

STATE OF WYOMING)	IN THE DISTRICT COURT
) ss.	
COUNTY OF LARAMIE)	FIRST JUDICIAL DISTRICT
)	
IN RE)	Docket No. [REDACTED]
)	
[REDACTED])	

BRIEF IN SUPPORT OF PETITION FOR EXPUNGEMENT

COMES NOW Petitioner, [REDACTED], by and through counsel, Mari-Frances Kline, files this Brief pursuant to court Order dated April 16, 2015 regarding the question before the Court which is whether attempted arson is a “violent felony” under WYO. STAT. ANN. § 7-13-1502 (Michie 2014) precluding Mr. [REDACTED]’s request for relief. Mr. [REDACTED] would also argue that he is eligible for relief due to the prosecuting attorney’s failure to file a timely objection or recommendation required by Wyo. Stat. § 7-13-1502.

Relevant Facts:

- Pursuant to Wyo. Stat. § 7-13-1502, Petitioner filed a Verified Petition for Expungement on November 13, 2014 relating to a felony conviction from 1991 for attempted first degree arson.
- Petitioner claims he is eligible pursuant to Wyo. Stat. § 7-13-1502 for an expungement of the records of arrest, charges, and convictions related to the offense because it falls within the statute.
- In addition, Petitioner claims he is eligible pursuant to Wyo. Stat. § 7-13-1502 due to the prosecuting attorney not filing any objection or recommendation as required by the statute.
- This court filed an Order Setting Status Conference on April 16, 2014 and Requesting Criminal History on December 8, 2014 requesting that the prosecuting attorney file with the court any objection or recommendation within ninety (90) days of the service of the petition on the prosecuting attorney.
- The ninety (90) day time frame ended on February 11, 2015.

- The prosecuting attorney failed to file an objection during the statutory time frame and instead apologized that it “slipped through the cracks” and made her objection known at the time of the hearing. This was one-hundred fifty-four (154) days from the date of service of the Petition.

Procedural Issues:

- The proceedings related to this offense occurred in this Court, therefore, jurisdiction is proper.
- The above offense which Petitioner seeks expunged is a felony offense and would fall under Wyo. Stat. § 7-13-1502.
- Pursuant to Wyo. Stat. § 7-13-1502:
 - At least ten (10) years have passed since the expiration of the terms of sentence imposed by the court, including any periods of probation and the completion of any program ordered by the court.
 - Any restitution ordered by the court has been paid in full.
 - Other than the conviction which Petitioner is seeking to expunge, Petitioner has not previously pleaded guilty or nolo contendere to or been convicted of any felony.
 - The felony which Petitioner is seeking to expunge did not involve the use or attempted use of a firearm.
 - Petitioner has not previously received an expungement of any records pursuant to Wyo. Stat. § 7-13-1502.
 - Petitioner is not a substantial danger to himself, any victim, or society.

Questions before the Court:

(1) Whether attempted arson is a “violent felony” under Wyo. Stat. § 7-13-1502 precluding [REDACTED] request for relief.

(2) Whether the prosecuting attorney has standing to object under Wyo. Stat. § 7-13-1502 due to failing to make a recommendation or objection pursuant to the statute. Or in the alternative, if [REDACTED] is due relief under the statute, the prosecuting attorney cannot raise an untimely objection and the Court shall order the expungement.

Mr. [REDACTED] Argument:

I. Attempted arson is not a “violent felony” under Wyo. Stat. § 7-13-1502 for two reasons:
A. The history of the original bill suggests that if an attempted crime was to be excluded, it would have been written into the statute. B. Because there is no state or federal binding authority on point, Mr. [REDACTED] argues that the court should follow the logic in State v. V.M.D., 2014-Ohio-1844, 2014 Ohio App. LEXIS 1802, 2014 WL 1775672 (Ohio Ct. App., Cuyahoga County May 1, 2014).

A. Wyo. Stat. § 7-13-1502 became a law in 2011. During the 2011 legislative session, the bill was introduced without any specific felonies excluded. *See* <http://legisweb.state.wy.us/2011/Summaries/SF0088.htm>. S.F. No. 0088 bill was introduced during the 2011 legislative session and was originally titled “Expungement of nonviolent felonies.” *Id.* Upon further consideration, the word “nonviolent” was specifically replaced with “specified” which would lead one to believe that the legislators contemplated that “violent” felonies could be expunged under the law. *Id.* It was during this specific revision to the bill that the list of felonies that would be excluded was placed in the proposed law. *Id.* Further suggesting that violent felonies could be expunged under the statute, but not the specified ones listed. *Id.* Mr. [REDACTED] would argue that the legislature would have placed “attempted” crimes in the list of exclusions if this was the intent of the statute.

During the 2014 Legislative session, Wyo. Stat. § 7-13-1502 was amended again to include additional felonies that could be expunged. 2014 Wy. ALS 124, 2014 Wyo. Sess. Laws 124, 2014 Wy. Ch. 124, 2014 Wy. SF 116, 2014 Wy. EA 61, 2014 Wy. ALS 124, 2014 Wyo. Sess. Laws 124, 2014 Wy. Ch. 124, 2014 Wy. SF 116, 2014 Wy. EA 61. The amendments to the statute now allow for expungement for the following additional felonies:

- Causing bodily injury to a peace officer;
- Possession of a deadly weapon;
- Possession of explosives;
- Promoting prostitution;
- Perjury;
- Felony DUI;
- Felony drug possession;
- Felony game and fish violations.

See <http://legisweb.state.wy.us/2014/Summaries/SF0116.htm>. Clearly, the legislature is attempting to broaden the scope of this statute. Therefore, the intent of the statute should be

liberally construed to allow expungement in this case.

B. In State v. V.M.D., V.M.D. sought expungement of an attempted robbery conviction under an Ohio statute that is similar to Wyo. Stat. § 7-13-1502. ORC Ann. 2953.32(C). The Ohio statute allows for expungement of felonies if they are not an “offense of violence.” ORC Ann. 2953.36(C). The trial court denied the request for expungement citing that attempted robbery was excluded by the statute because Ohio Stat. § 2901.01(A)(9)(a) defines robbery as an “offense of violence.”

On appeal, the Ohio appeals court had to determine whether attempted robbery should fall under the statute as an “offense of violence” and therefore preclude the petitioner’s request for expungement. Following its prior decision in State v. J.K., 965 N.E.2d 312, the appeals court “reviewed the record to determine whether the facts ‘clearly revealed’ that the defendant committed a disqualifying ‘offense of violence.’” V.M.D. at ¶ 12. The Court in V.M.D. pointed out that the “expungement provisions were crafted to be in fact remedial in nature and ‘must be liberally construed to promote their purposes.’” V.M.D. citing State ex rel. Gains v. Rossi 716 N.E.2d 204 at ¶ 15. *See also* CRIMINOLOGY: EXPUNGEMENT AND POST-EXONERATION OFFENDING, 104 J. Crim. L. & Criminology 353 *illuminated the different applications across the U.S. when it comes to the expungement of records.* Therefore, after taking the facts into consideration, the Court in V.M.D. did not think the attempted robbery fell within the exclusion of the expungement statute and reversed and remanded the case back to the trial court. *Id.*

In State v. J.K., the Ohio appellate court was faced with a similar situation as to the one before this court. J.K. at 312. The petitioner had committed attempted arson and had then changed his life and was never in trouble again. J.K. at 312. The court noted that even though arson is an “offense of violence,” the court determined that given the facts of the case, attempted arson is not an “offense of violence.”

Mr. [REDACTED] implores this court to follow the Ohio appeals court’s logic and determine that his attempted arson falls outside the intent of the exclusions under Wyo. Stat. § 7-13-1502. Given the fact that it has been almost twenty-four (24) years since the conviction in this case, Mr. [REDACTED] was a young man of barely twenty-one (21) at the time of his arrest, and that he has never so much as had more than a speeding ticket since that time. At this point in Mr. [REDACTED]’s life, he feels that he should be allowed the same privilege as any other citizen to say “no” to any

potential employer, application, or certification board when asked whether he has been convicted of a crime.

II. The Prosecution's untimely objection should constitute a waiver of its objection to the Petition for Expungement. Pursuant to Rule 12 of Wyoming Rules of Criminal Procedure (g):

Effect of failure to raise defenses or objections. -- Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (d), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver. WYO. R. CRIM P. 12(g) *emphasis added*.

There is no doubt that the objection from the Prosecutor was untimely under Wyo. Stat. § 7-13-1502. The Prosecution admitted to this fact at the Status Hearing on April 14, 2015. In fact, instead objecting within ninety (90) days following the Petition, the objection was one-hundred fifty-four (154) days from the date of service of the Petition.

This Court issued a an Order Setting Status Conference on April 16, 2014 and Requesting Criminal History on December 8, 2014 requesting that the prosecuting attorney file with the court any objection or recommendation within ninety (90) days of the service of the petition on the prosecuting attorney. Therefore, not only did the Prosecution receive the Petition, it then received the Order from this Court ordering it to comply with the statute.

The Prosecution's excuse that the case "fell through the cracks" does not constitute for cause under this rule. This is especially true given the fact that the prosecutor admitted at the Status Hearing on April 14, 2015, that her office had attempted to contact victims by mail within thirty (30) days of the Petition pursuant to the statute. Hence, the Prosecutor's office had knowledge of the petition well in advance of the ninety (90) days it was given to object under the statute. Therefore, if this Court finds Mr. [REDACTED] is eligible for relief under Wyo. Stat. § 7-13-1502, it should grant that relief without considering an objection by the Prosecution.

In conclusion, Mr. [REDACTED] requests that this Court to take into account a letter that he has attached to this Brief outlining his desire for expungement. If this Court finds that the Wyo. Stat. § 7-13-1502 does not preclude relief for Mr. [REDACTED], his statements should be considered by this Court in rendering its decision. Mr. [REDACTED]'s words speak for themselves and hope that it would move this Court to grant the relief requested based on the above arguments.

WHEREFORE, for the above reasons, Petitioner respectfully submits this Brief to this Court and asks the Court to enter an Order of Expungement in accordance with Wyo. Stat. § 7-13-1502.

RESPECTFULLY SUBMITTED this 13th day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of May, 2015, she caused a full, true and correct copy of the foregoing to be served by hand delivery or by depositing the same in the United States Mail, postage pre-paid and addressed to the following:

Prosecuting Attorney:
Leda Pojman, District Attorney
District Attorney's Office
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Attorney for Petitioner