BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-430

ICA EFiled: Mar 04 2024
02:22PM EST
Transaction ID 72232259

IN RE: EXPUNGEMENT OF RECORD OF N.B.,

Petitioner,

BRIEF OF RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

Katie Franklin [WVSB No. 10,767]
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: *Katherine.H.Franklin@wvago.gov*
Telephone: (304) 558-5830
Facsimile: (304) 558-5833

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioner N.B. is not entitled to an expungement of his criminal arrest record after the relevant charges were dismissed, nor is he entitled to a remand for further hearing under West Virginia Code § 61-11-26. Petitioner argues that he is innocent, and thus there exist "extraordinary circumstances" necessitating his expungement. Pet'r's Br. 7-8. Neither the law nor the record support this position. Petitioner is statutorily disqualified from an expungement due to his prior felony conviction. W. Va. Code § 61-11-25(a); App. 23. Despite Petitioner's claims to the contrary, the statutory framework is the most important consideration in determining whether expungement is not only appropriate, but whether it is available. Further, Petitioner has failed to establish any extraordinary circumstance which would warrant expungement beyond the statute. The circuit court did not abuse its discretion in denying the petition for expungement, nor did it err in ordering such denial without first holding a hearing. Accordingly, Respondent requests this Court affirm the circuit court's order of denial.

ASSIGNMENTS OF ERROR

Petitioner, by counsel, raises the following assignments of error in his brief:

1. The Circuit Court[1] 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 Petitioner for Expungement.

Pet'r's Br. 1.

[1] When quoting Petitioner, Respondent will incorporate Petitioner's capitalization of certain nouns.

STATEMENT OF THE CASE

I. Prior Criminal Record

Although the details of Petitioner's previous conviction are slim, it is undisputed that prior to the original charges in the underlying criminal proceedings, Petitioner was convicted of malicious wounding, a felony offense. App. 23. By letter dated October 14, 2003, the sentencing court was advised that Petitioner successfully completed the requirements of Anthony Correctional Center for Youthful Offenders. App. 221-22. Petitioner began his term at Anthony Correctional Center on March 5, 2003. App. 221.

II. Investigation, Trial, and Direct Appeal

On August 8, 2002, a dead body was found on Hickory Ridge in Cabell County, West Virginia. App. 245-46. Due to decomposition, it appeared that the body, determined to be female, had been dead for "several days." App. 248. The woman was partially clothed and partially concealed. App. 248. She had been manually strangled. App. 251. She was later identified as Deanna Louise Crawford ("Ms. Crawford"), a twenty-one-year-old mother. App. 252, 256. *State v. Barnett*, 226 W. Va. 422, 425, 701 S.E.2d 460, 463 (2010).[2]

"[T]he investigation was at a standstill until January of 2007," when Brian Dement ("Mr. Dement") told his uncle that he murdered Ms. Crawford. *Barnett*, 226 W. Va. at 425, 701 S.E.2d at 463. Mr. Dement said he perpetrated the murder along with three other men: Petitioner, Petitioner's brother Phillip Barnett ("Mr. Barnett"), and Justin Black ("Mr. Black"). *Id.* After his uncle surreptitiously recorded Mr. Dement's confession and provided a copy to law enforcement,

[2] Because neither the trial transcripts nor the earlier orders were included in Petitioner's Appendix, the opinions in *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010), *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010), and *Dement v. Pszczolkowski*, 245 W. Va. 564, 859 S.E.2d 732 (2021), provide the best source for accurate information predating November 2015.

Mr. Dement gave multiple statements to officers, each including varying admissions of culpability relating to himself, Mr. Black, Mr. Barnett, and Petitioner. *Id.*

Mr. Black gave a *Mirandized* statement to police where he "admitted that he was with the victim, [Mr.] Dement, [Mr.] Barnett, and [Petitioner] on the evening in question. He further admitted that he drove them from the party at his house to a place on Hickory Road." *Black*, 227 W. Va. at 302, 708 S.E.2d at 496. Mr. Black claimed "that he stayed at the vehicle while the others went to the area that became the crime scene. According to Mr. Black, [Mr. Barnett and Petitioner] eventually returned to the car red-faced and the three of them left, leaving the victim and Brian Dement behind." *Id.* Mr. Black later recanted this account, although the Supreme Court of Appeals of West Virginia affirmed the admissibility of the confession at trial. *Id.* at 302, 304, 708 S.E.2d at 496, 498.

Petitioner, Mr. Barnett, Mr. Black, and Mr. Dement were jointly indicted in May 2007 for the first degree murder of Ms. Crawford. App. 324. In October 2007, Mr. Dement pleaded guilty to second-degree murder, and was sentenced to 30 years of imprisonment. *Barnett*, 226 W. Va. at 425-26, 701 S.E.2d at 463-64. In 2008, Mr. Black was convicted by a jury of the lesser included offense of second degree murder. *Id.* at 426, 701 S.E.2d at 464. At trial, Mr. Black's defense admitted evidence of Mr. Dement recanting his confession to a private investigator. *Id.* Mr. Black's conviction was upheld on direct appeal. *Id.*

Petitioner and Mr. Barnett were tried jointly in 2008. *Barnett*, 226 W. Va. at 426, 701 S.E.2d at 464. Just like Mr. Black, the brothers were convicted of the lesser included offense of second degree murder. *Id.* Mr. Barnett was sentenced to forty years in prison, while Petitioner was sentenced to thirty-six years. *Id.* at 428, 701 S.E.2d at 466.

In 2010, the convictions of Petitioner and Mr. Barnett were overturned on direct appeal in a joint ruling, upon a finding "that the lower court abused its discretion by excluding the prior inconsistent statements of the State's key witness Brian Dement." *Barnett*, 226 W. Va. at 433, 701 S.E.2d at 471. The matter was remanded for new trial. *Id.* In so doing, the Court noted that by upholding Mr. Black's conviction, "the State may not be as limited in the presentation of its case in chief" on retrial. *Id.* at 433 n.13, 701 S.E.2d at 471 n.13.

III. Entry of Plea, and Parole Hearings

Instead of being retried, Petitioner and Mr. Barnett both pled guilty to voluntary manslaughter, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987). *Dement*, 245 W. Va. at 570, 859 S.E.2d at 738. App. 326. Mr. Barnett also pled guilty to an unrelated malicious wounding. *Dement*, 245 W. Va. at 570, 859 S.E.2d at 738. Petitioner was sentenced to fifteen years of incarceration upon the acceptance of his plea. App. 326. "Mr. Black and the Barnett brothers each have admitted to some involvement in the murder of Ms. Crawford to the West Virginia Parole Board." *Dement*, 245 W. Va. at 570, 859 S.E.2d at 738; App. 41-42.

IV. DNA Evidence and Subsequent Proceedings

On November 18, 2015, Mr. Black "filed a Motion for Post-Conviction DNA Testing pursuant to [West Virginia] Code § 15-2B-14," which was joined by Petitioner and Mr. Barnett. App. 200-01. The circuit court ultimately granted the motion. App. 201.

In November 2017, the West Virginia State Police Forensic laboratory advised that "[d]uring a search of the FBI's National DNA Index System (NDIS), a match occurred between" a specimen taken from Ms. Crawford's crime scene "and an offender from the Ohio [Bureau of Criminal Investigation] DNA Databank." App. 77-78. The DNA was matched to Timothy A.

Smith ("Mr. Smith"). App. 77-78. As a result, Mr. Smith was deposed by counsel for Petitioner and his co-defendants, and by the special prosecuting attorney. App. 89-123. Mr. Smith was also questioned by troopers with the West Virginia State Police. App. 168-199. Mr. Smith denied any involvement in Ms. Crawford's murder. App. 197, 199.

Petitioner, his co-defendants, and the State submitted to the circuit court a joint stipulation relating to the DNA evidence. App. 59. Thereafter, the circuit court granted petitions for *coram nobis*, filed by Petitioner, Mr. Barnett, and Mr. Black. App. 59. In support, the lower court found that "[t]he DNA evidence constitutes newly discovered evidence entitling each Petitioner to a new trial. [Petitioner and Mr. Barnett] have met the manifest injustice standard outlined in *State v. Olish*, 164 W. Va. 172 (1980), entitling them to withdraw their guilty pleas." App. 59. The circuit court declined to rule on the other pending motions. App. 59. "The original indictments [were] reinstated," and the matter was set for status hearing. App. 60. The State was ordered to decide whether it intended to retry the matter. App. 60.

Contemporaneously, Mr. Dement's writ for habeas corpus was denied by the circuit court. *Dement*, 245 W. Va. at 566, 859 S.E.2d at 734. This denial was overturned on appeal to the Supreme Court of Appeals of West Virginia, where the Court held "that the circuit court failed to provide a meaningful evidentiary hearing and that the circuit court's order [was] insufficient." *Id.* The matter was remanded with instructions. *Id.* at 578, 859 S.E.2d at 746.

Following remand, the circuit court held a status hearing on October 5, 2021. App. 30. At that time, the State proffered that it was unable to proceed against Mr. Smith because Petitioner and his three co-defendants made admissions of guilt to the West Virginia Parole Board, which would be admissible in any proceeding against Mr. Smith, and "would make it impossible to

proceed against Mr. Smith in any way." App. 41. The State went on to clarify its position that Petitioner and his co-defendants were culpable in Ms. Crawford's death:

> *So it is the position of the State that [Mr. Smith's] not the person that did it. We believe that the people involved were the ones that were charged.* And we believe that the numerous statements under oath that Mr. Dement made with regard to that would prove that. And that's why it is the position of the State that Mr. Smith could not be expected to be charged and certainly could not be prosecuted successfully in this matter.

App. 42 (emphasis added). The State hypothesized that if Petitioner, Mr. Barnett, and Mr. Black had given statements to police consistent with their statements to the Parole Board, then they "may have been charged only at the most with accessory after the fact if, in fact, those were truthful statements that were given at that time." App. 42.

Regardless, the State moved to dismiss the cases against Petitioner, Mr. Barnett, and Mr. Black. App. 42-43. Mr. Black's attorney disagreed, on the record, with the State's assessment as it relates to Mr. Smith's involvement, but noted "that the special prosecutor appointed in this matter has been extraordinarily diligent and careful in analyzing this case and discharging his duties," and expressed his appreciation for the prosecutor's service and the resulting dismissal. App. 43.

The circuit court advised that "[w]hen the Supreme Court sent the case back – which I knew – figured they would – and ordered me to have a hearing and make findings of fact and conclusions of law, I took that very seriously." App. 45, 51. Mentioning that "you could practically teach a course in criminal law in this one case, the legal issues coming up," the lower court took considerable time setting forth the tremendous effort he made to review the underlying record. App. 44-47.

The lower court paused to lament the death of Ms. Crawford, a "totally innocent" young woman who "was at the wrong place at the wrong time," before proceeding to grant the motion to

dismiss the indictments. App. 49, 58. Afterwards, the circuit court spoke directly to Petitioner and his co-defendants:

> But if they had any involvement in this case—and there will be some people out there that think you did and some people that think you didn't. And that's not my call to make. But you know in your own mind every day if you had—if you had anything to do with it, I hope that you have to think about it every day and every time you lay your head on a pillow. If you didn't have anything to do with it, I hope that you can totally forget about this case and go on with your life. *Only you all know what happened that night.*

App. 49 (emphasis added). The lower court said that he "read some testimony of some witnesses who placed [Petitioner and his co-defendants] there who were to me reluctant witnesses for the State." App. 49-50. "So that being said, I appreciate all your guys' work. And I know you all believed in your clients. I would say this, I would agree with the prosecutor. *I don't think Mr. Smith could have ever been convicted. Personally, I don't think he was involved in this case.*" App. 50 (emphasis added). The dismissal of the underlying charges did not come with a finding that Petitioner was actually innocent, and the transcript makes clear that neither the prosecutor nor the circuit court believed Mr. Smith was responsible.

V. Expungement Proceedings

In February 2023, Petitioner, by counsel, filed a *Petition for Expungement of Criminal Records Due to Dismissal*. App. 2-17. Petitioner requested a hearing on the petition. App. 16. The State filed a written *Response* in July 2023, opposing the expungement. App. 18-21. Following the State's written *Response*, the judge's law clerk, the special prosecuting attorney, and counsel for Petitioner engaged in an email exchange about a potential hearing. App. 25, 56-57. Although there was discussion about scheduling, counsel for Petitioner did not demand a hearing or even assert that a hearing was necessary. App. 56. Instead, counsel for Petitioner

advised that "[i]n the event the judge would like a hearing," counsel would prefer a date in the fall. App. 56. Counsel did not indicate that a hearing was given. App. 56.

On August 21, 2023, the circuit court entered an *Order Denying Expungement*. App. 22-25. In its order, the court found that Petitioner was not statutorily entitled to expungement. App. 22. The circuit court found that "[p]ublic policy is set by the legislature and not by the Courts." App. 23. Looking at West Virginia Code § 61-11-25, the circuit court noted that the Legislature has set forth "[t]hat any person who has previously been convicted of a felony may not file a petition for expungement pursuant to this section." App. 23 (quoting W. Va. Code § 61-11-25). "In enacting this code section, the legislature was explicitly stating that it is in the best interest of this state and society that those with previous felony convictions should not have subsequent charges expunged whether those charges were dismissed, or the Petitioner was acquitted." App. 23. The circuit court found Petitioner's previous felony conviction for malicious wounding to be "a very serious conviction." App. 23.

The circuit court went on to refute Petitioner's claim that he was exonerated, finding that the DNA evidence "[a]t best, gives him an alternative theory." App. 23-24. Noting that Petitioner's jury conviction was "based upon the sworn testimony of a co-defendant," the circuit court also noted that "Petitioner admitted he was involved in [the victim's] death in his first and third parole hearings, blaming Brian Dement for her death." App. 24. Ultimately, the court found that "[w]hen these charges are coupled with Petitioner's conviction for malicious wounding, which is not subject to expungement, the adverse effects upon him by the present charges [are] virtually nonexistent." App. 24.

The circuit court that denied the petition for expungement was the same circuit court that accepted Petitioner's voluntary manslaughter plea and sentenced Petitioner to the same (App. 326-

27), the same circuit court that granted the motion for additional DNA testing (App. 200-02), the same circuit court that granted Petitioner's writ for *coram nobis* (App. 59), and the same circuit court that accepted the State's dismissal of Petitioner's indictment (App. 58). App. 25.

SUMMARY OF ARGUMENT

I. At its essence, Petitioner's claims come down to two arguments: (1) he has been proven innocent; and (2) such innocence constitutes extraordinary circumstances for the granting of the expungement. Pet'r's Br. 7-8. "Expungement is principally a creature of statute." *In re A.N.T.*, 238 W. Va. 701, 704, 798 S.E.2d 623, 626 (2017). Despite Petitioner willing this Court to disregard West Virginia Code § 61-11-25 because it explicitly disqualifies Petitioner from eligibility for an expungement, it is that provision which must be followed. Not was Petitioner not deemed innocent, he has also not established why his case exculpates him more than a person who has been acquitted at trial, where the statute explicitly leaves the expungement of the latter in the discretion of the circuit court. W. Va. Code § 61-11-25. The circuit court below was intimately familiar with the facts of Petitioner's underlying criminal case, and did not need to conduct a hearing to issue a fair order. Petitioner has not proven abuse of discretion.

II. Petitioner claims that the circuit court failed to give adequate weight to material factors, and instead relied upon improper factors. A review of Petitioner's complaints and the record below demonstrates that the circuit court neither disregarded the facts, nor misstated the evidence. Instead, the circuit court displayed a sufficient grasp of criminal law and the prior proceedings in the underlying case. The circuit court did not err in its denial of the expungement.

III. Petitioner makes two arguments relating to public policy. In so doing, Petitioner fails to acknowledge more recent case law, which requires courts to grant significant deference to the Legislature in setting public policy. *See Jarrell v. Frontier W. Va., Inc.*, 249 W. Va. 335, 895

S.E.2d 190 (2023). Based on the accurate legal standard, the circuit court below did not rule in contradiction to the "public good."

IV. Petitioner also makes multiple arguments relating to due process rights. First, Petitioner incorrectly cites West Virginia law in arguing that the State partakes in the improper release of information. It does not. Second, 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. This has no relation to the West Virginia constitution. Third, Petitioner argues that while he did not have a statutory right to a hearing, he had an overarching constitutional right. He does not. Thus, the circuit court's order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision, because the record is fully developed, and because the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

STANDARD OF REVIEW

In West Virginia, "a circuit court's order granting or 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. "Only rarely, and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *State v. LaRock*, 196 W. Va. 294, 306, 470 S.E.2d 613, 625 (1996) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995)). "In general, 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 makes a serious mistake in weighing them." *Id.* at 307, 470 S.E.2d at 626 (quoting *Gentry*, 195 W. Va. at 520 n.6, 466 S.E.2d at 179 n.6).

ARGUMENT

I. The Circuit Court did not abuse its discretion in denying expungement.

Petitioner argues three grounds in support of this assignment of error: (1) the circuit court had "inherent authority" to expunge his record, and "newly discovered evidence that goes to the essence of a defendant's innocence or guilt has been recognized as an 'extraordinary circumstance,'" Pet'r's Br. 8; (2) the circuit court "ignored or improperly weighed material factors that demonstrate [Petitioner's] case to be an 'extraordinary circumstance,'" Pet'r's Br. 9; and (3) the circuit court's failure to hold a hearing "further evinces a failure to consider and properly weigh material factors," Pet'r's Br. 11. While Respondent will address each ground individually, it is important to give this argument the bird's eye view before looking at the sub-components. After all, this assignment of error begs the Court to find that Petitioner was entitled to expungement, even though expungement is not supported by either the law or the record.

The bedrock of Petitioner's legal argument is the premise that courts can grant expungement outside of the statutory framework, when there are "extraordinary circumstances". Pet'r's Br. 7-8. "There are two bases for judicial expungement of criminal records: statutory authority and the inherent power of the courts." *In re A.N.T.*, 238 W. Va. at 704, 798 S.E.2d at 626. "Expungement is principally a creature of statute; [however], this Court has recognized that the inherent powers of the Court may permit expungement as a remedy under certain circumstances." *Id.* (internal citation omitted). But "[a] circuit court, absent extraordinary circumstances and to protect constitutional rights or some other compelling public policy imperative, does not in the absence of statutory authority have the power to order the expungement of criminal history record information regarding a valid criminal conviction." Syl. pt. 1, *State ex rel. Barrick v. Stone*, 201 W. Va. 569, 499 S.E.2d 298 (1997).

Petitioner relies on the "inherent powers" argument because Petitioner concedes that expungement is not permissible under the statute, based on his prior malicious wounding conviction. Pet'r's Br. 8. Pursuant to the West Virginia Code,

> [a]ny person who has been charged with a criminal offense under the laws of this state and who has been found not guilty of the offense, or against whom charges have been dismissed, and not in exchange for a guilty plea to another offense, may file a civil petition in the circuit court in which the charges were filed to expunge all records relating to the arrest, charge or other matters arising out of the arrest or charge.

W. Va. Code § 61-11-25(a). "[A] person who has previously been convicted of a felony *may not* file a petition for expungement pursuant to this section." *Id.* While Petitioner offhandedly decides that ineligibility under West Virginia Code § 61-11-25 renders this controlling statute not relevant, Respondent avers that the applicable statutory authority remains the most powerful source of legal guidance. Pet'r's Br. 18.

First, if the statute, in black and white, forecloses expungement, then the Legislature's intent in setting forth this prohibition is germane to determining whether Petitioner should be granted expungement. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 3, *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017) (internal citations and quotations omitted). "It is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Id.* at syl. pt. 6.

In the case at hand, Petitioner is not eligible because Petitioner has a prior felony conviction, App. 23, 221-22, which automatically disqualifies him from expungement under West Virginia Code § 61-11-25, which the circuit court found to be "a very serious conviction," App. 23. The Court should not disregard the plain meaning of the statute. "Virtually every jurisdiction

addressing this issue has held that expungement absent statutory authority is a 'narrow' remedy, which is 'reserved for the most unusual or extreme cases.'" *In re A.N.T.*, 238 at 705, 798 S.E.2d at 627. It is, therefore, incumbent upon courts to give due deference to the legislative intent regarding expungement, and "not to add to statutes something the Legislature purposely omitted." Syl. pt. 6, *Butler*, 239 W. Va. 168, 799 S.E.2d 718. If the statute plainly bars Petitioner from expungement, then that should be, if not the end of the story, at least the main plot point.

Inexplicably, because of this prior felony, Petitioner argues that his dismissal *without prejudice*[3] is enough to constitute "extraordinary circumstances," even though Petitioner would have been *precluded* from statutory relief if he were acquitted at trial. Pet'r's Br. 7-8, 58; W. Va. Code § 61-11-25(a). Moreover, Petitioner somehow assumes that a dismissal is a more extraordinary indicator of actual innocence than an acquittal at trial.

If the Court proceeds to the "extraordinary circumstances" analysis, it should not be viewed in a vacuum. In this case, *even if* Petitioner did not have a prior felony, under West Virginia Code § 61-11-25 he would be *eligible* for expungement, but not *entitled* to one. The statute applies not only to cases which have been dismissed, but also to persons "who have been found not guilty." *Id.* Petitioner's entire argument that he meets "extraordinary circumstances" is based upon his claim that "[n]ewly discovered evidence...revealed [Petitioner's] conviction to be wrongful." Pet'r's Br. 7-8. Assuming for a moment that Petitioner's coloring of the facts was accurate, the statute itself does not guarantee expungement *even for persons acquitted at trial.* W. Va. Code § 61-11-25(a). All expungements submitted under West Virginia Code § 61-11-25 are subject to

[3] "It is generally recognized that a nolle prosequi, if entered before jeopardy attached, does not act as an acquittal and does not bar further prosecution for the offense." *State v. Cain*, 169 W. Va. 772, 776, 289 S.E.2d 488, 490 (1982).

the discretion of the circuit court, which "may grant the petition," but is not required to do so. *Id.* § 61-11-25(c).

It is axiomatic that a vacatur of a conviction does not ensure expungement. *See Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (noting how granting expungement after any vacatur would give the "defendant more relief than if he had been acquitted"); *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977) (expungement denied where government refused to concede defendant's innocence); *Allen v. Webster*, 742 F.2d 153, 154-55 (4th Cir. 1984) (upheld denial of expungement petition, when petitioner had been tried and acquitted); *United States v. Noonam*, 906 F.2d 952, 956 (3d. Cir. 1990) (a presidential pardon did not entitle petitioner to expungement of conviction); *Livingston v. U.S. Dep't of Just.*, 759 F.2d 74, 78 n.30 (D.C. Cir. 1985) ("Even individuals acquitted at trial are not entitled to expungement of their records 'as a matter of course.'").

If Petitioner's legal argument rests on the "extraordinary circumstances" standard, then the bedrock of Petitioner's factual argument is that those "extraordinary circumstances" are proven by Petitioner's actual innocence. Pet'r's Br. 9. Petitioner argues throughout his brief that he was "wrongfully convicted," App. 1, 8, 13, 15, 18, 19, 21, and that he is "an innocent person," App. 2. In support of this, Petitioner makes clear his position that Mr. Smith is the responsible party, going so far as to say that Mr. Smith's guilt is "the only theory for which there is objective, uncontestably evidentiary support." App. 3, 15-16. *It cannot be stated strongly enough: Mr. Smith is presumed innocent.* Mr. Smith has not been charged, much less convicted, of murdering Ms. Crawford. Mr. Smith has not been determined to be guilty, and neither judge nor jury have found Ms. Crawford's proverbial blood on Mr. Smith's hands. Despite Petitioner's claims, Mr. Smith is entitled to due

process—a right which Petitioner passionately claims as it relates to his own expungement petition but which he willfully ignores as it applies to Mr. Smith.

A jury *has* found Petitioner guilty of second degree murder. *Barnett*, 226 W. Va. 422, 701 S.E.2d 460. It was later overturned on evidentiary grounds, although his co-defendant's conviction was upheld based on nearly identical evidence. *Id.*; *Black*, 227 W. Va. 297, 708 S.E.2d 491. Petitioner later entered a plea to voluntary manslaughter. *Dement*, 245 W. Va. at 570, 859 S.E.2d at 738. Petitioner and Mr. Barnett both made admissions before the State Parole Board, which were noted by the prosecutor, App. 42, the circuit court, App. 23, and the Supreme Court of Appeals of West Virginia. *Dement*, 245 W. Va. at 570, 859 S.E.2d at 738. These incriminating statements are in addition to the confessions made to law enforcement by both Mr. Dement and Mr. Black, where both men not only admitted their own involvement, but also implicated Petitioner and Mr. Barnett. *Barnett*, 226 W. Va. at 425, 701 S.E.2d at 463; *Black*, 227 W. Va. at 302, 708 S.E.2d at 496. Mr. Black's confession was upheld as lawfully obtained. *Id.* at 304, 708 S.E.2d at 498.

Following remand, the State decided not to retry Petitioner, and dismissed the charges against him without prejudice. App. 40-42, 58. Contrary to Petitioner's claims, Pet'r's Br. 16, the State elected not to try Mr. Smith because it was the State's position that Mr. Smith was "not the person" who took Ms. Crawford's life; not merely because of the State's lack of confidence in obtaining a conviction. App. 42. At the dismissal hearing, the State made clear it believed "that the people involved were the ones that were charged." App. 42. The circuit court echoed this opinion: "I don't think Mr. Smith could have ever been convicted. Personally, I don't think he was involved in this case." App. 50.

The circumstances surrounding this matter suggest reasonable doubt may exist as it applies to both Petitioner *and* Mr. Smith. Respondent neither avers the guilt or innocence of either man. As the special prosecutor explained, if the State tried Mr. Smith, he would be acquitted based on the admissions of guilt made by Petitioner and his co-defendants; if the State retried Petitioner and his co-defendants, then Mr. Smith's DNA would result in a "not guilty" verdict. App. 41-42. The tragic consequence of this catch-22 is that Ms. Crawford and her family will likely never see justice. There is, however, no greater demonstration of reasonable doubt in the case at hand than there is in a case where a criminal defendant has been found "not guilty" at trial. If the latter is not guaranteed expungement, then Petitioner should not be guaranteed expungement.

It is with these fundamentals in mind that Respondent will now address Petitioner's specific arguments.

A. The facts of this case do not constitute an "extraordinary circumstance."

Petitioner argues that exonerating evidence is considered an "extraordinary circumstance" for the purposes of granting a new trial. *State ex rel. Smith v. Sims*, 240 W. Va. 601, 604, 814, S.E.2d 264, 267 (2018); Pet'r's Br. 9. This consideration was apparently applied below, as the DNA evidence—which while not dispositive is admittedly exculpatory—served as the grounds for Petitioner being permitted to withdraw his plea to voluntary manslaughter. App. 59-60. There is, however, no case law in West Virginia which equates "exonerating evidence" with "extraordinary circumstance" in the realm of expungement.

Expungement "is appropriate only when a defendant is factually innocent *and* can demonstrate that the continued public availability of the record will cause great harm that outweighs the public and governmental interest in maintaining the record." *In re TwoBears*, No. 80-20073-BRE, 2007 WL 1232043, at *3 (W.D. Tenn. Apr. 26, 2007) (emphasis in original). "A majority of jurisdictions find 'extraordinary circumstances' only if 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." *In re A.N.T.*, 238 W. Va. at 705, 798 S.E.2d at 627. "For example, expungement has been ordered where 'there has been an unlawful arrest, where an arrest has been made merely for harassment purposes, or where the statute under which an individual was prosecuted has subsequently been determined to be unconstitutional.'" *Id.* (internal citations omitted).

Petitioner has not been found factually innocent, and can legally be retried for Ms. Crawford's murder. Petitioner has not demonstrated that his assertions of innocence carry a greater weight than a petitioner seeking expungement upon acquittal by a jury. Likewise, Petitioner has not established that his circumstances are extraordinary, such that the Court should grant expungement in contradiction to the plain language of the statute. To the contrary: The statute accounts for persons found not guilty at trial. W. Va. Code § 61-11-25. From this inclusion, it becomes apparent that the Legislature did not intend for a vacatur to constitute an "extraordinary circumstance." *Id.*

While the Supreme Court of Appeals of West Virginia has acknowledged the potential for expungement pursuant to the "extraordinary circumstances" standard, Respondent has been unable to find a single case where an expungement was granted upon the Court's application of its "inherent powers," instead of ruling upon the application of the statutes. *See State ex. Rel. Barrick v. Stone*, 201 W. Va. 569, 499 S.E.2d 298 (1997); *Mullen v. State, Div. of Motor Vehicles*, 216 W. Va. 731, 613 S.E.2d 98 (2005); *In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623; *In re I.S.A.*, 244 W. Va. 162, 852 S.E.2d 229 (2020); *In re Perito*, 246 W. Va. 439, 874 S.E.2d 241 (2022); *and In re D.K.*, 248 W. Va. 699, 889 S.E.2d 781 (2023). On the other hand, this Court has overturned a circuit court's grant of expungement due to "extraordinary circumstances," finding that the

petitioner's situation was quite common. *In re A.N.T.*, 238 W. Va. at 705-06, 798 S.E.2d at 627-28. Given this legal precedence, Petitioner has failed to establish that the circuit court abused its discretion in denying his expungement request.

B. The circuit court gave appropriate weight to material factors.

For this argument, Petitioner primarily focuses on the circuit court's reference to the "sworn testimony of a co-defendant" in denying the expungement. Pet'r's Br. 10-11; App. 24. Petitioner then claims that Mr. Dement, the subject co-defendant, was a drug addict with mental illness, and the circuit court should not have found this testimony to be "satisfactory evidence of purported guilt." Pet'r's Br. 11; App. 24. Mr. Dement, however, testified at two trials, under oath, and subject to cross-examination, in the joint trial of Petitioner and Mr. Barnett, and in the trial of Mr. Black. *Barnett*, 226 W. Va. 422, 701 S.E.2d 460; *Black*, 227 W. Va. 297, 708 S.E.2d 491. Two separate juries found Mr. Dement's testimony credible. The circuit court was entirely correct in extending deference to the juries' finding as to Mr. Dement's credibility, and to give it due weight. *See* syl. pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) ("Credibility determinations are for a jury and not an appellate court."). Petitioner has not established that "a material factor deserving significant weight [was] ignored" by the circuit court, or that "an improper factor [was] relied upon." *LaRock*, 196 W. Va. at 307, 470 S.E.2d at 626 (internal citation and quotation omitted).

Rather, the record demonstrates the circuit court properly considered the material factors and determined which of them deserved significant weight. Plainly, the court's determination differed from Petitioner's desired view. Yet, it is within the circuit court's discretion to make these determinations, and it did not abuse its discretion by simply disagreeing with Petitioner's interpretation of the evidence.

C. The circuit court used appropriate discretion in deciding not to hold a hearing.

As Petitioner concedes, "a circuit court is not required under West Virginia law to hold a hearing prior to the dismissal of a case." Pet'r's Br. 11. In expungements, specifically, the Legislature has set forth that "the court may set a date for hearing." W. Va. Code § 62-11-25(c). "As a general rule of statutory construction, the word 'may' inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word 'may' usually renders the referenced act discretionary, rather than mandatory, in nature." Syl. pt. 6, *Div. of Just. & Cmty. Servs. V. Fairmont State Univ.*, 242 W. Va. 489, 836 S.E.2d 456 (2019).

In his dissenting opinion in *I.S.A.*, Chief Justice Armistead emphasized that the "statute does not provide an applicant with an automatic right to an expungement or to the right to have a hearing on his or her application." *In re I.S.A.*, 244 W. Va. at 170, 852 S.E.2d at 237 (Armistead, C.J., dissenting). "In enacting the expungement statute, the Legislature has clearly guarded the circuit judge's discretion to consider the facts of the case and determine if the expungement is appropriate." *Id.* When considering an expungement of a criminal conviction pursuant to the companion statute in West Virginia Code § 61-11-26, the West Virginia Supreme Court unanimously held that the statute "does not provide that live testimony must be taken on any of the topics." *State v. T.D.*, No. 14-0988, 2015 WL 3448196, at *2 (W. Va. Supreme Court, May 29, 2015) (memorandum decision).

In this case, the circuit court was in an excellent position to fully identify and consider the facts. The circuit court became involved in Petitioner's underlying criminal case in 2010, following Petitioner's overturned jury conviction. App. 326. The circuit court continued to oversee the criminal case until it was dismissed in 2021. App. 58. The circuit court that denied the expungement was the same circuit court that granted the motion for further DNA testing, App. 200-02, and that dismissed Petitioner's writ for *coram nobis* upon a finding of "manifest injustice,"

App. 59. At the dismissal hearing, the circuit court explained the extensive review conducted by the court, which included reviewing: the indictment, App. 45; Mr. Dement's plea agreement, transcript of hearing, and presentence investigation report, App. 44, 46-47; the trial transcripts, including the joint trial of Petitioner and Mr. Barnett, App. 45, 46; a copy of Mr. Dement's uncle's statement to police, App. 46-47; the habeas corpus petition and memorandum in support, App. 46; and the expert report relating to false confessions, App. 46.

Based upon this background, the circuit court did not believe the DNA evidence exonerated Petitioner, as argued in the petition for expungement. App. 24. Petitioner's basis for exoneration is Mr. Smith's guilt. Pet'r's Br. 15-16. Despite the DNA evidence, neither the State (Mr. Smith was "not the person" who committed the murder, App. 42) nor the circuit court ("I don't think [Mr. Smith] was involved", App. 50) were convinced that Mr. Smith is a culpable party. Similarly, the State has maintained "that the people involved were the ones that were charged," App. 42, and has made clear that it "does not share the Petitioner's analysis of the facts underlying that procedural history." App. 19. Moreover, the circuit court has long intimated that it is not convinced of Petitioner's innocence. The circuit court ended the dismissal hearing by telling Petitioner and his co-defendants, "[I]f you didn't do anything, didn't have any connection with it, I hope you can totally forget about it. *But if you did something and you're getting away with it, I hope you have a hard time sleeping at night.*" App. 51-52 (emphasis added). Petitioner's arguments center not on the circuit court's knowledge or understanding of the record, but rather on the circuit court's logical inferences and conclusions drawn therefrom. Pet'r's Br. 11. Disagreement with Petitioner's self-serving conclusions does not constitute error.

Further, given the breadth of the circuit court's familiarity with the underlying criminal case, it is difficult to imagine what additional information could have been elicited at a hearing

that would have impacted the ruling. In *Krein*, the Court upheld the circuit court's denial of an expungement petition without a hearing, finding that "Petitioner does not identify any evidence or argument that he would have presented during a hearing that was not already set forth in his written petition." *In re Krein*, No. 13-0694, 2014 WL 1672945, at *1 (W. Va. Supreme Court, Apr. 25, 2014) (memorandum decision). In the present case, the petition requesting expungement was sixteen pages, and effectively sets forth Petitioner's argument regarding Petitioner's alleged innocence, the application of the "extraordinary circumstances" argument to Petitioner's case, and how the charges have affected Petitioner's "ability to obtain and change employment, and adversely affects his social life."[4] App. 2-16. Even in its communication to the court's office, counsel for Petitioner notes that the scheduling of a hearing is only necessary "[i]n the event the judge would like a hearing." App. 56. Petitioner fails to explain on appeal what evidence he would have presented at hearing which "was not already set forth in his written petition" and already known to the court in the many prior proceedings. *In re Krein*, 2014 WL 1672945, at *1.

Petitioner also argues that the circuit court engaged in "copying and pasting the State's Response," which he interprets as evidence that the circuit court did not give due deference to his petition or the record. Pet'r's Br. 13. "Verbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice, *see South Side Lumber Co. v. Stone Constr. Co.*, 151 W. Va. 439, 152 S.E.2d 721 (1967) (findings of fact *should* represent trial judge's own determination), but it does not constitute reversible error." *Witteried v. City of Charles Town*, No. 17-0310, 2018 WL 2175820, at *5 n.4 (W. Va. Supreme Court, May 11, 2018) (memorandum decision) (quoting *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168

[4] It is not clear if Petitioner included any attachments to his original petition.

(1996)). While not ideal, this re-use of a party's wording does not negate the validity of the court's ruling, or effectively establishes error.

II. The circuit court relied on factors properly established on the record.

Petitioner argues the circuit court displayed a "disturbing misunderstanding of the evidence" when it denied expungement "because the DNA evidence utilized in correcting [Petitioner's] wrongful conviction 'at best gives him an alternative theory.'" Pet'r's Br. 15; App. 24. In support of this assertion Petitioner argues the many ways that Mr. Smith is guilty of murder; and ultimately, that "this 'alternate theory' is far more compelling than the theory upon which [Petitioner] was originally convicted and the only theory for which there is objective, uncontestable evidentiary support." App. 15-16. At the dismissal hearing, the circuit court gave recognition to counsel for Petitioner and his co-defendants, "I know you all believed in your clients." App. 50. The circuit court clearly did not. App. 50.

The zealous protestations of Petitioner's innocence and his fervent claims of Mr. Smith's guilt may be noteworthy, but are not evidence. Petitioner's brief relating to his innocence constitutes a statement of *opinion*; the circuit court's finding that Mr. Smith's culpability would be an "alternative theory" if Petitioner were retried is a legal reality. The charges that form the basis of the petition for expungement were dismissed pursuant to a nolle prosequi, which was accepted by the circuit court, but which is not a finding of either guilt or innocence. App. 58. Respondent will not re-argue its earlier assertion as to Mr. Smith's right to be presumed innocent, but it is important to reiterate that Mr. Smith's potential involvement in Ms. Crawford's murder has not been proven. As the special prosecutor explained at the dismissal hearing, if the State charged Petitioner and/or any of his co-defendants, or if it charged Mr. Smith, each would be able to effectively point the finger at the other to establish reasonable doubt. App. 41-42. This is the definition of an "alternative theory."

Petitioner also claims that the circuit court erred in considering Petitioner's admissions in his parole hearings. Pet'r's Br. 16; App. 24. Although Petitioner claims that "Parole Board hearing testimony is inherently coercive," the statements would undoubtedly be admissible against Petitioner if he were retried. Pet'r's Br. 16; W. Va. R. Evid. 801. It is not an abuse of discretion for a circuit court to consider the State's admissible evidence and the totality of the circumstances when deciding whether to expunge dismissed charges.

Petitioner further argues the circuit court erred by not considering Petitioner's "age, socioeconomic circumstances at the time of the offense, and, perhaps most importantly, [Petitioner's] time at the Anthony Correctional Center in which [Petitioner] learned valuable life and vocational skills." Pet'r's Br. 17. These factors, however, are not normally viewed as relevant in an expungement determination, and Petitioner cites no legal authority for the proposition that these factors must be examined. In *A.N.T.* the Court noted that "if employment problems resulting from a criminal record were sufficient to outweigh the government's interest in maintaining record, expunction would no longer be the narrow extraordinary exception, but a generally available remedy." 238 W. Va. at 705, 798 S.E.2d at 627 (internal citations and quotations omitted). The *A.N.T.* Court also disregarded consideration of the petitioner's mental health. *Id.*

While rehabilitation is a consideration for the expungement of a conviction, pursuant to West Virginia Code § 61-11-26, it is not a statutorily acknowledged factor in the expungement of a dismissed or acquitted offense under Section 25. W. Va. Code § 61-11-25. Logically, this is because expungement of a dismissal occurs when there is no prior felony conviction, and, therefore, no opportunity for rehabilitation. Petitioner's claims that the circuit court should have considered his time at Anthony Correctional Center *for the offense which makes him ineligible for statutory expungement* is unreasonable, and certainly does not demonstrate an abuse of discretion.

III. The circuit court did not fail to properly consider or weigh "public policy."

In his related *Argument* section, Petitioner treats the "public policy" claim as two separate issues; however, he includes only one *Assignments of Error* relating to "public policy." Pet'r's Br. 1, 17-18. To conform with Petitioner's *Assignments of Error*, Respondent will respond as if this is a two-part argument to the same assignment. Accordingly, Petitioner argues: (1) the circuit court did not "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" (Pet'r's Br. 17); and (2) "[t]he public policy imperatives implicated by [Petitioner's] case warrant an expungement of [Petitioner's] criminal record, as the continued punishment of an individual after a wrongful, invalid conviction is 'against public good'" (Pet'r's Br. 18). Respondent will address each.

A. The circuit court did not err by giving weight to the legislature's statutory construction in determining appropriate public policy.

Petitioner argues that the circuit court "incorrectly states the bases by which 'public policy' is determined in West Virginia," when the circuit court set forth in its order that "[p]ublic policy is set by the legislature and not by the Courts." Pet'r's Br. 18; App. 23. In support, Petitioner relies heavily on *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984), which sets forth that "the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." *Id.* at syl. pt. 1. Petitioner claims that *Cordle* clearly establishes a five-part test relating to public policy. In actuality, the Court in *Cordle* is merely quoting an opinion out of the Court of Errors and Appeals of New Jersey, which states that

> [t]he sources determinative of public policy are, among others, our 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 for whom government—with us—is factually established.

Cordle, 174 W. Va. at 325, 325 S.E.2d at 114 (quoting *Allen v. Com. Cas. Ins. Co.*, 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944)). The Court in *Cordle* created two new syllabus points: This is not one of them.

Here, in rejecting Petitioner's public policy argument, the circuit court found that "[t]he legislature, in enacting West Virginia Code § 61-11-25, established what the public policy is in the State of West Virginia regarding expungements." App. 23. The circuit court then proceeded to weigh Petitioner's prior conviction for malicious wounding, which the lower court found to be "a very serious conviction," "regardless of his age at the time." App. 23. The circuit court also cited the Court's finding in *Krein*, where the circuit court's denial of expungement was upheld. 2014 WL 1672945, at *1. The circuit court then made an important distinction between *Krein* and the Petitioner: the petitioner in *Krein* was seeking expungement of twenty-five misdemeanor charges that he was never convicted on, and "[a]lthough, these misdemeanor charges were important, none of them rose of the level of malicious wounding." *Id.*; App. 23.

Moreover, the circuit court's rejection of the public policy argument in the current matter was based on both the statute and applicable case law. App. 23. The circuit court did not err in this rejection. Recently, the Court has held that "[i]nherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person." Syl. pt. 2, *Jarrell*, 249 W. Va. 335, 895 S.E.2d 190 (quoting, syl. pt. 3, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992)). *"Ordinarily the courts will not decide on public policy grounds issues which are fairly debatable, but will instead leave them for legislative decision." Id.* at syl. pt. 3 (quoting syl. pt. 3, *Yoho v. Triangle PWC, Inc.*, 175 W. Va. 556, 336 S.E.2d 204 (1985)) (emphasis added). The Court has "additionally admonished that courts should

proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." *Id.* at ___, 895 S.E.2d at 196 (internal citation and quotations omitted).

Petitioner boldly claims that the circuit court applied "an erroneous legal standard [which] is enough, in and of itself" to find error. Pet'r's Br. 18. This argument contradicts the 2023 *Jarrell* decision that circuit courts "should proceed cautiously if called upon to declare public policy," and when the matter is "fairly debatable," courts should "leave" the public policy grounds "for legislative decision." Syl. pt. 3, *Jarrell,* 249 W. Va. 335, 895 S.E.2d 190. The first and primary deference is to the Legislature, and the circuit court did not err in giving this deference. App. 23. The Legislature has determined that Petitioner's prior felony disqualifies him from expungement, and this finding *is* the prevailing public policy of this State. The circuit court followed and appropriately applied the law to the facts in this case.

B. It is not "against public good" to deny Petitioner's expungement.

Petitioner spends a considerable amount of time arguing the value of expunging the "conviction of an innocent person." Contrary to the idea of innocence set forth throughout Respondent's brief, however, Petitioner has not been determined to be an innocent person. Petitioner argues that the circuit court failed to apply "the correct law and properly consider[ ] relevant judicial opinions," Pet'r's Br. 21; however, the circuit court's denial of the petition shows the critical disagreement with Petitioner's position as to whether Petitioner has established his innocence to such a degree that it constitutes "extraordinary circumstances," or otherwise violates the "public good." In its order, the circuit court gave a definition of "exoneration"—which Petitioner refutes—and explicitly found that "[t]he DNA evidence in questions does not exonerate the Petitioner." App. 24. The circuit court did not misapply the facts to the law; the circuit court simply disagrees with Petitioner's interpretation of said facts. Disagreement with Petitioner's self-interested opinion certainly does not rise to the level of abuse of discretion.

IV. The Circuit Court did not infringe upon Petitioner's due process rights.

Petitioner argues three grounds in support of this assignment of error: (1) "Background Check Reporting by Third-Party Agencies Implicates the Due Process Clause because the State Action Doctrine is Triggered," Pet'r's Br. 22; (2) "West Virginia should adopt a privacy interest in a wrongfully convicted individual's criminal record," Pet'r's Br. 25; and (3) if due process rights "are implicated," then the Court "must find that the Circuit Court's denial of the Petition for Expungement infringed upon those same rights," Pet'r's Br. 27. As discussed herein, these arguments are entirely without merit.

A. The State is not engaged in improper third-party background checks.

Petitioner's argument is that "[b]ackground checks in the State of West Virginia are regulated by both Federal and State legislation. *See* 15 U.S.C. § 1681 [*et seq.*]; West Virginia Code § 16-49[-1 *et seq.*]."[5] Pet'r's Br. 23. Petitioner further argues that "conduct by third-party background check reporting agencies may be fairly attributed to the state itself, meaning that Due Process concerns are implicated." Pet'r's Br. 23. Essentially, Petitioner is claiming that if the State of West Virginia provides criminal background checks to third-party reporting agencies, then it becomes a party to preventing Petitioner from obtaining employment, which invokes his due process rights under Article III, § 10 of the West Virginia Constitution. This is an admirably creative argument, but one without any basis in West Virginia law.

The Court has already rejected employment as grounds for expungement. "[C]ourts universally hold that employment problems resulting from a criminal record do not qualify as an

[5] West Virginia Code § 16-49-1 *et seq.* addresses background checks performed by the West Virginia Department of Health and Human Resources, relating to applicants for employment at nursing facilities, long-term care hospitals, hospice, and similar facilities. There is nothing in the record to indicate that Petitioner has any intention of obtaining work in this field, or how this Code provision is relevant to the case at hand.

'extraordinary' circumstance justifying expungement absent statutory authority." *In re A.N.T.*, 238 W. Va. at 705, 798 S.E.2d at 627. Arguing that the State is a party to the denial of such employment by providing the means to view a criminal record does not expand Petitioner's rights, or require additional layers of due process.

Petitioner claims that under the provisions of the Criminal Identification Bureau ("CIB"), as set forth under West Virginia Code § 15-2-24, "the State has elected to allow both private and State agencies to maintain and release" information relating to a person's criminal background. Pet'r's Br. 24. This argument fails, profoundly, upon reading of the relevant statutes.

West Virginia Code § 15-2-24(c) authorizes the CIB to "furnish fingerprints, photographs, records or other information to authorized law-enforcement and governmental agencies of the United States and its territories." This is consistent with federal law, 28 U.S.C.A § 524 and 34 U.S.C.A. § 40901, and the State's ratification of the National Crime Prevention and Privacy Compact, 42 U.S.C.A §14616. W. Va. Code § 15-2-24a. It is from this type of sharing that the Interstate Identification Index exists, which has been acknowledged by the Court as "a database frequently used by law enforcement officers." *State v. Tilley*, No. 17-0155, 2018 WL 3005946, at *6 (W. Va. Supreme Court, June 15, 2018) (memorandum decision). *See also Sanders v. United States,* 937 F.3d 316, 322 (2019) (It is "the cooperative federal-state system for the exchange of criminal history records."). The State does not commit a due process violation by following established federal and state law.

Pursuant to West Virginia Code § 15-2-24(d), the CIB "may furnish, with the approval of the superintendent [of the Department of Public Safety], fingerprints, photographs, records or other information to any private or public agency, person, firm, association, corporation or other organization…but all requests under the provisions of this subsection…must be accompanied by

a written authorization signed and acknowledged by the person whose fingerprints, photographs, records or other information is to be released." In other words, third parties will not be provided Petitioner's criminal background information *unless Petitioner authorizes its release, in writing*. The Petitioner cannot complain about the State providing his information to third parties, when the third parties cannot obtain such information without Petitioner's consent. This is not a rational basis for granting Petitioner's expungement.

B. Petitioner wrongly requests this Court to expand privacy rights in the State.

Petitioner's entire argument on this ground relies upon a 1989 case from Division 2 of the First District for the Court of Appeals for California, *see Cent. Valley Ch. 7th Step Found., Inc. v. Younger*, 214 Cal.App.3d 145, 262 Cal.Rptr. 496 (1989), and his nominal reference to three United States Supreme Court cases from the 1920s. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *and Olmstead v. U.S.*, 277 U.S. 438 (1928), *overruled by Katz v. U.S.*, 389 U.S. 347 (1967).

In *Younger*, the court found that "the California constitutional privacy guarant[ee] of article I, section 1 is violated by the dissemination of nonconviction information to nonexempt employers and licensing agencies for employment, licensing and certification purposes." *Younger*, 214 Cal.App.3d at 165, 262 Cal.Rptr.3d at ___.[6] The *Younger* ruling was premised on the California constitution, which sets forth as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const.,

[6] This reporter is not available on Westlaw.

Art. 1, § 1. West Virginia, however, does not have such a provision in its constitution.[7] Therefore, Petitioner's entire argument is wholly inapplicable and irrelevant to the case at hand.

Petitioner has not provided any cases of precedential value, or even a good faith argument that the courts in West Virginia would be inclined to "adopt a privacy interest in the criminal records of wrongfully convicted individuals."[8] Pet'r's Br. 27. The *Younger* case has been cited only once outside of California, in a 2001 district court decision from Maine, and its inclusion was a reference to a legal avenue, not an affirmation of the *Younger* court's ruling. *See Corbin v. Chitwood*, 145 F.Supp.2d 92, 98 (2001) (Petitioner "may have recourse in California to dispute the accuracy of his criminal history and may be able to contest whether it should have been disclosed by California authorities.").

This argument is beyond the scope of a petition for expungement, and seeks a ruling which eclipses this Court's role in reviewing a circuit court's denial below. Nothing about an abuse of discretion analysis relates to the application of California's constitution to West Virginia's jurisprudence. This argument should be rejected.

C. Petitioner's due process rights have not been violated.

Here, Petitioner once more acknowledges the circuit court's discretion in denying a hearing, but nevertheless argues that "the Due Process Clause must be respected, and a Circuit Court must operate under its confines." Pet'r's Br. 27. In support, Petitioner alleges impropriety when the circuit court made "[t]he 'mere gesture' of suggesting a hearing might be held," but instead entered an order denying the petition. Pet'r's Br. 28. This, presumably, relates to the email between the court's law clerk, the special prosecuting attorney, and counsel for Petitioner. App.

---

[7] The closest is Article III, § 3 of the West Virginia Constitution, which sets forth the rights reserved by the people. The word "privacy" does not appear.

[8] Again, Respondent contests this characterization of Petitioner.

56-57. In this exchange, counsel for Petitioner casually responds that "[i]n the event the judge would like a hearing," and neither demands nor conveys an expectation that a hearing must be held. App. 56-57. Counsel cannot now complain that the email exchange—wherein counsel inferred that a hearing was a possibility, but not a given—did not result in a hearing. App. 56-57.

Respondent has otherwise already addressed the circuit court's discretion in denying a hearing, and its basis in ruling on the substance of this case without conducting one. There is nothing set forth in Petitioner's fourth assignment of error that constitutes an additional due process right, which would necessitate hearing. The circuit court did not abuse its discretion by failing to hold a hearing in this civil proceeding.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm the circuit court's August 21, 2023, Order, of the Circuit Court of Cabell County, denying expungement.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

Katie Franklin [WVSB No. 10,767]
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: *Katherine.H.Franklin@wvago.gov*
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Counsel for Respondent

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-430

IN RE: EXPUNGEMENT OF RECORD OF N.B.,

Petitioner,

CERTIFICATE OF SERVICE

I, Katie Franklin, do hereby certify that the foregoing Brief of Respondent is being served on [all] counsel of record by File & Serve Xpress this 4th day of March, 2024.

Devon T. Unger, Esq.
West Virginia Innocence Project
WVU College of Law Clinical Program
P O Box 6130
Morgantown, WV 26506
Counsel for Petitioner

Katie Franklin
Assistant Attorney General