UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. KENNETH L. BRYANT, Defendant.	CASE NO. 84-0726-CR-RYSKAMP **GOVERNMENT'S RESPONSE TO DEFENDANT'S PRO SE MOTION TO EXPUNGE THE CLERK OF COURT'S FILES AND RECORDS**

COMES NOW, the United States of America, by and through the undersigned Assistant United States Attorney, and submits for the Court's consideration the instant Government's Response to Defendant's Pro Se Motion to Expunge the Clerk of Court's Files and Records. In opposition thereto, the government responds as follows:

I. BACKGROUND

An examination of the Court's case file[1] in this matter indicates the following: That on or about June 11, 1984, the defendant, who was then a student at Florida International University (FIU), in Miami, Florida, falsely told a FIU police officer that he was an Special Agent of the Federal Bureau of Investigation (FBI), working out of the FBI Office in Miami.

[1] Records of the Federal Archives and Records Center indicate that the United States Attorney's Office's file with respect to this prosecution were destroyed in January of 1996, pursuant to standard procedure after ten years' retention in archives.

Complaint Affidavit of October 11, 1984, at 1. The defendant was further alledged to have told the police officer that he (Bryant) was attempting to execute a federal warrant for obstruction of justice on a young woman who was an FIU student (hereinafter "the FIU student"), and asked the police officer to observe the FIU student's comings and goings in order to assist the defendant in serving the purported warrant. Id. The defendant further gave the FIU police officer an automobile tag number to run a registration check on, which was registered to the FIU student. Later in the same conversation, the defendant asked the FIU police officer to run a registration check on a second license tag. Id., at 1-2. The officer ran this second tag via the officer's car radio, and when the information came back over the radio, the defendant monitored the same radio frequency and, thereby, obtained the confidential information contained therein. Id., at 2.

Approximately one week prior to the above described events, the defendant also asked a detective with the City of Miami police department to deliver a letter to an Investigator of the Florida Department of Law Enforcement. Id., at 2. Therein, the defendant identified himself as "U.S. Special Agent" with the U.S. "Department of Justice, Organized Crime and Racketeering [Section], Organized Crime Strike Force." Id.; see also Exhibit A, attached thereto. In addition, the affidavit discloses that the defendant made several unauthorized communications over the radio frequencies utilized by the City of Miami Police Department, and the FBI. Id., at 2-3.

The defendant was subsequently arrested on October 11, 1984, and was thereafter indicted in Count I thereof, on charges of impersonating a federal agent, and in Counts II and III for the unauthorized use of a communication apparatus (related to the unauthorized communication over the radio) on October 20, 1984. The defendant, represented by the Federal Public Defender, subsequently pleaded guilty to Count I of the Indictment on January 14, 1985. The defendant was sentenced on February 27, 1985, and an amended Judgment and Commitment Order entered on September 13, 1985, providing for the following sentence:

> Imposition of sentence of confinement be withheld and, pursuant to Title 18, United States Code, Section 5010(a) of the Federal Youth Corrections Act the defendant be placed on probation for a period of FOUR (4) YEARS.

On January 6, 1986, defendant, through counsel, filed a motion to reduce and/or modify sentence pursuant to Federal Rule of Criminal Procedure 35. This Court granted defendant's Rule 35 motion on September 17, 1987, and issued a certificate of vacation of conviction and a discharge from probation.

Defendant filed the instant pro se motion on or about February 26, 1996. On October 23, 1996, this Court Ordered the United States to file a response to defendant's motion on or before November 25, 1996. Accordingly, the government responds as follows:

II. ARGUMENT

Title 18, United States Code, Section 5021(a), provides that "[u]pon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum

sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect." 18 U.S.C. § 5021(a).

In his motion, defendant complains that although his FBI Identification Division arrest and conviction records have been expunged (which the government has confirmed through an NCIC criminal history check), that he is prejudiced by virtue of the files and records maintained by the Clerk of Court's Office for the Southern District of Florida. In essence, the defendant alleges that he has been turned down for employment as a Special Agent with federal law enforcement agencies (e.g., the FBI and DEA) because the existence of those records comes to the attention of federal investigators conducting applicant background checks, thus divulging his expunged/set aside criminal history.

Although defendant's aspirations for employment as a federal career law enforcement officer are surely laudable, the United States would respectfully submit, however, that on the basis of Eleventh Circuit precedent, sealing or expunction of the files of the Clerk of Court with respect to the above-captioned matter is not appropriate under the Federal Youth Corrections Act (FYCA), Title 18, United States Code, Sections 5005 et seq.[2] (repealed Pub.L. 98-473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027). The records maintained by the Clerk of Court are most analogous to arrest records -- indeed, primarily are arrest

[2] A copy of these sections is attached for the Court's convenience as Government Exhibit A.

records. In United States v. Doe, 747 F.2d 1358 (11th Cir. 1984), the Eleventh Circuit ruled that Title 18, United States Code, Section 5021(a) does not entitle its recipient to the destruction, segregation, or sealing of his arrest record, or to the destruction of his record of conviction. Id. at 1359.[3] In so ruling, the Eleventh Circuit relied on the legislative history of the FYCA, and concluded that in enacting that statute and providing for expunction, Congress did not intend to conceal the fact of a conviction. Castano v. I.N.S., 956 F.2d 236, 239 (11th Cir. 1992)(citing Doe, 747 F.2d at 1359-60 ("[S]ection 5021(a) was not contemplated as a method of concealing the fact of conviction from employers, but rather as a way of opening up job opportunities to youth offenders in positions which, for reasons of company policy, government regulation, or otherwise, would not be available for ex-convicts." (citation omitted)).

With its issuance of the Doe opinion, the Eleventh Circuit joined the majority view of the First, Sixth, and Eighth Circuits, in holding that a youthful offender is not entitled to have his or her conviction record expunged pursuant to section 5021(a). See United States v. Doe, 732 F.2d 229, 230-32 (1st Cir. 1984); United States v. Doe, 556 F.2d 391, 392-93 (6th Cir. 1977); United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976). Moreover, as discussed at length in Doe v. Webster, 606 F.2d 1226, 1243-44 (D.C.

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[3] For the Court's convenience, and because defendant may not have ready access to these opinions, the government has appended copies of the two relevant Eleventh Circuit opinions hereto as Government's Exhibit B.

Cir. 1979), there are strong public policy rationales for the maintenance of these records.

The government would submit that the Doe and Castano Courts' holdings are similarly applicable here. Had Congress intended to completely conceal any trace whatsoever of a youth offender's arrest and conviction by means of Section 5021(a) of the FYCA -- to include the Court's files -- it clearly would have done so. Section 5021, however, is silent on that point.

III. CONCLUSION

For the reasons set forth above, the government respectfully submits that Title 18, United States Code, Section 5021, does not provide for the relief requested by defendant, and that his motion should thus be denied.

Respectfully submitted,

WILLIAM A. KEEFER
UNITED STATES ATTORNEY

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Government's Response to Defendant's Pro Se Motion to Expunge the Clerk of Court's Files and Records was mailed this 21st day of November, 1996, to:

Mr. Kenneth L. Bryant
8250 NW 191 St
Suite E
Miami, Florida 33015

JOHN C. McMILLAN, JR.
ASSISTANT UNITED STATES ATTORNEY

(d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

(Added May 9, 1952, c. 253, § 1, 66 Stat. 68, and amended Oct. 19, 1965, Pub.L. 89-267, § 1, 79 Stat. 990.)

CHAPTER 402—FEDERAL YOUTH CORRECTIONS ACT

Sec.
5006. Youth correction decisions.
5006. Definitions.
[5007 to 5009. Repealed.]
5010. Sentence.
5011. Treatment.
5012. Certificate as to availability of facilities.
5013. Provision of facilities.
5014. Classification studies and reports.
5015. Powers of Director as to placement of youth offenders.
5016. Reports concerning offenders.
5017. Release of youth offenders.
5018. Revocation of Commission orders.
5019. Supervision of released youth offenders.
5020. Apprehension of released offenders.[1]
5021. Certificate setting aside conviction.
5022. Applicable data.
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5024. Where applicable.
5025. Applicability to the District of Columbia.
5026. Parole of other offenders not affected.

[1] So in original. Item does not conform to section catchline.

§ 5005. Youth correction decisions

The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended Mar. 15, 1976, Pub.L. 94-233, § 3, 90 Stat. 231.)

§ 5006. Definitions

As used in this chapter—

(a) "Commission" means the United States Parole Commission;

(b) "Bureau" means the Bureau of Prisons;

(c) "Director" means the Director of the Bureau of Prisons;

(d) "youth offender" means a person under the age of twenty-two years at the time of conviction;

(e) "committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of this chapter;

(f) "treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and

(g) "conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended Mar. 15, 1976, Pub.L. 94-233, § 4, 90 Stat. 231.)

[§§ 5007 to 5009. Repealed. Pub.L. 94-233, § 5, Mar. 15, 1976, 90 Stat. 231]

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the

Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5011. Treatment

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.)

§ 5012. Certificate as to availability of facilities

No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.)

§ 5013. Provision of facilities

The Director may contract with any appropriate public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for "Support of United States Prisoners".

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.)

§ 5014. Classification studies and reports

The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended July 17, 1970, Pub.L. 91-339, § 1, 84 Stat. 437; Mar. 15, 1976, Pub.L. 94-233, § 6, 90 Stat. 231.)

§ 5015. Powers of Director as to placement of youth offenders

(a) On receipt of the report and recommendations from the classification agency the Director may—

(1) recommend to the Commission that the committed youth offender be released conditionally under supervision; or

(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5016. Reports concerning offenders

The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Commission as to each such offender as the Commission may require. United States probation officers and supervisory agents shall likewise report to the Commission respecting youth offenders under their supervision as the Commission may direct.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5017. Release of youth offenders

(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, §§ 7, 9, 90 Stat. 232.)

§ 5018. Revocation of Commission orders

The Commission may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5019. Supervision of released youth offenders

Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Commission. The Commission is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5020. Apprehension of released offenders

If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended July 17, 1970, Pub.L. 91-339, § 2, 84 Stat. 457; Mar. 15, 1976, Pub.L. 94-233, § 8, 90 Stat. 232.)

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Oct. 3, 1961, Pub.L. 87-336, 75 Stat. 750; Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.)

§ 5022. Applicable date

This chapter shall not apply to any offense committed before its enactment.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089.)

§ 5023. Relationship to Probation and Juvenile Delinquency Acts

(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title or the Act of June 25, 1910 (ch. 433, 36 Stat. 864), as amended (ch. 1, title 24, of the D. of C. Code), both relative to probation.

(b) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of chapter 403 of this title (the Federal Juvenile Delinquency Act), or limit the jurisdiction of the United States courts in the administration and enforcement of that chapter except that the powers

as to parole of juvenile delinquents shall be exercised by the Division.

(c) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of the Juvenile Court Act of the District of Columbia (ch. 9, title 11, of the D. of C. Code).

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Apr. 8, 1952, c. 163, § 1, 66 Stat. 45.)

§ 5024. Where applicable

This chapter shall apply in the States of the United States and in the District of Columbia.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Apr. 8, 1952, c. 163, § 2, 66 Stat. 45; June 25, 1959, Pub.L. 86-70, § 17(a), 73 Stat. 144; July 12, 1960, Pub.L. 86-624, § 12(b), 74 Stat. 413; Dec. 27, 1967, Pub.L. 90-226, Title VIII, § 801(a), 81 Stat. 741.)

§ 5025. Applicability to the District of Columbia

(a) The Commissioner of the District of Columbia is authorized to provide facilities and personnel for the treatment and rehabilitation of youth offenders convicted of violations of any law of the United States applicable exclusively to the District of Columbia or to contract with the Director of the Bureau of Prisons for their treatment and rehabilitation, the cost of which may be paid from the appropriation for the District of Columbia.

(b) When facilities of the District of Columbia are utilized by the Attorney General for the treatment and rehabilitation of youth offenders convicted of violations of laws of the United States not applicable exclusively to the District of Columbia, the cost shall be paid from the "Appropriation for Support of United States Prisoners".

(c) All youth offenders committed to institutions of the District of Columbia shall be under the supervision of the Commissioner of the District of Columbia, and he shall provide for their maintenance, treatment, rehabilitation, supervision, conditional release, and discharge in conformity with the objectives of this chapter.

(Added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46, and amended Dec. 27, 1967, Pub.L. 90-226, Title VIII, § 801(b), 81 Stat. 741.)

Transfer of Functions. Functions of the Board of Commissioners of the District of Columbia were transferred to the Commissioner of the District of Columbia. The office of Commissioner of the District of Columbia was abolished and replaced by the office of Mayor of the District of Columbia.

§ 5026. Parole of other offenders not affected

Nothing in this chapter shall be construed as repealing or modifying the duties, power, or authority of the Board of Parole, or of the Board of Parole of the District of Columbia, with respect to the parole of United States prisoners, or prisoners convicted in the District of Columbia, respectively, not held to be committed youth offenders or juvenile delinquents.

(Added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46.)

Change of Name. Reference to the Board of Parole deemed to be a reference to the United States Parole Commission pursuant to Pub.L. 94-233, § 12, Mar. 15, 1976, 90 Stat. 233.

CHAPTER 403—JUVENILE DELINQUENCY

Sec.
5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.
5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speedy trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitment.
5040. Support.
5041. Parole.
5042. Revocation of parole or probation.

§ 5031. Definitions

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

(As amended Sept. 7, 1974, Pub.L. 93-415, Title V, § 501, 88 Stat. 1133.)

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.

The case must therefore be remanded to the trial court with directions to determine whether attorney's fees are justified and, if so, in what amount.

REMANDED with directions.

John Elkin CASTANO, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 91-5031.

United States Court of Appeals, Eleventh Circuit.

March 17, 1992.

Alien requested that his immigration status be adjusted to permanent residency. The Board of Immigration Appeals upheld a ruling by an immigration judge that the alien was inadmissible based on the facts underlying his prior expunged conviction under the Federal Youth Corrections Act, and alien appealed. The Court of Appeals, Hill, Senior Circuit Judge, held that facts underlying prior conviction for drug trafficking which has been expunged pursuant to the Federal Youth Corrections Act may provide basis for denying alien admission to the United States under provision of the Immigration and Naturalization Act making inadmissible any alien whom immigration officer knows or has reason to believe is or has been illicit trafficker in drugs.

Affirmed.

1. Aliens ⇐47

Facts underlying prior conviction for drug trafficking which has been expunged pursuant to the Federal Youth Corrections Act may provide basis for denying alien admission to the United States under provision of the Immigration and Naturalization Act making inadmissible any alien whom immigration officer knows or has reason to believe is or has been illicit drug trafficker. Immigration and Nationality Act, § 212(a)(23)(B), 8 U.S.C.A. § 1182(a)(23)(B); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

2. Aliens ⇐54.3(4)

Board of Immigration Appeals' (BIA) finding that alien is ineligible for adjustment of status is subject to appellate review for errors of law.

3. Administrative Law and Procedure ⇐413

Aliens ⇐54.3(4)

Board of Immigration Appeals' (BIA) interpretation of agency regulations merits great deference and controls unless plainly erroneous or inconsistent with regulation.

4. Aliens ⇐53.10(2)

Provision of the Immigration and Nationality Act excluding alien known or believed to have trafficked in drugs is satisfied if credible evidence is presented to show knowledge or reasonable belief that alien has trafficked in drugs; if sufficient evidence shows such facts, adjustment may be denied. Immigration and Nationality Act, § 212(a)(23)(B), 8 U.S.C.A. § 1182(a)(23)(B).

5. Infants ⇐133

"Expunction" of conviction under the Federal Youth Corrections Act does not entitle youthful offender to concealment of conviction or facts underlying conviction; rather, "expunction" means that conviction itself will not stand as impediment to youthful offender in future. 18 U.S.C.(1982 Ed.) § 5021(a).

See publication Words and Phrases for other judicial constructions and definitions.

Robert M. Duboff, Teofilo Chapa, P.A., Miami, Fla., for John Elkin Castano.

Donald Couvillon, Civ. Div., Dept. of Justice, Washington, D.C., for I.N.S.

Petition for Review of an Order of the Immigration and Naturalization Service.

Before KRAVITCH, Circuit Judge, HILL* and SMITH**, Senior Circuit Judges.

HILL, Senior Circuit Judge:

In this case we decide whether an alien may be denied admission to the United States under § 212(a)(23)(B) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1182(a)(23)(B), as one whom the Immigration and Naturalization Service ("INS") knows or has reason to believe has trafficked in illegal drugs, when the denial is based upon facts underlying a prior conviction for drug trafficking which was expunged pursuant to the Federal Youth Corrections Act (FYCA), 18 U.S.C. § 5021(a). We AFFIRM the Board of Immigration Appeals' (BIA's) ruling that denial of admission pursuant to 8 U.S.C. § 1182(a)(23)(B) may be based upon the facts underlying an expunged conviction.

Petitioner entered this country in 1981 on a six month visa. Four months later he was indicted on cocaine distribution charges. Three years later, in 1984, he pled guilty to conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. Petitioner was sentenced under the FYCA to a probationary term. In March of 1985, he was found deportable as an overstay. In May of 1985, his probationary term was terminated and his conviction was expunged pursuant to the FYCA.

Petitioner, who in the meantime had married a United States citizen, requested that his immigration status be adjusted to permanent residency. The immigration judge declined, and ruled petitioner was an inadmissable alien under § 212(a)(23)(B) of the INA.[1] Section 212(a)(23)(B) renders inadmissable any alien who an immigration officer or consular official "know[s] or [has] reason to believe is or has been an illicit trafficker in any ... controlled substance," or has assisted others in the trafficking of any controlled substance. In ruling that petitioner was inadmissable, the immigration judge relied on the facts underlying the petitioner's 1984 conviction, which had been expunged, and the record of petitioner's conviction.[2]

The BIA panel, one judge dissenting, upheld the immigration judge's Order. The Appeals Board ruled that the immigration judge could properly rely on the facts underlying the petitioner's 1984 conviction, though not the conviction itself, in denying admission to the United States, despite the fact that the conviction had been expunged.[3]

[1] On appeal, petitioner argues that the expunction of a conviction under the FYCA is intended to give youthful offenders the opportunity to atone for their previous indiscretions and begin anew.[4] From

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

1. Even though petitioner was present in this country, he was treated as being denied admission to the United States. Petitioner sought an adjustment of his status under INA § 245(a), 8 U.S.C. § 1255(a), the stateside equivalent of being issued a visa by a consular official abroad and being admitted to this country as an immigrant. In order to be eligible for an adjustment, an alien must be otherwise admissible.

2. The immigration judge granted petitioner's request to voluntarily depart the United States. The Appeals Board vacated the immigration judge's allowance of voluntary departure as improperly granted. Petitioner carried the burden of establishing both his statutory eligibility and moral worthiness for voluntary departure. *See Matter of Seda*, 17 I. & N. Dec. 550, 554 (BIA 1980). While the expunged conviction could not be the basis for disallowance, the extrinsic evidence underlying the conviction rendered petitioner statutorily ineligible for voluntary departure as a person lacking in good moral character. *See* INA §§ 101(f)(3), 244(e).

3. The Appeals Board ruled that the inclusion of petitioner's criminal record in the record before the immigration judge was improper, though harmless, error as sufficient evidence independent of the record was introduced to sustain the immigration judge's ruling.

4. In implementing the Comprehensive Crime Control Act of 1984, Pub.L. 98-473, 98 Stat. 1837, 2031 (1984), Congress repealed the FYCA. However, since petitioner was sentenced under the FYCA, we decide this case thereunder.

GOVERNMENT EXHIBIT

this, petitioner argues, it follows that the facts underlying his expunged conviction should not have been allowed to provide the foundation for the denial of his admission to the United States. The Immigration Board has previously ruled that convictions expunged under the FYCA may not be considered in deportation proceedings. *See Matter of Zingis*, 14 I. & N. Dec. 621 (BIA 1974). Petitioner argues that the same result should obtain in admissability decisions. By allowing the facts underlying the expunged conviction to be considered on the issue of whether petitioner should be admitted into the United States, petitioner argues the Board has thwarted Congressional intent underlying the FYCA.

[2, 3] The BIA's finding that petitioner is ineligible for an adjustment of status is subject to appellate review for errors of law. *Kahlenberg v. Immigration and Naturalization Service*, 763 F.2d 1346, 1349 (11th Cir.1985). The BIA's interpretation of agency regulations merits great deference and controls unless plainly erroneous or inconsistent with the regulation. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977). There are no facts in dispute and it is clear that unless the INS is precluded from considering those facts by operation of the FYCA, petitioner is properly found inadmissable to this country.

We note initially that Section 212(a)(23)(B) does not require conviction in order to deny an alien admission to the United States. *See Matter of Favela*, 16 I. & N. Dec. 753, 756 (BIA 1979). An entirely separate provision of the INA provides that aliens who stand convicted of trafficking in narcotics will not be admitted to this country. *See* INA § 212(a)(23)(A), 8 U.S.C. § 1182(a)(23)(A). To allow an expunged conviction to stand as the foundation for denying an alien admission under INA § 212(a)(23)(A), the statutory provision that excludes aliens solely because of a conviction, may run counter to the Congressional intent behind the FYCA. However, as this question is not presently before us, we do not decide it here.

[4] The INA provision presently before us, § 212(a)(23)(B), does not exclude only those aliens who have been convicted. Under § 212(a)(23)(B), it is not necessary that an alien seeking admission have been convicted, or even arrested or investigated for drug trafficking in order to be inadmissable, the alien may be denied admission if officials "know or have reason to believe" that the alien has trafficked in drugs.[5] The BIA has concluded that the Congressional intent underlying section 212(a)(23)(B) was to provide a means for excluding known dealers of narcotics who, by avoiding conviction, had not otherwise been rendered inadmissable under section 212(a)(23)(A). *See In re P–*, 5 I. & N. Dec. 190, 193 (BIA 1953). The plain language of section 212(a)(23)(B) speaks of those applicants who immigration officials know, or have reason to believe, are or have been trafficking in narcotics. If credible evidence is presented to show knowledge or a reasonable belief that an individual has trafficked in drugs, the requirements of § 212(a)(23)(B) have been satisfied. If sufficient evidence shows such facts, an adjustment may properly be denied. *See Gambino v. Immigration & Naturalization Service*, 419 F.2d 1355, 1358 (2nd Cir.), *cert. denied*, 899 U.S. 905, 90 S.Ct. 2195, 26 L.Ed.2d 559 (1970). Because petitioner has pleaded guilty to cocaine trafficking, it logically follows that immigration officials do not merely have reason to believe he has trafficked in narcotics, they have reason to *know* he has done so. INS did not rely upon the conviction; witnesses to the facts were heard,[6] dence, both documentary and testimonial, on the facts underlying the conviction. The BIA found that the Immigration Service, in effect, "retried" the petitioner's criminal case in his admissibility hearing on the issue of whether petitioner was inadmissable pursuant to § 212(a)(23)(B).

5. We note that much of the case law relied upon by petitioner stands for the proposition that an expunged conviction may not provide the foundation for deportation. Deportation and admissibility, however, are two distinct issues.

6. In addition to petitioner's guilty plea, the Immigration Service also introduced lengthy evi-

We have previously ruled that an expunction under section 5021(a) does not entitle its recipient to the destruction, segregation, or sealing of his arrest record or to the destruction of the record of his conviction. *See United States v. Doe*, 747 F.2d 1358, 1359 (11th Cir.1984). In so ruling, we relied on legislative history to conclude that in enacting the FYCA and providing for expunction, Congress did not intend to conceal the fact of a conviction. *Doe*, 747 F.2d at 1359, 1360 ("[S]ection 5021(a) was not contemplated as a method of concealing the fact of conviction from employers, but rather as a way of opening up job opportunities to youth offenders in positions which, for reasons of company policy, government regulation, or otherwise, would not be available for ex-convicts" (citation omitted)).

[5] This reasoning is applicable in the instant case. Because expunction does not entitle its recipient to the concealment of a conviction, neither does it conceal the facts underlying a conviction. Expunction means that *the conviction itself* will not stand as an impediment to a youthful offender in the future. We conclude that expunction does not entitle petitioner to secret the fact of his conviction, or the facts underlying that conviction, from immigration officials. The facts underlying an expunged conviction may properly provide the basis for the denial of admission to an alien under section 212(a)(23)(B) as one known or reasonably believed to be a trafficker in narcotics. The factual basis of petitioner's conviction was properly allowed into evidence on the issue of petitioner's admissability to the United States.

To hold otherwise would mean that *conviction* of a drug trafficker could—potentially—*improve* his or her immigration status over the situation obtaining before conviction. If all of the facts presently before us were the same with the exception that petitioner had never been arrested, pleaded guilty, or been sentenced under the FYCA, it would be undisputed that the factual basis for immigration officials' reasonable belief that petitioner was trafficking in drugs would be admissible. We conclude that conviction and sentencing under the FYCA ought not actually *improve* petitioner's immigration status by disallowing the admission of the factual basis merely because of the invocation of the FYCA. Such a result would exceed Congressional intent by concealing not only the fact of a conviction which had been expunged, but also the facts relating to the conduct of the person under consideration for immigration into this country.

For the foregoing reasons, the ruling of the Board of Immigration Appeals is

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Richard Joseph BAUER, Defendant–Appellant.

Nos. 91–5160, 91–5163
Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

March 17, 1992.

Defendant pled guilty to armed bank robbery, being felon in possession of firearm, and was convicted by jury in the United States District Court for the Southern District of Florida, Nos. 89–14027–CR–FAM and 90–14013–CR–FAM, Federico A. Moreno, J., of forcing hostages to accompany him during bank robbery, using firearm during commission of crime of violence, and being in possession of unregistered firearm. Defendant appealed. The Court of Appeals consolidated cases and held that: (1) cumulative punishment for armed bank robbery and using firearm during crime of violence did not violate double jeopardy protections; (2) possession of unregistered silencer supported conviction for

Joranby, Asst. Federal Public Defender, West Palm Beach, Fla., Laurin A. Wollan, Jr., Tallahassee, Fla., for petitioners-appellants.

Joy Shearer, Asst. Atty. Gen., West Palm Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HENDERSON, ANDERSON and CLARK, Circuit Judges.

ON SUGGESTION FOR HEARING EN BANC

BY THE COURT:

The respondent Louie L. Wainwright, Secretary, Department of Corrections, State of Florida, filed his suggestion for en banc consideration of an order dated May 30, 1984, 734 F.2d 538, by this panel of the court, which order granted Ford's application for stay of execution. No judge in regular active service on the court has requested that the court be polled on hearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure. A new panel of the court has heard oral argument and taken under advisement Ford's appeal from the district court's order denying his petition for writ of habeas corpus. In light of these developments in the case, the suggestion for hearing en banc has become moot.

UNITED STATES of America, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 83-5686.

United States Court of Appeals, Eleventh Circuit.

Dec. 4, 1984.

Youthful offender who received early unconditional discharge petitioned to have his arrest and conviction records expunged. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denied the petition, and petitioner appealed. The Court of Appeals held that Federal Youth Corrections Act did not mandate destruction of the youthful offender's arrest and conviction records.

Affirmed.

1. Infants ⇐133

Provision of Federal Youth Corrections Act that upon unconditional discharge of a committed youth offender before expiration of maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect did not mandate destruction of arrest and conviction records of youthful offender who received an early unconditional discharge. 18 U.S.C.A. § 5021(a).

2. Infants ⇐133

Despite contention of youthful offender who received early unconditional discharge that his excellent record of rehabilitation presented appropriate case for exercise of district court's equitable powers to expunge his record, district court's decision denying expungement of the offender's arrest and conviction records had to be affirmed absent argument that the district court abused its discretion in denying the relief requested.

Michael J. Dissette, Haverford, Pa., for defendant-appellant.

Daniel J. Cassidy, Linda Collins-Hertz, David O. Leiwant, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and FAY, Circuit Judges, and ALLGOOD *, District Judge.

PER CURIAM:

In this case, we determine whether 18 U.S.C.A. § 5021(a) (West Supp.1984), a provision of the Federal Youth Corrections Act (Act), entitles a youthful offender, who received an early unconditional discharge, to destruction of the records concerning arrest, conviction, and sentencing. We affirm the district court's holding that section 5021(a) does not mandate the destruction of a youthful offender's conviction and arrest records.

In 1978, appellant, John Doe, pleaded guilty to various drug violations in Florida and Massachusetts. The District Court for the Southern District of Florida sentenced Doe to treatment and supervision pursuant to the Act. The District Court for the District of Massachusetts sentenced Doe to confinement under the Act and provided that its sentence run concurrently with the sentence imposed in Florida.

Doe was incarcerated on February 19, 1979, and on June 17, 1980, he began a pre-release program. On October 6, 1980, he was paroled from the pre-release program, and on November 24, 1982, Doe was unconditionally discharged from probation. Pursuant to section 5021(a), Doe's conviction was set aside and he was issued a certificate to that effect. Subsequently, Doe petitioned the District Court for the Southern District of Florida to have the records of his arrest, conviction, and sentencing expunged. The district court denied Doe's petition, and Doe appeals.

[1] Title 18 U.S.C.A. § 5021(a) provides that "[u]pon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect." Doe contends that this statutory provision mandates the destruction of his arrest and conviction records.

In *United States v. Doe*, 732 F.2d 229 (1st Cir.1984), the First Circuit held that section 5021(a) did not provide for the destruction, segregation, or sealing of an arrest record. *Doe*, 732 F.2d at 230. The District of Columbia Circuit agrees with the First Circuit. *See Doe v. Webster*, 606 F.2d 1226, 1230 (D.C.Cir.1979).

We also agree that section 5021(a) does not provide for the destruction, segregation, or sealing of an arrest record. If Congress intended section 5021(a) to provide for the destruction of the arrest record, it would have provided such language in the statute.

Doe also contends that section 5021(a) entitles him to have the record of his conviction destroyed. The circuit courts have disagreed on whether section 5021(a) mandates destruction of a conviction record. The First, Sixth, and Eighth Circuits have held that a youthful offender is not entitled to have his conviction record expunged pursuant to section 5021(a). *See Doe*, 732 F.2d 230–32; *United States v. Doe*, 556 F.2d 391, 392–93 (6th Cir.1977); *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976). The District of Columbia Circuit and the Tenth Circuit have indicated that section 5021(a) mandates segregation and sealing of a youthful offender's conviction record. *See Watts v. Hadden*, 651 F.2d 1354 n. 3 (10th Cir.1981); *Doe v. Webster*, 606 F.2d 1226, 1232–44 (D.C.Cir.1979). We interpret the legislative history of the statute to resolve this conflict among the circuits.

The legislative history of the Act reveals that section 5021(a) "was not contemplated as a method of concealing the fact of conviction from employers, but rather as a way of opening up job opportunities to youth offenders in positions which, for reasons of company policy, government regulation, or otherwise, would not be available for ex-convicts." *Doe*, 732 F.2d at 231.

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

nce concealment of the conviction was ot a basis for the Act, no rationale justi- es the destruction of the conviction cord. We, therefore, agree with the rst Circuit and hold that section 5021(a) es not require destruction of the convic- on record.

[2] Doe also contends that his excellent cord of rehabilitation presents an appro- iate case for the exercise of the district urt's equitable powers to expunge his cord. Doe, however, fails to argue that e district court abused its discretion in nying the relief requested, and therefore, e must affirm the district court's decision.

AFFIRMED.

Willie M. WALKER, et al., Plaintiffs,

Willie Rhondes and Bobbie P. Lowery, Plaintiffs-Appellants,

v.

The JIM DANDY COMPANY, Defendant-Appellee.

No. 83-7334.

United States Court of Appeals, Eleventh Circuit.

Dec. 4, 1984.

Title VII class action employment dis- mination suit was brought. On remand, 3 F.2d 1339, the United States District urt for the Northern District of Ala- ma, 97 F.R.D. 505, William M. Acker, Jr., entered an order denying class certifica- n and application for intervention, and appeal was taken. The Court of Ap- als, Hatchett, Circuit Judge, held that: District Court did not abuse its discre- n in refusing to certify action as a class ion, but (2) District Court abused its cretion in denying application for intervention since it failed to consider all of factors required to be considered in deciding whether motion to intervene was timely.

Affirmed in part and reversed and remanded in part.

1. Federal Civil Procedure ⇐162

Questions concerning class certification are left to sound discretion of district court. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

2. Federal Courts ⇐817

Court of Appeals will not reverse a district court's decision on class certification absent an abuse of its discretion. Fed. Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

3. Federal Civil Procedure ⇐184

Litigant seeking to maintain class action under Title VII of the Civil Rights Act of 1964 must meet clear requirements of numerosity, commonality, typicality and adequacy of representation specified in class action rule. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Federal Civil Procedure ⇐161.1

For all practical purposes, class action's requirements of numerosity, commonality, typicality and adequacy of representation effectively limit class claims to those fairly encompassed by named plaintiffs' claims. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

5. Federal Civil Procedure ⇐184

Title VII employment discrimination complaint filed by unsuccessful female applicants for supervisory positions provided insufficient basis for concluding that adjudication of applicants' claim of discrimination in hiring supervisory employees would require resolution of common questions of law and fact concerning employer's alleged discriminatory practices in recruitment, job assignment, transfer, and promotion with respect to lower level labor jobs or employees complaining of disparate job assignments or pay, and thus could not support certification of class of actual female applicants for employment, deterred female applicants for employment, and female employees. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure ⇐184

Title VII employment discrimination class complaint was properly dismissed where unsuccessful female applicants for supervisory positions, due to lack of qualifications for jobs sought, lacked a sufficient nexus with proposed class of actual female applicants for employment, deterred female applicants for employment, and female employees to be one of its members, since applicants had suffered no injury as a result of alleged discriminatory practices. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

7. Federal Civil Procedure ⇐313

In exercising its discretion whether to permit intervention, district court shall consider, among other things, whether intervention will unduly delay or prejudice adjudication of rights of original parties. Fed. Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

8. Federal Civil Procedure ⇐320
Federal Courts ⇐817

Question of timeliness of would-be intervenor's motion to intervene lies within district court's discretion; district court's action may be reviewed only for an abuse of discretion. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

9. Federal Civil Procedure ⇐320

In assessing timeliness of would-be intervenor's motion to intervene, district court must consider period of time during which would-be intervenor knew or reasonably should have known of his interest in case before he petitioned for leave to intervene, degree of prejudice to existing parties as result of would-be intervenor's failure to move to intervene as soon as he knew or reasonably should have known of his interest, extent of prejudice to would-be intervenor if his position is denied, and presence of unusual circumstances militating either for or against determination that application is timely. Fed.Rules Civ.Proc. Rule 24(b), 28 U.S.C.A.

10. Federal Civil Procedure ⇐320, 321

District court abused its discretion in denying application to intervene in Title VII employment discrimination action in view of its failure to give required consideration to factors of extent of prejudice to would-be intervenor if application were denied and existence of unusual circumstances militating either for or against determination that application was timely. Fed. Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

11. Federal Civil Procedure ⇐321

Where original plaintiffs in Title VII employment discrimination action had filed timely EEOC charge and district court was considering class certification issue at time application for intervention was made, would-be intervenor did not have to file separate, individual EEOC charge as a prerequisite to seek intervention. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

12. Federal Civil Procedure ⇐321

Where original plaintiffs in Title VII employment discrimination action had filed a timely notice of appeal from district court's refusal to certify action as a class action, and application for intervention had been before district court at scheduled hearing at which class certification was refused, would-be intervenor had viable case to intervene into. Fed.Rules Civ.Proc. Rule 24(b), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Reeves & Still, Susan Reeves, Robert L. Wiggins, Jr., Birmingham, Ala., for plaintiffs-appellants.