IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	**:**	**CRIMINAL ACTION**
	:	
v.	**:**	
	:	
CAROL ANNE BOND	**:**	**No. 07-528**

MEMORANDUM

Schiller, J. **January 6, 2015**

This is the final chapter of a long odyssey. This hoped for final installment featured a continuation of overzealous prosecution. The prosecutorial exercise of discretion here could have benefitted from the sage advice of Kenny Rogers: "know when to hold 'em, know when to fold 'em, know when to walk away."[1] In this case, discretion was on vacation.

The case is now before the Court on Defendant's Motion for Expungement of the records of two convictions recently vacated by the Supreme Court. For the reasons that follow, the Court determines that it has jurisdiction to decide this motion as to the judicial records of these convictions, as well as to the executive records held by the U.S. Department of Justice and the U.S. Attorney for the Eastern District of Pennsylvania. Those records shall be expunged. The Court determines that it does not have jurisdiction to decide the motion as to the records held by the U.S. Postal Service, the FBI, or the U.S. Probation Office for the Eastern District of Pennsylvania. Although those records will not be ordered expunged by this Court, the U.S. Attorney's Office for the Eastern District of Pennsylvania shall notify those agencies, and any other agency with which they have communicated about this case, that Defendant's convictions have been vacated by the Supreme Court and expunged.

[1] Kenny Rogers, *The Gambler*, on The Gambler (United Artists 1978).

I. BACKGROUND

The following briefly summarizes the pertinent facts of the case, which may be found in greater detail in *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009) (*Bond I*), *Bond v. United States*, 131 S. Ct. 2355 (2011) (*Bond II*), *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012) (*Bond III*), and *Bond v. United States*, 134 S. Ct. 2077 (2014) (*Bond IV*).

A. Factual Background

Defendant Carol Anne Bond is a microbiologist who discovered that her husband and her best friend had been having an affair, resulting in her erstwhile friend's pregnancy. Bond sought revenge by regularly placing toxic chemicals on the friend's car door, mailbox, and door knob over the course of approximately eight months. The chemicals were plainly visible and the friend suffered no injuries except "a minor chemical burn on her thumb, which she treated by rinsing with water." *Bond IV*, 134 S. Ct. at 2087. Although the friend repeatedly reported the chemicals to the local police, they failed to act. Eventually she went to the postal service, which dispatched inspectors to investigate the interference with her mailbox. Surveillance cameras placed by these inspectors captured video of Bond opening the mailbox, removing an envelope, and placing chemicals inside the friend's muffler.

The Commonwealth of Pennsylvania convicted Bond of a minor offense for some harassing phone calls and letters she sent to her victim, but did not bring charges related to the chemicals. Apparently not satisfied with this result, the United States charged her with two counts of mail fraud and two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229 (2014). That statute was passed in the Chemical Weapons Convention Implementation Act, Pub. L. No. 105-277, 112 Stat. 2681-856 (1998). Bond conditionally pled

guilty to all of the federal charges, reserving her right to appeal. She was sentenced to six years in prison. On appeal, Bond raised a Tenth Amendment challenge to the chemical weapons charges. The Government asserted she lacked standing and the Third Circuit agreed. *Bond I*, 581 F.3d 128. When the Supreme Court granted cert, the Government reversed its position and conceded the standing question. *Bond II*, 131 S. Ct. at 2361. The Supreme Court reversed on the standing issue, without expressing an opinion on the merits of the constitutional challenge. *Id.* at 2367.

On remand, Bond again raised her Tenth Amendment challenge and, in the alternative, argued that section 229 did not reach her conduct. Although the Third Circuit noted that, under the Government's interpretation, the breadth of the Act "turns each kitchen cupboard and cleaning cabinet in America into a potential weapons cache," *Bond III*, 681 F.3d at 154 n.7, it reluctantly determined that the statute covered Bond's conduct and moved on to the constitutional question, which the Circuit also determined in the Government's favor.

The Supreme Court again granted cert and unanimously reversed the Third Circuit in *Bond IV*. A majority of the Court avoided the direct constitutional challenge by holding that section 229 did not cover Bond's conduct. *Bond IV*, 134 S. Ct. at 2091. The Court found that the statute's meaning was ambiguous because of the following factors: "the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism." *Bond IV*, 134 S. Ct. at 2090. The Court stated it was bound to interpret the statute "consistent with principles of federalism inherent in our constitutional structure." *Id*. at 2088. The Court therefore determined: "the background principle that Congress does not normally

intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack." *Id*. at 2092.

Along the way, the Court repeatedly noted the "curious" nature of the case, stating: "with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes." *Id*. at 2090, 2092. The Court further criticized the Government's approach, stating:

> The Government's reading of section 229 would alter sensitive federal-state relationships, convert an astonishing amount of traditionally local criminal conduct into a matter for federal enforcement, and involve a substantial extension of federal police resources. It would transform the statute from one whose core concerns are acts of war, assassinations, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, hardly a poisoning in the land would fall outside the federal statute's domain.

Id. at 2091-92 (internal quotations and citations omitted). Later, the Court continued:

> Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State. Here, in its zeal to prosecute Bond, the Federal Government has displaced the public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, that Bond does not belong in prison for a chemical weapons offense.

Id. at 2093 (internal quotations and citations omitted). The Court concluded: "the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon." *Id*. at 2093.

B. Procedural Background

Bond IV remanded the case to this Court for resentencing on the two mail fraud convictions that remained after the chemical weapons charges were vacated. By that time, Bond had already served her original six-year sentence. The Probation Office proposed a revised Sentencing Guidelines calculation of 12 to 18 months. This calculation included increases for conscious risk of death or bodily injury, U.S.S.G. § 2B1.1(B)(15), and use of a special skill, *id*. § 3B1.3, as well as a decrease for acceptance of responsibility, *id*. § 3E1.1. Bond acquiesced to this recommendation. The Government, represented by the same prosecutor who has litigated this case at every stage except in the Supreme Court, vigorously opposed this recommendation. In an eighteen-page brief, the Government argued that "the most analogous guideline to the defendant's conduct in this case is for attempted murder," calculated a different recommended sentence of 63 to 78 months based on the attempted murder guideline, and therefore advocated for a sentence of six years, time served. In the history of the case, this was the first time the Government had ever raised an attempted murder theory. This Court followed the Probation Office's recommendation of 18 months, time served. Following the re-sentencing hearing on September 18, 2014, the docket in this case was closed.

On November 13, 2014, Bond moved to expunge the records of her now-vacated convictions for use of a chemical weapon. (Def.'s Mot. for Expungement, ECF Doc. No. 68 [Def.'s Mot.].) She requests that this Court order the expungement of records held not only by this District, but also by the U.S. Department of Justice, the U.S. Attorney for this District, the U.S. Postal Service, the FBI, and the U.S. Probation Office for this District. The Government opposes this request.

II. DISCUSSION

The Court first addresses the jurisdictional dispute and finds that it has ancillary jurisdiction over Bond's request for expungement of records held by the judicial branch, as well as those held by the U.S. Department of Justice and the U.S. Attorney for the Eastern District of Philadelphia. The Court declines to consider the request to expunge records held by the other executive agencies. The Court then turns to the merits of the expungement request.

A. Ancillary Jurisdiction

Although this Court's jurisdiction is limited, courts in the Third Circuit have ancillary jurisdiction to expunge criminal records in certain narrow circumstances, where the petitioner challenges the legality of the underlying criminal proceeding. *United States v. Rowlands*, 451 F.3d 173, 178 (3d Cir. 2006). Bond argues that such jurisdiction applies here, where the Supreme Court ruled that her convictions for use of chemical weapons were contrary to the law. (Def.'s Mot. at 5.)

The Government disputes that ancillary jurisdiction should apply in this case. (Gov't's Opp. to Mot. for Expungement [Gov't's Opp.] at 7-9.) The Government argues that, since the Third Circuit has never decided a case involving an expungement request that challenged the legality of the underlying conviction, any statements regarding jurisdiction to do so are merely dicta. *Id*. at 8-9. The Government also distinguishes between the Court's power to expunge judicial records and its power to expunge records kept by the executive branch, arguing that this Court has even less authority to consider a request for the latter. *Id*. at 10-12.

The Government relies heavily on *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), to argue that this Court lacks jurisdiction to consider this motion. As the Supreme Court stated in that case, federal courts "possess only that power authorized by

Constitution and statute, which is not to be expanded by judicial decree." *Id.* at 377. *Kokkonen* involved a lawsuit to enforce a settlement agreement which had, in part, resolved a previous federal case. The Supreme Court determined that the district court did not have jurisdiction to hear the enforcement matter. *Id.* at 381-82. In so doing, the Court defined the contours of modern-day ancillary jurisdiction as appropriate only "for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are . . . factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80. In addition, in *Kokkonen*, the parties did not request that the district court incorporate the settlement agreement into the order dismissing the original lawsuit, nor did the district court explicitly retain jurisdiction over the settlement agreement at its own discretion. Either scenario would have provided continued jurisdiction to enforce the agreement. *Id.* at 381-82. Without that jurisdiction, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." *Id.* at 382.

Since *Kokkonen*, the Third Circuit has determined that federal courts have "jurisdiction over petitions for expungement in narrow circumstances: where the validity of the underlying criminal proceeding is challenged." *Rowlands*, 451 F.3d at 177. This is consistent with either basis for ancillary jurisdiction stated in *Kokkonen*. First, where the underlying criminal proceeding is challenged, the claim is by necessity factually interdependent with the original proceeding. Second, if the prior proceeding was actually unlawful, a court may only vindicate its authority as a court of law with the power to rectify the matter.

The Government attempts to discredit *Rowlands* and rely instead on *United States v. Dunegan*, 251 F.3d 477 (3d Cir. 2001), by pointing out that *Rowlands* does not cite *Kokkonen*

but mainly cites pre-*Kokkonen* precedent. There are three major flaws with this argument. First, as explained above, *Rowlands* is fully consistent with *Kokkonen*. Second, *Rowlands* directly addresses and clarifies *Dunegan*, which extensively cites *Kokkonen*. Third, *Dunegan* does not support the Government's argument against ancillary jurisdiction in this case, as it explicitly reserved that question by stating: "We need not consider at this time whether a record may be expunged on the basis of Constitutional or statutory infirmity in the underlying criminal proceedings or on the basis of an unlawful arrest or conviction. . . . [The defendant] has not alleged any unlawful arrest or other legal infirmity." 251 F.3d at 480.

As Bond claims that her underlying convictions for use of a chemical weapon were illegal, this Court has jurisdiction to consider the matter of expungement.

B. Executive Branch Records

The Government contends that, even if this Court has jurisdiction to expunge judicial records, it does not have jurisdiction to consider a request to expunge executive records, such as those kept by the Attorney General. The only Third Circuit case the Government cites for this proposition is *Carter v. United States*, 431 F. App'x 104 (3d Cir. 2011). In *Carter*, the petitioner requested expungement of his FBI arrest records, where no judicial proceedings had ever been brought against him. The Third Circuit held: "As judicial proceedings against [petitioner] were never initiated, there is no prior act or proceeding over which we might have retained inherent jurisdiction. Furthermore, [petitioner asked] the court to expunge executive (FBI) records, not judicial records." *Id.* at 106. This Court will not read this offhand comment—in a non-precedential opinion that found no jurisdiction based on the lack of judicial proceedings—to mean that federal courts always lack jurisdiction to order expungement of executive records.

Older cases in the Third Circuit do not differentiate between executive and judicial records, simply referring to the expungement of all arrest and conviction records as an "extraordinary remedy," made "when an arrest or conviction is constitutionally infirm." *United States v. Noonan*, 906 F.2d 952, 956-57 (3d Cir. 1990). The Third Circuit has not otherwise spoken on the power of district courts to expunge executive records, as it has never considered a case in which petitioner claimed that the underlying proceedings were illegal.

Other circuits either do not differentiate between executive and judicial records, or have considered—and largely denied—only equitable requests for expungement, not requests based on the invalidity of the underlying proceedings. *E.g.*, *United States v. Meyer*, 439 F.3d 855, 861-62 (8th Cir. 2006) ("[Courts] may have ancillary jurisdiction to expunge criminal records in extraordinary cases . . . to correct an injustice caused by an illegal or invalid criminal proceeding. However, . . . [p]ermitting the expungement of a record solely on equitable grounds would interfere with state and federal laws that rely on the existence of accurate and complete criminal records."). Dicta from these latter cases indicate a possible split across circuits. On one side, the Sixth Circuit has proclaimed that judicial expungement of executive records "would amount to an extraordinary inter-branch incursion," implying that that circuit would be highly unlikely to find jurisdiction for such a request. *United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2011); *see also United States v. Janik*, 10 F.3d 470, 473 (7th Cir. 1993) ("To obtain expungement of records maintained by the FBI or any other Executive Branch agency, [the defendant] (or anyone else) must go directly to the Executive Branch."). On the other side, the Fifth Circuit would likely allow consideration of such a request, stating only that "to have standing to seek expungement, the party seeking expungement against executive agencies must assert an affirmative rights violation by the executive actors holding the records of the overturned

conviction." *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 699 (5th Cir. 1997); *see also Janik*, 10 F.3d at 473 (Cudahy, J., concurring in part and dissenting in part) ("[T]he relation of the federal courts to law enforcement agencies is so close as to validate as a practical matter judicial surveillance of closely related agency files.").

Given that the Third Circuit has not issued precedent differentiating between executive and judicial records, but does generally acknowledge the availability of expungement as a remedy, this Court will follow the Fifth Circuit's approach involving only a heightened standard for requests to expunge executive branch records. In this case, Bond has asserted an affirmative rights violation by some of the executive actors holding the records of the overturned conviction: She asserts that she was unlawfully prosecuted as a chemical weapons terrorist, when in fact she was merely a "jilted wife." *Bond IV*, 134 S. Ct. at 2083. Bond points to the fact that "with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes" as evidence that her prosecution was particularly inappropriate. *Id.* at 2092.

This Court finds that it has jurisdiction to consider Bond's request to expunge records held by the U.S. Attorney for the Eastern District of Pennsylvania and the U.S. Department of Justice regarding her vacated convictions. As Bond asserts no rights violations by the U.S. Postal Service, the Federal Bureau of Investigation, or the U.S. Probation Office for the Eastern District of Pennsylvania, this Court will decline to consider her request to expunge those entities' records.

C. Expungement Analysis

After finding jurisdiction, the Third Circuit's test for expungement is "a balancing test in which the harm to the individual caused by the existence of the records is weighed against the

governmental interest in maintenance of the records." *Rowlands*, 451 F.3d at 177. Some of the factors to be weighed in the balancing include:

> the accuracy and adverse nature of the information, the availability and scope of dissemination of the records, the legality of the methods by which the information was compiled, the existence of statutes authorizing the compilation and maintenance, and prohibiting the destruction, of the records, and the value of the records to the Government.

Paton v. La Prade, 524 F.2d 862, 869 (3d Cir. 1975). The Third Circuit, however, has explicitly not indicated "the relative importance to be attached to each of the factors." *Id.* at 869 n.6.

Some of these factors weigh against expungement. The information—that Bond was convicted of two charges under section 229, which were subsequently vacated by the Supreme Court—is certainly accurate. The availability of that information[2] seems to be widespread; the Government has referenced significant publicity related to this case, in addition to the facts recited in the public record of *Bond I* through *Bond IV*. There are statutes that authorize the compilation and maintenance of such records. *E.g.*, 28 U.S.C. § 534(a)(1) (2014) ("The Attorney General shall . . . acquire, collect, classify, and preserve identification, criminal identification, crime, and other records[.]").

Other factors weigh in favor of expungement. The nature of the information, which associates Bond with charges of chemical weapons terrorism, is certainly damaging, regardless of the ultimate disposition of those charges. This is particularly true given Bond's profession as a microbiologist who works with dangerous chemicals. Although the methods by which the

[2] The *Paton* factors specifically refer to "the availability and scope of dissemination of the records" as opposed to "the information." 524 F.2d at 869. The Court will give the Government the benefit of the doubt in its argument regarding the dissemination of the information, as restricting this factor merely to the official record makes no difference to the outcome here. The Court gives little weight to this factor, as denying Bond her remedy on the basis of media interest in her story seems particularly unjust.

information was compiled may have seemed superficially legal, the Supreme Court has now clarified that the main vehicle for compiling the information—prosecution of Bond's conduct under section 229—is entirely illegal.

The final factor, however, controls this Court's analysis. The Federal Government can have no real interest in preserving a record of Bond's unlawful conviction at this stage. As the Supreme Court stated, "there are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the State. The Solicitor General acknowledged as much at oral argument." *Bond IV*, 134 S. Ct. at 2093. The Court could not have spoken more plainly on this issue.

Moreover, the Supreme Court strongly disapproved of the prosecutorial decision to charge Bond with this crime, a censure that appears to be lost on Bond's perennial prosecutor. This prosecutor's continued unwillingness to acknowledge the extent of the Supreme Court's censure of his methods is expressed by a footnote in his brief that states: "Bond does not, and cannot, contend that there was not probable cause to support even the Chemical Weapons charges ultimately reversed by the Supreme Court." (Gov't's Opp. to Mot. for Expungement [Gov't's Br.] at 9 n.4.) To the contrary, this is exactly what the Supreme Court held: properly construed, there is no way the Chemical Weapons statute covers Bond's conduct in this case. This is the first and only case in which any prosecutor in the country has ever tried to stretch this statute so far as to "dramatically intrude[ ] upon traditional state criminal jurisdiction." *Bond IV*, 134 S. Ct. at 2088 (quotation omitted). Not only did the Government lack probable cause to bring the chemical weapons charges, it was prosecutorial overreach to try to second-guess the state authorities' decision and shoehorn Bond's conduct into a statute on terrorism. In this way,

this case is unlike *United States v. Panarella*, in which the conviction sought to be expunged was one of many vacated by a Supreme Court re-interpretation of a more esoteric criminal statute. Crim. A. No. 00-655, 2012 WL 440396, at *2 (E.D. Pa. Feb. 13, 2012). It is also unlike *United States v. Williams*, in which police misconduct led the Government to exercise its discretion to dismiss convictions out of a well-reasoned concern that the convictions were invalid. Crim. A. No. 08-21, 2011 WL 489771, at *2 (N.D. Okla. Feb. 7, 2011). In that case, the interests of justice also required the records of the convictions to be available as evidence for future proceedings, civil or criminal, against the allegedly offending police officer. *Id.* at *5.

Now that the Supreme Court has clarified that "in its zeal to prosecute Bond, the Federal Government has 'displaced' the 'public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign,'" this Court cannot see how the Government's continued attempts to uphold and preserve the evidence of this strange and illegal conviction—first by arguing for a hefty upward departure from the guidelines upon re-sentencing, and now by vehemently opposing record expungement—serves either the Government interest or the interests of justice. *Bond*, 134 S. Ct. at 2093. In elevating Bond's petty, obsessive quest for vengeance to the level of an international terrorist attack and continuing to try to preserve the results despite two Supreme Court decisions that clearly rejected the Government's position, this prosecutor is perilously close to transforming this case into one about his own petty obsession with these charges. Enough.

The judicial records of Bond's convictions under section 229 shall be expunged. The records kept by the U.S. Department of Justice and the U.S. Attorney for the Eastern District of Pennsylvania shall also be expunged. The U.S. Attorney for the Eastern District of Pennsylvania is further ordered to notify the appropriate divisions of the U.S. Postal Service, the FBI, the U.S.

Probation Office for the Eastern District of Pennsylvania, and any other agency with which he has communicated about this case, that these convictions have been vacated by the Supreme Court and expunged.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendant's motion to expunge. An Order consistent with this memorandum will be docketed separately.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

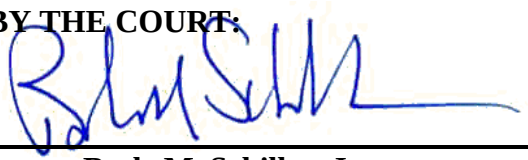
UNITED STATES	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
CAROL ANNE BOND	:	**No. 07-528**

ORDER

AND NOW, this **6th** day of **January, 2015**, upon consideration of Defendant's Motion for Expungement, the Government's response and Defendant's reply thereto, and for the reasons stated in the Court's accompanying memorandum dated January 6, 2015, it is hereby **ORDERED** that:

1. The motion (Document No. 68) is **GRANTED** in part and **DENIED** in part;
2. The judicial records of Defendant's convictions under section 229 shall be expunged;
3. The records kept by the U.S. Department of Justice and the U.S. Attorney for the Eastern District of Pennsylvania regarding Defendant's convictions under section 229 shall also be expunged;
4. The U.S. Attorney for the Eastern District of Pennsylvania shall notify the appropriate divisions of the U.S. Postal Service, the Federal Bureau of Investigation, the U.S. Probation Office for the Eastern District of Pennsylvania, and any other agency with which he has communicated about this case, that Defendant's convictions under section 229 have been vacated by the Supreme Court and expunged.

BY THE COURT:



Berle M. Schiller, J.