BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-430

IN RE: EXPUNGEMENT OF RECORD OF N.B.

Petitioner,

Appeal from the Circuit Court of Cabell County, West Virginia

---

PETITIONER'S BRIEF

Devon T. Unger (WVSB N. 12827)
Melissa J. Giggenbach (WVSB No. 8036)
Phillip A. Raines (Rule 10 Student Attorney)
Jerrick L. Allen (Rule 10 Student Attorney)
West Virginia Innocence Project
WVU College of Law Clinical Law Program
P.O. Box 6130
Morgantown, WV 26506
(304) 293-7249
melissa.giggenbach.wvip@gmail.com
devon.unger.wvip@gmail.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

West Virginia Cases

Other State Cases

Constitutions

Statutes and Rules

Miscellaneous

ASSIGNMENTS OF ERROR

The Petitioner raises four assignments of error:

1. The Circuit Court abused its discretion by ignoring material factors deserving significant weight and by improperly weighing certain factors.
2. The Circuit Court abused its discretion by relying on improper factors that were not established in the record.
3. The Circuit Court erred by failing to apply settled law on the determination of "public policy."
4. The Circuit Court infringed upon the Due Process rights of N.B. by denying the Petition for Expungement.

STATEMENT OF THE CASE

This Court is being asked to reverse a decision of the Circuit Court of Cabell County denying Petitioner's ("N.B.") Petition for Expungement without a hearing. N.B. sought to invoke the Circuit Court's inherent authority to expunge his criminal arrest record after he was wrongfully convicted of a crime he did not commit. App. 002. The issue at hand is whether the Circuit Court abused its discretion in the process of assessing whether N.B.'s case constitutes an "extraordinary circumstance" that implicates a "compelling public policy imperative" sufficient to trigger the court's inherent authority to expunge criminal records. App. 022-25; *In re Perito*, 246 W. Va. 439, 444, 874 S.E.2d 241, 246 (2022).

On August 8, 2002, Deanna Crawford's body was found in a wooded area of Cabell County. App. 245. Foul play was clear, but N.B. was neither a suspect nor a person of interest. App. 245-304. Police collected DNA from different objects found on the scene, including Ms.

Crawford's pants, beer and snuff cans, and several cigarette butts. App. 233. The DNA collected during their investigation has never matched N.B.'s DNA, nor that of any of his co-defendants. App. 003. The case went cold for several years. App. 003. N.B. remained a stranger to the case and was never a person of interest during that time. App. 003.

In January of 2007, Brian Dement, a well-known drug user, falsely confessed to the murder of Ms. Crawford and wrongfully implicated himself, N.B., and two others. App. 066. Mr. Dement confessed to several different versions of events to law enforcement and attorneys, as well as under oath during court proceedings. App. 133, 139-42. All versions told by Dement were contradictory. App. 139-42. In addition to his contradictory statements, Mr. Dement recanted his confessions implicating N.B. on numerous occasions. App. 125-27, 136. Despite contradicting confessions and recantations by Mr. Dement, and a lack of objective, physical evidence implicating N.B., N.B. was convicted at trial. App. 068.

N.B.'s conviction was reversed by the Supreme Court of Appeals on July 13, 2010, on the ground that his attorney was improperly prevented from presenting an audio recording of Mr. Dement's prior inconsistent statements at trial. App. 214. Having already served two years in prison as an innocent person, N.B. accepted an *Alford* plea to Voluntary Manslaughter on January 18, 2011, to avoid being retried for murder and forced to spend the rest of his life in prison for a crime he did not commit. App. 326-27.

In 2015, Josh Tepfer of the Exoneration Project filed a post-conviction Motion for DNA testing on behalf of N.B.'s codefendant Justin Black to test Ms. Crawford's fingernail scrapings, hairs recovered from her hands and shirt, a sexual assault kit, seminal fluid found in her pants, and the beer cans, cigarette butts, and snuff cans found at the scene. App. 200. The Motion was granted. App. 201.

In June of 2016, the West Virginia Innocence Project began its representation of N.B. App. 004. In 2017, the Bode Cellmark Forensics Lab released results from the seminal fluid on Ms. Crawford's pants that revealed a single-source male donor of semen and skin cells. App. 331-38. That DNA profile excluded N.B. and his three codefendants as possible donors. *Id*. The same DNA profile identified in the results from the seminal fluid was also present on at least one cigarette butt collected near Ms. Crawford's body. App. 068.

After the Bode Cellmark Forensic Lab released results excluding N.B. and his codefendants, counsel for one of N.B.'s codefendants compelled the West Virginia State Police to manually search the Combined DNA Index System ("CODIS") for known DNA profiles. App. 201. CODIS was established to help law enforcement agencies gain investigative leads by making connections between lab specimens which have been tested and individuals whose DNA is in the FBI's National DNA Index System (NDIS), in cases where no suspect has been identified.[1] It achieves this objective by comparing target DNA to DNA records contained in the database.[2] The use of CODIS for confirmation of in-state searches is "limited to open criminal cases or cases that are being actively investigated by a law enforcement agency." W. Va. Code. R. § 81-9-8.6.

As the identity of Ms. Crawford's murderer and the culpability of N.B. was called into question, the case was reopened and actively investigated. App. 168. The CODIS search revealed a positive match to a convicted sex offender with a history of violent behavior, Timothy Smith. App. 078, 087, 157. Smith was already incarcerated for unrelated offenses. App. 168. He was investigated and he conceded to possibly having relations with Ms. Crawford but denied her murder. App. 094, 104-106. Smith did not dispute that he resided in the Huntington area at the

[1] *Law Enforcement Resources: Combined DNA Index System (CODIS)*, FED. BUREAU OF INVESTIGATION, https://le.fbi.gov/science-and-lab/biometrics-and-fingerprints/codis-2.
[2] *Id.*

time of Ms. Crawford's murder and that he was a regular client of sex workers during this time. App. 095-100. Further, Smith was unable to explain how his DNA came to be deposited at the scene where Ms. Crawford's body was found. App. 104-105. He also denied knowing N.B. or any of N.B.'s co-defendants. App. 091.

On May 10, 2019, N.B. was permitted to withdraw his *Alford* plea in light of the newly discovered DNA evidence. App. 059. Specifically, N.B. was entitled to withdraw his plea because his case rose to the level of "manifest injustice." *Id*.; *State v. Olish*, 164 W. Va. 712 (1980).

On October 5, 2021, the Cabell County prosecutor elected to dismiss all charges against N.B. and two of his codefendants. App. 031-32. At the time, Mr. Dement had a pending habeas corpus action challenging his own conviction. App. 030. The Circuit Court had previously although Mr. Dement was legally entitled to the petition being granted, he was "not morally" entitled. App. 045. However, this denial was reversed by the West Virginia Supreme Court of Appeals after it found that the Circuit Court had abused its discretion in denying the habeas corpus petition. App. 062-076. After the reversal, Mr. Dement agreed to dismiss the habeas corpus action upon the State's dismissal of the charges against N.B. and the two other co-defendants, and upon a reduction of Mr. Dement's sentence to time served. App. 035. During the hearing for the habeas corpus action, the State indicated that it lacked confidence in its ability to secure a conviction against Smith despite the DNA results implicating Smith, and that it accordingly would not be charging him. App. 040-42. The Motion to Dismiss the habeas corpus action was subsequently granted by the Circuit Court of Cabell County. App. 058.

Though N.B.'s charges were wholly dismissed upon a voluntary motion by the State, his criminal history record still reflects the arrest, charges, and convictions of Second-degree Murder and Voluntary Manslaughter in connection with Ms. Crawford's death. App. 328-29. As a result,

N.B. has encountered difficulty obtaining employment and housing. App. 011. The continued presence of the arrest, charges, and convictions on this criminal history record also causes N.B. to suffer significant emotional distress. App. 012.

On February 10, 2023, N.B. filed a Petition for Expungement of Criminal Records in the Circuit Court of Cabell County. App. 001. N.B. did not seek expungement under 61-11-25, because he is ineligible under this statute based on a felony conviction from when he was a youthful offender. App. 006. N.B. argued, instead, that his subsequent exoneration constituted the "extraordinary circumstances" necessary for the Circuit Court to invoke its inherent expungement power. App. 008-010.

Despite N.B.'s presentation to the Circuit Court of extraordinary circumstances worthy of an expungement within his Petition, no hearing on the merits of the issue was ever held. The Circuit Court of Cabell County then issued an Order Denying Expungement (the "Order") on August 21, 2023, in a near-verbatim recitation of the State's July 28, 2023 Response (the "Response"). App. 018-25. The Order repeats the Response's assertions that the newly discovered evidence and post-conviction procedural developments merely provide N.B. with "an alternative theory," and the adverse effects of the presence of the charges on N.B.'s record are "virtually nonexistent." App. 024. N.B. timely filed a Notice of Appeal. App. 323.

SUMMARY OF THE ARGUMENT

Individuals who are factually exonerated by DNA evidence from a conviction for a killing they did not commit should not have to carry the water of the actual perpetrator simply because the State lacks confidence that it can secure a conviction against anybody else. Allowing N.B. to face the effects on his life, liberty, and property which should be faced by another

individual is a fundamental miscarriage of justice and deprivation of N.B.'s Due Process Rights, which can only be remedied by an expungement of N.B.'s record.

The Circuit Court incorrectly denied the expungement petition filed by N.B. First, the Circuit Court not only ignored material factors deserving of significant weight and consideration, but in turn relied on factors that were not established in the record. Second, the Circuit Court further erred by asserting that only the West Virginia Legislature establishes what constitutes public policy imperatives. Finally, the Circuit Court fundamentally deprived N.B. of his Due Process rights under the Federal and West Virginia Constitutions because failing to expunge the arrest record of N.B. affects his life, liberty, or property.

Accordingly, this Court should reverse the Order of the Circuit Court denying an expungement and instruct the Circuit Court to enter an Order granting the Petition for Expungement or, in the alternate, instruct the Circuit Court to hold a hearing on this matter.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument under West Virginia Rule of Appellate Procedure 20(a), as this case involves an issue of fundamental public importance, in addition to potential issues of first impression. Specifically, this case implicates the rights of citizens to be free from the consequences of an offense they did not commit, and potential Due Process implications, as well. Further, neither this Court nor the Supreme Court of Appeals of West Virginia has issued an opinion regarding the expungement of records related to a wrongful conviction. Finally, pursuant to West Virginia Rule of Appellate Procedure 18(a), oral argument is necessary as the decisional process would be significantly aided by oral argument, given that the matter before this Court is one which substantively spans over the course of nearly two decades.

ARGUMENT

I. Standard of Review

A circuit court's order denying expungement of criminal records is reviewed for an abuse of discretion. Syl. Pt. 1, *In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623 (2017). "[A]n abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *Wal-Mart Stores East, L.P. v. Ankrom.*, 244 W. Va. 437, 454, 854 S.E.2d 257, 274 (2020) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520, 466 S.E.2d 171, 179 (1995)). Put simply, a trial court "abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law." *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citing *Cox v. State*, 194 W. Va. 210. 218 n.3, 460 S.E.2d 25, 33 n.3 (1995)).

In addition, where the issue on appeal from the circuit court is clearly a question of law, the reviewing court applies a *de novo* standard of review. *State v. Myers*, 229 W. Va. 238, 244, 728 S.E.2d 122, 128 (2012) (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)). Finally, where a reviewing court turns to any factual determinations made by a lower court, either explicitly or implicitly made, the reviewing court looks only for clear error. *State v. Wilson*, 273 W. Va. 288, 293, 787 S.E.2d 559, 564 (2016) (quoting *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995).

II. The Circuit Court abused its discretion in denying the Petition for Expungement because it ignored material factors of N.B.'s case deserving significant weight and consideration.

When operating outside the bounds of statutorily entitled expungements, circuit courts have inherent authority to expunge criminal records in the event of "extraordinary circumstances" and "compelling public policy imperatives." Newly discovered evidence, such as the kind which

revealed N.B.'s conviction to be wrongful, is an "extraordinary circumstance." The Circuit Court in the case at hand abused its discretion by ignoring the extraordinary circumstances of N.B.'s underlying case, and by relying on factors not established in the record, in direct violation of settled West Virginia law. The decision of the Circuit Court to forego a hearing on the merits of this matter further evinces an abuse of discretion.

A. A Circuit Court has inherent authority to expunge criminal records in extraordinary circumstances and to protect compelling public policy imperatives, and newly discovered evidence that goes to the essence of a defendant's innocence or guilt has been recognized as an "extraordinary circumstance."

Under West Virginia law, circuit courts have inherent authority to expunge criminal records. *In re Perito for Expungement of Rec*., 246 W. Va. 439, 444, 874 S.E.2d 241, 246 (2022). With this inherent authority, a circuit court may grant an expungement in "extraordinary circumstances and to protect constitutional rights or some other compelling public policy imperative." *Id*. (quoting Syl. Pt. 1, *State ex rel. Barrick v. Stone*, 201 W. Va. 569. 499 S.E.2d 298 (1997)). The inherent authority to expunge criminal records is separate and distinct from the statutory expungement authority provided by W. Va. Code § 61-11-25. *Mullen v. Div. of Motor Vehicles*, 216 W. Va. 731, 733 n.2, 613 S.E.2d 98, 100 n.2 (2005). While the statutory authority precludes the expungement of criminal arrest records of individuals previously convicted of a felony, West Virginia jurisprudence is devoid of a suggestion that a circuit court is similarly limited when exercising its inherent authority to expunge. *See* W. Va. Code § 61-11-25.

Although the Supreme Court of Appeals of West Virginia has not specifically defined "extraordinary circumstances" in this context, such an analysis typically means that a court may consider a "wide range of factors." *Buck v. Davis*, 580 U.S. 100, 137 (2017). The Supreme Court of the United States has held that when a court is determining the availability of relief under Federal Rule of Civil Procedure 60(b), Relief From A Judgment or Order, a determination of

whether "extraordinary circumstances" exist "may include consideration of a wide range of factors, including 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *See* Fed. R. Civ. P. 60(b); *Buck v. Davis*, 580 U.S. at 123 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 849 (1988)). The extraordinary circumstances test is not defined but rather is illustrated by way of the facts of a case, considering the totality of the circumstances. *See Buck v. Davis*, 580 U.S. at 123-128.

Notably, the Supreme Court of Appeals of West Virginia has recognized that newly discovered exonerating evidence constitutes an extraordinary circumstance when considering whether to grant a new trial. *State ex rel. Smith v. Sims*, 240 W. Va. 601, 604, 814 S.E.2d 264, 267 (2018). In *Smith*, it was held that extraordinary circumstances warranted the denial of a prosecutor's writ of prohibition challenging a circuit court's decision to grant a new trial "where a victim and an eyewitness to a homicide, who did not testify at trial, subsequently offered testimony exonerating the Defendant." *Id*. Though the prosecutor argued that the trial court erred by concluding that the eyewitness's testimony would have produced a different result at a second trial, the Supreme Court of Appeals instead found that a different result was likely if the jury had the benefit of the eyewitness's testimony. *Id*. at 608. This was so because the eyewitness's testimony went "to the very essence of the Defendant's guilt or innocence." *Id*. Consequently, it was held that the case epitomized an "extraordinary circumstance." *Id*.

B. In denying N.B.'s Petition for Expungement, the Circuit Court ignored or improperly weighed material factors that demonstrate N.B.'s case to be an "extraordinary circumstance."

In addition to *Buck* and *Smith*, the Supreme Court of Appeals of West Virginia has offered further guidance regarding the definition of extraordinary circumstances. *See In re A.N.T.*, 238 W. Va. 701; 798 S.E.2d 623 (2017). Specifically, the Court has offered that extraordinary

circumstances exist where "the facts underlying the petitioner's criminal records were truly unusual or extreme, so as to cast doubt on the validity of his/her arrest, charge, or conviction." *Id.* at 705.

Given the unique nature of the matter now before this Court, *In re A.N.T.* provides guidance. *See Id.* In that matter, A.N.T. filed an expungement petition seeking to expunge her conviction for discharging a firearm within 500 feet of a dwelling, to which A.N.T. pleaded no contest per an agreement with the State. *Id.* at 702-703. In an emotionally distressed state, A.N.T., a police officer's wife, discharged her husband's service weapon while their children were home, forming the factual basis for the conviction. *Id*. Sometime later, A.N.T. sought expungement of her criminal record alleging that, without the expungement of her record, she would be unable to secure a teaching certificate in the State of Ohio. *Id.*

The *A.N.T.* Court found that A.N.T. did not meet the "extraordinary circumstances" test that petitions for expungement operating outside direct statutory authority must pass. *Id. a*t 705. In so finding, the Court asserted that "expungement absent statutory authority is a 'narrow' remedy, which is 'reserved for the most unusual or extreme case,'" and that expungements are not meant to remedy "'adverse consequences which attend every arrest and conviction.'" *Id*. (quoting *United States v. Rowlands,* 451 F.3d 173, 179 (3d Cir. 2006)). Pursuant to this logic, the Court found that A.N.T. was not entitled to an expungement. *Id.* at 706. Further, the Court found A.N.T. not entitled to an expungement as A.N.T.'s conviction was a legally valid conviction made pursuant to a plea agreement. *Id*.

Here, in addition to the plea withdrawal and its supporting bases, several factors deserving weight and consideration were ignored by the Circuit Court. These factors demonstrate that N.B. is entitled to an expungement. First, the Circuit Court improperly concluded that N.B.'s conviction

was based on the "sworn testimony of a co-defendant." App. 024. While this claim is not an inherent mischaracterization, it is one which improperly fails to consider all the relevant evidence. For example, the facts that Mr. Dement attempted to recant his false confession, that Mr. Dement was suffering from an episode related to mental illness, and that Mr. Dement admitted to being under the influence of multiple illicit substances while offering these "confessions" to police officers were all overlooked by the Circuit Court in its swift conclusion that this "sworn testimony" is satisfactory evidence of purported guilt. App. 024. These explanations, backed up by expert opinions, were made as "sworn testimony" under oath and were ignored and never appropriately addressed by the Circuit Court in denying the Petition for Expungement without a hearing.

Unlike the case of *In re A.N.T.*, N.B. does not assert that the "extraordinary circumstances" test is satisfied simply because he faces the consequences of a legally valid conviction which others similarly situated would also face. Rather, N.B. is facing the consequences of a conviction which was later vacated, and in which N.B. was permitted to withdraw a plea due to "manifest injustice," namely newly discovered evidence which implicated a violent, convicted sex offender as the true perpetrator. App. 059-061, 078. Despite the Circuit Court's characterization of this case as one like "any criminal conviction," in which N.B. is asserting the "same impact on his life as [A.N.T.]," the following bases, which likely would have been expounded upon at a hearing, demonstrate why this case is a far cry from "any criminal conviction." App. 024.

C. The Circuit Court's decision not to hold a hearing in this matter further evinces a failure to consider and properly weigh material factors in N.B.'s case.

Because expungement proceedings are civil in nature, the West Virginia Rules of Civil Procedure govern the proceeding. While a circuit court is not required under West Virginia law to hold a hearing prior to the dismissal of a case, case law from both West Virginia and other jurisdictions highlights the important role of hearings in a trial court's consideration and weighing

of evidence in expungement cases. The Supreme Court of Appeals of West Virginia has previously held, upon reviewing a circuit Court's denial of an expungement, that a hearing was warranted where there was a lack of evidentiary support for a circuit court's ruling. *In re I.S.A.*, 244 W. Va. 162, 169, 852 S.E.2d 229, 236 (2020) (citing *Bartles*, 196 W. Va. at 389, 472 S.E.2d at 835). Further, "an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the Circuit Court make a serious mistake in weighing them." *Wal-Mart Stores East, L.P. v. Ankrom*, 224 W. Va. at 454, 854 S.E.2d at 274.

In a neighboring jurisdiction, Ohio law generally requires that a trial court hold a hearing in an expungement matter because under "normal" circumstances, the trial court would be required to hear evidence before rendering a decision. *State v. Potts*, 11th Dist. Trumbull No. 2019-T-0038, 2020-Ohio-989 at ¶ 14. The "essential purpose" of such a hearing "is to provide a reviewing court with all relevant information bearing on an applicant's eligibility." *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). Ohio recognizes that because a trial court's finding of fact during a trial involves an actual hearing of the evidence, hearings are key to the proper consideration of evidence in expungement cases. *Potts*, 2020-Ohio-989 at ¶ 14. Kentucky also requires that hearings be held in contested expungement matters. Ky. Rev. Stat. § 431.073(3), (4)(a); Ky. Rev. Stat. 431.078(3). So, too, does Maryland. Md. Code Ann., Crim. Proc. § 10-110(f)(1).

Here, the Circuit Court's issuance of an order without first holding a hearing further evinces an abuse of discretion. N.B. does not argue that the Circuit Court's failure to hold a hearing constitutes a procedural error in and of itself. However, the lack of a hearing and the Circuit

Court's apparent unwillingness to hear evidence before rendering a decision is additional evidence of a failure to adequately consider and properly weigh material factors in N.B.'s case.

The Circuit Court did not provide an opportunity for the parties to present all relevant information bearing on N.B.'s qualification for expungement of criminal records, and instead issued an Order that largely appears to have been an exercise in copying and pasting the State's Response. N.B. was given no opportunity to present testimony, for example, on the ways in which his wrongful conviction continues to detrimentally impact his life, or to rebut the State's Response in open court. Rather than hear and consider all the material evidence of N.B.'s case as might be done during a trial court's usual fact-finding endeavor, the Circuit Court elected to simply adopt the State's response. When coupled with fact that the Order was issued shortly after N.B. was informed that a hearing was likely to be held, with no explanation as to why a hearing was ultimately foregone, this casts even more doubt on the degree of actual consideration the Circuit Court gave to the material facts of N.B.'s case. *See* App. 022-025, 056-057. If the Circuit Court performed the required fact finding and weighing of evidence, it is not apparent by the issuance of the Order, or the Order itself.

While the decision to forego a hearing might be appropriate in a case with an overwhelming amount of evidence stacked against a petitioner, no such case exists here. N.B. was wrongfully convicted for a crime he did not commit. After newly discovered DNA and investigative evidence came to light, N.B. was permitted to withdraw his *Alford* plea and the State wholly dismissed the charges against him, restoring N.B. to innocence. Despite this, N.B. continues to suffer negative, life-altering consequences of a criminal record that reflects a crime he did not commit and of which he currently is not convicted. The decision of the Circuit Court to ignore the important role a hearing would have played in this matter, issue a verbatim recitation of the State's Response as an

Order, and brush aside the adverse effects of a wrongful arrest and subsequent conviction on one's criminal record as being "virtually nonexistent" indicates a failure to meaningfully consider the material facts of this case. Accordingly, this Court should reverse.

III. The Circuit Court abused its discretion by relying on factors that were not properly established on the record.

The Supreme Court of Appeals of West Virginia has routinely recognized that a trial court abuses its discretion when, among other situations as discussed herein, "its ruling is based on an erroneous assessment of the evidence or the law." *In re I.S.A.*, 244 W. Va. at 168, 852 S.E.2d at 235 (quoting *Bartles v. Hinkle*, 196 W. Va. at 389, 472 S.E.2d at 835; *see also Gentry v. Mangum*, 195 W. Va. at 520 n.6, 466 S.E.2d at 179 n.6. In so recognizing, the Court has examined both legal and factual errors in determining that a lower court abused its discretion in denying a petition for expungement. *See In re Petition of C.M.H.*, No. 22-0339, 2023 W. Va. LEXIS 182 (May 16, 2023) (finding that the Circuit Court of Wetzel County abused its discretion in denying a petition for expungement by incorrectly identifying the petitioner's family member as a cohabitant under West Virginia Code § 61-11-26(c)(5)). Although *I.S.A.* is not entirely analogous to this case, its analysis is instructive and pertinent to this Court's review.

In *I.S.A.*, the Circuit Court denied a petition to expunge a felony arrest record under section 61-11-25 based on a finding that the felony had been dismissed in exchange for a guilty plea to another offense. *In re I.S.A.*, 244 W. Va. at 163, 165, 852 S.E.2d at 230, 232. As part of the agreement to dismiss the felony charge, I.S.A. had agreed to be charged with a related misdemeanor, and they agreed to enter into a pretrial diversion agreement under West Virginia Code section 61-11-22 regarding the new misdemeanor charge. Importantly, the pretrial diversion agreement did not require I.S.A. to enter a guilty plea. *Id.* at 167-68, 852 S.E.2d at 234-35. Despite this fact, the Circuit Court held that I.S.A. was not eligible for expungement under 61-11-25,

because the felony was dismissed in exchange for a guilty plea to another offense. *Id.* at 165, 852 S.E.2d at 232. Even more relevant to this case, the Circuit Court went a step further and held, as an independent ground to deny relief, that expunging the arrest record would be "contrary to the public interest and public safety...due to the serious nature of the charged event." *Id.* at 165, 233.

In rejecting this reasoning, the Supreme Court concluded that the Circuit Court further abused its discretion with "an erroneous assessment of the evidence," because "there are no established facts on the record to support a finding that I.S.A. committed the acts as alleged and that granting his request for expungement, therefore, be contrary to the public interest and public safety." *Id.* at 169, 236. Finally, the Court concluded that due to the lack of evidentiary support for the Circuit Court's ruling, denying the petition made by I.S.A. without a hearing constituted an abuse of discretion. *Id.*

Here, like in *I.S.A.*, in which the Court concluded an abuse of discretion occurs when a lower court relies on an erroneous assessment of the evidence, the matter before this Court demonstrates perhaps an even more disturbing misunderstanding of the evidence than the purported plea agreement in *I.S.A.* First, the Circuit Court found that N.B. was not entitled to an expungement because the DNA evidence utilized in correcting N.B.'s wrongful conviction "at best gives him an alternative theory." App. 024. While this would be a facially persuading conclusion if one was to simply ignore all surrounding context, the entirety of the context is necessary for a proper analysis. This conclusion by the Circuit Court fundamentally ignores that, when weighed against the DNA evidence in the underlying case, the inconsistent statements made by Mr. Dement, which the Circuit Court suggested served as the basis for N.B.'s conviction, are wholly unavailing. Furthermore, the Circuit Court ignored the specifics of what the post-conviction DNA testing revealed. Those specifics being that not only was semen found on the victim's underwear and on

a cigarette butt near her body, but also that this DNA positively matched to Timothy Smith, a convicted sex offender with not only a history of violence, but also a history of paying sex workers to engage in sexual activity. App. 097. Further ignored are claims made by an ex-wife of Mr. Smith indicating that he not only would routinely physically and verbally abuse her, but that he admitted to taking the life of a sex worker in years past. App. 069. Given that the deceased in N.B.'s underlying case was a known sex worker in Cabell County, this "alternate theory" is far more compelling than the theory upon which N.B. was originally convicted and the only theory for which there is objective, uncontestable evidentiary support.

Turning to additional claims made by the Circuit Court, these demonstrate an abuse of discretion by relying on factors not properly established on the record, as well. In denying the Petition for Expungement made by N.B., the Circuit Court quickly and with no evidentiary support claimed that N.B. "admitted he was involved in [the deceased's] death in his first and third parole hearings, blaming [a co-defendant] for her death." App. 020.[3] In so doing, the Circuit Court simply took the State at its word by issuing its near-verbatim recitation of the State's response of an Order, while ignoring the important contextual implications surrounding these purported "admissions." Parole Board hearing testimony is inherently coercive as unrepresented individuals attempt to secure release by making statements they believe they are required to make to secure release. Put differently, here the Circuit Court abused its discretion by making claims with a lack of evidentiary support just like in *I.S.A.*

Furthermore, a final comparison to *I.S.A.* can be made with the Circuit Court of Cabell County similarly making broad-sweeping claims about public policy without sufficient factual findings.

[3] N.B. has consistently asserted he in fact denied guilt during his first parole hearing. There is no direct evidence on this point other than N.B.'s assertion because the Parole Board did not preserve a recording or transcript from N.B.'s first parole hearing.

Like in *I.S.A.*, in which the lower court abused its discretion with its claims of public policy, herein we see similar issues as, without a hearing on the merits of the expungement petition, the parties were not given ample opportunity to discuss N.B. or the malicious wounding felony from his youth. Again, while the Circuit Court in this matter claimed that in enacting the pertinent part of the expungement statute the legislature was expressing a matter of public safety and public interest, it did so without adequately establishing facts in support of this proposition on the record. The Circuit Court failed to examine relevant factors such as N.B.'s age, socioeconomic circumstances at the time of the offense, and, perhaps most importantly, N.B.'s time at the Anthony Correctional Center in which N.B. learned valuable life and vocational skills. App. 221-22. To restate, the Circuit Court made findings without sufficient facts established on the record, in a similar manner as was done in *I.S.A.*

The Supreme Court of Appeals in *I.S.A.* reversed that Circuit Court for doing so, and this Court should do the same.

IV. The Circuit Court erred by failing to apply settled law on the sources determinative of "public policy," erroneously proclaiming that "public policy is set by the legislature and not by the courts."

Where the issue on appeal from the circuit court is clearly a question of law, the reviewing court applies a *de novo* standard of review. *State v. Myers*, 229 W. Va. At 244, 728 S.E.2d at 128. Determining whether a public policy exists in West Virginia is a question of law. Syl. Pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). "Public policy" is the legal principle that "no person can lawfully do that which has a tendency to be injurious to the public or against public good . . . even though 'no actual injury may have resulted therefrom in a particular case 'to the public.'" *Id.* at 325 (quoting *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 37 A.2d 37 (1944)). A court must decide what constitutes public policy as a matter of

law in light of the particular circumstances of each case. *Id*. The sources determinative of public policy include but are not limited to: (1) our federal and state constitutions, (2) statutes, (3) judicial decisions, (4) principles of common law, and (5) acknowledged prevailing concepts of federal and state governments relating to the safety, health, morals, and general welfare of the people for whom government is established. *Id*. The Supreme Court of Appeals has decided cases based on public policy imperatives derived from common law and judicial decisions. *Id*. at 325-27.

Here, the Circuit Court's Order incorrectly states the bases by which "public policy" is determined in West Virginia. In its analysis of the public policy imperatives underlying expungement of criminal records, the Order states, *without* legal citation, that "[p]ublic policy is set by the legislature and not by the Courts." The Order then proceeds to examine the text of W. Va. Code § 61-11-25 in support of its assertion, even though relief under this statutory expungement authority was never sought by N.B. Because the true sources of public policy imperatives stretch far beyond legislatively created statutes and specifically include common law, judicial decisions, and acknowledged prevailing concepts of federal and state governments relating to the safety, health, morals, and general welfare of the people, the Circuit Court's characterization of the law is clearly erroneous.

Applying an erroneous legal standard is enough, in and of itself, for this Court to find that the Circuit Court erred, and reverse. That is exactly what this Court should do.

V. The public policy imperatives implicated by N.B.'s case warrant an expungement of N.B.'s criminal record, as the continued punishment of an individual after a wrongful, invalid conviction is "against public good."

The idea that wrongful convictions are injurious to the public and against public good is engrained in our federal and state jurisprudence. The injustice that results from the conviction of an innocent person strikes at the "core of our criminal justice system." *Schlup v. Delo* 513 U.S.

298, 324, 115 S. Ct. 851, 866 (1995). The conviction of an innocent person is more unjust than permitting a guilty person to walk free. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) (Harlan J., concurring). Prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction[.]" *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935), *overturned on other grounds by Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270 (1960).

The Supreme Court of the United States recognizes that wrongful convictions are presumed to have "continuing collateral consequences," *after* the expiration of an incarcerated person's sentence, sufficient to meet the "injury-in-fact" standing requirement of Article III of the U.S. Constitution. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998). Wrongfully convicting and incarcerating an individual for years may also "reasonably be regarded as so extreme and outrageous to permit recovery" in a claim for intentional infliction of emotional distress. *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419, 428 (1998). Further, wrongfully incarcerating an individual for years is something that "no reasonable person could be expected to endure." *Black v. W. Va. State Police*, No. 3:22-cv-0096, 2023 U.S. Dist. LEXIS 175537, at * 26 (S.D. W. Va. Sep. 29, 2023) (quoting *Philyaw v. Eastern Assoc. Coal Corp.*, 219 W. Va. 252, 633 S.E.2d 8 (2006)). The Supreme Court of Appeals of West Virginia has even called for the establishment of "a standing commission to review cases of wrongful convictions, identify their causes, and make recommendations for changes in the criminal justice system to help ensure that wrongful convictions are less likely to recur in the future." *In re: Renewed Investigation of the State Police Crime Lab*, 219 W. Va. 408, 416 n. 12, 633 S.E.2d 762, 770, n. 12 (2006).

Here, N.B.'s wrongful conviction and the adverse effects he continues to face because of that wrongful conviction implicate compelling public policy imperatives. Despite the Circuit Court's erroneous conclusion regarding the legislative purpose of the expungement statute, our

federal and state jurisprudence makes clear that wrongful convictions and the continuing effects they have on wrongfully convicted persons, post-incarceration, involve established public policy imperatives derived from basic notions of justice. Those imperatives were wholly disregarded by the Circuit Court in issuing its Order. *See* App. 023-024.

In its analysis of public policy, the Circuit Court overlooks the fact that N.B. is not currently convicted of the crime, and that he seeks now to have the conviction and related arrest removed from his record. It overlooks the fact that N.B. simply strives to regain some semblance of dignity and liberty after losing years of his life in prison to an invalid conviction. It further overlooks the fact that N.B. faces continuing adverse consequences such as housing and employment issues, in addition to mental health concerns. N.B.'s case then clearly involves the type of "continuing" adverse consequences of a wrongful conviction that drive the policy-based rule of *Spencer v. Kemna*. 523 U.S. at 7. The Circuit Court incorrectly characterizes the public policy argument raised by N.B. as an attempt to merely argue "the impact that these charges have on his life," without acknowledging the context in which the charges on N.B.'s record arose in the first place.

Contextually, at least one court has already suggested that a codefendant of N.B. for the underlying offense, Justin Black, was wrongfully convicted and incarcerated, in addition to being subsequently exonerated by the same DNA testing implicated in the case before this Court. *See Black*, 2023 U.S. Dist. LEXIS 175537. Indeed, when reviewing a Motion for Summary Judgment made by the West Virginia State Police in a suit filed by Black alleging, among other issues, intentional infliction of emotional distress, the U.S. District Court for the Southern District of West Virginia wrote that "[w]rongfully convicting and incarcerating an individual for ten years...constitutes behavior 'no reasonable person could be expected to endure.'" *Id.* at 27 (quoting *Philyaw v. Eastern Assoc. Coal Corp.*, 219 W. Va. 552, 633 S.E.2d 8, 13 (W. Va. 2006)).

Furthermore, as offered by one of the foremost authorities in the field of wrongful convictions, the definition of "exoneration" as provided by the University of Michigan's National Registry of Exonerations establishes in pertinent part that:

> [a] person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was relieved of all the consequences of the criminal conviction, [and received] a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal.

Glossary, NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited December 06, 2023).

Here, the circumstances surrounding N.B.'s underlying wrongful conviction and requisite arrest demonstrate exactly the type of case which calls for an expungement. Not only is N.B. a former co-defendant of Mr. Black, who at least one court has mentioned was wrongfully convicted as mentioned above, but N.B. and those similarly situated satisfy the definition offered by the National Registry of Exonerations to a tee. Further, N.B. was relieved of all consequences of his wrongful conviction and received a dismissal of all charged upon motion by the State, which should have allowed N.B. to live his life as a free man. However, the wrongful conviction and the continuing adverse effects of a wrongful conviction surrounding N.B. have prevented this from being so. Accordingly, compelling public policy imperatives warrant the utilization of a court's inherent authority to expunge N.B.'s record of associated criminal charges. Had the Circuit Court applied the correct law and properly considered relevant judicial opinions, it might have reached the correct result.

This Court now has a chance to reach the correct result.

VI. The Circuit Court infringed upon the Due Process rights of N.B. by denying the Petition for Expungement.

While this Court may, and indeed should, reverse on the foregoing grounds, assuming *arguendo* that this Court needs yet another reason to do so it may turn to the Due Process rights of N.B. and those similarly situated under the U.S. and West Virginia Constitutions. Private discrimination which the State involves itself with, such as background check reporting, implicates Due Process rights. Further, while this State has not recognized a privacy or liberty interest in criminal records, the history behind Due Process rights, law from our sister jurisdictions, and the unique factual posture of this case demonstrate why this Court should adopt such an interest.

A. Background Check Reporting by Third-Party Agencies Implicates the Due Process Clause because the State Action Doctrine is Triggered.

The West Virginia Constitution reads, in pertinent part, that "[n]o person shall be deprived of life, liberty, or property, without due process of law." W. VA. CONST. art. III, § 10; *see also Petry v. Stump*, 219 W. Va. 197, 632 S.E.2d 353 (2006). Further, where there is private discrimination, a State must have "significantly involved itself with invidious discrimination" for the state action doctrine under Due Process rights to be triggered. *See Moose Lodge No. 117 v. Irvis, 407* U.S. 163 (1972). Indeed, settled law from the Supreme Court of the United States makes clear that "the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Id.* at 172; *see also Shelley v. Kramer*, 334 U.S. 1 (1948); *Burlington v. Vermont Parking Authority*, 365 U.S. 715 (1961) (finding that a private restaurant who refused service because of racial identity violated the Fourteenth Amendment because the restaurant was leased from the State Parking Authority).

Background checks in the State of West Virginia are regulated by both Federal and State legislation. *See* 15 U.S.C. § 1681; West Virginia Code § 16-49. In fact, there exist several websites which provide private employers with information as to how to stay compliant with West Virginia background check laws. *See e.g. West Virginia Background Checks for Employers (2023)*, IPROSPECTCHECK (Nov. 16, 2023), https://iprospectcheck.com/west-virginia-background-check/ (last visited Dec. 06, 2023). When deciding whether a private action triggers the state action doctrine, reviewing courts must examine whether there exists a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Collins v. AAA Homebuilders*, 175 W. Va. 427, 430, 333 S.E.2d 792, 795 (1985) (Miller, C.J. dissenting) (referencing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum v.* Yaretsky, 457 U.S. 991 (1982)). A close nexus may fairly be shown if "the private entity exercises powers that are historically the prerogative of the State." *Id.*

Here, conduct by third-party background check reporting agencies may be fairly attributed to the state itself, meaning that Due Process concerns are implicated. At issue in the matter before this Court are arrest and conviction records from an offense for which N.B. was wrongfully convicted, and subsequently cleared of any wrongdoing. A search conducted by a third-party agency demonstrates that if one searches for N.B., and any records associated with N.B., the history of the offense for which N.B. was wrongfully implicated clearly appears. Upon a cursory search into several background check reporting agencies, it is apparent that said agencies gather their information from West Virginia State agencies, such as the "Administrative Office of Courts, the West Virginia Sex Offender Registry, and the Department of Corrections." *See West Virginia Background Checks*, BACKGROUNDCHECKS.COM, https://www.backgroundchecks.com/our-data/coverage-map/west-virginia-state-background-check (last visited Dec. 19, 2023). Indeed, even the

website of the West Virginia State Police includes a link to a third-party reporting agency, IdentoGO, a Lexis Nexis partner. *See Criminal Records,* W. VA. STATE POLICE, https://www.wvsp.gov/departments/criminalrecords/Pages/default.aspx (last visited Dec. 19, 2023). According to its website, the West Virginia State Police does not even conduct background checks anymore and instead directs people to contact a private, third-party vendor: IdentoGO. *Id.* Herein, the State has elected to inextricably link its traditional function with a third-party, private entity.

Not only do third-party background check reporting agencies receive their information from public West Virginia State agencies charged with the safe harbor of this information, but also several State agencies are explicitly charged with the managing of information which would be revealed in a background check by one of these third-party agencies. For example, under West Virginia Code § 15-2-24, there exists a Criminal Identification Bureau which was created "for the purpose of receiving and filing...records and other information pertaining to the investigation of crime and the apprehension of criminals." W. Va. Code § 15-2-24(a). Under subsections (c) and (d) of the originating statute, the Criminal Identification Bureau may furnish, to both public and private agencies alike, "fingerprints, photographs, records or other information." W. Va. Code § 15-2-24(c)-(d). As the State has elected to allow both private and State agencies to maintain and release the same information, the historical-prerogative-of-the-State prong of the *Edison* inquiry is satisfied. Indeed, this is exactly the type of "entwinement" which the United State Supreme Court has indicated turns private action into State action. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n,* 531 U.S. 288 (2001).

Accordingly, because N.B.'s rights under the Due Process Clause are being actively violated, this Court should order the expungement of his record.

B. West Virginia should adopt a privacy interest in a wrongfully convicted individual's criminal record.

The Supreme Court of the United States has read the guarantee of "liberty" without due process of law under the Fourteenth Amendment to include a broad right to privacy, which has encompassed a number of personal areas that everyday citizens face. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law prohibiting the teaching of foreign languages to children until the Ninth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (upholding the rights of families to allow their children to attend parochial schools). Indeed, one of the most cited statements by a Supreme Court justice on the subject of privacy comes from Justice Brandeis' famous dissent in *Olmstead v. U.S.*, in which he said that:

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect...They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

While West Virginia has yet to take up the issue of Due Process at it relates to the records of a wrongfully convicted individual, at least one reviewing court has determined that the "dissemination of arrest records to authorized agencies" implicates an individual's right to privacy as guaranteed by the relevant State Constitution. *Cent. Valley Ch. 7th Step Found. v. Younger*, 214 Cal. App. 3d 145, 151. Further, the *Younger* Court found that the dissemination of entries of an arrest without a disposition attempting to "determine whether...the individual was exonerated" violated the privacy guarantees under the California Constitution. *Id*. When the California

Department of Justice asserted it was a "mere repository" for information, the reviewing court disagreed, asserting that it was not unrestricted in the data the Department could share. *Id.* at 160.

The *Younger* Court is not the only instance in which California recognized a right to privacy in the dissemination of arrest records. Indeed, an additional California case further acts as guidance in demonstrating why this Court should act along the lines of better-reasoned opinions. *See White v. Davis*, 13 Cal. 3d 757, 553 P.2d 222 (1975). In *Davis*, the California Supreme Court held that the "mischiefs" at which the right to privacy are directed include but are not limited to: (1) the overbroad collection and retention of unnecessary personal information by government and business interests; and (2) the lack of a reasonable check on the accuracy of existing records. *Id. a*t 775. Finally, the *Younger* Court concluded that, as information related to an exoneration are not necessary to reveal, this omission would leave incomplete records which do not serve any compelling state interest which might justify an infringement into a privacy interest. *Cent. Valley Ch. 7th Step Found. v. Younger*, 214 Cal. App. 3d at 152.

Here, like in *Davis* in which one of its chief concerns was the overbroad collection and retention of unnecessary personal information, these same concerns are triggered in the matter now before this Court. Assuredly, this proposition is something with which all West Virginians can relate. Further, California expressed a concern with reasonable checks on the accuracy of existing records. While it is not in dispute that N.B. was, in fact, arrested for the offense he was wrongfully convicted of, his subsequent clearing of any wrongdoing is not expressed by the way present records are displayed. By taking the words of Justice Brandeis in *Olmstead* at their very core, that the right to be "let alone" is "the most comprehensive of rights and the right most valued by civilized men," it becomes evident that this Court, at the very least, should find that N.B. has a right to be "let alone" and cease to face the consequences of a crime he had nothing to do with.

For the foregoing reasons, this Court should adopt a privacy interest in the criminal records of wrongfully convicted individuals, such as N.B.

C. If this Court finds that the Due Process Rights of N.B. are implicated, it must find that the Circuit Court's denial of the Petition for Expungement infringed upon those same rights.

When a State chooses to "act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Bilotti v. Dodrill*, 183 W. Va. 48, 53, 394 S.E.2d 32, 37 (W. Va. 1990) (quoting *Evitts v. Lucey*, 469 U.S. 387 (1985)). Further, while the Supreme Court of the United States has admitted it has not concretely defined what is meant by the liberty guaranteed by the Due Process Clause, it has held that "[it] denotes not merely freedom from bodily restraint but also the right of the individual to...enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. at 399. In attempting to define the "pursuit of happiness," at least one scholar has surmised it to be equated with the "Greek sense of *eudaimonia* or human flourishing," as analyzed against Blackstone's Commentaries on the Laws of England and our own Declaration of Independence. Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JUR. REV. 195, 260 (2015). Finally, the United States Supreme Court has also noted that '"the fundamental requisite of due process of law is the opportunity to be heard,"' and that a "mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Here, as a Circuit Court's inherent authority to grant an expungement, while not without limitations as previously discussed, is largely discretionary, the Due Process Clause must be respected, and a Circuit Court must operate under its confines. The Circuit Court, then, abused its

discretion in denying the Petition for Expungement presented by N.B. as doing so violated N.B.'s Due Process rights. The "mere gesture" of suggesting a hearing might be held, then subsequently adopting a verbatim recitation of the State's Response against granting the expungement sought by N.B. By not holding a hearing on the merits of this issue, N.B. was not allowed to protect his privacy or pursuit of "human flourishing" as, at the very least, every day N.B. is not granted this expungement is another day he continues to carry the water of the real perpetrator.

CONCLUSION

The Circuit Court of Cabell County abused its discretion by applying an erroneous view of the law. When the justification for an expungement lies outside the four corners of the relevant expungement statute, extraordinary circumstances control. A number of extraordinary factors deserving significant weight pertaining to the wrongful conviction of N.B. were either ignored by the Circuit Court, or improper factors not sufficiently established on the record were relied upon. This abuse of discretion not only forces N.B. to remain in a whirlwind of injustice that he has been dealing with for over a decade, but it also infringes upon N.B.'s Due Process rights under the U.S. and West Virginia Constitutions. Accordingly, for the foregoing reasons, N.B. respectfully asks this Court to reverse the Circuit Court of Cabell County with instructions to enter an Order granting the expungement of his records or, in the alternate, with instructions to hold a hearing on the merits of this issue.

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-430

IN RE: EXPUNGEMENT OF RECORD OF N.B.

Petitioner,

Appeal from the Circuit Court of Cabell County, West Virginia

---

CERTIFICATE OF SERVICE

I, Devon T. Unger, do hereby certify that on December 20, 2023, a copy of the foregoing **PETITIONER'S BRIEF** was electronically served upon counsel of record via the File and Xpress system.

/s/ Devon T. Unger
Devon T. Unger