

Analyzing Violation of Probation Objections to Expungement After *Abhishek I.*

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In August 2022, the Court of Special Appeals of Maryland decided the case *In re Expungement Petition of Abhishek I.* in favor of the State of Maryland, denying Abhishek I.’s petition for expungement of a misdemeanor theft conviction on the grounds that petitioner had violated the terms of his probation and therefore failed to “satisfy” his sentence.¹

The effect of a violation of probation on the eligibility of a criminal conviction for expungement was raised de novo in *Abhishek*, and the application of the decision to procedurally distinct cases of probation violation remains to be developed. This document explores the *Abhishek* decision itself, pre-*Abhishek* case law relating to expungement eligibility in Maryland, and the legislative history of expungement statutes in the Maryland General Assembly, all of which support a narrow application of *Abhishek* to specific cases in which a sentence of probation after conviction was closed as “unsatisfied.” Other dispositions in a violation of probation case, which include the continuation of probation or the conversion of the sentence, are not unambiguously disqualifying based on the language of the expungement statutes, which is the basis for expungement ineligibility established by *Abhishek*.²

The *Abhishek* Opinion

The *Abhishek* expungement petition was filed in December 2020 to expunge a 2008 conviction for misdemeanor theft under Maryland Code Ann., Crim. Proc. Art. § 10-110(a)(1)(x). The defendant had been sentenced to a year of incarceration, suspended, and one year of supervised probation. In 2010, the defendant pled guilty to violation of his probation, for which he was incarcerated for four days and his probation was closed “unsatisfactorily.”

The court begins its decision with an analysis of the history of expungement in Maryland, as follows:

Before addressing appellant’s contention, we briefly address, as relevant to this appeal, the statutory scheme for expungement, i.e., the removal of a court record or a police record “from public inspection.” CP § 10-101(e) (defining “expungement”). In 1975, the General Assembly enacted House Bill 482, which was codified at Md. Ann. Code, Art. 27, §§ 735–741 (1976 Repl. Vol.). Vincent S., slip op. at 12. Section 737(a)(1)–(5) provided that a person charged with a crime

¹ *In re Abhishek I.*, 282 A.3d 318, 319-20 (Md. Ct. Spec. App. 2022).

² *See id.* at 323.

was eligible for expungement in cases that did not result in a judgment of conviction, i.e., acquittal, dismissal, entry of a nolle prosequi, placement on the stet docket, or probation before judgment. The Court of Appeals explained that the expungement procedure was designed “to help protect individuals seeking employment or admission to an educational institution, by entitling them to expungement of unproven charges, so that those individuals could avoid being unfairly judged during their application processes.” *Stoddard v. State*, 395 Md. 653, 664 (2006). A petition for expungement was permitted no earlier than three years from the judgment, with an exception if the person executed a waiver of any tort claim arising from the charge. See Art. 27, § 737(c).

In 1982, the General Assembly expanded the scope of expungement, permitting expungement in the situation where a person was convicted of only one criminal act, which was not a violent crime, and the person was “subsequently granted a full and unconditional pardon by the Governor.” Md. Ann. Code, Art. 27, § 737(a)(7) (1976 Repl. Vol. & Supp. 1982). The time limitation for expungement under this provision was different; it could not be filed “earlier than 5 years nor later than 10 years after the pardon was signed by the Governor.” Art. 27, § 737(c).

In 2008, the General Assembly further expanded the scope of convictions that could be expunged, including “minor nuisance crimes such as panhandling, drinking an alcoholic beverage in a public place, and loitering.” *Vincent S.*, slip op. at 16. Accord Md. Code Ann., Crim. Proc. Art. (“CP”) § 10-105(a)(9) (2008 Repl. Vol.). Although some prosecutors and law enforcement agencies objected to the change,³ the proponents of the change expressed the view that extending eligibility for expungement to convictions for nuisance-related crimes would help impoverished people who were attempting to rehabilitate themselves.⁴ A petition to expunge these convictions could “not be filed within 3 years after the conviction or satisfactory completion of the sentence, including probation, that was imposed for the conviction, whichever is later.” CP § 10-105(c)(6) (emphasis added).

In 2016, the General Assembly enacted the Justice Reinvestment Act (“JRA”), 2016 Md. Laws ch. 515, which, among other things, added § 10-110 to the Criminal Procedure Article. CP § 10-110 greatly expanded the list of criminal convictions that potentially were eligible for expungement. See CP § 10-110(a)(1)–(3). Among the many new criminal convictions that were now eligible for expungement was theft. See CP § 10-110(a)(1)(x), (2)(i). For these convictions, there was a longer

³ Opinion cites to Letter in Opposition to 2008 House Bill 685 from State’s Attorney for Baltimore City Patricia Jessamy to the House Judiciary Committee (see page 4, footnote 2 of opinion).

⁴ Opinion cites to Letter in Support of 2008 House Bill 685 from Jason Perkins-Cohen, Executive Director, JOTF, to Honorable Joseph Vallario, Chair of the House Judiciary Committee (see opinion page 4, footnote 3).

waiting period; a petition for expungement could not be filed earlier than ten years after the “person satisfies the sentence or sentences imposed for all convictions for which expungement is requested, including parole, probation, or mandatory supervision.” CP § 10-110(c)(1) (emphasis added).⁵

This overview of the development of criminal record expungement in Maryland demonstrates a general progress from limited opportunity for expungement to today’s more expansive approach, but fails to fully examine the policy objectives and criminological theory underlying this development. A more detailed examination of the state’s legislative aims provides more context for why the current statute is written as it is and how it should be interpreted going forward.

The History of Criminal Record Expungement in Maryland

The Maryland General Assembly first enacted legislation providing for criminal record relief in the form of expungement in 1975.⁶ The statute applied only to non-convictions and allowed for expungement only after a three-year waiting period.⁷ The legislature intended to “help protect individuals seeking employment or admission to an educational institution, by entitling them to expungement of unproven charges, so that those individuals could avoid being unfairly judged during their application processes.”⁸ Since 1975, the goal and driving motivator of expungement legislation in Maryland has been removing barriers to employment, education, and other application-dependent processes that allow individuals to succeed in creating a stable life.

There have been numerous legislative changes to expungement laws in the state over the past near-fifty years.⁹ In 1982, the legislature enacted an amendment providing expungement relief for convictions of non-violent crimes following a pardon by the Governor, and in 1988 the legislature enacted the “good cause” provision that is codified today as CP § 10-105.¹⁰ However, it was not until 2008, when the legislature enacted what is codified as CP § 10-105(a)(9), that any convictions became eligible for expungement - the narrow category of “minor nuisance crimes.”¹¹ The purpose of such a change was to create an avenue for people experiencing homelessness to “escape the collateral consequences or civil disabilities of such convictions.”¹²

In considering Senate Bill 695, which would become CP § 10-105(a)(9), the legislature laid out the purposes and expected consequences of a record expungement process. The Fiscal and

⁵ *Abhishek I.*, 282 A.3d at 320-22.

⁶ *In re Vincent S.*, 278 A.3d 770, 777-78 (Md. Ct. Spec. App. 2022).

⁷ *Id.* at 778.

⁸ *Id.*, quoting *Stoddard v. State*, 395 Md. 653, 664 (2006).

⁹ *See id.* at 777-80.

¹⁰ *Id.* at 778.

¹¹ *Id.* at 779.

¹² Legislative Bill File, SB 695, Senate Judicial Proceedings Committee Floor Report at 8 (2008).

Policy Note associated with that bill stated that “[n]uisance laws are frequently used to discourage the public presence and activities of destitute and homeless persons. Expungement will allow such individuals to escape the collateral consequences or civil disabilities of such convictions.”¹³

In hearings on the bill prior to adoption, the Homeless Persons Representation Project testified:

Forever stigmatizing these individuals [convicted of nuisance crimes] with a conviction that can never be removed from their record does not help the individual or society. . . . Expanding the expungement statute to permit removal of nuisance crime convictions will increase the likelihood that individuals will be able to access these much needed housing resources [public housing, Section 8 housing vouchers, low-income housing tax credits, and other public assistance for housing].¹⁴

A representative of the ACLU further testified that “[t]hese convictions operate to permanently entrap individuals in an increasingly cramped cycle of hopelessness that serves neither public safety nor the public good.”¹⁵

Under this statutory scheme, the Maryland Court of Special Appeals decided *Robert B. v. State*, granting a petition for expungement for a defendant then on probation. In announcing the decision, the court had the following to say regarding the purpose of the expungement process:

The general purpose of the Criminal Record Expungement Statute, CP § 10-101 *et seq.*, is to ‘provide for the expungement of certain police and court records, providing procedures for such expungement, prohibiting certain practices concerning criminal charges not resulting in conviction, and relating generally to criminal records.’ The statute aims to prevent a person from unfairly suffering the social and professional stigma of a criminal charge that did not result in a conviction.¹⁶

In 2016, the legislature enacted the Justice Reinvestment Act (“JRA”), allowing for expungement of several convictions by creating Criminal Procedure section 10-110. In almost every legislative session since its enactment, the JRA has been amended to include additional convictions in the list of eligibility.¹⁷ In 2022, the legislature enacted an amendment to the JRA

¹³ 2008 SB 695 Bill File p. 8, Fiscal and Policy Note.

¹⁴ 2008 SB 695 Bill File p. 39, Homeless Persons Representation Project Testimony Supporting SB 695.

¹⁵ 2008 SB 695 Bill File p. 39, ACLU Testimony Supporting SB 695.

¹⁶ *Robert B. v. State*, 998 A.2d 909, 919-20 (Md. Ct. Spec. App. 2010) (citations omitted).

¹⁷ In 2017, the legislature added battery as a common law conviction eligible for expungement. In 2018, the legislature added first, second, and third-degree burglary; felony theft; and PWID as eligible convictions for expungement after 15 years. In 2019, violations of certain maritime laws and prostitution-related convictions were made eligible for expungement. In 2021, the legislature made fourth-degree burglary, driving with a

that reduces the waiting period required before expunging possession with intent to distribute cannabis.¹⁸

In support of the JRA, Maryland Alliance for the Poor provided the following testimony on the purpose and effects of expungement:

The collateral consequences of encountering the criminal justice system are severe – and disproportionately impact certain racial and ethnic groups. Research shows that possession of a criminal record is a major impediment to securing a job and housing in Maryland. Employment and stable housing are crucial steps in building economic security, but unfortunately for many Marylanders, a criminal record leads to unemployment, poverty, and homelessness. These negative outcomes have a disparate impact on the racial and ethnic groups that are overrepresented in Maryland’s criminal justice system. The JRCC noted that black residents in Maryland are disproportionately sent to prison for drug offenses, serve longer terms than white offenders, and are less likely to receive parole. The changes proposed by SB 1005 will work to reduce racial and ethnic disparities in Maryland’s correctional system, advancing policies that are fair and equitable.¹⁹

In 2023, the legislature passed the REDEEM Act, which reduced the wait times for the expungement of convictions and added to the list of eligible convictions. In considering the bill, proponents discussed the purpose of expungement and the expected effect of increased eligibility. Delegate Sandy Bartlett, one of the bill’s sponsors, testified that “[t]he result of passing [the REDEEM Act] will be employment opportunities for many people who are currently considered unemployable because a background check will reveal a 10 year or 15 year old misdemeanor. Without that opportunity, the odds of recidivism and re-incarceration increase drastically.”²⁰

Christopher Dews, a representative of the Job Opportunities Task Force (“JOTF”), further testified:

JOTF supports the REDEEM Act as a means of reducing the impact of incarceration and enhancing employment opportunities for lower-income workers and job seekers throughout the state. A criminal record can be both the cause and consequence of poverty and has detrimental effects on the employment prospects for the estimated 25% of working-age Marylanders with a record. . . . One of the primary drivers of high recidivism rates is the inability of returning citizens to find

suspended/canceled/refused/revoked license, and various cannabis-related convictions expungeable. *In re. Vincent S.*, 278 A.3d 770, 780 (footnote 9).

¹⁸ *Id.*

¹⁹ Bill File p.59, Maryland Alliance for the Poor, Testimony in Support of SB 1005 (2016).

²⁰ Delegate J. Sandy Bartlett, FAVORABLE - HB97 - REDEEM Act (January 31, 2023).

a job: over 60 percent of formerly incarcerated persons remain unemployed one year after their release. This is primarily because more than 85% of employers perform background checks on all of their job applicants and deny employment to many returning citizens based on a record. A past criminal conviction of any sort reduces job offers by half. . . . A 2015 Manhattan Institute study revealed that employment, especially within the first six months of release, drastically lowers the likelihood of recidivism for nonviolent offenders.²¹

Finally, Chief Attorney Mary Denise Davis of the Maryland Office of the Public Defender testified:

We are constantly working for our clients to move them forward in their goals of being a full time member of their communities and not to be burdened with the stigma of a criminal record when that record is long past. . . . For some clients the past remains in the past, but for many clients it does not. It continues with every job application or job advancement; with every housing application and with every educational application.²²

In summation, the development of Maryland’s current expungement scheme has been practical as well as technical, reflecting an increased awareness of the importance of ameliorative measures to smooth reentry after criminal process. The emphasis placed on ameliorative outcomes by the advocates for these provisions suggests that the application of the statutes should be evaluated in terms of effect upon the petitioning defendant. However, legislative history is only one component of statutory interpretation, and one that the *Abhishek* decision does not find dispositive of the question at issue.²³ Other standards for interpreting ameliorative statutory provisions can be found in Maryland case law at various stages of this expungement history.

Statutory Interpretation of Ameliorative Provisions

The general standard for interpretation of statutory language is laid out in *Davis v. Slater*, in which the Maryland Court of Appeals (now the Supreme Court of Maryland) stated that if the “language is clear and unambiguous, we need not look beyond the provision’s terms to inform our analysis; however, the goal of our examination is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision.”²⁴

More specifically, when a statute is ameliorative in nature, it must be constructed in a manner consistent with the ameliorative purpose. In *Harrison v. John F. Pilli & Sons, Inc.*, the

²¹ Christopher Dews, TESTIMONY IN SUPPORT OF THE REDEEM ACT (HB0097) (January 31, 2023).

²² Mary Denise Davis, Chief Attorney of the Pretrial Unit, Baltimore City, Maryland Office of the Public Defender, POSITION ON PROPOSED LEGISLATION (January 25, 2023).

²³ *In re. Abhishek I.*, 282 A.3d 318, 324-25 (Md. Ct. Spec. App. 2022).

²⁴ 861 A.2d 78, 81 (Md. 2004) (internal citations omitted).

court states: “[W]e note that the statute is clearly remedial, and that there also exists a canon of statutory constructions that remedial statutes are liberally construed to suppress the evil and advance the remedy.”²⁵ Furthermore, “[a]lthough statutes relating to remedies and procedure as a general rule are to be liberally construed with a view toward the effective administration of justice, they are not to be given such a construction as will defeat or frustrate the legislative intention.”²⁶

Taking into consideration the lengthy record of ameliorative intent in the legislative history of expungement, it is clear that these canons of interpretation require a liberal construction of expungement eligibility to “advance the remedy”²⁷ of alleviating the stigma of criminal charges and their effect upon future employment, education, and housing. Such a construction requires that *Abhishek* be applied narrowly, cutting off access to the remedy of expungement only within the narrow and unambiguous factual scenarios similar to that of the petitioner in that case.

Applying *Abhishek* to Violation of Probation Cases

In analyzing the applicability of *Abhishek* to a violation of probation case, it is essential to understand the various procedural scenarios \ that may result in probation and the dispositions that can result from a violation.

The most important distinction in probation cases is between “probation before judgment” and “probation after conviction.” The latter is a punishment to which a criminal defendant may be sentenced after being found guilty of or pleading guilty to a crime.²⁸ Like any other sentence for a set term, it subjects the defendant to a period of ongoing supervision and legal scrutiny, but it is not considered an ongoing criminal process.²⁹ The 2010 case *Robert v. State* declares in no uncertain terms that when a case ends in a disposition of guilt and a sentence of probation is entered, the criminal process has ended and any further proceedings on the matter of the probation are civil in nature.³⁰

“Probation before judgment” (“PBJ”), however, is not a sentence handed down as the result of an entry of judgment, but rather a process a defendant consents to undertake (typically as part of an agreement with the state) to defer further criminal proceedings pending the completion of a probationary period.³¹ There is no entry of a judgment of guilt and the underlying criminal process is considered “stayed,” rather than closed, until probation is complete.³² A violation of probation

²⁵ 582 A.2d 1231, 1234 (Md. 1990).

²⁶ Criminal Injuries Compensation Board v. Gould, 331 A.2d 55, 61 (Md. 1975).

²⁷ *Harrison*, 582 A.2d at 1234.

²⁸ Md. Code Ann. Crim. Proc. § 6-221 (West 2023).

²⁹ *Robert v. State*, 998 A.2d 909, 915 (2010).

³⁰ *Id.* at 918-19.

³¹ Crim. Proc. § 6-220.

³² *Id.*

may result in the case being resumed and could result in an entry of a disposition of “guilty” on the underlying criminal charge, sometimes years after the case was initially filed.³³

The distinction is important because eligibility for expungement of cases resulting in a PBJ and of cases resulting in a conviction are established by different provisions of the Maryland Code, each of which provide different eligibility requirements. Criminal Procedure Article section 10-105 lays out the process for expunging cases that result in most dispositions other than guilty (including not guilty, nolle prosequi, stet, and PBJ),³⁴ while section 10-110 establishes the process for expunging cases that result in convictions for eligible offenses.³⁵ The *Abhishek* opinion arises out of the eligibility criteria of section 10-110,³⁶ and does not deal with the different eligibility language applied to PBJs and other non-conviction dispositions in section 10-105. As such, an *Abhishek* objection to an expungement petition would only be relevant to a case where the probation that was violated was a probation after conviction of an otherwise-eligible offense.³⁷

The second element that must be factored into the analysis of a violation of probation case is the disposition that results from the violation. When a defendant is accused of a violation of probation, the court holds a hearing in which a determination is reached as to whether the violation actually occurred.³⁸ If it is found that the defendant did, in fact, violate probation, one of several dispositions can result. One situation is what occurred in the case of *Abhishek*, in which the probation was terminated and a sentence of incarceration was imposed.³⁹ In such a situation, the original sentence of probation is unsatisfied and the case becomes ineligible for expungement.⁴⁰

However, the court could find that a violation of probation did occur but, rather than terminate probation, instead keep the defendant on probation with the same or different conditions.⁴¹ This creates a situation not addressed in *Abhishek* that would likely leave the case eligible for expungement, provided that the defendant ultimately satisfies the subsequent probationary period and meets the other eligibility requirements laid out in section 10-110.⁴² Remember, the reasoning of *Abhishek* specifically relates to cases in which a sentence is not satisfied, so a violation of probation is not necessarily disqualifying if the sentence is ultimately satisfied.

³³ *Id.*

³⁴ *Id.* § 10-105.

³⁵ *Id.* § 10-110.

³⁶ *In re. Abhishek I.*, 282 A.3d 318, 319 (Md. Ct. Spec. App. 2022).

³⁷ *Id.*

³⁸ Md. R. 4-347.

³⁹ *Abhishek I.*, 282 A.3d at 319.

⁴⁰ *Id.*

⁴¹ *See* Crim. Proc. § 6-224(b)(2).

⁴² *See id.* § 10-105.

In the case of a probation before judgment, the result of a violation is typically not the imposition of an alternative sentence, but rather the resumption of underlying criminal case and the entry of judgment on the previously stayed proceeding.⁴³ This is typically recorded in the court’s file as an “amended disposition,” with the disposition date being the date of the finding of guilt after the violation of probation. This circumstance moves the expungement analysis out of the realm of section 10-105 and into section 10-110 territory.⁴⁴ Section 10-105 allows expungement in situations where probation before judgment is “entered,” but requires that probation be completed before the waiting period for expungement eligibility begins to run.⁴⁵ When a PBJ is converted into an amended disposition of conviction, probation is not completed, so section 10-105 eligibility would never accrue.⁴⁶ However, section 10-110 creates expungement eligibility for a case resulting in a conviction, provided that the underlying charge is one of the listed offenses eligible for expungement and the appropriate time period has passed.⁴⁷ As such, if a violation of probation before judgment results in an amended disposition to “guilty” and the underlying charge is eligible under section 10-110 (and all other threshold eligibility requirements are met), the case will be eligible for expungement after the appropriate waiting period, despite the fact that there had been a probationary period prior to conviction and that probation had been violated. It is important to note that, while a conviction following a violation of a PBJ should be eligible following the satisfaction of the waiting period, that period only begins to run after the completion of the sentence imposed by the amended disposition, further pushing back the eligibility date for the expungement of the case.⁴⁸

Why are all of these distinctions necessary? While all of this analysis is a fairly straightforward application of sections 10-105 and 10-110 to the various circumstances that can arise from a violation of probation, it is important to analyze the specific procedural posture of a case involving a violation of probation to understand whether the *Abhishek* decision renders the case ineligible. Because *Abhishek* is new case law in the field of expungement, practitioners will likely see many *Abhishek* objections from state’s attorneys in the next several months, some of which might involve cases where the applicability of *Abhishek* is dependent on how widely or narrowly the court’s opinion is applied.

The entire decision in *Abhishek* turns on the unambiguous case record indicating that the petitioner’s sentence was closed “unsatisfactorily.”⁴⁹ As we have seen, not every finding of a violation of probation results in a sentence being closed as “unsatisfied,” and therefore not every case with a violation of probation is clearly ineligible for expungement under *Abhishek*. A violation

⁴³ *Id.* § 6-220.

⁴⁴ *See id.* §§ 10-105, 10-110.

⁴⁵ *Id.* § 10-105.

⁴⁶ *See id.* § 10-105(c)(2)(i).

⁴⁷ *Id.* § 10-110.

⁴⁸ *See id.*

⁴⁹ *In re. Abhishek I.*, 282 A.3d 318, 319 (Md. Ct. Spec. App. 2022).

of probation that results in a continuation of probation would still be eligible for expungement once the probation is satisfied and provided the other eligibility requirements are met.⁵⁰ A violation of probation before judgment that results in an amended disposition may still be eligible for expungement under section 10-110, provided that the amended disposition is for a charge eligible under that statute, the sentence is completed, and the appropriate waiting period has run.⁵¹ As the *Abhishek* decision acknowledges, where interpretation of the statute is ambiguous, it must be interpreted to further the legislative aim of amelioration.⁵² Its disqualifying effects, therefore, should be limited to instances where a sentence of probation is unambiguously unsatisfied and no other avenue to expungement eligibility exists. As we have seen, there are situations in which a violation of probation may be entered but the eligibility requirements of sections 10-105 or 10-110 may nevertheless be satisfied by a criminal defendant.

Conclusion

The Maryland Court of Special Appeals' *Abhishek I.* decision applies the eligibility language of Criminal Procedure statute 10-110 to a situation in which a criminal defendant's sentence of probation was closed "unsatisfactorily."⁵³ Many practitioners of expungement law in Maryland have since expressed concerns about the application of the decision to other cases in which a criminal defendant violated probation. The *Abhishek* decision, however, is based on a clear, unambiguous statement in the case record indicating that one of the eligibility requirements for expungement was not satisfied.⁵⁴ There are many potential situations in which probation may be violated that do not result in the same ineligibility, such as a violation that does not terminate probation or a violation of a probation before judgment resulting in an amended disposition. These cases fall outside the scope of *Abhishek* and may well satisfy the technical requirements of either section 10-105 or section 10-110, as the case may be. An attorney responding to an objection to an expungement petition should carefully review the court record, the status of the probation after the violation hearing, and the final disposition of the case to determine whether the requirements of either 10-105 or 10-110 are satisfied, and be prepared to explain the legislative history of expungement law in any instance where the application of the statute is ambiguous.

⁵⁰ See Md. Code Ann. Crim. Proc. §§ 10-105, 10-110.

⁵¹ See *id.* § 10-110.

⁵² See *Abhishek I.*, 282 A.3d at 323 (stating that, if statutory language is ambiguous, it must be interpreted based on indicia of the legislative intent).

⁵³ *Id.* at 319.

⁵⁴ *Id.* at 323.