

No. _____

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In the
SUPREME COURT OF THE UNITED STATES

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IN RE W. P.,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

----- ♦ -----

On Petition For A Writ Of Certiorari

To The United States Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER AND WHEN EXPUNGEMENT IS A REQUIREMENT OF PROCEDURAL DUE PROCESS AND EQUAL TREATMENT.**
- II. WHETHER A STATE DENYING EXPUNGEMENT AFTER SUCCESSFUL COMPLETION OF ITS PRETRIAL DIVERSION PROGRAM DENIES DUE PROCESS.**
- III. WHETHER WEST VIRGINIA'S STATUTE REGARDING EXPUNGEMENT ELIMINATES THE PRESUMPTION OF INNOCENCE AND IS UNCONSTITUTIONAL UNDER DUE PROCESS AND EQUAL PROTECTION CLAUSE OF 14TH AMENDMENT.**
- IV. WHETHER PUBLIC ARREST RECORD REMAINING, UNDER THE FACTS OF THIS CASE, IS PUNISHMENT AGAINST THE RIGHTS OF AN INNOCENT PERSON.**

PARTIES TO THE PROCEEDING

All parties are listed in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the West Virginia Supreme Court of Appeals.

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OPINIONS BELOW

The combined opinion of the West Virginia Supreme Court of Appeals appears at Appendix A and is reported at 2018 W. Va. LEXIS 81.

The opinions of the Kanawha County Circuit Court on Petitioner's two Petitions for Expungement were entered on March 2, 2017 and are found at Appendix B and Appendix C and are unpublished.

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JURISDICTION

Petitioner seeks review of the decision of the West Virginia Supreme Court entered on February 2, 2018. A copy of that decision appears at Appendix A.

This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. CONSTITUTION Amendment XIV

W. Va. Code § 61-2-9.

Malicious or unlawful assault; assault; battery; penalties.

W. Va. Code § 61-2-28.

Domestic violence – criminal acts.

W. Va. Code § 61-11-22.

Pretrial diversion agreements; conditions; drug court programs.

W. Va. Code § 61-11-25.

Expungement of criminal records for those found not guilty of crimes or against whom charges have been dismissed.



STATEMENT OF THE CASE

1. Petitioner is a black male born in South Charleston West Virginia.
2. All law enforcement, judicial and state actors involved in this case are Caucasian.
3. Petitioner has no prior or subsequent criminal arrests.
4. On July 1, 2011, petitioner along with his three siblings owned a house in South Charleston WV.
5. On July 1, 2011, Petitioner was 58 years of age.
6. Sometime during May of 2011, shortly after petitioner's mother died, Danaya Reid ("Danaya") Petitioner's 34 year old niece, broke into Petitioner's house.
7. Subsequently on June 29th 2011 petitioner and his older brother "George Patterson II, now deceased" took back possession of their house and was living there.
8. On or about July 1, 2011, Robert Yeager, Lieutenant for the South Charleston Police Department ("Lt. Yeager") and his older sister, Kanawha County Magistrate Judge Julie Yeager¹ ("Magistrate Yeager") got together and decided to take possession of petitioner's house and give it to Danaya.
9. On July 1, 2011, at approximately 4:30pm, Lt. Yeager and uniformed officers of the South Charleston Police Department ("SCPD") came to Petitioner's

¹ *Judicial commission charges Yeager with embezzlement*, Charleston Gazette-Mail , Dec. 12, 2017
https://www.wvgazettemail.com/news/judicial-commission-charges-yeager-with-embezzlement/article_add1a2b3-1151-515d-9f38-ff0e0e78834f.html

house and ordered George [Petitioner's brother], Eros [Petitioner's son] and Petitioner to vacate Petitioner's property immediately. Petitioner vacated the house as the police ordered.

10. On July 2, 2011, Danaya Reid ("Petitioner's niece") filed a Domestic Violence Petition, 11-DV-1041, with Magistrate Yeager in the Kanawha County Family Court, naming Petitioner as the Respondent.

11. On July 2, 2011, an SCPD Officer who was under command of Lt. Yeager, submitted a Criminal Complaint against Petitioner and a Warrant For Arrest was issued by a Kanawha County Magistrate Judge.

12. On July 2, 2011, while Lt. Yeager and Magistrate Yeager were both on duty, Petitioner was arrested by the South Charleston, West Virginia Police Department and taken before Magistrate Yeager's court.

13. On July 2, 2011 Magistrate Yeager, signed an Emergency Order of Protection, Magistrate Case No. 11-D-1081, Family Court case No. 11-DV-1041, with Danaya as the Petitioner and Petitioner as Respondent.

14. On or about July 6, 2011, Petitioner's sister Gail filed a Domestic Violence Petition, Magistrate Case No. 11-D-1094, Family Court Case No. 11-DV-1054) with the Kanawha County Magistrate Court.

15. On August 3, 2011, a hearing was held before Kanawha County Family Court Judge Mike Kelly on all pending Domestic Violence charges.

16. During the August 3, 2011, hearing Judge Kelly entered an Order denying both Domestic Violence Protective Orders and Terminating the Emergency

Protective Orders, 11-D-1081/11-DV-1041 (Appendix D) and 11-D-1094/11-DV-1054 (Appendix E).

17. On November 15, 2011, Petitioner was offered and accepted a pre-trial diversion agreement. (Appendix F) Petitioner accepted the pre-trial after being told by his attorney and a different magistrate Judge that compliance with the pretrial agreement would allow the Petitioner to expunge the record.

18. On May 22, 2012, after completion of the pre-trial diversion, both complaints and all charges were dismissed. (Appendices G and H respectively)

19. On February 17, 2017, petitioner filed his petition for expungement of 11-M-6041 in Kanawha County Circuit Court, case 17-P-49 requesting to have the matter expunged.

20. On February 21, 2017, petitioner filed his petition for expungement of 11-M-6104 in Kanawha County Circuit Court, case 17-P-50 requesting to have the matter expunged.

21. On March 2, 2017, without explanation or a hearing the Kanawha County Circuit court entered two orders denying both petitions, in cases 17-P-49 and 17-P-50. (Appendices B and C respectively.)

22. On March 17, 2017 Petitioner filed his Motions to Reconsider with Supporting Affidavits for case 17-P-49 and for case 17-P-50. The circuit court never ruled on Petitioners post-order motions.

23. On March 31, 2017 Petitioner filed his petition with the West Virginia Supreme Court of Appeals.

24. On February 2, 2018, the West Virginia Supreme Court of Appeals entered their opinion, denying Petitioner's appeal and addressing Petitioner's post-order motions in their opinion. (Appendix A)

25. Petitioner has exhausted all state remedy by appeal.

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REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT REVIEW OF THE WV STATE SUPREME COURT OF APPEALS' DECISION BECAUSE IT IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND CONFLICTS WITH DECISIONS OF OTHER STATES WHERE EXPUNGEMENT IS GRANTED

The issue of expungement has been discussed and dissected in detail. In particular, *Federal Expungement: A Concept in Need of a Definition*, p. 91-92. James W. Diehm, St. John's Law Review Vol. 66 (April, 2012) addresses the federal issue head-on:

The decision on expungement is generally entrusted to the discretion of the trial judge, but this discretion is not without limitation.⁸⁷ Frequently a hearing will be required.⁸⁸ In fact, the courts of at least one state have held that the right to a hearing is afforded by the due process clause. [fn89: *See In re Pflaum*, 451 A.2d 1038, 1041 (Pa. Super. Ct. 1982) (due process requires that hearing be held on motion to expunge).] The record developed at the hearing then permits an appellate court to examine the evidence and determine whether expungement was appropriate in the particular case. [fn90: *See Friesen*, 853 F.2d at 818 (appellate court could not decide propriety of expunction without evidentiary record); G., 774 F.2d at 1395 (failing to make decision because

of insufficient factual record); *see also Chastain*, 510 F.2d at 1237-38 (requiring hearing on merits before expungement could be granted).]

The determination of these issues cannot be left to the states. The nationwide character of federal law requires that it be uniformly applied to all citizens from coast to coast.¹⁶⁰ If the application of federal statutes is made dependent upon state law, a state legislature, merely by passing a law, can defeat the purpose and effect of a federal criminal statute. [fn161: *See United States v. Landaw*, 727 F. Supp. 481, 483 (N.D. Ind. 1989)] Residents of different states will be treated differently. *Id.*, p. 104

UNITED STATES SUPREME COURT

North Carolina v. Rice, 404 U.S. 244; 92 S. Ct. 402 1971

The defendant filed a habeas corpus application in the United States District Court for the Western District of North Carolina, but the application was denied for his failure to exhaust state remedies by appeal. The United States Court of Appeals for the Fourth Circuit reversed, and adjudged that the defendant was entitled to have the record of his conviction expunged, on the grounds that exhausting state remedies would have been futile; that the defendant was denied due process by the imposition of a more drastic sentence on the second trial, since this discouraged the taking of appeals; and that the case was not rendered moot by the defendant's having been completely discharged by the state, since injurious consequences might still obtain from his conviction (*434 F2d 297*).

On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case for reconsideration of the question of mootness.

FEDERAL COURTS

FOURTH CIRCUIT COURT OF APPEALS

United States v. Richardson, 856 F.2d 644, (4th Cir. N.C. September 12, 1988)

Although there is no requirement that a pretrial diversion program be created and operated in any district, if one is created it cannot be managed in an unconstitutional or discriminatory manner.

In order to establish selective prosecution a defendant must show that the government was motivated by a discriminatory purpose with a resulting discriminatory effect. The defendant must establish not only that he has been singled out while others similarly situated have not been prosecuted but also that the decision to prosecute was based on impermissible considerations.

A defendant challenging the government's pretrial diversion decision must set forth specific facts supporting his selective prosecution contention and may not rest on bald assertions of constitutional violations. In determining whether a hearing is necessary, a district court should consider the defendant's claim, and if on its face it is nonfrivolous and supported by specific factual allegations, allow the government to respond by offering an explanation for its decision. A hearing is not a matter of right and is not available to every defendant who complains about not being offered participation in a pretrial diversion program. It is a matter left to the discretion of the district court.

DISTRICT COURT OF MARYLAND

United States v. McKnight, 33 F. Supp. 3d 577; 2014 U.S. Dist. LEXIS 95484

Turning to the interests of Defendant, the negative consequences of a criminal record on a person's employability are demonstrable. Over one-half of all employers conduct criminal background checks that can operate as a complete bar to ex-offender employment.

Maryland law, *MD Code Ann., Crim. Proc. § 10-105(a)(2)* provides that persons charged with commission of a crime may seek expungement if the charge has been dismissed. (West 2014).

In *United States v. Bohr*, the United States District Court for the Eastern District of Wisconsin ordered expungement of the Defendant's indictment and arrest records, noting that his case was dismissed prior to reaching the trial stage and, "more importantly, the United States Attorney apparently agrees with Defendant that the Government's interest in law enforcement does not justify retention of these records." *406 F. Supp. 1218, 1219 (E.D. Wis. 1976)*.

DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
United States v. Flowers, 983 F. Supp. 159

Another innovation known as pre-trial diversion or deferred prosecution, has also become popular in recent decades, though prosecutors have informally and effectively utilized this technique for many years. See Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure § 13.6*, at 217 (1984) ("For years, individual prosecutors have in a very informal . . . way permitted diversion . . . agreeing not to proceed with prosecution of a defendant if he in return makes restitution to the victim or does some other act."). This alternative does not involve actual conviction and sentencing but is a middle ground between formal adjudication and outright dismissal of a charge. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure § 13.1*, at 158-59 (1984). The plan diverts defendants away from the criminal justice system, providing them with the opportunity to have their case dismissed. See Note,

Pretrial Diversion from the Criminal Process, 83 Yale L.Rev. 827 (1974). There is, however, a price for the dismissal, a price that differs from program to program, but is far less than a conviction, a criminal record, and a lengthy prison term. Generally it involves a defendant rehabilitating herself by meeting a series of conditions and maintaining a clean record for a substantial period of time. See Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.Rev. 827 (1974); see also *Debra T. Landis, Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R. 4th 147-182 (1981 & Supp. 1997)(overview of pretrial diversion programs of several jurisdictions). Used both in the federal and several state court systems, two of the most well-known versions of diversion and their history are discussed below. (pretrial diversion "not only preserves prosecutorial and judicial resources, but also protects many first-time offenders from obtaining criminal records"); Cohen & Liebman at 1; see generally Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.Rev. 827 (1974).

Today, conditions pending dismissal for adult offenders usually include those used in probation cases--paying restitution, maintaining employment, attending counseling, and performing community service. Cohen & Liebman at 1. Guidelines for defendant eligibility for pretrial diversion are set by the Department of Justice by way of internal policy. *Id.* Pretrial Services Agency officers conduct an investigation of the defendant who is under consideration for diversion to ascertain whether he is well-suited for the program. Thomas J. Wolf, *What United States*

Pretrial Services Officers Do, 61 Fed. Probation, March 1997, at 23. It is well understood that defendants who commit crimes that are "spontaneous or isolated acts" will be those most likely diverted. Joel & Liebman at 1.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
United States v. Goodrich, 2008 U.S. Dist. LEXIS 10206

Defendant pled guilty to the charges. There is no indication that Defendant was wrongfully convicted or that there was any government misconduct involved in obtaining the convictions. Despite the continued adverse effects public knowledge of the convictions might have on Defendant, this case is not one which justifies the Court exercising whatever authority it may have to expunge the records in this case.

STATE COURTS

KENTUCKY

Commonwealth of Kentucky v. Shouse, 183 S.W.3d 204; 2006 Ky. App. LEXIS 11

In December 1999, Mr. Orville Eugene Shouse pled guilty to a class D felony and entered a pretrial diversion program. The pretrial agreement he signed before entering states in part as follows:

I understand that upon successful completion I may petition the Court for expungement of the dismissed-diverted charge.

Mr. Shouse successfully completed the pretrial agreement and moved, for dismissal of all charges. On December 2001, the trial court ordered the charge against Mr. Shouse "dismissed".

On October 2004, Mr. Shouse moved to have the record expunged under KRS

431.076. The trial court denied the motion to expunge. Mr. Shouse asked the court to reconsider the motion to expunge. And on December 28, 2004, the court vacated the previous order and granted the motion to expunge. The state appealed.

The Court found that the trial judge did not err in concluding that the action against Mr. Shouse was dismissed with prejudice and that he was therefore entitled to avail himself of the expungement statute.

In *Hyatt, supra at 123*, the Court addressed the purpose of pretrial diversion programs stating:

It is clear that the legislature intends for a successful pretrial diversion to, in effect, wipe the slate clean as to those charges. The legislature does not intend for the successful participant to be stigmatized

In the instant case West Virginia statute specifically prohibits petitioner's expungement. Petitioner is denied expungement and the consequences of a criminal arrest record without any due process or explanation. The cited WV statute, W. Va. Code § 61-11-22 automatically excludes petitioner's eligibility for expungement as if he were guilty. Under the statute, petitioner is not innocent until proven guilty.

There is little question that in America Black Men are arrested and charged by police at a greater rate than similarly situated White Men. Here the police merely accused and filled out paperwork on Petitioner, however the prosecutor decided not to prosecute Petitioner.

TENNESSEE

Blackwell v. State of Tennessee 605 S.W.2d 832; 1980 Tenn.Crim.App.LEXIS

Defendant, Virgil Blackwell was indicted for driving under the influence of an intoxicant (D.U.I.), first offense. a trial court (Tennessee), held that a district attorney could deny defendant the opportunity to participate in a pretrial diversion program based on the nature of the offense with which defendant was charged.

The trial court held that the district attorney could deny defendant the opportunity to participate in the diversion program because to have permitted diversion and possible expungement upon completion of the program would have created a recording problem that would have frustrated the recidivist provisions of *Tenn. Code Ann. §§ 55-10-601 et seq.*

On appeal, the court reversed the trial court's judgment. The court held that it had been for the legislature to determine which charges should have barred the participation of an accused in a pretrial diversion program, and which should not have barred such participation.

In *State of Tennessee v. Terry Horn, Sr.*, Court of Criminal Appeals at Knoxville, released April 26, 1979. See also *James H. Beech v. State of Tennessee*, Court of Criminal Appeals at Nashville, released July 23, 1979, in which the court held "that the nature of and the circumstances surrounding the offense could not and would not of itself be sufficient to deny diversion," noting that "[if] that were the case, all offenses within the framework of diversion could be denied on that basis alone."

B. WEST VIRGINIA STATUTE REGARDING EXPUNGEMENT OF A PERSON NOT CONVICTED OF A CRIME IS UNCONSTITUTIONAL

UNDER DUE PROCESS AND EQUAL PROTECTION CLAUSE OF
14TH AMENDMENT

WEST VIRGINIA

In re A.N.T., 238 W. Va. 701, 798 S.E.2d 623 (W. Va. April 5, 2017)

Recognizing the absence of statutory authority to order expungement of A.N.T.'s criminal records, the circuit court relied on Syllabus Point 1 of *State ex rel. Barrick v. Stone*, 201 W.Va. 569, 499 S.E.2d 298 (1997), which provides:

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 maintained by the State Police Criminal Investigation Bureau pursuant to *W.Va. Code*, 15-2-24 [1977].

To find that "extraordinary circumstances" justified expungement of A.N.T.'s criminal records, the circuit court cited the following: (1) A.N.T.'s emotional distress at the time she committed the offense, (2) her purported emotional recovery, and (3) her goal of improving her employment status by obtaining a teaching certificate in Ohio, which would be hampered by disclosure of her arrest, charge, and conviction.

W. Va. Code § 61-11-25 is unconstitutional as applied in the instant case. Petitioner is presumed innocent until proven guilty under the US Constitution. The statute allows the state to presume Petitioner guilty because he was accused by police under a certain statute, clearly in violation of due process. Without due process Petitioner is being punished and labeled the same as a guilty person.

West Virginia's state supreme court of appeals has decided an important question of federal law regarding the rights of the innocent in a way that conflicts

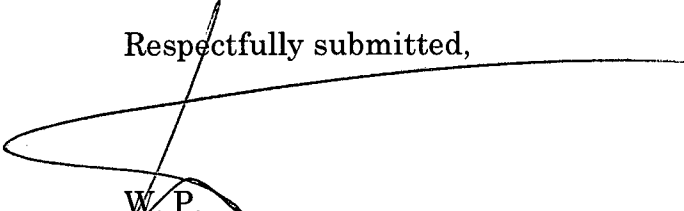
with relevant decisions of this Court and that has not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: April 27, 2018

Respectfully submitted,



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