BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 23-ICA-430

IN RE: EXPUNGEMENT OF RECORD OF N.B.

Petitioner,

Appeal from the Circuit Court of Cabell County, West Virginia

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PETITIONER'S REPLY BRIEF

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CORRECTION OF MATERIAL FACTS

The Respondent submitted to this Court a statement of the case that mischaracterizes several important facts. At its core, the Respondent's version of events functions as little more than a suggestion that N.B.'s presumption of innocence is now tarnished. The correction of these material facts is essential for this Court's consideration of this case. However, N.B. will not seek to correct all the various factual misrepresentations made by the Respondent.

First, the Respondent suggests that the uncle of Brian Dement ("Mr. Dement") simply "surreptitiously recorded Mr. Dement's confession and provided a copy to law enforcement." Resp. Br. at 2. But the specific circumstances under which this statement was obtained are important. Notably, despite this characterization by the Respondent, a cursory glance at the statement that Mr. Dement offered to a private investigator reveals that Mr. Dement had no recollection of being recorded nor of offering a statement to his uncle. App. 126. Mr. Dement went on to admit to the fact that he "was strung out on drugs" because his mother had passed away, leaving him in a fragile mental and emotional state. App. 126. Notably, this statement by Mr. Dement undermines the triggering event which resulted in N.B. losing years of his life for a crime he is factually and legally innocent of. This is a foundational fact for this Court's understanding of the material factors ignored by the circuit court.

Second, when discussing Timothy Smith ("Smith"), the individual whose DNA was positively matched to a sample found on the remains of Ms. Crawford, the Respondent accurately cites relevant pages in the joint appendix but fails to state exactly what of Smith's was found on and around Ms. Crawford after her death. This is important as the Respondent vacillates between whether Smith is innocent, presumed innocent, or whether there exists sufficient evidence to try and convict *any* party in the death of Ms. Crawford. *See* Resp. Br. at 14-16. What the Respondent

fails to identify for this Court is that Smith's semen and skin cells were found on the inside of Ms. Crawford's pants, and the very same DNA was identified as being present on a cigarette next to Ms. Crawford's remains. App. 068, 331-38. As this Court is operating outside of the bounds of statutory analysis, pertinent facts such as these should be, to borrow language from the Respondent, "if not the end of the story, at least the main plot point." Resp. Br. at 13. As such, this Court must be fully informed as to the pivotal facts in this case.

Finally, an assertion about N.B.'s underlying proceedings needs to be corrected. The Respondent states, in the body of its argument, that the circuit court "dismissed" the petition made by N.B. for a writ of *coram nobis* upon a finding of manifest injustice. Resp. Br. at 19. While this appears to be an innocent mistake of the pen, it cannot be stated strongly enough that the circuit court granted the petition, having found that N.B. met the manifest injustice standard. App. 59-60. This, in turn, is what allowed N.B. to withdraw his *Alford*/*Kennedy* plea. App. 59-60.

Accordingly, N.B. respectfully requests that this Court disregard any mischaracterization of not only the foregoing facts, but also those not referenced herein that are in direct contradiction to the joint appendix.

ARGUMENT

I. West Virginia Code § 61-11-25 does not govern N.B.'s case because N.B. seeks expungement of his arrest record under the court's inherent authority to expunge criminal records in "extraordinary circumstances."

The Respondent argues that West Virginia Code § 61-11-25 "remains the most powerful source of legal guidance" for determining whether N.B.'s arrest record should be expunged. Resp. Br. at 12. It is unclear why the Respondent dedicates so much time and effort to an analysis of West Virginia Code § 61-11-25 when N.B. does not seek expungement under this statutory expungement mechanism. Instead, N.B. seeks expungement of his arrest record, after his wrongful

conviction and incarceration, under the court's inherent common law authority to expunge criminal records. App. 002, *see In re Perito for Expungement of Rec.*, 246 W. Va. 439, 444, 874 S.E.2d 241, 246 (2022).

Though the Respondent makes the bare assertion that West Virginia Code § 61-11-25 is "germane" to determining whether N.B. should be granted expungement, the Respondent fails to explain why the statutory expungement mechanism applies to N.B.'s case or governs a circuit court's inherent authority to expunge criminal records. Resp. Br. at 12. A court's inherent authority to expunge is *separate and distinct* from the statutory expungement mechanism of West Virginia Code § 61-11-25. *Mullen v. Div. of Motor Vehicles*, 216 W. Va. 731 n.2, 613 S.E.2d91, 100 n.2 (2005). The Respondent offers no authority for the idea that a circuit court is limited to the words of West Virginia Code § 61-11-25 when exercising its inherent common law authority to expunge. Though a simple application of the expungement statute would likely make the Respondent's case easier, relief under the expungement statute was never sought by N.B. Thus, the Respondent's focus on the expungement statute fails to address the true issue at hand and only serves to distract from an appropriate analysis of the court's inherent authority to expunge criminal records.

The Respondent claims that N.B. "somehow assumes that a dismissal is a more extraordinary indicator of actual innocence than an acquittal at trial." Resp. Br. at 13. N.B. neither asserts nor assumes this. However, N.B. asserts that he is currently, under the law, as innocent as every other United States citizen of the crime that gave rise to the underlying criminal proceeding because he is not convicted of the crime of Ms. Crawford's murder. Though the Respondent goes to great lengths to make the point that "a jury *has* found Petitioner guilty of second degree murder[,]" the fact remains that this conviction was invalid, and was vacated by the Supreme Court of Appeals of West Virginia. Resp. Br. at 15. Furthermore, N.B.'s conviction was not simply

overturned on evidentiary grounds," as suggested by the Respondent. *Id*. His conviction also constituted a violation of his fundamental Sixth Amendment right to confront Dement, his accuser, at trial. App. 203-14. Thus, N.B. is now due a full and complete presumption of innocence. His prior conviction was clearly "wrongful."

The Respondent dedicates much of its brief to emphasizing the presumption of innocence that should be afforded to Smith, whose DNA was found on multiple items at the scene where Ms. Crawford's body was recovered, as well as to the premise that N.B. is not actually "innocent." Resp. Br. at 14. The Respondent asserts that "neither judge nor jury have found Ms. Crawford's proverbial blood on Smith's hands." *Id*. Proverbial blood aside, Smith's real semen was found in Ms. Crawford's pants at the scene of her body's recovery. App. 078-87, 331-38. Smith's real DNA was present on a used cigarette near Ms. Crawford's body. App. 068. N.B. has no connection to Smith, and Smith was unable to reasonably explain why his DNA was found in multiple places at the site of Ms. Crawford's body. App. 91, 104-105.

The Respondent fails to address why N.B. is undeserving of the presumption of innocence it so eagerly affords Smith. This is particularly perplexing because no physical evidence of the murder of Ms. Crawford has ever been linked to N.B. or his former co-defendants. Even if the multiple pieces of physical evidence connecting Smith and Ms. Crawford's body are removed from the equation, it is indisputable that N.B. is not convicted of Ms. Crawford's murder and that N.B. therefore deserves a complete presumption of innocence.

Finally, the Respondent expends considerable effort explaining why no person is ever "guaranteed" expungement. Resp. Br. at 13-14. N.B. does not argue that any West Virginia law guarantees expungement. Rather, N.B. argues that a fair, meaningful exercise of the circuit court's discretion is necessary in evaluating his expungement case, though it did not occur. Further,

because of N.B.'s wrongful conviction, any meaningful consideration of this case reveals extraordinary grounds for expungement under the circuit court's inherent authority to expunge criminal records. *See In re Perito for Expungement of Rec.*, 246 W. Va. at 444.

A. N.B's wrongful conviction and the continuing adverse consequences of his wrongful conviction constitute an "extraordinary circumstance."

The Respondent's primary argument on this issue boils down to the assertion that because N.B. could theoretically be retried for Ms. Crawford's murder, he is not factually innocent and cannot claim his case to be an extraordinary circumstance. Resp. Br. at 17. Once again, this argument overlooks the fact that N.B. was *not* retried and is *not* convicted of the crime of Ms. Crawford's murder. Anyone who was alive in the United States at the time of Ms. Crawford's death could now be accused of the crime. The Respondent should be entirely willing to afford N.B. a full presumption of innocence because he is not guilty of Ms. Crawford's murder. N.B. is as innocent as the author of the Respondent's brief, as innocent as every judge in West Virginia, and currently as innocent as every other person on Earth of the crime that gave rise to N.B.'s wrongful arrest and conviction.

Second, the Respondent holds out as support for its position the fact that it cannot find a case in which an expungement was granted based on a circuit court's inherent authority to expunge criminal records. Resp. Br. at 17. The Respondent treats *In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623 (2017) as a model for why N.B.'s arrest record should not be expunged. Resp. Br. at 17-18. However, the Respondent's Brief does *not* address the glaring factual differences between *A.N.T.* and the case at bar and why N.B.'s case is clearly distinguishable from the petitioner's case in *A.N.T. Id*. As a result, the Respondent offers no coherent explanation for why N.B.'s case should be cast into the same bucket as the *A.N.T.* petitioner's case.

Put simply, *A.N.T.* did not involve a wrongful conviction that gave rise to the records the petitioner sought to expunge. *A.N.T.*, 238 W. Va. at 706. Unlike N.B.'s wrongful conviction, the conviction of the petitioner in *A.N.T.* was valid. *Id*. The facts of *A.N.T.* are, therefore, nothing like the facts of N.B.'s case. The Respondent's inability to find a judicial opinion granting the expungement of a wrongfully convicted person's record under the circuit court's inherent authority does not preclude N.B. from receiving fair treatment under the law.

Further, the Respondent's inability to locate a judicial opinion granting the expungement of a wrongfully convicted person's record is unsurprising. "Extraordinary circumstances" are a "highly unusual set of facts that are not commonly associated with a particular thing or event." *Circumstance*, BLACK'S LAW DICTIONARY (11th ed. 2019). Vacated convictions, particularly those based on newly discovered DNA evidence, are exceedingly unusual, exceptional, and not regularly reoccurring because they are an extraordinary circumstance.

N.B. was wrongfully convicted and is currently due a full and complete presumption of innocence. If this Court does not recognize N.B.'s wrongful conviction and the ongoing negative consequences of his wrongful conviction to be an "extraordinary circumstance," it is impossible to see how any petitioner seeking expungement under the circuit court's inherent authority to expunge criminal records might ever succeed.

B. The circuit court did not give appropriate weight to material factors of N.B.'s case.

The Respondent asserts that the circuit court "gave appropriate weight to material factors," couched in an argument concerning credibility determinations and conclusions by various juries. *See* Resp. Br., p. 18. Specifically, the Respondent speaks at length regarding Mr. Dement and how the conclusions made by the circuit court are simply the lower court "disagreeing with Petitioner's

interpretation of the evidence." Resp. Br., p. 18. Not only are the points made by the Respondent a gross mischaracterization of the points made by N.B. in his opening brief, but they also mislead this Court regarding the issues now before it.

While the Respondent cites a lone case concerning credibility determinations as related to appellate review, the Respondent ignores what this case truly concerns. For example, the Respondent offers the legal standard that "credibility determinations are for a jury and not an appellate court." *See State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). While this is indeed an isolated standard issued by the *Guthrie* Court, the issue before that Court was whether there was sufficient evidence to sustain the Appellant's *conviction* which was secured at trial. *Id.* at 669, 175. Furthermore, the Respondent briefly cites but then ignores the standard that petitions for expungement existing outside the realm of statutory frameworks must meet. That is, expungements granted absent "statutory authority" are a "'narrow' remedy," meant only for "the most unusual or extreme case." *In re A.N.T.*, 238 W. Va. 701, 702-703; 798 S.E.2d 623, 627 (2017) (quoting *United States v. Rowlands*, 451 F.3d 173, 179 (3d Cir. 2006)).

Here, the Respondent suggests to this Court that N.B. characterizes Mr. Dement as simply a "drug addict with mental illness," and that this characterization is sufficient evidence for the circuit court to have erred in denying the expungement. Resp. Br., p. 18. While N.B. does offer to this Court a detailed recounting of the many issues surrounding Mr. Dement and his testimony, N.B. does not rest solely on the "credibility" of Mr. Dement. Instead, what the Respondent conveniently omits are the facts offered by N.B. which the circuit court ignored. *See* "Correction of Mischaracterized and Misstated Facts," *supra*. These facts, among others, demonstrate that the matter before this Court is so starkly different from the facts of *A.N.T.* and any other case in West Virginia regarding expungements that it cannot help but beg the question: "If not now, when?"

Additionally, the Respondent seeks to equate jury determinations of guilt, and the credibility or lack thereof of trial witnesses, with the proposition that N.B. has somehow not established the unusual and extreme nature of this case. Indeed, by viewing the *Guthrie* case in isolation, the Respondent attempts to place blinders on this Court as to what this case is truly about -- the expungement of an *arrest* record for an individual who is both factually and legally innocent of the arresting offense. Said differently, in an expungement matter, the lower court is being asked to consider whether the original arrest(s) or conviction(s) should be removed from the petitioner's record, not whether trial witnesses were credible or whether there was sufficient evidence to support the conviction. What is now before this Court is not a trial review, but whether the circuit court erred by swiftly dismissing a mountain of evidence demonstrating that N.B. is strongly deserving of an expungement of his arrest record.

C. The circuit court's decision to forgo a hearing further evinces an abuse of discretion, as a hearing would have permitted new and material testimony to be heard.

The Respondent's chief argument as to why the circuit court used "appropriate" discretion in deciding not to hold a hearing is that the Respondent finds it "difficult to imagine what additional information could have been elicited at a hearing that would have impacted the ruling." Resp. Br at 20-21. However, "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." Pet'r's Br. at 13. He was given no opportunity to explain prior statements he made to the parole board when he was incarcerated, or why he made them. While the Respondent may place little value upon a wrongfully convicted person's perspective or the continuing consequences of a wrongful conviction, this previously unheard testimony and evidence is material to the evaluation of whether "extraordinary circumstances" exist in N.B.'s case. A hearing would have permitted the circuit court, were it exercising meaningful discretion,

to develop a full and complete understanding of N.B.'s case through this additional testimony. The decision to forgo a hearing is simply additional evidence of the circuit court's abuse of its discretion.

The Respondent also incorrectly asserts that "Petitioner's basis for exoneration is Mr. Smith's guilt." Resp. Br. at 20. The Respondent argues that N.B. is not actually innocent of Ms. Crawford's murder and points to Judge Ferguson's doubt as to Smith's "involvement" as support for this argument. *Id*. Contrary to the Respondent's characterization of N.B.'s basis for asserting that he was wrongfully convicted, N.B. asserts that his conviction was wrongful because: (1) he is *not* convicted of Ms. Crawford's murder; (2) he was permitted to withdraw his *Alford* plea because his case met the "manifest injustice" standard; (3) the State dismissed all charges against him; (4) the co-defendant who initially implicated N.B. via false statements has since recanted and explained the reasons behind the false statements; (5) he has not been retried; (6) no physical evidence has *ever* been linked to him; and (7) the only person to whom physical evidence *has* been linked is Smith.

If anything, the circuit court's doubt as to Smith's involvement and N.B.'s "innocence" highlights the circuit court's less-than-perfect understanding of the factual and legal background of the case, given the presence of Smith's semen in Ms. Crawford's pants, the presence of Smith's DNA on a used cigarette found near Ms. Crawford's body, and the dismissal of all charges against N.B. App. 031-32, 068, 078-87, 331-38. Though the Respondent challenges N.B.'s innocence and unjustly attempts to color N.B. with a presumption of guilt, N.B. is not convicted of murder. He is presumed to be innocent, as is Smith despite the compelling physical evidence tying Smith to the victim.

Finally, the Respondent argues that the circuit court's "verbatim adoption" of the State's Response to N.B.'s Petition for Expungement, "*[w]hile not ideal*" and "not the preferred practice," does not "negate the validity of its ruling, or effectively establishes [*sic*] error." Resp. Br. at 21-22 (citing *South Side Lumber Co. v. Stone Constr. Co.*, 151 W. Va. 439, 152 S.E.2d 721 (1967)) (emphasis added). N.B. has never asserted that the circuit court's verbatim recitation of most of the State's Response constitutes reversible error in and of itself. Pet'r's Br. at 11. Instead, the circuit court's apparent copying and pasting of the State's Response—replete with formatting errors and typos—is additional evidence demonstrating the circuit court's abuse of discretion and clear failure to meaningfully consider this expungement case. While it may not be reversible error in and of itself for a circuit court to simply repeat the bulk of one party's brief, it is more indicative of a failure to meaningfully consider the issues than it is evidence of thoughtful contemplation. After all, such a ruling is "not ideal." Resp. Br. at 21.

Further, this was not a circumstance in which N.B. or the State was asked to submit a proposed order or proposed findings and conclusions. Had the circuit court asked for either of these items, the parties would have been given a meaningful opportunity to respond and object to the opposing party's submission. Such opportunity was not provided here, which makes the circuit court's wholesale adoption of the State's Response significantly more troubling than a mere departure from the "preferred practice."

II. The circuit court relied on factors that were not properly established on the record, and the Respondent's assertion that parole board hearing testimony would "undoubtedly be admissible" against N.B. is inaccurate.

As relevant to this section, the Respondent primarily makes three arguments meant to illustrate that the lower court "relied on factors properly established on the record." As will be discussed, the Respondent argues that: (1) "the circuit court's finding that Mr. Smith's culpability

would be an 'alternative theory' if Petitioner were retried is a legal reality," (2) the Parole Board hearing testimony now discussed by both parties would "undoubtedly be admissible against Petitioner if he were retried," and (3) this Court should disregard N.B's rehabilitation at the Anthony Correctional Center because it is not a "statutorily acknowledged factor." *See* Resp. Br., pp. 22-23. Issues with the further mischaracterization of arguments set forth by N.B. aside, the following are points that actually constitute a "legal reality," if that is what the parties are truly seeking.

First, the Respondent cites no case, nor is N.B. aware of any, which formally defines what the legal standard for an "alternative theory is." No "legal reality" exists to serve as the "definition of" an alternative theory in cases such as this one. West Virginia courts have defined *differing* theories that finders of fact may consider in deciding culpability. *See Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020) (finding that a civil defendant could rely on the theory of joint negligence or of intervening cause); *State v. Brown*, 212 W. Va. 397, 572 S.E.2d 920 (2002) (finding that larceny by fraudulent scheme and larceny by embezzlement were alternative theories).

Here, the case before this Court is a far cry from an "alternative theory." While it is true that, if charged, Mr. Smith *could* effectively point the finger at N.B. or any of his co-defendants, it is also true that Mr. Smith could attempt to claim an alibi, put on an insanity defense, or something as ludicrous as head trauma resulting in a gap in his memory. Similarly, as West Virginia allows for such theories, Mr. Smith could attempt to request a verdict form that asks the jury to choose between first-degree murder and its lesser included offenses. These are "alternative theories." A positive match to DNA found in semen and skin cells on Ms. Crawford's remains, and a spent cigarette next to her corpse, is not an "alternative theory." Assuredly, this is not an attempt by N.B.

to split metaphorical hairs. Rather, these facts that exonerated N.B. and two of his co-defendants were wholly disregarded by the State in its response in opposition to the expungement, the circuit court when it adopted a verbatim recitation of that same response, and now the Respondent in its characterization of these facts as an "alternative theory." This Court now has the chance to do what this issue has been begging for since its inception -- recognize this case as one unlike any other expungement case on record, and reverse.

Similarly, the Respondent offers nothing outside of a single rule of evidence to support its position that the inherently coercive Parole Board hearing testimony would "undoubtedly be admissible against Petitioner if he were retried." Resp. Br., p. 23 (citing W. Va. R. Evid. 801). What the Respondent again conveniently omits is that not only is the admissibility of statements given to a Parole Board an open question of evidentiary law in West Virginia, but also that several other legal issues would tend to suggest the opposite of the Respondent's conclusions.[1] *See* 2 Louis J. Palmer, Jr., *Handbook on Evidence for West Virginia Lawyers,* § 802.02 (7th ed. 2021 & Supp. 2023).

Additionally, under West Virginia law, Parole Board hearings are statutorily custodial interrogations, given that "the Parole Board shall arrange for the inmate to appear…and the panel may examine and *interrogate* him or her[.]" W. Va. Code § 62-12-13(m) (emphasis added). Naturally, as should be known by any representative of the State, custodial interrogations require an individual to be made aware of their rights under *Miranda v. Arizona*, lest any admissions made in that interrogation be made inadmissible. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (finding that custodial interrogations exist where questioning initiated by law enforcement officers begins after a person has been deprived of their freedom of action in any significant way); *State v. Farley*,

[1] Procedurally, the issue regarding the admissibility of N.B.'s parole board statements was actively being litigated when the State voluntarily dismissed the charges against N.B., and the circuit court had not yet ruled on that issue.

238 W. Va 596, 797 S.E.2d 573 (2017) (defining custodial interrogation); U.S. CONST. AMEND. V; W. VA. CONST. art. III, § 5; W. Va. Code § 57-5-2 (conferring upon a witness compelled to testify over a claim of self-incrimination a complete immunity except for perjury). Finally, precedent from the West Virginia Supreme Court of Appeals establishes that an incarcerated individual is in a state of custody. *Cline v. Mirandy*, 234 W. Va. 427, 433; 765 S.E.2d 583, 590 (2014) (finding that "all incarceration is a form of custody").

Here, the Respondent now attempts to pose a hypothetical in which the previously discussed statements to the Parole Board would assuredly be used to suggest that N.B. is somehow culpable in the death of Ms. Crawford. Looking beyond the fact that the admissibility of Parole Board statements is still an open question of law in West Virginia, glaring Fifth Amendment concerns have been wholly ignored by the Respondent in its sweeping, blanket assertion. Plainly, when individuals are incarcerated and under the control of the State, they are by definition deprived of their freedom of action in a significant way. Accordingly, the Respondent attempts to insert an exception to *Miranda* and its West Virginia progeny in an inherently coercive situation where individuals are incredibly vulnerable. Frankly, the foregoing suggests the exact opposite of the Respondent's position on the admissibility of statements made during a Parole Board hearing.

Finally, the Respondent asserts that this Court should disregard N.B.'s rehabilitative efforts at the Anthony Correctional Center because this point lacks statutory acknowledgment. Resp. Br., p. 23. N.B. agrees with the Respondent's reading of § 61-11-25, as it does not enumerate rehabilitation as a statutory factor. However, this is not the lone statutory provision concerning expungement. Accordingly, rehabilitation is enumerated in both §§ 61-11-26 and 61-11-26a as a factor for a court's consideration in reviewing a petition for expungement. Nevertheless, this case is not one operating under the statutory framework. The Respondent's constant attempts to redirect this Court

to a statute that N.B. is not even seeking expungement under demonstrate what the Respondent knows to be true, that N.B. does as well. This case is one of "extraordinary circumstances," which require this Court to reverse.

III. There is no rule stating that "public policy is set by the legislature and not by the courts," and the consequences of NB.'s wrongful conviction are "against public good."

The Respondent argues that circuit court's Order Denying Expungement properly articulates the law regarding the sources of public policy. Resp. Br. at 24-26. In addition, the Respondent Asserts that the denial of the expungement of N.B.'s arrest record is not "against public good" because N.B. is not "an innocent person." *Id*. at 26. N.B. addresses each argument in turn.

A. Sources of public policy are not limited to statutory language, and the circuit court's Order mischaracterizes the law on the sources of public policy.

The Respondent asserts that "the circuit court did not err by giving weight to the legislature's statutory construction in determining appropriate public policy." Resp. Br. at 24. This assertion mischaracterizes what the circuit court did. The circuit court did not simply "give weight" to the legislature's statutory construction in its "determination" of public policy. Rather, the circuit court considered *only* the construction of an uninvoked statute and wholly disregarded all other sources of public policy. App. 023.

Though the Respondent attempts to cast aside the multiple sources of public policy recognized by the Supreme Court of Appeals of West Virginia in *Cordle* on the basis that such recognition was not formed into a syllabus point, the Supreme Court of Appeals has decided cases based on public policy imperatives derived from common law and judicial decisions. *See Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325-27, 325 S.E.2d 111, 114-17 (1984); *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990). The *Cordle* court quoted *Allen v. Commercial Casualty Ins. Co.*'s list of public policy sources, including "federal and state

constitutions, our public statutes, *our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health morals and general welfare of the people*[,]" in its succinct "answer" to the certified question of whether a determination of the existence of public policy is a question of law. *Cordle*, 174 W. Va. at 325 (quoting *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 37 A.2d 37 (1944) (emphasis added). Moreover, in *Tiernan v. Charleston Area Med. Ctr., Inc.*, the Supreme Court of Appeals stated: "In *Cordle* we recognized a public policy emanating from the *common law* right of privacy[.]" 203 W. Va. 135, 142, 506 S.E.2d 578, 585 (1998) (emphasis added). The *Tiernan* court also explicitly endorsed "prior judicial decisions" as an authoritative source of public policy. *Id*. at 141. Thus, the assertions of both the circuit court and the Respondent that trivialize the significance and weight of public policy discerned by our courts do not pass legal muster.

Second, the Respondent asserts that the rule from *Jarrell v. Frontier W. Va., Inc.*, 249 W. Va. 335, 895 S.E.2d 190 (2023)—that circuit courts "should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject"—means that the expungement statute should determine which public policy imperatives govern the circuit court's inherent common law authority to expunge criminal records, full stop. Resp. Br. at 26 (quoting *Jarrell*, 895 S.E.2d at 196 (2023)) (internal citation and quotations omitted). However, *Jarrell* does not say that "public policy is set by the legislature and not by the courts." App. 023. There is no such "rule." This is why the State failed to provide a legal citation for the rule when initially opposing N.B.'s expungement petition and why the circuit court failed to provide a legal citation for the rule in its Order Denying Expungement. App. 018, 023. The circuit court's mischaracterization of the law constitutes reversible error, in and of itself.

No law requires courts in West Virginia to regard statutory language as the sole source of public policy. No law states that courts play no role in determining and establishing public policy. In fact, the *Jarrell* court specifically noted that, in the context of the wrongful discharge matter that was before it, courts will look to "established precepts in our constitution, legislative enactments, . . . and judicial opinions" in evaluating public policy. *Jarrell*, 895 S.E.2d at 197 (quoting Syl. pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 277, 424 S.E.2d 606, 612 (1992)). Moreover, the *Jarrell* court declined to find a "substantial public policy" emanating from the statute at issue in the case because the legislature did not include "an express statement of public policy" in that statute. *Jarrell*, 895 S.E.2d at 198.

The Respondent's *Jarrell* argument also fails to acknowledge relevant public policy imperatives that have been previously established. There are many prior, authoritative judicial expressions on the subject of wrongful convictions. Without wholly restating pages 18 and 19 of the Petitioner's Brief, both the Supreme Court of the United States and the West Virginia Supreme Court of Appeals recognize the severe injustice and the threat to our entire criminal justice system that results from wrongful convictions. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) (Harlan J., concurring); (*Schlup v. Delo* 513 U.S. 19 298, 324, 115 S. Ct. 851, 866 (1995); *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998); *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); *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419, 428 (1998). The existence of a public policy recognizing wrongful convictions to be injurious to the public and against public good is not "fairly debatable." *See* Resp. Br. at 26 (quoting Syl. pt. 3, *Jarrell*, 895 S.E.2d 190).

The Respondent's characterization of *Jarrell* is not the legal sledgehammer the Respondent wishes it to be. *Jarrell* is not particularly relevant to the analysis of N.B.'s case because N.B. does

not ask the Court to discern public policy from statutory language. And to the extent that *Jarrell* is relevant, the decision bolsters N.B.'s case because of the value it assigns "prior judicial expression on the subject" of public policy and the Court's unwillingness to read into statutes that which is not expressly articulated. *Jarrell*, 895 S.E.2d at 197-98. There is no express statement of public policy in West Virginia's expungement statute, and there is certainly no express statement in the expungement statute regarding the treatment of wrongfully convicted individuals. *See* West Virginia Code § 61-11-25.

B. N.B.'s wrongful conviction and the continuing adverse consequences of the wrongful conviction are "against public good," and N.B. deserves the complete presumption of innocence.

The Respondent asserts that it is not "against public good" to deny N.B.'s expungement because N.B. "has not been determined to be an innocent person." Resp. Br. at 26. Again, it is peculiar that the Respondent enthusiastically grants a presumption of innocence to Smith—whose semen was found in Ms. Crawford's pants and whose DNA was found on multiple items where her body was discovered—but refuses to grant the presumption of innocence to N.B. after N.B. was permitted to withdraw his *Alford* plea and the State moved to dismiss all charges against him. Resp. Br. at 14, 26. Though N.B. is not guilty of murder and holds a place in the National Registry of Exonerations,[2] the Respondent still inexplicably saddles him with a presumption of guilt. The Respondent's argument symbolizes the unwarranted stigma and unjust adverse consequences of wrongful conviction that N.B. still faces daily.

[2] Ken Otterbourg, *Nathaniel Barnett*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 25, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6045.

N.B. is as innocent as every other individual on Earth who has not been convicted of the murder of Ms. Crawford. The ongoing adverse effects of his wrongful conviction are therefore "against public good."

IV. According to both binding and persuasive authority, N.B.'s Due Process rights have been violated.

When discussing the implication of N.B.'s Due Process rights in this case, the Respondent again mischaracterizes arguments made by N.B. Specifically, the Respondent asserts that "Petitioner begs this Court to adopt a 1989 case which applies California's constitution to a privacy right in removing dismissed cases from background information provided to employers." Resp. Br., p. 10. Additionally, while N.B. is grateful that the Respondent finds his Due Process arguments "admirably creative," the Respondent categorically ignores the state of the law surrounding the Due Process Clause by simply claiming that the State is "not engaged in improper third-party background checks." Resp. Br., p. 27.

Briefly, nowhere in N.B.'s brief was it ever "begged" that this Court "adopt" the *Younger* Court's ruling. *See Cent. Valley Ch. 7th Step Found. V. Younger*, 214 Cal. App. 3d 145 (1989). The most liberal interpretation of N.B.'s words does not even support this proposition, as it was stated in the opening Brief by N.B. that this Court "should adopt a privacy interest in the criminal records of wrongfully convicted individuals[.]" Pet'r's Br., p. 27. Indeed, the distinction between an illustrative example and a direct ask for the adoption of an extra-jurisdictional holding must be respected. As the Respondent seems incredibly focused on statutory interpretation, if this Court chose to adopt the holding of Younger, that is well within the bounds of its statutorily granted power. See W. Va. Code § 51-11-3.

Finally, the Respondent asks this Court to disregard precedent from the Supreme Court of the United States simply because of its age. When discussing N.B.'s law in support of the position that his Due Process rights have been violated, the Respondent suggests that somehow N.B.'s reference to "three United States Supreme Court cases from the 1920s" are inferior to anything the Respondent offers in counter which, notably, is nothing. Unlike the Respondent, N.B. would respectfully request that this Court continue to follow the letter of the law until the Supreme Court of the United States expressly overturns said precedent. Accordingly, this Court should follow established precedent, unbothered for a century's worth of time, and reverse.

CONCLUSION

For the forgoing reasons, N.B. respectfully asks this Court to reverse the Circuit Court of Cabell County's Order Denying Expungement with instructions to enter an Order granting the expungement of N.B.'s records or, alternatively, with instructions to hold a hearing on the merits of these issues.

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

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CERTIFICATE OF SERVICE

I, Devon T. Unger, do hereby certify that on March 23, 2024, a copy of the foregoing **PETITIONER'S REPLY BRIEF** was electronically served upon counsel of record via the File and Xpress system.

/s/ Devon T. Unger
Devon T. Unger