dunn, *You're Fired - The Role of State Courts in the Expungement of Criminal Records for Federal Security Clearance Purposes*, 71 MO. L. REV. (2006)

Available at: <https://scholarship.law.missouri.edu/mlr/vol71/iss2/7>

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# You're Fired! The Role of State Courts in the Expungement of Criminal Records for Federal Security Clearance Purposes

In re *Dyer*<sup>1</sup>

## I. INTRODUCTION

The events of September 11, 2001, radically altered many facets of American life. One dramatic change was the establishment of the Federal Department of Homeland Security, created to regulate and oversee various aspects of the federal government in an effort to promote safety and prevent terrorism. As part of this mission, the Department of Homeland Security now manages the investigations that determine eligibility for security clearances necessary for many federal government jobs.

As a result of this process, Scott Dyer was denied renewal of the security clearance necessary for his employment as a building engineer at a federal courthouse in Denver, Colorado.<sup>2</sup> This denial was based on Dyer's criminal record of forgery and theft from an incident that occurred in Missouri in 1990.<sup>3</sup> When Dyer petitioned a Missouri court for expungement of his criminal record, the Missouri Supreme Court denied Dyer's petition and upheld the constitutionality of a statute that limits judicial authority to expunge criminal records to situations involving a list of specific elements.<sup>4</sup>

Although the court's decision produced the seemingly harsh result of denying Dyer a specific avenue for regaining his federal employment, it was ultimately consistent with precedent, constitutional law, and the policies underlying both the expungement of criminal records and the relationship between the federal and state governments.

## II. FACTS AND HOLDING

In 1990, Scott Dyer, then eighteen years old, stole another man's baseball paraphernalia, wallet, and two personal checks, which Dyer and a friend forged.<sup>5</sup> Afterward, the police arrested and charged Dyer with two counts of forgery and one count of theft.<sup>6</sup> Dyer pleaded guilty to one of the forgery

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1. 163 S.W.3d 915 (Mo. 2005) (en banc).

2. *Id.* at 917.

3. *Id.*

4. *Id.* at 920-21.

5. *Id.* at 917.

6. *Id.*

charges and the theft charge, and the remaining forgery charge was dismissed.<sup>7</sup> The court placed Dyer on probation for three years.<sup>8</sup>

Dyer's criminal record prevented him from renewing his security clearance through the Department of Homeland Security in 2004, and as a result of this denial, Dyer lost his job as a building engineer at a federal courthouse in Denver, Colorado.<sup>9</sup> Dyer filed a petition for expungement of these criminal records,<sup>10</sup> arguing that his record was eligible for statutory expungement under Missouri Revised Statutes section 610.122, or in the alternative, for equitable expungement.<sup>11</sup> As an alternative to these two arguments, Dyer argued that section 610.122 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 10 of the Missouri Constitution.<sup>12</sup>

The trial court ruled in favor of Dyer and ordered expungement of his criminal records.<sup>13</sup> The trial court's order of expungement rested on three separate grounds: (1) Dyer satisfied the requirements of section 610.122, which provides for statutory expungement of criminal records; (2) section 610.122 was unconstitutional in that it violated both the United States Constitution and the Missouri Constitution; and (3) section 610.122 was not the exclusive means of ordering expungement; the court's equitable powers include the order of expungement of criminal records and exercise of these powers in Dyer's case was proper.<sup>14</sup>

Because the trial court found section 610.122 unconstitutional, the state had authority to appeal directly to the Missouri Supreme Court.<sup>15</sup> On appeal, the state argued that the trial court's order of expungement was erroneous because the case did not satisfy the elements of section 610.122 and the court had no inherent equitable expungement power.<sup>16</sup> The state further argued that the trial court's holding that section 610.122 was unconstitutional was erroneous because the statute conformed with the Missouri Constitution's "clear title" and "one subject matter" rules and because Dyer's equal protection and due process rights were not violated.<sup>17</sup> In response, Dyer argued that the trial court's decision was not erroneous because equitable expungement had not been barred in Missouri, that he was entitled to equitable expungement, and

7. *Id.*

8. *Id.*

9. *Id.*

10. Brief of the State of Missouri, Sub Nom. the Criminal Records Repository at \*11, *In re Dyer*, 163 S.W.3d 915 (No. SC86236).

11. *See id.* at \*20-26. *See also* MO. REV. STAT. § 610.122 (2000).

12. *In re Dyer*, 163 S.W.3d at 920.

13. *Id.* at 917.

14. *Id.* at 918.

15. *In re Dyer*, 163 S.W.3d at 917. *See also* MO. CONST. art. V, § 3.

16. Brief of the State of Missouri, Sub Nom. the Criminal Records Repository at \*17-18, *In re Dyer*, 163 S.W.3d 915 (No. SC86236).

17. *Id.* at \*30-31.

that section 610.122 was constitutionally defective under the Missouri Constitution's clear title and one subject matter rules.<sup>18</sup>

In a unanimous decision, the Missouri Supreme Court reversed the trial court, holding that Dyer was not entitled to statutory expungement under section 610.122 because the requisite elements were not satisfied, that the inherent equitable power of the judiciary to issue orders of expungement was abrogated in Missouri by the adoption of section 610.122, and that section 610.122 did not violate Missouri's clear title and one subject matter rules or the Equal Protection and Due Process Clauses.<sup>19</sup>

### III. LEGAL BACKGROUND

#### *A. Equitable Expungement of Criminal Records*

A substantial conflict exists among jurisdictions regarding the inherent power of courts to expunge criminal records in the absence of an authorizing statute.<sup>20</sup> Some courts maintain that express legislative authority is necessary for judicial power to expunge criminal records.<sup>21</sup> Some courts in this group view expungement as a distinct legislative task that involves the balancing of public policy interests,<sup>22</sup> while other courts base their conclusion on the deference given to law enforcement agencies in determining the requirements for disposing of criminal records.<sup>23</sup> In contrast, other courts, including federal courts, maintain that the judiciary has the inherent power to expunge criminal

18. Brief of Dyer at \*10, \*24-25, *In re Dyer*, 163 S.W.3d 915 (No. SC86236).

19. *In re Dyer*, 163 S.W.3d at 918, 920-21.

20. For a discussion of the influence of the relationship between legislative actions and equitable powers, see Zymunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

21. See, e.g., *Mulkey v. Purdy*, 234 So. 2d 108 (Fla. 1970) (holding that in the absence of statutory authority, the court could not order the expungement of a criminal record of a person who had previously pleaded guilty to an attempt to commit petit larceny and had completed probation); *Turner v. State*, 876 So. 2d 1056 (Miss. App. 2004) (holding that the court lacked the innate power to expunge the criminal record of a convicted person); *Application of Raynor*, 303 A.2d 896 (N.J. 1973) (holding that the court was without authority to order the expungement of petitioner's record).

22. See, e.g., *Mulkey*, 234 So. 2d 108 (Fla. 1970) (reasoning that the question of whether criminal records should be expunged was a question for legislative determination); *Application of Raynor*, 303 A.2d 896, 897 (N.J. Super. Ct. App. 1973) (reasoning that the question of the right to have arrest records expunged was a matter within legislative discretion).

23. See, e.g., *Commonwealth v. Zimmerman*, 258 A.2d 695, 696 (Pa. Super. Ct. 1969) (reasoning that judicial expungement of criminal records would be contrary to a statute providing law enforcement with the responsibility for maintaining custody of records of convicted persons).

records in limited circumstances.<sup>24</sup> In making determinations regarding expungement of criminal records, these courts typically consider the seriousness of the offense, the prior criminal record, age, and occupation of the convicted person, and the specific governmental interest in retaining the criminal records.<sup>25</sup>

Prior to the adoption of the current section 610.122, Missouri courts occasionally asserted equitable power to expunge criminal records.<sup>26</sup> However, this equitable power was limited to cases that included illegal prosecution, acquittal, or extraordinary circumstances.<sup>27</sup> Further limiting the availability of equitable expungement of criminal records in Missouri is the general requirement that, to qualify for equitable relief, proof of a lack of an adequate remedy at law is necessary.<sup>28</sup> Furthermore, the Missouri Supreme Court has stated that “[u]nless a statutory scheme is plainly inadequate under circumstances where a court has a duty to act, there is no need for the court to exercise its equity powers to fashion a ‘better’ remedy than exists in the statutes.”<sup>29</sup>

### *B. Statutory Expungement of Criminal Records and Section 610.122*

Prior to the adoption of sections 610.100 through 610.150, Missouri courts had no statutory expungement authority and only limited equitable authority to expunge criminal records.<sup>30</sup> This situation changed dramatically in 1993, when the Missouri legislature updated and amended sections 610.100 through 610.150.<sup>31</sup> Of particular importance is section 610.122, which, as amended in 1995, provides:

24. *See, e.g.*, *United States v. Crowell*, 374 F.3d 790, 793 (9th Cir. 2004), *cert. denied*, 543 U.S. 1070 (2005) (holding that federal courts have the inherent power to expunge criminal records in appropriate and extraordinary circumstances despite a lack of express legislative authority); *State v. Schultz*, 676 N.W.2d 337, 340-41 (Minn. App. 2004) (holding that courts have inherent expungement power when retention of records will result in infringement of petitioner’s constitutional rights or when benefits of expungement to petitioner are commensurate with disadvantages to public).

25. *See, e.g.*, *Meinken v. Burgess*, 426 S.E.2d 863, 866 (Ga. 1993) (holding that a balancing test between the defendant’s interest in having criminal records expunged and the state’s interest in retention of the records should be used in determining whether to issue equitable expungement).

26. *See, e.g.*, *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667 (Mo. 1993); *Buckler v. Johnson County Sheriff’s Dep’t*, 798 S.W.2d 155, 158 (Mo. App. 1989).

27. *See, e.g.*, *Kuenzle*, 865 S.W.2d 667; *Buckler*, 798 S.W.2d at 158.

28. *See Ford v. Dir. of Revenue*, 11 S.W.3d 106, 110 (Mo. App. 2000).

29. *Cotton v. Wise*, 977 S.W.2d 263, 264 (Mo. 1998) (en banc).

30. David L. Naumann, *Meaningful Reform of Expungement Law of a Midsummer Night’s Dream?*, 51 J. MO. B. 31, 31 (1995).

31. *Id.*

[A]ny record of arrest recorded pursuant to section 43.503, RSMo, may be expunged if the court determines that the arrest was based on false information and the following conditions exist: (1) There is no probable cause, at the time of the action to expunge, to believe the individual committed the offense; (2) No charges will be pursued as a result of the arrest; (3) The subject of the arrest has no prior or subsequent misdemeanor or felony convictions; (4) The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest; and (5) No civil action is pending relating to the arrest or the records sought to be expunged.<sup>32</sup>

This provision outlined for the Missouri courts, for the first time, the statutory requirements for ordering expungement of criminal records.<sup>33</sup> Additionally, section 610.126(2), as amended in 1995, mandates that, “[e]xcept as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record.”<sup>34</sup>

In *Kuenzle v. Missouri State Highway Patrol*, a petitioner requested expungement of his criminal records under the court’s equitable powers.<sup>35</sup> The Missouri Supreme Court ruled that Missouri courts no longer had such authority, stating, “Equity Courts may not disregard a statutory provision, for where the Legislature has enacted a statute which governs and determines rights of the parties under stated circumstances, equity courts equally with courts of law are bound thereby.”<sup>36</sup> Since the legislature had specifically provided for expungement of certain criminal records under enumerated circumstances in section 610.122, the courts no longer had the equitable authority to expunge criminal records in cases not meeting the statutory requirements.<sup>37</sup> *Kuenzle*, however, preceded the 1995 amendment of section 610.122, and prior to *In re Dyer*, the Missouri Supreme Court had not examined how the amendment influenced the inherent equitable power of Missouri courts to expunge criminal records.<sup>38</sup>

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32. MO. REV. STAT. (2000). According to the Historical and Statutory Notes, “The 1995 amendment inserted ‘or subsequent misdemeanor’ in clause (3), rewrote clause (4), which previously was a limitations provision and added clause (5), relating to pendency of civil action.”

33. Naumann, *supra* note 30, at 32.

34. MO. REV. STAT. § 610.126(2) (2000).

35. *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667, 668 (Mo. 1993) (en banc).

36. *Id.* at 669 (quoting *Milgram v. Jiffy Equip. Co.*, 247 S.W.2d 668, 676-77 (Mo. 1952)).

37. *Id.*

38. Lower Missouri courts had examined this issue prior to *Dyer*. See, e.g., *Ford v. Dir. of Revenue*, 11 S.W.3d 106 (Mo. App. 2000) (holding that the trial court

### C. *The One Subject Matter and Clear Title Rules*

The Missouri Constitution states, “No bill shall contain more than one subject which shall be clearly expressed in its title.”<sup>39</sup> This provision provides two separate limitations to the state legislature’s procedural powers: (1) a bill may only address one subject matter, and (2) the subject of every bill must be clearly expressed in the title.<sup>40</sup> The language of this provision is clearly a mandatory, as opposed to discretionary, direction to the state courts.<sup>41</sup> The Missouri Supreme Court has detailed the various functions this provision serves, including the encouragement of disciplined procedure, prevention of surprise, deterrence of logrolling,<sup>42</sup> promotion of public awareness and understanding of pending legislation, and preservation of clear choices for the governor when deciding whether to exercise the veto power.<sup>43</sup> In sum, the rules act to prevent “fraudulent, misleading, and improper legislation.”<sup>44</sup>

The Missouri Supreme Court has established standards for determining whether a bill violates the clear title rule.<sup>45</sup> The title of a bill must generally denote the type of legislation enacted.<sup>46</sup> Thus, if the subject matter of any bill exceeds the limits of the title, the title and the bill should be ruled constitutionally invalid.<sup>47</sup> The court does not, however, require that the title of a bill include every detail or aspect of the bill itself; a title depicting the “general content” of the bill is constitutionally sufficient.<sup>48</sup> A title can be too general, however, if it is so vague that the contents of the underlying bill cannot be reasonably ascertained.<sup>49</sup>

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lacked the inherent equitable power to expunge criminal records where a statute existed governing the expungement of such records).

39. MO. CONST. art. III, § 23.

40. *Carmack v. Dir., Mo. Dep’t of Agric.*, 945 S.W.2d 956, 959 (Mo. 1997) (en banc).

41. *Id.*

42. Logrolling is defined as “[t]he exchanging of political favors; esp[ecially], the trading of votes among legislators to gain support of measures that are beneficial to each legislator’s constituency.” BLACK’S LAW DICTIONARY 960 (8th ed. 2004).

43. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. 1997) (en banc).

44. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo. 1997) (en banc).

45. *Nat’l Solid Waste Ass’n v. Dir. of Dep’t of Natural Res.*, 964 S.W.2d 818, 820 (Mo. 1998) (en banc) (quoting *Fust*, 947 S.W.2d at 429).

46. *Fust*, 947 S.W.2d at 428.

47. *Id.*

48. *Id.* at 429.

49. *Id.* For examples of titles held to violate the clear title rule, see *Home Builders Ass’n of Greater St. Louis v. State*, 75 S.W.3d 267, 270-71 (Mo. 2002) (en banc) (holding that the title “relating to property ownership” fails the clear title requirement); *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 147-49 (Mo. 1998) (en banc) (holding that the title “An Act To repeal sections 355.176, 355.331, 402.215 and 473.657, RSMo 1994, relating to certain incorporated and non-incorporated en-

Additionally, the Missouri Supreme Court has established a test for determining whether a bill violates the single subject rule. To contain only one subject, the provisions of a bill must “fairly relate to the same subject, have natural connection therewith or [be] incidents or means to accomplish its purpose.”<sup>50</sup> The initial inquiry in determining whether a bill meets this test centers on the title, assuming the title is not too broad to violate the clear title rule.<sup>51</sup> To meet the requirements of the test, the challenged provision must relate to or have a connection with the subject expressed in the title or be a method to accomplish the purpose of the bill.<sup>52</sup> If a court finds that a bill violates the single subject rule, the entire bill is unconstitutional “unless the Court is convinced beyond a reasonable doubt that one of the bill’s multiple subjects is its original, controlling purpose and that the other subjects are not.”<sup>53</sup> If a court determines the original, central purpose of a bill, the court may remove the unconstitutional portions of the bill dealing with other subjects and allow the remainder of the bill dealing with the primary purpose to stand.<sup>54</sup>

Despite these restrictions, Missouri courts afford legislative acts a “strong presumption of constitutionality.”<sup>55</sup> In keeping with this presumption, procedural attacks on legislation are disfavored by the courts.<sup>56</sup> Thus, all doubts regarding the procedural constitutional validity of legislative acts are resolved in favor of the acts, and courts require a finding of clear constitutional procedural violation before rendering any legislative act unconstitutional.<sup>57</sup> Additionally, courts will seek to avoid interpretations of legislative acts that are limiting or destructive.<sup>58</sup> Finally, the party asserting that a legislative act is an unconstitutional violation of one of these requirements bears the burden of proof.<sup>59</sup>

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tites, and to enact in lieu thereof eleven new sections relating to the same subject” fails the clear title requirement).

50. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 6 (Mo. 1984) (en banc).

51. *Mo. Health Care Ass’n v. Attorney Gen.*, 953 S.W.2d 617, 622 (Mo. 1997) (en banc).

52. *Fust*, 947 S.W.2d at 428. For an example of the court’s analysis in finding a violation of the single subject rule, see *Carmack v. Dir., Mo. Dep’t of Agric.*, 945 S.W.2d 956 (Mo. 1997) (en banc).

53. *Carmack*, 945 S.W.2d at 961 (quoting *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103) (Mo. 1994) (en banc)).

54. *Id.*

55. *Hammerschmidt*, 877 S.W.2d at 102.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Fust v. Attorney General*, 947 S.W.2d 424, 428 (Mo. 1997) (en banc).



*D. National Security Clearance*

Protecting delicate national information from foreign nations or organizations and seditious internal forces is essential to the national security of the United States.<sup>60</sup> Secrecy is necessary in part because, during both war and peace, a lapse in confidentiality of sensitive data can present military opponents with advantages in successfully defending against military operations or developing new military technologies.<sup>61</sup> Furthermore, protected and secure intelligence operations are integral to obtaining adequate warning of potentially threatening activity (particularly given the heightened risk of terrorism present today) and maintaining beneficial diplomatic relationships with other nations.<sup>62</sup>

Given the significant need for protecting sensitive information, the Executive Branch has developed an extensive security clearance process for federal government employees.<sup>63</sup> Through the grant of a security clearance, the federal government places its trust in the recipient to appropriately handle sensitive information.<sup>64</sup> A security clearance is necessary for many federal government jobs, and the denial or revocation of a security clearance often results in an employee's termination.<sup>65</sup> The denial or revocation of an individual's security clearance can additionally result in difficulties obtaining other comparable employment and in stigmatization as a disloyal citizen.<sup>66</sup>

The current security clearance system has its origins in Executive Orders issued by Presidents Truman and Eisenhower following World War II.<sup>67</sup> On March 21, 1947, President Truman issued Executive Order 9,835, which established uniform standards and procedures for evaluation of the loyalty of all current and prospective employees in every federal department and agency of the Executive Branch.<sup>68</sup> If an investigation revealed that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States," the Order authorized the termination of a current federal government employee or the refusal of employment to a prospective federal gov-

60. David C. Mayer, Note, *Reviewing the National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims*, 85 CORNELL L. REV. 786, 792 (2000).

61. *Id.*

62. *Id.* at 792-93.

63. *Id.* at 793.

64. William H. Miller, Comment, *A Position of Trust: Security Clearance Decisions After September 11, 2001*, 14 GEO. MASON U. CIV. RTS. L.J. 229, 229 (2004).

65. *Id.* at 230.

66. Mayer, *supra* note 60.

67. *See id.* at 793-94.

68. Exec. Order No. 9,835, 12 Fed. Reg. 1935 (Mar. 21, 1947). For a more in-depth discussion of Executive Order 9835, see Michael E. Parrish, *A Lawyer in Crisis Times: Joseph L. Rauh, Jr., The Loyalty-Security Program, and the Defense of Civil Liberties in the Early Cold War*, 82 N.C. L. REV. 1799, 1807-10 (2004).

ernment employee.<sup>69</sup> Factors in determining an individual's loyalty included evidence of espionage, treason, advocacy of revolution against the United States, or unauthorized disclosure of confidential information; performance of employment duties in a manner indicative of service to another government; or membership in a blacklisted organization.<sup>70</sup>

President Eisenhower superseded Executive Order 9,835 and expanded the federal government's security clearance program through Executive Order 10,450, issued on April 27, 1953.<sup>71</sup> The Order began by stating that national security required that "all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States."<sup>72</sup> In addition to the factors utilized under Executive Order 9,835 in determining an individual's loyalty, the new Order added:

The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but not be limited, to the following: (1) Depending on the relation of the Government employment to the national security: (i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy. (ii) Any deliberate misrepresentations, falsifications, or omissions of material facts. (iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addition, or sexual perversion. (iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure. (v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.<sup>73</sup>

On November 5, 1953, President Eisenhower further defined the federal government's security clearance system by issuing Executive Order 10,501, which established classification categories for delicate national information.<sup>74</sup> The depth of investigation to determine whether or not to a grant security clearance varied based on the type of information the individuals would have

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69. Exec. Order 9,835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

70. *Id.*

71. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

72. *Id.*

73. *Id.*

74. Exec. Order No. 10,501, 18 Fed. Reg. 7049 (Nov. 5, 1953). The classification categories were Top Secret, Secret, and Confidential. *Id.*

access to as part of their employment.<sup>75</sup> Although subsequent Executive Orders have further refined the federal government's security clearance system,<sup>76</sup> Executive Order 10,450 remains largely in effect today.<sup>77</sup> The current factors taken into consideration in a security clearance investigation include allegiance to the United States, foreign influence, foreign preference, sexual behavior, personal conduct, financial considerations, alcohol consumption, drug involvement, criminal conduct, security violations, outside activities, and misuse of information technology.<sup>78</sup>

#### IV. THE INSTANT DECISION

In *In re Dyer*, in an opinion authored by Judge Michael A. Wolff, the Missouri Supreme Court reversed the decision of the trial court that had granted the expungement of Dyer's criminal record either under section 610.122 or the court's inherent equitable powers, and had held that section 610.122 was an unconstitutional violation of the Equal Protection and Due Process Clauses.<sup>79</sup> Noting that section 610.122 represents the sole avenue for expungement in Missouri, the Missouri Supreme Court denied Dyer's petition for expungement of his criminal record because the case did not satisfy the elements of section 610.122.<sup>80</sup> The court also upheld the procedural and constitutional adequacy of section 610.122, thereby denying Dyer's claims that the statute violated the clear title and one subject matter rules and Equal Protection and Due Process Clauses.<sup>81</sup>

The court first concluded that the facts of the case did not satisfy the elements necessary for expungement of records under section 610.122.<sup>82</sup> The court reasoned that three of the requirements of section 610.122 were not met because Dyer's arrest was not based on false information, probable cause existed to believe Dyer committed the offense, and Dyer received a suspended imposition of sentence.<sup>83</sup>

75. *Id.*

76. See Exec. Order No. 12,968, 60 Fed. Reg. 40245 (Aug. 2, 1995); Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

77. See Miller, *supra* note 64.

78. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. §§ 147.3-147.15 (2004).

79. *In re Dyer*, 163 S.W.3d 915, 918 (Mo. 2005) (en banc).

80. *Id.* at 918, 921.

81. *Id.* at 920.

82. *Id.* at 918-19. For a discussion of the elements necessary for expungement of records under section 610.122, see *supra* note 32 and accompanying text.

83. *Id.* at 918. The remaining three requirements of section 610.122 were satisfied, however, because there were no pending charges relating to the incident, Dyer had no prior convictions, and no civil actions were pending regarding the occurrence.  
*Id.*

In order to fulfill the false information requirement, the petitioner is required to show that at least some of the information relied on by the police in making the arrest was based on a lie.<sup>84</sup> The court held that Dyer did not meet this burden because he admitted he had some involvement in the crime and pleaded guilty.<sup>85</sup> Thus, there was no evidence that a lie led the police to erroneously charge Dyer with forgery and theft.<sup>86</sup>

Based on the same reasoning, the court held that probable cause existed to arrest Dyer.<sup>87</sup> After equating probable cause in this context with reasonable cause, the court explained that, “[t]he false information requirement and the probable cause requirement, when combined, ‘necessarily imply and mean that a petitioner . . . has the burden to affirmatively demonstrate at a hearing, by a preponderance of the evidence . . . his actual innocence of the offense for which he was arrested.’”<sup>88</sup> The court reasoned that, because it is unlikely Dyer falsely or mistakenly pleaded guilty to forgery and theft, the pleadings are strong evidence that Dyer was not actually innocent.<sup>89</sup> Thus, Dyer failed to meet his burden of establishing that probable cause did not exist to support the arrest.<sup>90</sup>

Finally, the court reasoned that even if Dyer’s arrest was based on false information and probable cause for arrest did not exist, Dyer’s record was still not eligible for expungement under section 610.122 because Dyer received a suspended imposition of sentence for one of the forgery charges and the theft charge.<sup>91</sup> Section 610.122 explicitly bans expungement of records if the petitioner received a suspended imposition of sentence.<sup>92</sup> The court rejected Dyer’s argument that because he received the suspended imposition of sentence prior to the adoption of section 610.122, application of this element to his case constituted an illegal *ex post facto* law.<sup>93</sup> The trial court had accepted this argument by adding to section 610.122 a time frame that rendered the element inapplicable to the present case.<sup>94</sup> The Missouri Supreme Court, however, rejected the premise that application of this element to Dyer’s claim would render section 610.122 an *ex post facto* law because the statute does not deal with prior conduct.<sup>95</sup> Rather, the court concluded, the statute merely regulates when a court is able to order the destruction of records.<sup>96</sup> Conse-

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84. *Id.* at 918-19.

85. *Id.* at 919.

86. *Id.*

87. *Id.*

88. *Id.* (quoting *Martinez v. State*, 24 S.W.3d 10, 20 (Mo. App. 2000)).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

quently, the court held that Dyer's petition for expungement of records under section 610.122 must necessarily fail.<sup>97</sup>

The court next ruled that section 610.122 is constitutional.<sup>98</sup> Dyer argued that section 610.122 is unconstitutional in three ways.<sup>99</sup> First, Dyer maintained that the statute is an illegal *ex post facto* law.<sup>100</sup> The court rejected this argument based on the same analysis used in regard to Dyer's argument about his suspended imposition of sentence.<sup>101</sup> Second, Dyer claimed that the statute violated the one subject matter and clear title rules.<sup>102</sup> Finally, Dyer argued that the statute, by denying expungement to those who received a suspended imposition of sentence, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 10 of the Missouri Constitution.<sup>103</sup>

The court rejected Dyer's argument based on the one subject matter and clear titles rules.<sup>104</sup> The bill enacted two provisions, one prohibiting a translator for a speech- or hearing-impaired person from disclosing a conversation without the speech- or hearing-impaired person's consent, and the other establishing the requisite elements for expungement of criminal records.<sup>105</sup> The court reasoned that both these provisions deal with confidentiality, and thus, the bill did not violate the one subject matter rule.<sup>106</sup> Furthermore, since the title of the bill, "related to the confidentiality of certain information," clearly conveyed this subject matter, the court ruled that the bill did not violate the clear title rule.<sup>107</sup>

The court then addressed Dyer's substantive constitutional arguments.<sup>108</sup> The court quickly dismissed Dyer's due process claim by stating that Dyer had not been deprived of the procedural rights associated with due process.<sup>109</sup> The court also rejected Dyer's equal protection claim, stating that the legislative distinction on the basis of suspended imposition of sentence is rational.<sup>110</sup> In explanation, the court stated that the government has an interest in the maintenance of correct criminal records and denying expungement to those who received a suspended imposition of sentence promotes this interest.<sup>111</sup>

97. *Id.*

98. *Id.* at 920.

99. *Id.*

100. *Id.*

101. *See supra* notes 93-97 and accompanying text.

102. *In re Dyer*, 163 S.W.3d at 920.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 920-21.

Finally, the court rejected Dyer's argument that Missouri courts have the power to issue equitable expungement of records.<sup>112</sup> Recognizing that Missouri courts had previously exercised this power, the court held that through the adoption of section 610.126, the legislature had eliminated this power.<sup>113</sup> The court further held that the legislature had the authority to alter the equitable power of Missouri courts pursuant to Article II, Section 1 of the Missouri Constitution.<sup>114</sup>

Before concluding its decision, the court noted that even if it did have the authority to issue equitable expungement, the present case likely did not qualify because Dyer presented no evidence of an illegal prosecution, acquittal, or other extraordinary circumstances.<sup>115</sup> Despite this, the court expressed sympathy regarding the seemingly harsh result dictated by the current state of the law.<sup>116</sup> The court stated, "[t]he harm Dyer suffered from this 15-year-old arrest record is caused by the policies of the federal Department of Homeland Security on security clearances, and this Court is not in a position to determine whether such policies are rational or irrational."<sup>117</sup> The court then noted that, as an alternative, Dyer could seek a pardon from the governor, but whether this would satisfy the Federal Department of Homeland Security's standards was unknown.<sup>118</sup>

## V. COMMENT

Although producing a seemingly harsh result, the unwillingness of Missouri courts to afford Dyer the relief necessary for him to remain employed was ultimately correct. At least a few grounds exist upon which the Missouri Supreme Court could have circumvented section 610.122 and granted Dyer his requested relief – namely the clear title and one subject matter rules. The Missouri Supreme Court, however, appropriately left resolution of the broader problem – the potentially severe and far-reaching consequences of the current national security clearance system – to the federal government. This section will examine the decision's treatment of the clear title and one subject matter rules, the decision's relationship to the current national security clearance regime, and possible ramifications and results of the decision.

In the 1995 legislative session, Missouri House Bill 135 amended section 610.122 and added the subsequent arrests, suspended imposition of sentence, and civil action requirements necessary for a court to issue an ex-

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112. *Id.* at 921.

113. *Id.*

114. *Id.*

115. *Id.* at 921, n.4.

116. *Id.* at 921.

117. *Id.*

118. *Id.* at 921, n.3.

pungement of criminal records.<sup>119</sup> House Bill 135 additionally made conversations between a speech- or hearing-impaired person and a translator inadmissible as evidence without the consent of the speech- or hearing-impaired person.<sup>120</sup> The title of House Bill 135 was “relating to the confidentiality of certain information.”<sup>121</sup>

In examining the two provisions enacted by House Bill 135, the court had at least some room to find violations of the clear title and one subject matter rules. A bill can violate the clear title rule if the title fails to denote the general type of legislation enacted or is too vague to reasonably ascertain the subject of the bill.<sup>122</sup> The title of House Bill 135 merely stated that it dealt with the confidentiality of certain information.<sup>123</sup> Both of the provisions of House Bill 135 deal, in the broadest sense, with confidentiality of specific information. In a narrower sense, however, they do not appear to relate to the same subject matter at all. One deals with the admissibility of evidence regarding conversations between a translator and speech- or hearing-impaired person, and the other deals with the expungement of criminal records. These two provisions will rarely, if ever, apply in the same factual situation. Additionally, they do not address the same type of information. One protects the disclosure of information in a confidential relationship and the other deals with judicial authority to dispose of an individual’s criminal record. Furthermore, the provisions do not relate to the same point in a judicial proceeding. One limits admissibility of evidence, and the other limits the disposal of criminal records after all judicial proceedings are complete. Thus, in all senses other than the broad title of confidentiality, the provisions appear to be wholly different.

Given this analysis, the court could have made a reasonable argument that House Bill 135 violated the clear title and one subject matter rules because it contained provisions dealing with two different subjects and the reference in the title to confidentiality was too vague to ascertain the subjects of the bill. The court then could have ruled the entire bill unconstitutional.<sup>124</sup> Without section 610.122, the court might have ruled that Missouri courts still retained the inherent equitable authority to expunge criminal records. Given the high standards Missouri courts used to justify equitable expungement, however, it is unlikely the present case would have qualified for equitable expungement even if section 610.122 was unconstitutional.

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119. H.B. 135, 1995 Leg. (Mo. 1995).

120. *In re Dyer*, 163 S.W.3d at 920.

121. *Id.*

122. *See supra* Section III(C).

123. *In re Dyer*, 163 S.W.3d at 920.

124. *See supra* Section III(C). As an alternative to finding the entire bill unconstitutional, the court could have found one of the two provisions to be the original purpose, in which case, it could have only struck the other provision and left the remainder of the bill intact. *Id.*

Instead of conducting a similar analysis of the clear title and one subject matter rules, the court, in seven sentences and without detailed discussion, dismissed Dyer's claim and ruled that House Bill 135 was constitutionally sound.<sup>125</sup> The lack of detailed consideration of the clear title and one subject matter rules appears particularly odd in light of the court's recognition of the unfortunate result.<sup>126</sup> Rather than leaving resolution of this situation entirely to the Federal Department of Homeland Security, the Missouri legislature, or the Missouri governor, the court could have taken an initial step toward resolving the problem, even if the outcome in the present case would have remained the same.<sup>127</sup> Indeed, the Missouri Supreme Court could have ruled section 610.122 unconstitutional under the clear title and one subject matter rules. Looking at the broader picture and considering national security concerns, however, it was appropriate for the court not to do so.

First of all, even prior to the adoption of section 610.122, Missouri courts ordered expungement of a criminal record only in extraordinary circumstances that typically indicated the individual had been wrongly convicted.<sup>128</sup> Dyer provided no evidence that he was wrongly convicted.<sup>129</sup>

Additionally, the only reason the Missouri courts even considered expungement of Dyer's record was because of its effect on his employment. Understandably, the court felt sympathy for the fact that Dyer suffered loss of employment due to a fifteen-year-old arrest record. The court, however, was ultimately correct in avoiding the temptation to use the clear title and one subject matter rules to find section 610.122 unconstitutional simply to rectify one attenuated result. The court recognized that Missouri's expungement system did not cause Dyer the loss of his job; the national security clearance criteria and Dyer's past crimes were the true causes. Thus, the court would not have been justified in finding the entire statute structurally unconstitutional to provide relief for one individual.

National security considerations support the court's decision. The federal government has established an extensive system for determining the trustworthiness of federal government employees.<sup>130</sup> Security clearance investigations examine, along with a host of other factors, an individual's criminal activity.<sup>131</sup> The federal government has made a determination that prior criminal records are important in examining an individual's loyalty. It does not make sense for the Missouri courts to circumvent this determination

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125. *In re Dyer*, 163 S.W.3d at 920.

126. *See id.* at 921.

127. It is possible that the court was swayed by the fact that rendering the bill unconstitutional would likely not have affected the outcome of the case and by the strong presumption in favor of the constitutionality of legislative acts.

128. *See supra* notes 26-29 and accompanying text.

129. *In re Dyer*, 163 S.W.3d at 918-19.

130. *See supra* Section III(D).

131. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. §§ 147.3-147.15 (2004).



by eliminating all traces of an individual's criminal record. If the court had granted the expungement relief, it would have effectively pronounced that Dyer's criminal record was not a sufficient justification for his loss of security clearance. More importantly, the Missouri Supreme Court would have substituted its judgment regarding what is best for national security for that of the federal government. The federal government is in a much better position than the Missouri Supreme Court to determine who should and should not be granted security clearances.

Furthermore, the criminal record criterion seems rational in a security clearance investigation. Dyer was convicted of *theft*.<sup>132</sup> Few other crimes are more relevant in determining someone's capacity for appropriately handling confidential information than one dealing with the unlawful taking of another's property. Even if Dyer did not actually pose a security threat, given the increased risk of terrorism today, it is rational for the federal government to adopt uniform criteria that operate to prevent an individual from obtaining a security clearance, and to err on the side of caution when applying the criteria.

Even if the Missouri Supreme Court had taken the series of steps necessary for expungement of Dyer's record, the intended benefit – the reinstatement of Dyer's security clearance and employment – was not guaranteed. If the court had expunged Dyer's criminal record, this expungement would not have erased the federal government's records regarding Dyer's criminal history. Absent a finding of Dyer's actual innocence of the underlying crimes, it is unlikely that the federal government would suddenly be persuaded that Dyer's criminal history did not provide a basis for denying security clearance. Given the probability that the requested relief would not produce the desired result, the court had even less incentive to find a method by which it could grant an expungement of Dyer's criminal record.

The Missouri Supreme Court's decision in this case not only reached the correct result, it also clarified existing Missouri law. First, the decision firmly established the constitutionality and vitality of section 610.122 in limiting the authority of Missouri courts to order expungement of criminal records. The court explicitly held that section 610.122 is the sole judicial method for ordering expungement of criminal records. Thus, Missouri courts, unlike many courts in the country, now clearly lack the inherent equitable power of expungement. Second, *Dyer* clearly defined the requisite elements of section 610.122 and determined that if any of the elements are not satisfied, Missouri courts are without power to offer any type of relief. Finally, the court left the burden of resolving situations like Dyer's – situations in which a seemingly sympathetic individual is precluded from working in certain occupations because of a previous conviction – to either the federal government or other branches of the state government. Thus, while Dyer and others like him may have other available avenues of relief, it is clear that, at least for the foresee-

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132. *In re Dyer*, 163 S.W.3d at 917.

able future, the Missouri Supreme Court has removed the Missouri judiciary from the dispute.

## VI. CONCLUSION

In *In re Dyer*, the Missouri Supreme Court correctly denied Dyer's request for expungement of his criminal records because the elements of the constitutionally valid section 610.122 were not satisfied and because Missouri courts lack the inherent equitable power to expunge criminal records.<sup>133</sup> This decision firmly established section 610.122 as the exclusive method of judicial expungement of criminal records in Missouri and left resolution of situations like Dyer's to the federal government or a different branch of the Missouri government.

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133. *Id.* at 918.

