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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DARREN DAVID CHAKER,  <div style="text-align: right; padding-right: 20px;">Petitioner,</div> vs.  ALAN CROGAN, SAN DIEGO COUNTY PROBATION DEPARTMENT and PEOPLE OF THE STATE OF CALIFORNIA,  <div style="text-align: right;">Respondents.</div>		Civil No. 00cv2137-BTM   <b>ORDER ISSUING WRIT OF HABEAS CORPUS</b>
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This matter is on remand from the Ninth Circuit Court of Appeals with instructions to issue a writ of habeas corpus. See Chaker v. Crogan, 428 F.3d 1215, 1220 (9th Cir. 2005) (holding that the statute under which Petitioner was convicted violates the First Amendment to the United States Constitution, granting the petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254, and remanding for issuance of the writ), cert. denied, 126 S.Ct. 2023 (2006). Petitioner is no longer in custody as a result of his misdemeanor conviction, and the parties disagree on the form of relief the writ should provide. All parties agree that the following language proposed by this Court is appropriate: "Respondents are **ORDERED** to release Petitioner forthwith from any and all custodial constraint arising from his February 1999 conviction in San Diego County Superior Court Case No. C186979, and to refrain from contending that the conviction is not null and void." However, the parties disagree as to whether the Court can or should also order expungement of records relating to the conviction.

1           Petitioner requests the Court to not only issue an order with the above language, but to  
2 also direct the State of California to forward that order with instructions to expunge all records  
3 of his arrest, prosecution and conviction by permanently destroying or sealing such records, or,  
4 if that is not possible, order obliteration of any and all entries or notations relating to his arrest,  
5 prosecution and conviction, to any person or agency which was notified of his arrest, prosecution  
6 and conviction, including but not limited to the California Department of Justice, the Superior  
7 Court of San Diego County, the San Diego County District Attorney's Office, the San Diego  
8 County Sheriff's Department, the City of El Cajon, the El Cajon Police Department, the Federal  
9 Bureau of Investigation and the National Crime Information Center. (Doc. No. 132.) The  
10 Attorney General of the State of California, representing Respondent State of California,  
11 although initially agreeing that expungement was an appropriate remedy (Doc. No. 129), now  
12 contends this Court lacks jurisdiction to order the state, its courts and law enforcement agencies  
13 to expunge records which they lawfully maintain. (Doc. No. 131.) The Attorney General  
14 contends that even assuming expungement is an available remedy in this Court through some  
15 other cause of action, such as one brought under 42 U.S.C. § 1983, it is not available in a habeas  
16 action as a matter of law, and is in any case unnecessary because the Court's proposed language  
17 is sufficient to allow Petitioner to return to state court and seek expungement under California  
18 law. (Id.)

19           Although the only form of relief authorized by the common-law writ of habeas corpus  
20 was a prisoner's immediate release from custody, for nearly 140 years federal courts have been  
21 authorized by Congress to "dispose of the matter as law and justice require." Wilkinson v.  
22 Dotson, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (quoting 28 U.S.C. § 2243). This grant  
23 of authority to fashion habeas relief is to be construed broadly. Hilton v. Braunskill, 481 U.S.  
24 770, 775 (1987) (citing In re Bonner, 151 U.S. 242, 261 (1894) ("The court is invested with the  
25 largest power to control and direct the form of judgment to be entered in cases brought up before  
26 it on *habeas corpus*.")) Nevertheless, the broad authority granted under 28 U.S.C. § 2243 still  
27 requires federal courts to be mindful of the concerns that any remedy should be "'tailored to the  
28 injury suffered from the constitutional violation' without 'unnecessarily infring(ing) on

1 competing [state] interests.” Nunes v. Mueller, 350 F.3d 1045, 1057 (9th Cir. 2003), cert.  
2 denied, 543 U.S. 1048 (2004) (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).  
3 The Ninth Circuit has recognized a district court’s power to expunge criminal records under  
4 various grants of authority, including habeas corpus. See United States v. Sumner, 226 F.3d  
5 1005,1012 (9th Cir. 2000) (collecting cases).

6 The traditional remedy of immediate release from custody is not available in this case  
7 because Petitioner is no longer in custody as a result of his conviction, although that fact does  
8 not defeat the Court’s power to grant relief. See Carafas v. La Valle, 391 U.S. 234, 239-40  
9 (1968) (holding that once habeas corpus jurisdiction has attached, it is not defeated by the  
10 subsequent release of prisoner). The Ninth Circuit here recognized that Petitioner’s custody had  
11 ended, but held that this case was not moot due to “an irrefutable presumption that collateral  
12 consequences result from any criminal conviction,” and in particular because Petitioner “faces  
13 the prospect of harsher punishment at a later date as a result of his conviction . . . .” Chaker, 428  
14 F.3d at 1219. The Court also noted that Petitioner “has shown ‘that the conduct of which he  
15 complains has caused him to suffer an “injury in fact” that a favorable judgment will redress.’”  
16 Id. (quoting Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 124 (2004)).

17 Thus, the remand order in this case clearly contemplates that the writ address, at a  
18 minimum, the sole collateral consequence identified by the Ninth Circuit, the fact that Petitioner  
19 faces the prospect that his conviction will subject him to harsher punishment in the future, and  
20 to fashion a remedy which will redress that injury. Although the order proposed by this Court  
21 clearly eliminates the possibility that the invalidated conviction could be used to enhance a  
22 future sentence, Petitioner contends expungement is necessary to eliminate additional collateral  
23 consequences of his conviction, examples of which he gives as its potential use to impeach him  
24 should he testify at a future proceeding, protection from state agencies which consider these  
25 records in matters such as licensing, etc., as well as consequences not directly attributable to the  
26 state, such as private employers who consider arrest records in their employment decisions.

27 The original Respondent to this action, the Chief Probation Officer of San Diego County,  
28 no longer has custody over Petitioner due the expiration of probation. The California Attorney

1 General has intervened to represent Respondent State of California (Doc. No. 121), and does not  
2 contest that the State of California is a proper Respondent. Nevertheless, the Attorney General  
3 argues that any remedy in this action must be limited by the fact that the writ of habeas corpus  
4 acts only on a petitioner's custodian, and is therefore aimed at protecting liberty interests only,  
5 and not every conceivable collateral consequence arising from a conviction.

#### 6 **Federal Agency Records**

7 To the extent Petitioner is seeking an order from this Court directing the physical  
8 destruction or obliteration of records referencing his arrest, prosecution and conviction which  
9 are held by federal agencies, such relief is unavailable in this action. The Court has jurisdiction  
10 in this matter only over the named Respondents. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894  
11 (9th Cir. 1996). Thus, the Court has no jurisdiction in this matter over federal agencies such as  
12 the FBI or National Crime Information Center.

13 Moreover, even were the Court to find it had jurisdiction over those entities, Petitioner  
14 has not demonstrated standing to seek expungement of his records from those agencies, nor  
15 established an entitlement to such a remedy. See Sealed Appellant v. Sealed Appellant, 130 F.3d  
16 695, 699 (5th Cir. 1997) ("In order to have standing to seek expungement, the party seeking  
17 expungement against executive agencies must assert an affirmative rights violation by the  
18 executive actors holding the records of the overturned conviction."); see also United States v.  
19 Crowell, 374 F.3d 790, 796 n.6 (9th Cir. 2004) (noting that even where expungement of judicial  
20 records would be appropriate when a conviction has been set aside, different considerations are  
21 involved with respect to executive agencies, which are required by Congress to maintain certain  
22 records), cert. denied, 543 U.S. 1070 (2005); Doe v. United States, 964 F. Supp. 1429, 1432  
23 (S.D. Cal. 1997) (recognizing inherent equitable power of district court to order expunction of  
24 federal criminal records in an action brought pursuant to 28 U.S.C. § 1331); Maurer v.  
25 Individually and as a Member of Los Angeles County Sheriff's Office, 691 F.2d 434 (9th Cir.  
26 1982) (recognizing in 42 U.S.C. § 1983 action that federal courts have "inherent equitable power  
27 to order 'the expungement of local arrest records as an appropriate remedy in the wake of police  
28 action in violation of constitutional rights,'" but noting that the FBI lacks authority to expunge

1 arrest records maintained by California authorities) (quoting Sullivan v. Murphy, 478 F.2d 938,  
2 968 (D.C. Cir. 1973) and citing Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978)).

### 3 State, City and County Records

4 With respect to expungement of the records of Petitioner's arrest, prosecution and  
5 conviction maintained by the state, city and county courts and agencies, the Attorney General  
6 contends such relief is unnecessary because an order containing the Court's proposed language  
7 is sufficient to provide Petitioner with the means to return to state court and seek expungement  
8 under California law. Petitioner replies that Maurer stands for the proposition that the California  
9 expungement statute is not an adequate form of relief. However, the Court in Maurer found, in  
10 an action brought pursuant to 42 U.S.C. § 1983, that the California statute providing for  
11 destruction of arrest records, which requires a showing of factual innocence, was not an adequate  
12 remedy because the plaintiff was not factually innocent, and that such relief was therefore not  
13 an adequate substitute for expungement in light of the fact that a declaratory judgment declaring  
14 the conviction invalid was not an available remedy. Maurer, 691 F.2d at 437. Petitioner here  
15 states that it appears to be an open question under California law whether he satisfies the factual  
16 innocence requirement so as to avail himself of the state expungement provision. However,  
17 unlike the plaintiff in Maurer, Petitioner essentially has the equivalent of a declaratory judgment  
18 declaring his conviction invalid in the form of the published opinion of the Ninth Circuit. See  
19 Chaker, 428 F.3d at 1220 (9th Cir. 2005) (holding that the statute under which Petitioner was  
20 convicted violates the First Amendment to the United States Constitution and granting the  
21 petition for writ of habeas corpus). As set forth at the end of this Order, the Court directs the  
22 state to notify those agencies it notified of Petitioner's arrest, prosecution and conviction, that  
23 his conviction has been declared invalid. Thus, an order of expungement is clearly not necessary  
24 to prevent Petitioner from facing "the prospect of harsher punishment at a later date as a result  
25 of his conviction." Chaker, 428 F.3d at 1219.

26 Petitioner contends expungement is necessary in order to prevent him from suffering  
27 other collateral consequences of his conviction, including its potential effect on employment,  
28 licensing, etc., consequences which even the California expungement statute may not eliminate.

1 Petitioner relies on a passage from Nunes, 350 F.3d at 1057, where the Court stated, in  
2 determining whether specific performance of a plea bargain rejected due to constitutionally  
3 deficient performance of counsel was an appropriate habeas remedy, that: “Conceptually, any  
4 habeas remedy ‘should put the defendant back in the position he would have been in if the Sixth  
5 Amendment violation never occurred,’ and in some circumstances granting a new trial is not the  
6 appropriate remedy to that end.” Id. (quoting United States v. Blaylock, 20 F.3d 1458, 1468 (9th  
7 Cir. 1994)). Thus, Petitioner contends this Court should use its equitable power to fashion a  
8 remedy that will put him back in the position he was in before he was arrested, prosecuted and  
9 convicted under an invalid statute.

10 However, Nunes involved a Sixth Amendment violation, whereas this Court is dealing  
11 with a First Amendment violation. In Nunes the court determined that the Sixth Amendment  
12 violation would have justified the petitioner’s release from custody, but found that ordering the  
13 state to re-offer the same plea bargain, which had been denied the petitioner due to ineffective  
14 assistance of counsel, was the appropriate narrowly-tailored habeas remedy because it would  
15 cure the constitutional taint and put him back in the position he was in before the violation  
16 occurred. Nunes, 350 F.3d at 1057. It is unlikely that any court has the power to put Petitioner  
17 here back in the position he would have been had he never been arrested, prosecuted and  
18 convicted of violating an invalid statute, i.e., to erase the fact of his arrest, prosecution and  
19 conviction. The published opinion of the Ninth Circuit contains the details of Petitioner’s,  
20 prosecution and conviction, and Petitioner does not contend this Court could direct the Ninth  
21 Circuit to depublish its opinion and seal its docket. Nevertheless, Petitioner contends that  
22 expungement of the records held by the various state, city and county agencies would enure to  
23 his benefit, as it would prevent at least some, if not all, potential collateral consequences of his  
24 conviction.

25 Nunes recognized that the broad grant of authority to fashion a federal habeas remedy “as  
26 law and justice require” does not relieve the federal courts of their duty to be mindful of the  
27 concerns that any remedy must be “‘tailored to the injury suffered from the constitutional  
28 violation’ without ‘unnecessarily infring(ing) on competing [state] interests.’” Nunes, 350 F.3d



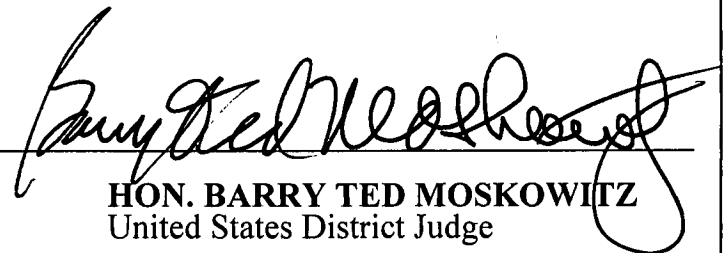
1 at 1057 (quoting Morrison, 449 U.S. at 364 (noting a “general rule that [habeas] remedies should  
2 be tailored to the injury suffered from the constitutional violation and should not unnecessarily  
3 infringe upon competing interests.”)). The form of relief provided by this Court is adequate to  
4 eliminate the most obvious and likely collateral consequence of the conviction, the one identified  
5 by the Ninth Circuit, in that it will eliminate “the prospect of harsher punishment at a later date  
6 as a result of his conviction.” It also provides Petitioner with the means of utilizing procedures  
7 available under state law to challenge or prevent any of the potential collateral consequences he  
8 has identified. At the very least, Petitioner has not demonstrated it is inadequate for those  
9 purposes. The extraordinarily broad form of relief sought by Petitioner unnecessarily infringes  
10 on state interests because it directs the State of California to take steps to expunge records which  
11 are lawfully maintained by state, city and county agencies, based on speculation of possible  
12 future injury. Neither law nor justice require the Court to dispose of this action in such a  
13 manner. However, the Petitioner is entitled to have the Respondents notify any agency that they  
14 previously notified of the arrest and conviction that the conviction has been determined to be  
15 null and void. This neutralizes any possible injury that would occur from the prior notification.

16 **Conclusion and Order**

17 The Court hereby **ISSUES** a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.  
18 Respondents are **ORDERED** to release Petitioner forthwith from any and all custodial constraint  
19 arising from his February 1999 conviction in San Diego County Superior Court Case No.  
20 C186979, and to refrain from contending that the conviction is not null and void. Respondents  
21 are **DIRECTED** to notify any and all agencies which Respondents have notified of the fact of  
22 Petitioner’s arrest, prosecution and conviction, that the conviction has been declared null and  
23 void. The Court retains jurisdiction over this matter for the limited purpose of enforcement of  
24 the writ.

25 **IT IS SO ORDERED.**

26 DATED: 9-1-2006

27   
28 **HON. BARRY TED MOSKOWITZ**  
United States District Judge

CC: ALL PARTIES