

DRAFT
IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No.

**JERMAINE FLOOD, WINSTON BAITY, JEAN JOHNSON,
RICHARD THOMAS, JR. and JOSEPH TOMAN, ET AL.,**

Plaintiffs,

v.

PENNSYLVANIA STATE POLICE,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JERMAINE FLOOD, WINSTON BAITY,
JEAN JOHNSON, RICHARD
THOMAS, JR., and JOSEPH TOMAN,
individually and on behalf of all others
similarly situated, now and in the future,

Plaintiffs (Petitioners),

v.

PENNSYLVANIA STATE POLICE
OF THE COMMONWEALTH OF
PENNSYLVANIA,

Defendant (Respondent).

CIVIL ACTION - EQUITY

No.

Class Action

**PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

Named plaintiffs Jermaine Flood, Winston Baity, Jean Johnson, Richard Thomas, Jr., and Joseph Toman and class plaintiffs respectfully petition this Court for an Order granting a Preliminary Injunction pursuant to Pennsylvania Rule of Civil Procedure 1531, and in support thereof allege as follows:

1. As set forth more fully in the verified Class Complaint, a copy of which is attached hereto as Exhibit "A," the Pennsylvania State Police ("PSP") has disseminated and continues to disseminate inaccurate and false criminal history records for a certain class of individuals – victims of identity theft whose identifying information was used by another and resulted in the creation of a criminal record, hereinafter referred to as "criminal identity theft

victims.” Even after a criminal identity theft victim has proven that he or she was not the person arrested for offenses reported his or her record, PSP continues to report these offenses when criminal history record requests are made for the criminal identity theft victim.

2. PSP blatantly and willfully refuses to correct criminal history records associated with this class of individuals although it acknowledges the criminal records for those individuals are inaccurate. PSP’s refusal to correct its records is a violation of the Criminal History Record Information Act, 18 Pa.C.S. § 9101, *et seq.*, which requires the maintenance and dissemination of accurate criminal records, and Article I, Section 1 of the Pennsylvania Constitution, which guarantees Pennsylvania residents the fundamental right to reputation.

3. PSP refuses to correct the inaccurate and false criminal record information associated with criminal identity theft victims even after the inaccuracies and falsehoods have been brought to PSP’s attention and verified through the use of fingerprint identification.

4. Plaintiffs have made efforts to solve this problem with PSP on numerous occasions and brought this action promptly upon PSP’s final refusal to alleviate the harm. *See* _____, attached hereto as Exhibit “B.”

5. On xx/xx/xx plaintiffs caused a copy of the verified Class Complaint and this Petition to be served by hand delivery upon PSP.

6. On xx/xx/xx, plaintiffs filed their verified Complaint with this Court. A true and correct copy of the Complaint is attached hereto as Exhibit “C” and made a part hereof.

7. The attached brief in support of plaintiffs’ motion for a preliminary injunction along with supporting affidavits and declarations demonstrates that plaintiffs will

succeed on the merits of their claims that PSP violated and continues to violate plaintiffs' rights to reputation afforded by the Pennsylvania Constitution and is failing to maintain and disseminate accurate criminal records required by the Pennsylvania Criminal History Record Information Act.

8. Plaintiffs, and the class they represent, will suffer continued irreparable harm if the outrageous actions by the PSP are not enjoined because their criminal records can be checked at any time without their knowledge. Each time the PSP disseminates false information, it causes immediate and irreparable harm to plaintiffs and the class they represent, potentially impairing their employment, housing and other important interests.

9. Plaintiffs, and the class they represent, have no adequate remedy at law.

10. PSP will not suffer any appreciable injury if this motion is granted because it is based on statutorily and constitutionally mandated requirements and PSP will merely be restrained from violating plaintiffs' constitutional rights and the Criminal History Record Information Act by issuing false criminal history records.

WHEREFORE, plaintiffs, and the class they represent, respectfully request this honorable Court to enter an Order in the form attached, granting a preliminary injunction:

(1) restraining the PSP from disseminating criminal history records containing inaccurate and false information for persons who have proved that they are the victims of criminal record identity theft; and (2) requiring the PSP to remedy its system for disseminating criminal history

records in order to achieve strict compliance with the Criminal History Record Information Act and Article I, Section 1 of the Pennsylvania Constitution.

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Dated: April __, 2005

IT IS FURTHER ORDERED that plaintiffs shall cause a copy of this rule, along with a copy of the Complaint and the aforesaid Petition and accompanying papers, to be served upon defendants at least five (5) days before the day of the hearing.

BY THE COURT:

J.

2. Named and Class Plaintiffs have demonstrated a likelihood of success on the merits of their claims that defendant has violated the Criminal History Record Information Act, 18 Pa.C.S. § 9101, *et seq.*

3. Named and Class Plaintiffs have demonstrated a likelihood of success on the merits of their claims that defendant has violated plaintiffs' fundamental right to protect their reputations pursuant to Article I, Section 1 of the Pennsylvania Constitution.

4. Named and Class Plaintiffs will suffer irreparable harm and loss if defendant is this Court does not issue a preliminary injunction (1) enjoining defendants from further disseminating inaccurate and false criminal history records; and (2) requiring defendant to correct individuals' inaccurate and false criminal history records with corrected information brought to defendant's attention by such individuals.

5. Named and Class Plaintiffs do not have an adequate remedy at law; and

6. Any potential harm to defendant in granting preliminary injunctive relief does not outweigh the potential harm to Named and Class Plaintiffs in not entering this relief;

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. The motion of Jermaine Flood, Winston Baity, Jean Johnson, Richard Thomas, Jr., and Joseph Toman for a preliminary injunction is GRANTED; and

2. Defendant is required to refrain from disseminating criminal history records containing information inaccurately linking individuals to crimes they did not commit.

3. Defendant is required to remedy its system for disseminating criminal history records in order to achieve strict compliance with the Criminal History Record Information Act, namely by complying with 18 Pa.C.S. § 9152 when an individual makes a valid challenge to his or her criminal history record by:

(a) providing a system in which criminal history record information is corrected;

(b) providing a certified and corrected copy of the criminal history record information to the individual;

(c) destroying or replacing with the corrected information, prior erroneous criminal history record information disseminated to criminal justice agencies; and

(d) supplying the individual with the names of those noncriminal justice agencies and individuals which have received erroneous criminal history record information

4. This Order will be effective immediately.

J.

FACTS

Background

Identity theft is a growing problem nationwide. In Pennsylvania, there were more than 5,000 reported victims of identity theft in the year 2000 alone. *See* Identity Theft Data Clearinghouse, Identity Theft Complaints from Pennsylvania Victims for January 1 – December 31, 2002, attached hereto as Exhibit __.

In 2001, the United States Federal Trade Commission (FTC) reported that identity theft was its number one source of consumer complaints – 42 percent of all complaints that year. *See* Identity Theft Protection Information and Resource Center website, <http://www.identity-theft-protection.com/stats.html>. And in 2003, the FTC found that 4% of identity theft victims were aware that their identifying information had been provided by another upon arrest. *See* FTC Identity Theft Survey Report, September 2003 [insert link]. The PSP disseminated 1,074,325 criminal history records in 2004. March 9, 2005 Testimony of PSP Commissioner Colonel Jeffrey Miller to Commonwealth Senate Budget Committee.

While the public is aware that identity theft can destroy the victims' credit, there is an even more invidious harm that can result from identity theft – the perpetrator can create a criminal record in the name of the victim by providing the victim's identifying information (name and birth date or social security number) upon arrest. This problem is commonly referred to as "criminal identity theft."

Identity theft victims may find it time consuming and cumbersome to repair the damage done to their credit, but there currently is no remedy for Pennsylvanians wrongfully

linked to arrests and convictions as a result of criminal identity theft. Through this action, plaintiffs seek to correct this horrible injustice, which violates the Pennsylvania Constitution as well as the Criminal History Record Information Act.

Current PSP Practice

When a Pennsylvania resident who has been victimized by identity theft learns that his or her name and identifying information has been used by another (the perpetrator) and resulted in a criminal history record in the victim's name, the victim can prove that he or she is not responsible for the record by providing fingerprints to the PSP. The PSP compares the fingerprints of the identity theft victim with the fingerprints taken at the time of arrest, so the victim easily can be exonerated of any wrongdoing.

Despite conclusive proof of mistaken identity, however, the PSP does not sever the link between the innocent identity theft victim and the criminal record created by the identity thief. Instead, the PSP issues the victim a letter (hereinafter, "PSP Letter") which states that a copy of the PSP Letter must accompany every request for the victim's criminal record and, if the PSP Letter does not accompany the request, the PSP admittedly disseminates an "incorrect" record for the victim – a record linking the victim to crimes the PSP knows they did not commit. *See Exhibit __*, PSP Letter dated April 30, 2002 to plaintiff Thomas.

This procedure may sound simple enough, but there are several reasons why it is wholly inadequate and results in substantial harm to the plaintiffs and the class they represent.

For this procedure to effectively prevent the dissemination of inaccurate criminal records for the plaintiffs and the class they represent, at least four conditions must be met: 1) the

class members must know when someone is going to request their criminal records; 2) the class members must have an opportunity to present the PSP Letter to the inquiring party before the request is made; 3) the inquiring party must accept the PSP Letter; and 4) the inquiring party must submit the PSP Letter and the request for criminal history to the PSP by mail. As the experiences of the named plaintiffs illustrate, these conditions, which are almost entirely out of their control, are too often not met and the consequences are devastating.

Anyone may request a Pennsylvania resident's criminal record history without that person's knowledge or consent. The ability of anyone to request criminal records at any time and without notice or permission means that the first three conditions cannot be satisfied with any regularity. This fact alone renders the current procedure ineffective as a means of ensuring either compliance with the Criminal History Record Information Act or protection of the plaintiffs' fundamental constitutional right to reputation.

Another significant factor contributing to the ineffectiveness of the current PSP procedure is the availability of an on-line service administered by the PSP known as the "PATCH," Pennsylvania Access to Criminal History. Using the PATCH, anyone with access to the internet can visit <https://epatch.state.pa.us>, agree to pay ten dollars (\$10) for a criminal record check, transmit the name of a person and either a birth date or a social security number and receive a virtually instantaneous response from the PSP of either "no record" or "request under review." *See* Declaration of Linda Blanchette, attached hereto as Exhibit ___. One problem for the plaintiffs and class members is that, even if they have an opportunity to present and explain the PSP Letter, there is no way for the inquiring party to communicate through the PATCH about the existence of the PSP Letter.

When the PATCH system is used to make inquiries about the criminal records of the plaintiffs and the class members, the PATCH will not immediately indicate “no record” even if plaintiffs properly have no criminal record. Rather, the PATCH will respond “request under review,” which is the same response the PATCH provides for individuals who have criminal records to be reported. Inquiring parties may understandably presume that the “request under review” response to the PATCH inquiry means that the plaintiffs have a criminal record to be reported, even though they do not, and this assumption will be reinforced when the inquiring party later receives in the mail from the PSP a criminal record that inaccurately links the plaintiffs to crimes they did not commit. *See* Declaration of Linda Blanchette, attached hereto as Exhibit __.

Although the PATCH has been in existence for several years, it was not widely available until February 2003, when a technical upgrade made the system accessible to anyone with internet access and a credit card. Stephanie L. Arnold, *Public Can Find Criminal Records Instantly in Pennsylvania*, *The Philadelphia Inquirer*, February 5, 2003, at B2. Not surprisingly, it quickly became the preferred method for employers and others to check criminal records in Pennsylvania because it provides a response within seconds. By contrast, it typically takes six weeks to obtain a response to requests for criminal histories that are submitted to the PSP by mail.

Now, more than seventy percent (70%) of all criminal record checks received by the PSP are submitted on-line through the PATCH system. Thus, plaintiffs, through no fault of their own, are in the unfortunate position of asking potential employers and others who are accustomed to the speed and convenience of the PATCH to instead revert to the mail-in system

and to wait six weeks for the PSP's response. This burdensome process is hardly conducive to obtaining employment in today's fiercely competitive market.

Even when the plaintiffs know someone is going to request their criminal records and have an opportunity to present the PSP Letter and explain that the request for their records must be submitted by mail and not through the PATCH, the procedure often still does not work. In many instances, the inquiring party is a current or potential employer and plaintiffs have discovered in practice that the person with whom they interview and to whom they present the PSP Letter typically is not the same person responsible for requesting the criminal history records. In fact, many employers contract with third-party providers for this service, so the person actually requesting criminal records is not even in the same location as the person who receives the PSP Letter. Even when an interviewer expresses a willingness to submit the PSP Letter with a request for criminal records through the mail, the PSP Letter often is not included with the request and, as a result, the PSP provides a criminal record that inaccurately links the plaintiffs to crimes they did not commit.

The plaintiffs have a constitutionally protected, fundamental right to their reputations and, pursuant to the Criminal History Record Information Act, the PSP has a statutory obligation to maintain and disseminate accurate criminal records. The PSP's current procedure fails to address these rights and obligations.

Plaintiffs have suffered substantial harm as a direct result of the PSP's dissemination of inaccurate criminal records. And each time the PSP disseminates a criminal record linking the plaintiffs to crimes they did not commit, they suffer irreparable harm to their reputations. Plaintiffs initiated this action on behalf of themselves and others similarly situated

to force the PSP to comply with both its statutory obligations under the Criminal History Record Information Act and the plaintiffs' fundamental constitutional rights by implementing a new procedure to ensure that it does not further denigrate the reputations of innocent Pennsylvanians by disseminating criminal records linking victims of criminal identity theft to crimes they did not commit when the PSP has actual knowledge that the victims are not responsible for the reported crimes.

Plaintiffs' Facts

Each of the plaintiffs has been victimized by criminal identity theft - someone stole their identifying information and provided their identifying information upon an arrest and conviction, resulting in a criminal history records that inaccurately associates the plaintiffs with crimes they did not commit. Each plaintiff discovered this error in the PSP's records after the PSP disseminated an inaccurate criminal history record to a third party, who then took adverse action against the plaintiffs as a direct result. See _____. After discovering the PSP's error, the plaintiffs sought to correct the PSP's records and provided their fingerprints to the PSP to demonstrate that they were not the individuals responsible for the crimes being associated with them in the PSP's records. In each instance, the PSP confirmed that plaintiffs were not responsible for the crime associated with them in its records, and it sent the PSP Letter to each plaintiff. See _____.

The plaintiffs have found the PSP Letter entirely ineffective as a means of remedying the PSP's erroneous link between them and crimes and arrests committed by others.

Jermaine Flood

Plaintiff Jermaine Flood has never been convicted of a crime or even been arrested. However, his cousin has provided Jermaine's identifying information upon arrest on numerous occasions. As a result, Jermaine Flood's criminal history record maintained by the PSP erroneously shows an extensive criminal history because he is wrongfully associated with the criminal records belonging to his cousin.¹ See Affidavit of Jermaine Flood, attached hereto as Exhibit ___.

Jermaine Flood has experienced continued problems with his incorrect record for years despite these explanatory letters. Most damaging have been Mr. Flood's employment problems as a direct result of the incorrect criminal history record – Mr. Flood works in the health care field, in which background checks are often mandated by law and employment of persons with certain convictions is legally prohibited. Mr. Flood has worked as a nursing aide, an emergency room technician and a lab technician. Though he completed training to be a licensed practical nurse, he was unable to sit for the board exam because of his erroneous criminal record with the PSP. See Flood Affidavit, attached hereto as Exhibit ___.

In February of 2003, Mr. Flood secured a job as a relief aide for the Dr. Gertrude a. Barber Center, a facility for mentally retarded persons. He worked just one day for the facility before being fired for his erroneous criminal history record. Mr. Flood attempted to explain his situation of being an identity theft victim, and even provided the Center with a clean PSP report

¹ In addition to his official criminal record with the PSP, Jermaine Flood also has credit reports indicating that he has an extensive criminal record. Often, such reports are compiled from the PSP central repository records.

which had been produced on November 29, 2001, but the facility would not accept his explanation or the prior clean report. *Id.* at ____.

In addition to employment problems, Mr. Flood has also experienced other serious problems as a result of the inaccurate criminal history record. Most notably, a routine police stop resulted in a nine-hour detention in jail until the identity issue was resolved. *Id.* at ____.

Mr. Flood has done precisely as the PSP directed in the May 30, 2003 letter. In fact, Mr. Flood keeps several copies of the letter with him at all times, including a laminated copy. He gives it to all potential employers with the portions indicating that it should be submitted with a background check request highlighted. Still he has since lost numerous employment opportunities² and was arrested and detained for nine hours because the PSP continues to disseminate criminal history records linking him to crimes he did not commit although the PSP is aware that Mr. Flood is a victim of criminal identity theft who has no record of his own.

² Mr. Flood was hired to work for the American Red Cross as a donor collector, but during orientation he was questioned about his criminal history record. Despite his explanation, he was fired and escorted off the premises. In May of 2004, Mr. Flood lost an opportunity to work at the Plymouth House nursing home as a certified nursing assistant and was let go during orientation from a job with the Allegheny Valley School which he was to provide in-home care to mentally disabled persons. Mr. Flood was fired in orientation when the United Parcel Service, after hiring Mr. Flood, completed his background check producing a disqualifying record.

Plaintiff Winston Baity

Plaintiff Jean Johnson

Jean Johnson is a certified nursing assistant and is subject to the Older Adults Protective Services Act (OAPSA) in the home health care field. Pursuant to OAPSA, Ms. Johnson must submit to background checks from the PSP to work in her field because persons with certain convictions are barred from employment.

Plaintiff Richard Thomas, Jr.

Plaintiff Joseph Toman

Like Mr. Flood, Joseph Toman has never been arrested for anything in his life and has no criminal history whatsoever. In 1996, Mr. Toman had his wallet stolen. In September of 2000, Mr. Toman discovered that he had an erroneous record when it appeared he might lose his new job in a Target store stockroom because of a background check that came back with a criminal history. This record included the following erroneous notations: May 1996 charges for aggravated assault, recklessly endangering another person and simple assault; February 1998 charges for receiving stolen property, unauthorized use of a vehicle and aggravated assault; and May 1998 charges for aggravated assault, carrying a firearm without a license and carrying firearms in a public place. Because of these charges on Mr. Toman's record, Target told him that he would have to clear up the charges before he could begin work.

Mr. Toman went to the PSP to be fingerprinted and have a comparison done of his fingerprints with the fingerprints of the person arrested on the charges. The PSP provided Mr. Toman with a PSP letter (see Letter from Lt. Michael J Fronczek to Joseph Mario Toman dated

September 6, 2000, attached hereto as Exhibit __) and Mr. Toman managed to work at Target for an additional four months before moving on other employment opportunities.

Then, on January 17, 2001, Mr. Toman was placed in a job as a graphic designer with Verizon Directory Graphics, Inc. by a staffing agency known as Tech/Aid. Mr. Toman provided the PSP Letter to the staff at Tech/Aid. Five days later, however, Mr. Toman was told that his position was over-staffed and was let go. However, on April 1, 2001, Mr. Toman saw the advertisement run for his position, contacted the Human Resources Department at Verizon and denied the ad had been run. After filing charges with the EEOC, Mr. Toman learned that he was discharged from his employment by Tech/Aid, not Verizon and that it was only after discovering that he was convicted of several felonies on three different occasions. *See* Letter from Kurt Young, Federal Investigator to Joseph Toman, dated January 17, 2002, attached hereto as Exhibit __. Clearly the PSP Letter was insufficient to protect Mr. Toman from being fired.

In July of 2003, after developing a serious health condition that removed Mr. Toman from the workforce, he continued to have problems with his record even outside the employment context. In July 2003, Mr. Toman applied for subsidized housing for which Mr. Toman required attorney intervention. Then, in early 2004, when he moved, his record again became an issue when his potential landlord performed a background check.

ARGUMENT

The Pennsylvania Supreme Court repeatedly has recognized the obvious and substantial harm that is associated with the publication of derogatory criminal record information and held that expungement of accurate criminal record information is required in certain circumstances. *See Carlacci v. Mazaleski*, 798 A.2d 186, 190 (Pa. 2002) (protection from abuse

order expunged where the order was declared null and void by stipulation); *Commonwealth v. D.M.*, 695 A.2d 770, 772 (Pa. 1997) (granting expungement following acquittal because “the law offers no greater absolution to an accused than acquittal of the charges, and that expunction of an arrest record, after being found not guilty, is not a matter of judicial clemency.”); *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978) (approving concept of protecting the reputation of a person unlawfully committed to mental institution because “the continued existence of the hospital records pose[s] a threat to appellant’s reputation.”); *see also Commonwealth v. J.T.*, 420 A.2d 1064, 1065 (Pa. 1980) (right to reputation mandated expungement of court records arising from illegal commitment); *Commonwealth v. Armstrong*, 434 A.2d 1205, (Pa. 1981) (holding that in absence of an overriding societal interest in retaining the record, expungement must be granted following first-time offender’s completion of Accelerated Rehabilitative Disposition Program). In these cases, the criminal records at issue were accurate and properly associated with the parties challenging them yet the Pennsylvania Supreme Court recognized that, in a variety of circumstances, the fundamental right to reputation requires that certain accurate criminal record information be expunged to prevent substantial and irreparable harm to one’s reputation.

Here, the situation is even more compelling. The plaintiffs and the class they represent were not in any way involved with the arrests and convictions being associated with them.³ Plaintiffs simply seek appropriate relief to ensure that once the PSP has actual knowledge that it disseminated a criminal record inaccurately linking a class member to crimes they did not

³ Plaintiffs do not suggest that PSP prevent even the first dissemination of a record erroneously linking someone to an arrest or conviction. To the contrary, the plaintiffs and the class they represent are limited to those who have discovered that the PSP disseminated a criminal record that inaccurately linked them to crimes and proven to the PSP that the link was in error by the submission of their fingerprints.

commit, it take appropriate measures to ensure that it does not again disseminate the false and derogatory criminal history record information.

Surely an identity theft victim who has proven that she is incorrectly associated with crimes must be afforded the same constitutional protections to reputation as those who have been arrested and acquitted or who have completed an Accelerated Rehabilitative Disposition Program following an arrest and conviction.

Plaintiffs are entitled to preliminary injunctive relief because their right to relief is clear, the need for relief is immediate and the injury will be irreparable if the injunction is not granted. *City of Philadelphia v. Commonwealth of Pennsylvania*, 837 A.2d 591, 598 (Pa. Commw. 2003)(citing *City Zebra v. Pittsburgh Area School District*, 296 A.2d 748 (Pa. 1972)).

A. Plaintiffs Are Likely To Prevail On The Merits.

Plaintiffs are likely to prevail on the merits of their claims for injunctive relief pursuant to the Criminal History Records Information Act and Article I, Section 1 of the Pennsylvania Constitution.

1. The Pennsylvania Constitution

In 1790, the Pennsylvania Constitution was amended to “expressly identif[y] reputation as one of the fundamental interests that cannot be abridged by the legislature.” *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 193 (Pa. 1987).⁴ See, e.g. *Norton v. Glenn*, 860 A.2d 48, 58 (Pa. 2004); *Sprague v. Walter*, 518 Pa. 425, 439 (Pa. 1988); *Moyer v.*

⁴ All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring possessing and protecting property and reputation Pa. Const. art. I, § 1.

Phillips, 462 Pa. 395 (Pa.1975); *Meas v. Johnson*, 185 Pa. 12, 19 (Pa.1898); *Barr v. Moore*, 87 Pa. 385, 393 (Pa. 1878) (“The right to protect reputation being inherent in man and being indefeasible, it cannot be annulled by legislative action.”).

Today, even more than in 1790, a good reputation is a prerequisite for a good life. In an era of data-bases that are internationally accessible on demand over the internet, a false criminal record can instantaneously and irrevocably shadow a citizen’s life as she deals with police officers and educators, with credit agencies and employers, with landlords and neighbors and prospective spouses. In *Commonwealth v. Armstrong*, a generation before the explosion of the internet, the Pennsylvania Supreme Court observed:

The harm ancillary to an arrest record is obvious: Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual’s reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested.

495 Pa. 506 (Pa. 1981) (*quoting Commonwealth v. Malone*, 366 A.2d 584 (Pa. Super. 1976)).

And the harm arising from criminal history records that erroneously report a criminal conviction is even more virulent.

In addition to providing a remedy when private actors intrude upon the fundamental constitutional right of acquiring, possessing and defending reputation, the Supreme Court, citing to Article I Section I, has held that the government cannot cast unwarranted aspersions on the good names of its citizens. E.g., *A.Y. v. Commonwealth*, 537 Pa. 116, 124 (Pa.

1994) (finding procedure for creating “black list” from accusations of child abuse violated due process). The Court in *A.Y.* recognized that our society is founded upon the principle that citizens enjoy “inherent and inalienable rights ... of acquiring, possessing and protecting property and reputation” which cannot blithely be surrendered in the name of prosecutorial convenience. *See also Simon v. Commonwealth of Pennsylvania* 659 A.2d 631 (Pa. Common. 1995) (enjoining publication and distribution of report accusing plaintiff of connection to racketeering as inconsistent with Article I Section 1). To protect against both of these evils, under Article I Section 1, the courts of Pennsylvania have barred governmental agencies from maintaining records even if they may be technically accurate where the records risk unwarranted blackening of the subjects’ reputations.

The leading case is *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978), where the Pennsylvania Supreme Court confronted a plaintiff who had been committed to Danville State Hospital in violation of his constitutional rights. When the commitment was reversed and declared null and void, the Supreme Court determined that the requirements of Article I Section 1 dictated destruction of all official records of that unlawful commitment. The court reasoned that although they recorded accurately the unlawful commitment, “the continued existence of the hospital records pose a threat to appellant’s reputation,” and the Commonwealth could not exacerbate the initial unlawful deprivation of liberty by putting the plaintiff’s reputation at continued risk by retaining those records.⁵

⁵ See *Commonwealth v. J.T.*, 420 A.2d 1064, 1065-66 (Pa. Super. 1980) (finding right to reputation mandated expungement of court records arising from an illegal commitment as justice demanded the appellant be returned to a position as near as possible to that which she enjoyed prior to the illegal commitment; namely, an “unsullied record.”)

The Pennsylvania Supreme Court extended the principle of *Wolfe v. Beal* to the criminal justice system in a series of cases beginning with *Commonwealth v. Wexler*, 494 Pa. 325 (Pa.1981), which recognized the constitutional right of innocent citizens to eliminate the threat to their reputation from even accurate arrest records in circumstances where the arrest records wrongly suggest guilt. In *Commonwealth v. Wexler* itself, the Court determined that as a matter of substantive due process where criminal charges are dismissed because the Commonwealth is unable to sustain its burden of proof at trial, the accused is entitled not only to a judgment of acquittal, but to the expungement of the record of her arrest unless the Commonwealth can bear the “heavy burden” “to present compelling evidence justifying the retention of arrest records.” 495 Pa. at 330. Expanding on the Commonwealth’s burden, the Supreme Court conclude that the Commonwealth’s assertion of a general interest in maintaining accurate records for those accused of crime could not outweigh the specific, substantial interest associated with clearing one’s record. *Id.* at 332-335 (quoting *Commonwealth v. Welford*, 279 Pa. Super. at 303, 420 A.2d at 1345); accord *Commonwealth v. Armstrong*, 495 Pa. 506, 511 (Pa.1981) (finding the interest of an employer’s bonding company in “ferreting out a potential applicant’s arrest record” inadequate).

After a decade and a half of experience with the *Wexler* rule, the Court erected even stronger protections for the innocent, holding that where an accused has been acquitted at trial, she “is automatically entitled to the expungement of his arrest record.” *Commonwealth v. D.M.*, 548 Pa. 131, 137 (Pa. 1997). So, too, in *Carlacci v. Mazaleski*, 568 Pa. 471 (Pa. 2002), the Supreme Court extended *Wolfe v. Beal* to provide a remedy under Article I Section 1 to an individual who had been the defendant in a Protection from Abuse Act proceeding. Where such a proceeding was dismissed, the Court held, the constitutional right to reputation required

records of the proceeding be expunged, notwithstanding the absence of statutory authority to do so.

Nor is the principle limited to situations where the falsity of the allegations has been demonstrated in a judicial proceeding. Official records are not free to incorporate information that threatens to falsely tarnish the reputation of the citizenry simply on the basis of official convenience. In *Pennsylvania Bar Ass'n v. Commonwealth*, 607 A.2d 850, 857 (Pa. Commw. Ct. 1992), this Court relied on Article I Section 1 and *Wolfe v. Beal* to enjoin the operation of a “repository” of reports by insurance companies identifying attorneys who represented claimants involved in “suspected fraudulent claims.” This Court found “the existence of government records containing information that might subject a party to negative stigmatization is a “threat” to that party’s reputation under Article I Section 1.” 607 A.2d at 853. Noting that the “repository” was maintained in an “arbitrary manner, with undefined suspicion as the basis for reports and no system in place to evaluate them for veracity or probative value,” this Court held that the “repository” was at odds with the Pennsylvania Constitution’s commitment to hold inviolable the fundamental right to acquire, possess and defend reputation. *Id.* at 857.

The PSP’s approach to criminal identity theft makes a mockery of plaintiffs’ constitutional rights. Whatever the level of constitutional obligation to assure initially that criminal records are accurate before they are disseminated to all and sundry – and the fact that by the Commonwealth’s own account one in three records are inaccurate should give this Court pause. **[insert audit cite]**. The PSP’s cavalier decision to retain and disseminate records that link plaintiffs to crimes they did not commit, notwithstanding the PSP’s own determination that plaintiffs are actually innocent of those crimes flies in the face of Article I Section 1. Plaintiffs have already been the victims of criminal identity theft that has blackened their reputations

through the placement of false information in the PSP repository. PSP acknowledges as much. But rather than seeking to alleviate the results of that violation, the PSP adds one of its own: it insists on retaining and making available for instant dissemination criminal history records that wrongly impugn the plaintiffs' constitutionally protected right to reputation.

This is not an approach consistent with the PSP's constitutional obligations nor is it one that this court can allow to continue. The plaintiffs in *Wolfe, Wexler, DM* and *Carlacci* were entitled to eliminate the wrongful threat to their reputation from public records that sullied their reputations, even though the records at issue were technically accurate. A fortiori, the plaintiffs here and those similarly situated are entitled to an order defending their right to reputation and preventing the PSP from continuing to spew forth mistaken records that falsely link them to crimes of which PSP admits they are innocent.

2. The Criminal History Records Information Act

It is of paramount importance to the PSP, the public – and the plaintiffs – that the criminal history records maintained and disseminated by the PSP be accurate. The Office of Attorney General for the Commonwealth has acknowledged the importance of maintaining accurate criminal history information:

The correction of inaccurate records is crucial to the development of complete and accurate criminal records in the central repository. CHRIA (Criminal History Record Information Act) requires the correction of inaccurate data and carries a corresponding obligation to notify those to whom the inaccurate data has been disseminated so that appropriate corrections can be made.

2000-2001 Audit Report, Criminal History Record Information Act, Office of Attorney General, Commonwealth of Pennsylvania, at 27 (*citing* 18 Pa. C.S.A. § 9114). [p. 43, 45, 47 - add references]

As recognized by the Commonwealth's 2000-2001 audit, the PSP's obligations to maintain and disseminate accurate criminal history records are founded upon the Criminal History Record Information Act.

Pursuant to the Criminal History Record Information Act, 18 Pa. C.S. § 9101, *et seq.*, it is the duty of every criminal justice agency, including the PSP, to maintain **accurate and complete** criminal history record information. 18 Pa. C.S. § 9111 (emphasis added). Moreover, regardless of the manner of discovery of inaccuracies, a criminal justice agency reporting erroneous information must correct its own records and notify all recipients of the inaccurate data and the required correction. 18 Pa. C.S. § 9114.

The Act further directs that an individual with inaccurate criminal history record information has a right to the following: (1) to have the inaccuracies corrected; (2) to receive a certified and corrected copy of the criminal history record information; (3) have prior erroneous information disseminated to criminal justice agencies be destroyed or replaced with corrected information; and (4) receive a list of the names of those non-criminal justice agencies and individuals that have received erroneous criminal history record information. 18 Pa.C.S. § 9152. Pursuant to the Act's regulations, an individual also has the right to have the PSP make a reasonable effort to notify those individuals and non-criminal justice agencies to which the erroneous information was disseminated and include a certified and corrected copy of the record with that notice. *See* 37 Pa. Code § 195.5.

The Act specifically provides for enforcement of these rights through an injunctive action: “any ... individual ... may institute an action in a court of proper jurisdiction against any person, agency or organization to enjoin any criminal justice agency, non-criminal justice agency, organization or individual violating the provisions of this chapter or to compel such agency, organization or person to comply with the provisions of this chapter.” 18 Pa. C.S. § 9183.

The named plaintiffs learned of information contained in their criminal history records maintained by the PSP that inaccurately links them to crimes they did not commit and have proved conclusively, by submitting their fingerprints to the PSP, that the information being reported about them is false. Yet, the PSP continues to disseminate criminal history records that erroneously link the plaintiffs to crimes they did not commit.

The PSP even goes so far as to claim that it “lacks statutory authority to correct purported ‘mistakes’ or ‘untrue records’ ... it may not sua sponte change the Criminal History Record Information.” Exhibit __, Letter from Barbara Christie to Sharon M. Dietrich dated February 8, 2005 (citing 37 Pa. Code § 195.5). However, pursuant to the Act, the PSP must “correct its *own* records” regardless of how the inaccuracy in the data is discovered. 18 Pa. C.S. § 9114 (emphasis added).

Plaintiffs have gone through the PSP fingerprinting system to prove that the information is in fact erroneous and the PSP admits, in its PSP Letters, that the information is incorrect. *See* Exhibits __, __ and __, PSP Letters (“if a copy of the form does not accompany the request, ***the incorrect information*** will be sent to you or the requesting individual, agency or employer.”). Moreover, pursuant to section 195.5, once a record is validly challenged, the

repository, a/k/a the PSP, *shall insure* that the record is corrected, a certified corrected copy is provided to the individual, errors in record information are eliminated or replaced with corrected information, the individual is supplied with the names and addresses of those who have received the erroneous record information, and every reasonable effort is made to notify those to whom the erroneous records were disseminated and include with the notification a certified corrected copy of the record. Plaintiffs have gone through the PSP fingerprinting system to prove that the information is in fact erroneous and the PSP admits, in its PSP Letters, that the information is incorrect. *See* Exhibits __, __ and __, PSP Letters (“if a copy of the form does not accompany the request, *the incorrect information* will be sent to you or the requesting individual, agency or employer.”).

Both the Pennsylvania constitution and the Criminal History Record Information Act require the PSP to change its procedures to prevent the dissemination of criminal history records that inaccurately link criminal identity theft victims to crimes the PSP had confirmed they did not commit.⁶

B. Plaintiffs Are in Dire Need of Immediate Relief to Prevent Immediate and Irreparable Harm That Cannot Be Adequately Compensated By Damages.

The plaintiffs have been harmed in many ways by the PSP’s dissemination of criminal history records linking them to crimes they did not commit. They have suffered through periods of unemployment and under-employment as a direct result of the erroneous reports

⁶ When a private credit reporting agency reports false information about a person’s criminal history record, it violates the Fair Credit Reporting Act (FCRA) and is subject to civil suit under FCRA and state defamation statutes. *See* FCRA, _____; *Baird v. Dun & Bradstreet*, 285 A.2d 166, ___ (Pa. 1971)(finding Dun & Bradstreet credit report that falsely reported an indictment for adultery was libelous *per se*); [cite PA defamation statute].

disseminated by PSP. Plaintiff Johnson, for instance, lost her home because she has been unable to secure employment. *See Johnson Affidavit*. Plaintiff Flood was detained for over nine hours because a bench warrant was issued for the person who stole his identity.

As proven by the experiences of the named plaintiffs, immediate and irreparable harm is resulting from the PSP's knowing dissemination of inaccurate and erroneous criminal history records. "An injury is regarded as irreparable if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." *See Milicic v. Basketball Marketing Co, Inc. d/b/a/ AND 1*, 857 A.2d 689, 695 (Pa. Super. 2004). Each time the PSP disseminates a criminal record that inaccurately links the plaintiffs to crimes they did not commit, they suffer immediate and irreparable harm to their reputations in violation of their fundamental rights as residents of the Commonwealth pursuant to Article I of the Pennsylvania Constitution.

On more than one occasion, the PSP has disseminated criminal history records linking the named plaintiffs to crimes they did not commit even though the plaintiffs provided their fingerprints to the PSP and demonstrated to the PSP's satisfaction that they did not perpetrate any of the crimes they have been wrongfully associated with by the PSP. The criminal history record published by the PSP with respect to Mr. Thomas, for example, indicated, among a long list of offenses, a rape conviction and other sex-related offenses, and that he had served time in prison, although Mr. Thomas has never been arrested, much less convicted, for any sex-related offense and has never been incarcerated. *See Exhibit __* and related attachments. Similarly, Ms. Johnson has no criminal record and has never been arrested, yet the criminal history disseminated by the PSP links her to 19 theft convictions and, among others, convictions for harassment and providing false information to authorities. *See Exhibit __* and related

attachments. And the criminal record wrongfully associated with Mr. Baity included an outstanding bench warrant for charges of assault, reckless endangerment and endangering the welfare of a child.

As these examples illustrate, there is immediate and irreparable harm each time the PSP disseminates a criminal record to a third party that inaccurately links the plaintiffs and those similarly situated to crimes they did not commit.

CONCLUSION

For the reasons set forth in Plaintiffs' Motion for Preliminary Injunction and this Memorandum of Law in Support, Plaintiffs are entitled to a preliminary injunction requiring the PSP to comply with the provisions of the Criminal History Record Information Act.

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