Criminal Law—First Circuit Holds Federal Courts Lack Jurisdiction to Expunge Criminal Records on Equitable Grounds—*United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 377 (2007)

Federal courts have ordered the expungement of a defendant's criminal record when the criminal proceeding was unlawful.[1] When the defendant bases her request for expungement on equitable grounds, however, federal courts differ on whether they have jurisdiction to consider the request.[2] In *United States v. Coloian*,[3] the United States Court of Appeals for the First Circuit considered whether a district court had jurisdiction to hear a motion to expunge a criminal record on equitable grounds.[4] The court held that the district court did not have jurisdiction to consider the motion.[5]

Artin Coloian is an attorney and was the Chief of Staff to the former Mayor of Providence, Rhode Island, Vincent "Buddy" Cianci.[6] In 2001, a federal grand jury indicted Coloian on charges of bribery and conspiracy to commit bribery.[7] The following year, after a four-day trial, a jury acquitted Coloian of both charges.[8]

In 2005, Coloian filed a motion to expunge in the United States District Court for the District of Rhode Island.[9] Coloian argued that the court should expunge his record for reasons of equity: to prevent harm to his reputation and career.[10] In response to Coloian's motion, the government argued that the

1. *See* Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir. 1973) (affirming well-established principle that courts may expunge records to preserve basic legal rights); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967) (directing district court to order county officials to expunge records of unlawful arrests and convictions); *see also* 8A FED. PROC., L. ED. § 22:26 (2007) (articulating district court's ancillary jurisdiction to expunge record of *unlawful* arrest or conviction). In the context of criminal records, courts use the terms "expungement" and "expunction" interchangeably to refer to "[t]he removal of a conviction . . . from a person's criminal record." BLACK'S LAW DICTIONARY 603 (7th ed. 1999).

2. *See infra* notes 25-26 and accompanying text (detailing circuit split on issue).

3. 480 F.3d 47 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 377 (2007).

4. *Id.* at 50.

5. *See id.* at 52 (agreeing with certain circuits, but not others, on application of Supreme Court precedent).

6. *Id.* at 48.

7. 480 F.3d at 48. In addition to Coloian, the grand jury indicted others, including "Buddy" Cianci, the former mayor of Providence, Rhode Island, on a variety of public corruption offenses. *See id.* The indictment alleged that Coloian participated in a scheme to get a job for Christopher Ise in exchange for a $5,000 payment to Cianci. *Id.*

8. *Id.*

9. *Id.* (noting Coloian filed motion more than three years after acquittal).

10. *See id.* at 48-49 (detailing Coloian's arguments in motion to expunge). At the motion hearing, Coloian admitted that the record of his acquittal did not disqualify him from positions he might desire in the future. *Id.* at 49. Nonetheless, he argued that he was more deserving of expungement than other acquitted defendants because, as an attorney and businessman, his reputation is particularly significant and the record of his acquittals damages his reputation. *Id.*

district court did not have jurisdiction to expunge a record on equitable grounds, and, in the alternative, if the court did have jurisdiction, then Coloian did not deserve expungement.[11]

The district court, in an oral disposition, held that federal courts have inherent authority to expunge criminal records, but they should use that power sparingly.[12] If Coloian's prosecution was unlawful or his criminal record constituted an extreme hardship, expungement would have been appropriate.[13] Finding that Coloian failed on both counts, the district court refused to expunge his record.[14] On appeal, the First Circuit held that the district court did not have jurisdiction to consider a request to expunge criminal records based on equitable grounds.[15]

When an arrest or prosecution violates federal law, courts may order the expungement of a suspect's or defendant's criminal record.[16] A court order to expunge a criminal record, however, is an extraordinary remedy.[17] In specific circumstances, federal law expressly allows for expungement.[18] In general, though, Congress favors the preservation of criminal records.[19]

When federal law does not provide for expungement of a criminal record, federal courts may only consider expungement requests using ancillary

11. *See* 480 F.3d at 49 (noting government's arguments in response to Coloian's motion).

12. *Id.* (quoting district court's oral disposition).

13. *See id.* (describing hypothetical successful argument for expungement).

14. *See id.* (quoting from district court's oral disposition).

15. 480 F.3d at 52 (reasoning Supreme Court precedent foreclosed ancillary jurisdiction to expunge for equitable reasons). By "equitable grounds," the court meant "grounds that rely only on notions of fairness and are entirely divorced from legal considerations." *Id.* at 51 n.6.

16. *See supra* note 1 and accompanying text (citing two cases in which federal courts ordered expungement of records after unlawful arrests and convictions).

17. *See, e.g.*, United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004) (denying expungement despite defendant's commendable rehabilitation); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (noting courts generally grant expungement only in extreme circumstances); United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975) (concluding numerous authorities demonstrate expungement reserved for extreme cases); *see also* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1313 n.59 (2000) (noting federal courts rarely expunge records of acquitted defendants); Joel Cohen & James L. Bernard, *"Expungement": Can A Successful Criminal Defendant Ever Gain Complete Closure?*, N.Y. L.J., Oct. 14, 1997, at 1 (finding expungement available only in very rare circumstances).

18. *See, e.g.*, 10 U.S.C. § 1565(e) (2006) (requiring expungement of DNA records after court overturns military conviction); 18 U.S.C. § 3607(c) (2006) (permitting expungement of criminal records in specified drug possession cases); 42 U.S.C. § 14132(d) (2006) (permitting expungement of F.B.I.'s DNA records in specified cases after conviction overturned). Most states have statutes that entitle defendants to expungement in "certain well-defined situations." James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 82 (1992) (favoring such states' expungement policies over uncertainty and inconsistency of federal decisions); *cf.* Kristin K. Henson, Comment, *Can You Make This Go Away?: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 392 (2005) (noting forty states have statutes providing for expungement, but statutes differ significantly).

19. *See* 28 U.S.C. § 534(a)(1) (2006) (requiring Attorney General to preserve different types of records of criminal investigations and proceedings); United States v. Meyer, 439 F.3d 855, 862 (8th Cir. 2006) (holding 28 U.S.C. § 534(a)(1) makes expungement of executive branch records on equitable grounds illegal); United States v. Janik, 10 F.3d 470, 472 (7th Cir. 1993) (interpreting 28 U.S.C. § 534(a)(1)-(4) to require executive branch maintenance of accurate criminal records).

jurisdiction.[20] Ancillary jurisdiction covers claims incidental to a district court's original jurisdiction over a criminal prosecution.[21] The Supreme Court defined the contours of ancillary jurisdiction in *Kokkonen v. Guardian Life Insurance Co. of America*.[22] Writing for a unanimous Court, Justice Scalia described the two uses of ancillary jurisdiction: to allow a single court to dispose of "factually interdependent" claims; and to "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[23] When courts refer to the "inherent power" of a court to consider a claim, they refer to the latter of these two uses of ancillary jurisdiction.[24]

The Third, Eighth, and Ninth Circuits use Justice Scalia's description of ancillary jurisdiction to determine that federal courts do not have jurisdiction to consider the expungement of criminal records absent a claim of unlawful arrest or prosecution.[25] In contrast, the Second, Fourth, Seventh, Tenth, and D.C. Circuits hold that district courts may consider the expungement of records for

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20. *See* United States v. Meyer, 439 F.3d 855, 859 (8th Cir. 2006) (concluding jurisdiction to expunge conviction arises only from ancillary jurisdiction absent express statutory authority). Ancillary jurisdiction is "jurisdiction to adjudicate claims and proceedings that arise out of a claim that is properly before the court." BLACK'S LAW DICTIONARY 855 (7th ed. 1999); *see also* 28 U.S.C. § 1367 (2006) (codifying federal courts' ancillary jurisdiction). *See generally* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (3d ed. 2007) (explaining legislative and judicial history of ancillary jurisdiction).

21. *See* 18 U.S.C. § 3231 (2006) (giving district courts original jurisdiction over all violations of United States law). Federal courts typically use ancillary jurisdiction in civil cases, not criminal ones. *See* Robert G. Morvillo & Robert J. Anello, *Ancillary Jurisdiction in Criminal Cases*, N.Y. L.J., June 5, 2007, at 3 (noting unusual nature of using ancillary jurisdiction in criminal cases).

22. 511 U.S. 375 (1994). The Court reversed the Ninth Circuit's affirmation of a district court order enforcing a settlement agreement. *Id.* at 382. The district court lacked the inherent power to enforce the settlement agreement when, after dismissing the case, it did not retain jurisdiction to enforce the agreement. *Id.* at 380-82.

23. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379-80 (1994) (noting degree of factual interdependence between claims has varied). The Court gave two examples of cases in which it had approved the use of ancillary jurisdiction to enable the successful functioning of federal courts: *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), which compelled payment of attorneys' fees as a sanction, and *United States v. Hudson*, 11 U.S. 32, 34 (1812), which ordered fines for contempt to maintain order during judicial proceedings. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994).

24. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994) (interpreting lower courts' reliance on "inherent power" as reference to second use of ancillary jurisdiction).

25. *See* United States v. Rowlands, 451 F.3d 173, 178 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 598 (2006) (declining petition for expungement because court lacked inherent jurisdiction); United States v. Meyer, 439 F.3d 855, 862 (8th Cir. 2006) (concluding district court cannot use ancillary jurisdiction to expunge record of conviction on equitable grounds); United States v. Dunegan, 251 F.3d 477, 478 (3d Cir. 2001) (ruling federal courts lack inherent power to hear motions for expungement); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000) (noting district courts' ancillary jurisdiction limited to expunging record of unlawful arrest); *see also* 8A FED. PROC., L. ED. § 22:26 (2007) (observing district court cannot use ancillary jurisdiction to expunge criminal records on equitable grounds). If a court were to expunge a criminal record "to reward a defendant's rehabilitation," it would do so "solely on equitable grounds," which is beyond the bounds of ancillary jurisdiction. United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000).

reasons of equity.[26] Even those courts that allow consideration of a motion to expunge on equitable grounds seldom, if ever, grant expungement.[27] The decisions issued in the Second, Fourth, Seventh, Tenth, and D.C. Circuits, unlike those in their sister circuits, either came down before *Kokkonen* or did not apply *Kokkonen*'s reasoning.[28]

In *United States v. Coloian*, the First Circuit answered for the first time whether federal courts under its jurisdiction may entertain a petition to expunge

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26. *See* United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004) (holding district courts have jurisdiction to expunge judicial branch records); United States v. Janik, 10 F.3d 470, 472 (7th Cir. 1993) (affirming district court's jurisdiction over expungement of judicial records); Livingston v. U.S. Dep't of Justice, 759 F.2d 74, 78 (D.C. Cir. 1985) (noting undisputed status of courts' inherent equitable power to expunge arrest records); Allen v. Webster, 742 F.2d 153, 154-55 (4th Cir. 1984) (affirming district court's use of equitable discretion to deny expungement); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (holding use of ancillary jurisdiction proper when considering motion to expunge); 24 C.J.S. *Criminal Law* § 2415 (2007) (observing some courts have recognized inherent equitable power to expunge criminal records); *cf.* United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975) (concluding many decisions establish power to expunge records of acquitted arrestees but not convicted ones). In *Coloian*, the First Circuit did not include the Fourth Circuit when listing the circuits that have upheld federal courts' jurisdiction to consider expungement. *See* 480 F.3d at 51-52 (failing to include Fourth Circuit in list of circuits granting jurisdiction). When considering whether to expunge judicial records, a court must conduct a "balancing test." United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004). "[T]he dangers of unwarranted adverse consequences to the individual [must] outweigh the public interest in the maintenance of the records" for a court to order expungement. *Id.* (internal quotation marks omitted) (quoting United States v. Janik, 10 F.3d 470, 472 (7th Cir. 1993)); *see also* Livingston v. U.S. Dep't of Justice, 759 F.2d 74, 78 (D.C. Cir. 1985) (noting necessity to delicately balance equities when considering expungement). The Fourth, Seventh, and Tenth Circuits have not mentioned which type of jurisdiction allows district courts to consider expungement. *See, e.g.*, United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004) (holding district courts have jurisdiction to expunge without explaining why); Allen v. Webster, 742 F.2d 153, 154-55 (4th Cir. 1984) (noting, with scant supporting authority, district courts' equitable jurisdiction to consider expungement requests); United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975) (concluding district courts have jurisdiction to expunge after citing many decisions but not analyzing them). Although those circuits do not specify ancillary jurisdiction as the basis for considering expungement, it appears to be the most logical choice. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994) (explaining reliance on inherent power as basis for considering expungement as use of ancillary jurisdiction).

27. *See, e.g.*, United States v. Flowers, 389 F.3d 737, 740 (7th Cir. 2004) (holding district court erred in granting expungement of conviction); United States v. Schnitzer, 567 F.2d 536, 540 (2d Cir. 1977) (affirming district court's denial of motion to expunge); United States v. Linn, 513 F.2d 925, 928 (10th Cir. 1975) (affirming district court's denial of motion to expunge); *see also* Leipold, *supra* note 17, at 1313 n.59 (noting federal courts only exercise power to expunge records in extreme cases).

28. *See* United States v. Meyer, 439 F.3d 855, 860-61 (8th Cir. 2006) (using Court's instruction on scope of ancillary jurisdiction); United States v. Dunegan, 251 F.3d 477, 479 (3d Cir. 2001) (refusing to consider petition for expungement in light of purposes of ancillary jurisdiction outlined in *Kokkonen*); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000) (ruling consideration of expungement on equitable grounds inconsistent with purposes of ancillary jurisdiction described in *Kokkonen*). *See generally* United States v. Flowers, 389 F.3d 737 (7th Cir. 2004) (failing to mention *Kokkonen*); United States v. Janik, 10 F.3d 470 (7th Cir. 1993) (predating *Kokkonen*); Livingston v. U.S. Dep't of Justice, 759 F.2d 74 (D.C. Cir. 1985) (same); Allen v. Webster, 742 F.2d 153 (4th Cir. 1984) (same); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (same); United States v. Linn, 513 F.2d 925 (10th Cir. 1975) (same). One commentator, writing prior to *Kokkonen*, noted the disagreement among circuits and recommended that Congress pass legislation to resolve "questions relating to the place of expungement in our jurisprudence." Diehm, *supra* note 18, at 75 (calling for clear statement of policy from Congress); *cf.* Henson, *supra* note 18, at 386 (recommending legislation to resolve confusion about courts' power to expunge criminal records).

a criminal record on equitable grounds.[29] The court sided with the Third, Eighth, and Ninth Circuits, holding that federal courts may only use ancillary jurisdiction for one of the two purposes Justice Scalia described in *Kokkonen*.[30] According to the court, Coloian's request failed the first test, because it was not "factually interdependent" with the claims originally before the district court—the charges of bribery and conspiracy to commit bribery.[31] Coloian also failed the second test, as the court held that federal courts do not require the power to consider expungement in order to function successfully.[32] The First Circuit held that district courts do not have jurisdiction to consider expungement of criminal records on equitable grounds.[33]

The First Circuit was right to apply *Kokkonen*'s conception of ancillary jurisdiction to *Coloian*.[34] In the absence of statutory authority, federal courts may only expunge criminal records by using their ancillary jurisdiction.[35] Not only was the First Circuit correct to apply *Kokkonen*, it also applied it properly.[36] The original claim before the district court—that Coloian was guilty of bribery and conspiracy to commit bribery—was not factually interdependent with whether it would be fair to expunge his criminal record in order to protect his career and reputation.[37] Furthermore, the district court functioned successfully when the jury acquitted Coloian.[38]

Congress has provided for expungement of criminal records in specific circumstances and has also expressed its preference for the maintenance of accurate criminal records.[39] In the absence of legislation permitting federal courts to consider expungement on equitable grounds, the *Coloian* court properly denied jurisdiction.[40] The court could have affirmed the district

29. 480 F.3d at 51-52 (recognizing circuit split). This case was the first time that the First Circuit had directly considered the issue. *Id.* at 50. In another First Circuit case, the court assumed without deciding that district courts may order expungement of criminal records on equitable grounds. Reyes v. Supervisor of the DEA, 834 F.2d 1093, 1098 (1st Cir. 1987) (affirming district court's refusal to use equitable authority to expunge criminal record).

30. 480 F.3d at 52 (quoting permissible uses of ancillary jurisdiction outlined in *Kokkonen*).

31. *Id.* (recognizing similar lack of interdependence between claims in *Coloian* and those in *Kokkonen*).

32. *Id.* (concluding district court functioned successfully in acquitting Coloian and criminal record does not threaten acquittal).

33. *Id.* (following *Kokkonen* to foreclose use of ancillary jurisdiction).

34. *See* 480 F.3d at 52 (reasoning neither purpose of ancillary jurisdiction allows considering expungement on equitable grounds).

35. *See supra* notes 20-21 and accompanying text (discussing ancillary jurisdiction and federal courts' use of it in criminal cases).

36. *See* 480 F.3d at 52 (examining whether Coloian's claim fit under purposes Justice Scalia described in *Kokkonen*).

37. *See id.* (distinguishing two claims from each other); *see also supra* note 10 (summarizing Coloian's arguments in favor of expungement).

38. 480 F.3d at 52 (reasoning record of acquittal consistent with and respectful of jury's judgment).

39. *See supra* notes 18-19 and accompanying text (discussing statutes that allow expungement and require maintenance of criminal records).

40. *See supra* note 18 and accompanying text (listing statutes providing for expungement, none of which allow expungement solely on equitable grounds); *see also* Diehm, *supra* note 18, at 81-82 (distinguishing

court's denial of the motion, thereby accepting jurisdiction but providing Coloian with the same result.[41] The Supreme Court's decision in *Kokkonen*, however, prevented the court from doing so.[42]

One could argue the First Circuit should not have applied *Kokkonen* because its facts are so different from those in *Coloian*.[43] While the facts of the two cases are completely different, *Kokkonen* provides a clear analysis of the purposes of ancillary jurisdiction that the First Circuit appropriately heeded.[44] One could also argue that the First Circuit did not apply *Kokkonen* correctly, either because Coloian's two claims were factually interdependent or because a grant of jurisdiction was necessary for the court to function successfully.[45] The first part of that argument would fail because there is very little interdependence between Coloian's acquittal, which turned on his role in the alleged bribery scheme, and his request to expunge, which turned on the significance of his reputation to his career.[46] The second part of the argument is equally faulty because the court functioned successfully when it acquitted Coloian, and considering expungement of the acquittal would in no way improve how the court functions.[47]

In *United States v. Coloian*, the United States Court of Appeals for the First Circuit considered whether federal courts have jurisdiction to hear requests to expunge criminal records on equitable grounds. The court was correct to apply the Supreme Court's description of the purposes of ancillary jurisdiction in *Kokkonen*, and it applied that analysis correctly. In the absence of legislation allowing federal courts to consider expungement on equitable grounds, the court properly denied jurisdiction.

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federal expungement law from most state law). Expungement statutes in most states are more comprehensive than federal statutes because they do not apply only to narrowly defined situations. *See* Diehm, *supra* note 18, at 81-82 (comparing federal and state approaches to expungement). Congress should remedy the inconsistencies in federal expungement jurisprudence by decreeing whether federal courts have jurisdiction to expunge on equitable grounds. *Id.* at 75; *cf.* Henson, *supra* note 18, at 386 (recommending legislation to resolve extent of courts' power to expunge criminal records).

41. *See supra* note 27 (listing decisions from other circuits granting jurisdiction but denying expungement). The district court refused to expunge Coloian's record. *See* 480 F.3d at 49 (recounting district court's reasoning in denying expungement).

42. *See* 480 F.3d at 52 (applying *Kokkonen* to answer whether court may grant expungement on equitable grounds).

43. *See supra* note 22 and accompanying text (discussing facts of *Kokkonen*); *see also* Morvillo & Anello, *supra* note 21 (noting ancillary jurisdiction usually used for civil cases only).

44. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379-80 (1994) (declaring two purposes for use of ancillary jurisdiction); *see also* 480 F.3d at 52 (reasoning *Kokkonen* forecloses use of ancillary jurisdiction to expunge on equitable grounds).

45. *See* 480 F.3d at 52 (applying *Kokkonen*).

46. *See supra* notes 7 and 10 and accompanying text (detailing charges against Coloian and arguments in favor of expungement).

47. *See* 480 F.3d at 52 (concluding records of acquittal consistent with jury's judgment).