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IN THE

Supreme Court of Virginia

RECORD NO. 170199

AYESHA RAJ ANEJA,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The petitioner-appellant, Ayesha Raj Aneja ("Aneja") filed her Complaint for Expungment ("petition") on December 17, 2015, in the Circuit Court of the City of Williamsburg/James City County ("the trial court).[1] (App. 1-4)

Aneja verified the petition under oath, and attached three exhibits. (App. 4-10) Exhibit A consisted of a January 20, 2014 warrant initially charging Aneja with felonious assault and battery of a law enforcement officer, but judicially amended on April 25, 2014 to charge misdemeanor disorderly conduct ("the warrant"). (App. 5-6; *and see* App. 11-14) The other exhibits consisted of Exhibit B, a misdemeanor summons charging Aneja with false identification to a law enforcement officer, and Exhibit C, a misdemeanor summons charging her with public intoxication. (App. 7-10)

In relevant part, Aneja's petition sought expungement under Va. Code §19.2-392.2 of all records of her January 20, 2014 arrest on the charge of assault and battery of a law enforcement officer ("felony arrest"). (App. 1-2, 5-6) The Commonwealth filed no responsive pleading.

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[1] The Honorable Michael E. McGinty conducted the proceedings relating to Aneja's petition.

Thereafter, pursuant to Va. Code §19.2-392.2(E), the trial court received Aneja's criminal history record information from the Central Criminal Records Exchange ("CCRE"), including her fingerprints. On October 24, 2016, the trial court conducted an ore tenus hearing on the petition ("the hearing"). (App. 22 - 68)

Aneja testified at the hearing, and introduced four exhibits into evidence.[2] (App. 28-48, 69-97) The Commonwealth called no witnesses, but confirmed the trial court's receipt into the record of the petition's Exhibits A, B and C and the CCRE materials. (App. 48-49)

At the hearing's conclusion the trial court granted in part and denied in part Aneja's petition. It ordered expungment of records pertaining to the two misdemeanor summonses. (App. 64; *and see* App. 7-10) It denied the petition as to her felony arrest upon the warrant. (App. 64-66)

The trial court entered its Order of Expungement/Order Denying Expungement ("final order") on November 14, 2016. (App. 15-17) Aneja filed her Notice of Appeal on November 21, 2016. (App. 18-20)

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[2] References to Aneja's hearing exhibits will appear herein as "P- __". (App. 69-97)

STATEMENT OF FACTS

The General District Court of Williamsburg/James City County conducted April 25, 2014 proceedings on the warrant. (App. 5-6) On that occasion, the court amended the warrant to charge Aneja with a misdemeanor, disorderly conduct, under Va. Code §18.2-415. (App. 5-6; *and see* App. 29-30)

Aneja pled guilty to disorderly conduct. (App. 6, 13; *and see* App. 30) The court found her guilty of the offense, and imposed a $200 fine, with six months in jail, suspended, conditioned on three years' "good behavior, keeping the peace, obeying this order and paying fines and costs." (App. 6) Aneja paid the fine and court costs that same day. (App. 6, 13)

The warrant reflects no preliminary hearing or findings on the felony charge. (App. 6, 12; *and see* App. 29-30) Consistent with the General District Court's jurisdictional limits, Aneja entered no plea to that charge. (App. 6)

Prior to the incident precipitating the felony arrest, Aneja had never before been charged with any criminal offense. (App. 32)

At the hearing, *inter alia*, Aneja testified that she graduated from the College of William and Mary in 2016 with a BBA in

Marketing, with minors in Computer Science and Economics. (App. 31-32); *and see* P-1 (Aneja resume). (App. 69). She earned a 3.8 cumulative grade point average in her major and her minors, spending four semesters on the Dean's List. (App. 32)

She described her work as an entertainment department intern at Disney ABC Television Group ("Disney ABC"):

> So I create spots for on-air for all their comedies as well as some of their reality shows. I create their digital…campaigns. I create GIFs. I do, um - - I work with post production. I work with VP. I work with the coordinator of their creative director making sure that everything goes out on time.
>
> I spend over 40 hours a week. I usually stay overtime between two and four hours a day and to make sure everything gets done.

(App. 33; *and see* App. 31-32)

Aneja testified that she aspires to work at the subsidiary of the Disney companies known as "Disney Junior" in children's entertainment. (App. 30-31; *and see* App. 33) She also intends "to get my MBA or law degree in a couple of years to help me in my career." (App. 31; *and see* App. 33)

Her previous work experience included summer employment at the Clinton Foundation as a communications intern working in "the culinary camp. Through that I realized that I wanted to go into

children's entertainment marketing, as I worked creating videos and TV shows for the camp." (App. 30; *and see* App. 69). The following summer she worked at Paramount Pictures "in their entertainment marketing, interactive department working on their digital campaign," and continued to gain interest in that field of work. (App. 30-31)

The application process for Disney ABC required Aneja to consent to a background check. (App. 34) Her exhibit, P-2, consisted of a September 8, 2016 letter from Kimberly Surabian, of Disney ABC, provisionally offering Aneja an entertainment marketing internship in Burbank, California, with a start date of September 20th. (App. 70)

The application process required disclosure only of criminal convictions, however, the subsequent criminal record check revealed Aneja's felony arrest. (App. 34-35, 48) Aneja testified that the revelation served to delay her internship's start date. (App. 34-35) Aneja's exhibit, P-3, consisted of a September 2016 email chain between her and Brittany Hayashi, Coordinator of Disney Campus Recruitment. (App. 71-72) On September 19, 2016, Hayashi wrote to Aneja confirming a delay of her start date pending "the status of your background check." (App. 72) She wrote again on September

21, 2016, explaining that Aneja "had disclosed something" regarding her background, and to "hang tight." (App. 71)

Aneja expressed a continuing interest in the Clinton Foundation, and stated that future employment there would require a criminal background check. (App. 35-36) For her previous summer internship, that organization required Aneja "disclose all charges and convictions." (App. 36) While at the Clinton Foundation, Aneja had to disclose her felony arrest to a supervising communications assistant. (App. 42) She testified that "in every position there's always a chance that the…boss will also know before I even walk in that door." (App. 42).

Her future aspirations include working with children. (App. 36) In the past, she served as a volunteer in a middle school, in a church camp, in a high school, and at "Matthew Whaley's Elementary for their International Night." (App. 36-37) Her resume documented her history of volunteer activities. (App. 69)

Aneja further testified that she wanted to volunteer in an elementary-age children's "Buddy Program," but "didn't apply, because I knew I would need to go through that [background] check." (App. 37) [Clarification added].

She noted that she also applied for a position at PBS, "which is a non-profit, so they do really strong background checks as well, and for their kids coordinator position[.]" (App. 37) She progressed to the final interview process with PBS, but instead decided to pursue her Disney ABC internship to improve her prospects of eventual work at Disney Junior. (App. 37)

Aneja testified that as an undergraduate, her academic standing enabled her to take a course "at the William and Mary Law School, Regulation of Markets, in my junior year." (App. 38) She thereafter researched law school and bar admissions requirements. (App. 39) In researching law school admissions requirements in California and Virginia, she found that "they all require you to disclose any convictions or criminal background," including charges. (App. 39)

Aneja's exhibit, P-4, consisted of a sample Character/Fitness Questionnaire from the Virginia Board of Bar Examiners. (App. 73-97) The instructions for its Section 13, entitled "Legal Proceedings (Civil, Criminal and Traffic Violations)," require that all questions "be answered fully, regardless of…dismissals or similar termination, including charges that were not prosecuted." (App. 83) Only expunged charges are excepted from disclosure in response to

Question 13.3, which inquires whether the applicant "presently or have you ever been a party or otherwise involved…in a criminal…action or legal proceeding." (App. 83)

Her counsel asked Aneja "would it be fair to say your fear is with these very competitive positions that [the felony arrest] may end up being a disqualifier if people knew?" (App. 42) [Clarification added]. She responded, "Absolutely." (App. 42) In response to a similar question, she stated, "I just feel like for one thing is…obviously with my career and…having the issue with that, I don't want it to define me as a person today and for then." (App. 41)

With respect to the incident at William and Mary leading to her felony arrest, Aneja acknowledged making poor choices with alcohol at the time. (App. 40) She denied, however, committing an assault and battery upon the involved police officer. (App. 41) On cross-examination, she took the same position: "[A]s far as remembering from that night, when I was moving my hands, I - - they were behind my back…I was being cuffed. I was scared…Knowing me as a person I know, I don't think that I meant to or did in any way. I moved my hands…I didn't mean to grab anything. I mean, I didn't intend.

And there were times I couldn't see my hands. I didn't, you know." (App. 46-47)

During oral argument, Aneja's counsel addressed the "otherwise dismissed" issue of Va. Code §19.2-392.2(A)(2). (App. 49; *and see* App. 52, 58) Counsel cited Dressner v. Commonwealth, 285 Va. 1 (2013), asserting that "the matter is clearly expungeable." (App. 49) Counsel noted that disorderly conduct does not constitute a lesser included offense of assault and battery of a law enforcement officer.[3] (App. 52, 56-58)

Counsel then addressed the issue of Va. Code §19.2-392.2(F), whether "the continued existence and possible dissemination of information relating to the [felony arrest]…causes or may cause circumstances which constitute a manifest injustice" to Aneja.[4] *See* (App. 50-51, 60, 62-63, 65-66) [Clarification added]. Counsel asserted throughout his arguments that Aneja met her burden of proof on the issue.

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[3] In that regard, counsel cited Davis v. Commonwealth, 2004 Va. App. LEXIS 489 (2004), for the proposition that disorderly conduct and assault and battery constitute separate and distinct offenses. (App. 58)

[4] Aneja herein will refer to this issue as "the 'manifest injustice' issue." Va. Code §19.2-392.2(F).

For example, Aneja's counsel argued that she "does not have to show it's an actual manifest injustice…she has to show that it may cause a manifest injustice[.]" (App. 51) Counsel noted Aneja's high-achieving background, her interest in law both as an undergraduate and for her future, her work to-date in media production and marketing, and her interest in working with children. (App. 51; *and see* App. 50) He stated in part, "this is a proven track record and a proven effort," and that Aneja seeks expungement "to have these doors not closed on her in the future." (App. 51). Further, he argued that, "manifest injustice is the existence that everyone is worried about, an employer's record checks, background checks…that's why we have expungements[.]" (App. 60)

The trial court expressed no disagreement regarding whether the General District Court "otherwise dismissed" the felony charge within the meaning of Va. Code §19.2-392.2(A)(2). (App. 59-61, 63-66) Instead, the trial court discussed, and ultimately purported to base its ruling on the "manifest injustice" issue. (App. 59-61, 63-66); *and see* Order of Expungement/Order Denying Expungement, p. 2, ¶2. (App. 16)

On the “manifest injustice” issue, the trial court focused entirely on the underlying facts surrounding Aneja’s felony arrest, and the negotiated agreement to amend the warrant. (App. 59-61, 63-66) It made no comment upon Aneja’s probative evidence. Specifically, the trial court did not address Aneja’s evidence that the felony arrest record has, and in the future could hinder her ability to obtain the employment to which she aspires, or to pursue a legal or advanced business education. (App. 59-61, 63-66)

The trial court posed the following comparative hypothetical scenario:

> If a defendant is charged -- arrested and charged with a felony of grand larceny or it could be assault and battery on an officer, but a grand larceny, let's say, and the charge is eventually nol-prossed by the Commonwealth, the defendant doesn't have any prior record, but the evidence would show that it was nol-prossed by the Commonwealth, because the defendant cooperated against other co-defendants who were deemed to be more culpable… and then it would be information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner, that that's the standard the Court has to use even if it's withdrawn and it's never been amended, correct, under those circumstances, **what would the manifest injustice to the defendant be if the defendant cooperated with the Commonwealth and had its charge dropped, never went to trial because of the cooperation, but he's going to have that record appear on his record and not be expunged?**

(App. 59-60) [emphasis added].

The trial court went on to openly question the meaning of the statutory term, "manifest injustice." (App. 61-62) It stated, "I'm not aware of any case law." (App. 61)

Aneja's counsel sought to address the trial court's hypothetical scenario through additional argument. (App. 60-63) Counsel recognized the trial court's preoccupation with the underlying facts and the plea agreement. (App. 62-63) In this colloquy, counsel paraphrased the statement of policy found in Va. Code §19.2-392.1, noted Aneja's denial of guilt, and distinguished her situation from that of the hypothetical's cooperating co-defendant. (App. 60, 62-63)

The trial court then ruled:

> As to the records in regards to the felony…I don't find that she's met her burden, that she would have to show that there was a manifest injustice to the Petitioner to have that remain. So I'm going to deny the petition for expungment as to…the felony for assault and batter on a law enforcement officer.

(App. 65)

Aneja's counsel then sought leave to ask a clarifying question, which request the trial court granted. (App. 65)

> I think the Court's ruling is based on the circumstances of the case, um, but just so I could advise my client -- so I know the next question I have -- if she ever found herself

> in a position where she were denied for that reason, um, I think the Court's logic would still be the same based on the circumstances of what transpired, but I want to just be able to properly advise her.

(App. 65)

The trial court then confirmed that its ruling stemmed from the underlying facts surrounding Aneja's felony arrest and the negotiated misdemeanor disposition:

> Yes. And, I mean, I threw out that hypothetical that -- you know, about the grand larceny and the person cooperates and gets the charge withdrawn, that would it be a manifest injustice for that record to remain **when the circumstances would be that this person was properly arrested**, and the Commonwealth had -- felt it had certain evidence, but withdrew the charge?
>
> This is a situation where she was arrested. And, again, I'm not trying to get into the merits of the case, but she was arrested for a felony. **The same charge resulted in an amendment to a misdemeanor, but a guilty plea and a guilty finding on that.**
>
> And so that's the Court's position, that **the circumstances here, including the case, would not -- would be -- would not be a manifest injustice to have that remain on there.**

(App. 65-66) [emphasis added].

Aneja contends that the trial court both misinterpreted the provisions of Va. Code §19.2-392.2, and erroneously disregarded her probative evidence on the "manifest injustice" issue.

ASSIGNMENT OF ERROR

The trial court erred in partially denying Aneja's expungement petition; it misinterpreted Va. Code §19.2-392.2 and disregarded evidence demonstrating the manifest injustice to Aneja that has been, and may be caused by the continued existence and possible dissemination of information about her arrest.

Error preserved: Complaint for Expungement, and its Exhibits A-C (App.1-10); Transcript of October 24, 2016 hearing (App. 28-42, 48-52, 56-66); Aneja Exhibits P-1 though P-4 (App. 69-97); Order of Expungement/Order Denying Expungement (App. 15-17).

STANDARD OF REVIEW

This appeal presents issues of statutory interpretation, and the application of facts to statutorily prescribed standards. Thus, it involves pure questions of law, and mixed questions of law and fact.

Issues of statutory interpretation present pure questions of law, subject to de novo review. Laws v. McIlroy, 283 Va. 594, 598-99 (2012); Commonwealth ex rel. Fair Housing Bd. v. Windsor Plaza Condo. Ass'n, 289 Va. 34, 51 (2014). The "purpose for which a statute is enacted is of primary importance in its interpretation or construction." Gregg v. Commonwealth, 227 Va. 504, 507 (1984) (interpreting Va. Code §19.2-392.2), *quoting* Norfolk So. Ry. Co. v. Lassiter, 193 Va. 360, 364 (1952).

A mixed question of law and fact receives de novo review. Chalifoux v. Radiology Assocs. of Richmond, Inc., 281 Va. 690, 695

(2011); Luria v. Bd. of Dirs., Westbriar Condo. Unit Owners Ass'n, 277 Va. 359, 365 (2009); Collins v. First Union Nat'l Bank, 272 Va. 744, 749 (2006). The Court traditionally gives deference to the trial court's factual findings. *See e.g.* Purce v. Patterson, 275 Va. 190, 194 (2008)(deference trial court's factual findings, "but we review the trial court's application of the law to those facts de novo.").

ARGUMENT and AUTHORITIES

A. The records of Aneja's felony arrest are subject to expungement, because the underlying charge was "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2).

The trial court's ruling, coupled with its comparative hypothetical scenario, can be interpreted as a finding that the General District Court did not "otherwise dismiss" the felony charge. Va. Code §19.2-392.2(A)(2). (App. 59-60, 65-66) To the extent that the trial court so ruled, it erred as a matter of law under the holding of Dressner v. Commonwealth, 285 Va. 1, 5-7 (2013). (App. 25-26, 49, 52, 56-59)

In Dressner, the petitioner initially received a summons for possession of marijuana in violation of Va. Code §18.2-250.1. 285 Va. at 3-4. The Fairfax County General District Court, approving a plea agreement, amended the summons to charge reckless driving

under Va. Code §46.2-852. *Id.*, at 4. Dressner pled guilty to the traffic offense, upon which plea the court convicted and imposed a fine. *Id.*

Dressner later filed an expungement petition, and the Fairfax County Circuit Court denied it. 285 Va. at 4. That court agreed with Dressner on the "manifest injustice" issue, however, it held that:

> [B]ecause the original summons was amended, "expunging the [p]ossession of [m]arijuana charge would also expunge the record supporting the [r]eckless driving conviction" and thereby "distort [Dressner's] record in a manner deemed impermissible…in Necaise v. Commonwealth, 281 Va. 666, 699 (2011).

Id., at 4. [Clarifications in original]

This Court disagreed and reversed. 285 Va. at 5-7. It first noted that the issue whether the petitioner "has a right to seek expungement" of arrest records under Va. Code §19.2-392.2(A) represents the "threshold determination" in considering an expungement petition. *Id.*, at 5. For this proposition, it cited and quoted Daniel v. Commonwealth, 268 Va. 523, 530 (2004). *See also* Brown v. Commonwealth, 278 Va. 92, 99-100 (2009). It then framed the appellate issue: "The dispositive question in this appeal is whether the possession of marijuana charge was 'otherwise dismissed' pursuant to" Va. Code §19.2-392.2(A)(2). *Id.*, at 5.

In its analysis, the Court ruled that Necaise v. Commonwealth, 281 Va. 666 (2011) did not control the outcome of Dressner's case. Dressner, 285 Va. at 5-6. In Necaise, the Court held that a petitioner may not expunge records of a felony arrest that resulted in his conviction of a lesser included misdemeanor. 281 Va. at 669. In that instance, the felony charge is not "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2). *Id.*, at 668-69. The Court's Necaise decision held that "[b]ecause the misdemeanors of which Necaise was convicted were lesser included offenses of the felonies with which he was charged, all of the elements of the offenses of which he was convicted were subsumed within the felony charges and they were the sole bases for the convictions." *Id.*, at 669.

In Dressner, the Court found that marijuana possession and reckless driving constitute "completely separate and unrelated" charges. 285 Va. at 6. It further noted that Dressner entered no plea to the marijuana charge, nor did the Fairfax General District Court "make any finding that the evidence was sufficient to establish guilt on that charge." *Id.*, at 7.

As a result, "the possession of marijuana charge was necessarily 'otherwise dismissed' within the intendment of" Va. Code

§19.2-392.2(A)(2). 285 Va. at 6. The Court concluded that Dressner occupied the "status of 'innocent' [as to the possession of marijuana charge] so as to qualify under the expungement statute as a person whose charge has been 'otherwise dismissed.'" *Id.*, at 7 (*in part quoting* Gregg v. Commonwealth, 227 Va. 504, 507 (1984), *and citing* Brown, 278 Va. at 102. [Clarification in original].

The Court went on to find that any perceived "distortion" of Dressner's record stemming from expungement of marijuana charge records did not provide a statutory basis for denying her petition. 285 Va. at 7. Thus, the Court held that Dressner properly could seek expungement of the records of that charge. *Id.*

In this case, the General District Court amended the felony warrant to a separate and unrelated misdemeanor charge, disorderly conduct. Va. Code §18.2.415. The behaviors required to convict one of disorderly conduct differ significantly from the behaviors that constitute assault and battery of a law-enforcement officer. *Compare* Va. Code §18.2-57 *with* Va. Code §18.2-415.

In fact, in Va. Code §18.2-415, the General Assembly stated, "the conduct prohibited under…this section shall not be deemed to include the utterance or display of any words or to include conduct

otherwise made punishable under this title." Thus, by statute, disorderly conduct does not constitute a lesser included offense of assault and battery of a law enforcement officer.

An examination of caselaw yields the same result. For example, in Davis v. Commonwealth, 150 Va. 611, 617 (1928), the Court held that assault and battery requires an intention to do bodily harm, either an "actual intention" or one "imputed by law." By contrast, disorderly conduct requires "the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[.]" Va. Code §18.2-415.

The elements of disorderly conduct involve no attempt or offer to do some bodily hurt to another, or offensive touching. The elements of assault and battery require such conduct. Harper v. Commonwealth, 196 Va. 723, 733 (1955)(assault); Jones v. Commonwealth, 184 Va. 679, 682 (1946)(battery).

Disorderly conduct therefore does not constitute a lesser included offense of assault and battery of a law enforcement officer. *See* Sansone v. United States, 380 U.S. 343, 350 (1965)("the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater").

As in Dressner, then, the General District Court "otherwise dismissed" Aneja's felony charge. She did not plead to the felony charge. The General District Court neither conducted evidentiary proceedings on it nor made findings relevant to it. She therefore stands as person "innocent" of the felony, "within the intendment of" Va. Code §19.2-392.2(A)(2). 285 Va. at 6; *and see* Va. Code §19.2-392.1 (statement of legislative policy that "arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit").

Significantly, at the hearing, the Commonwealth acknowledged Dressner's controlling applicability. Counsel stated, "I agree if the Court does not see it as a lesser included…then it would be expungeable. I'm not arguing that you can't expunge it because it would alter the records in a way that we don't plan for. That is - - the Supreme Court has spoken on that. You don't choose not to expunge something for that reason." (App. 60)

The General District Court having "otherwise dismissed" the felony charge, records of Aneja's felony arrest are subject to expungement. Va. Code §19.2-392.2(A)(2).

B. The trial court misinterpreted the language of Va. Code §19.2-392.2(F) by considering the facts surrounding Aneja's felony arrest and the warrant's amendment, and finding them dispositive of the "manifest injustice" issue.

Turning to the "manifest injustice" issue, the trial court erroneously interpreted Va. Code §19.2-392.2(F). It did so by considering the facts surrounding Aneja's felony arrest and the warrant's amendment, and finding them dispositive of that issue. (App. 59-60, 65-66)

At the hearing, the trial court did not acknowledge Aneja's evidence on the "manifest injustice" issue. To the contrary, with reference to its comparative hypothetical scenario, it considered the facts surrounding Aneja's arrest and the warrant's amendment. (App. 66) With her having pled guilty to disorderly conduct, it ruled that with "the circumstances here…would not be a manifest injustice to have that remain on there." (App. 66)

On this issue of apparent first impression, Aneja contends that the facts surrounding her arrest, including the plea bargain resulting in the warrant's amendment, bear *no* relation to the inquiry mandated by Va. Code §19.2-392.2(F). She further asserts that the trial court's rationale directly contradicted the legislative policy expressed in Va. Code §19.2-392.1. In sum, the trial court completely misinterpreted

the relevant statute and erred as a matter of law.

Subpart (F) of Va. Code §19.2-392.2 requires a court to consider evidence and determine whether "the continued existence and possible dissemination of information relating to the arrest…causes or may cause circumstances which constitute a manifest injustice to the petitioner[.]" This inquiry fully conforms with the General Assembly's intent to abate hindrances to one's ability to obtain employment, an education and credit. That is, "to protect such [innocent] persons from the unwarranted damage which may occur as a result of being arrested." Va. Code §19.2-392.1 [clarification added].

The trial court's hypothetical scenario pejoratively compared Aneja's situation to that of a cooperating co-defendant vis-à-vis a grand larceny charge. (App. 59-60, 65-66) The hypothetical necessarily portrayed the co-defendant as guilty of the larceny, yet avoiding criminal responsibility for it through his cooperation. Under such circumstances, the trial court opined that the co-defendant would suffer no manifest injustice if records of his arrest remained, as he was "properly arrested, and the Commonwealth…withdrew the charge[.]" (App. 65-66)

In its ruling, the trial court clearly cast upon Aneja the same criminal culpability with which it viewed the hypothetical co-defendant. (App. 65-66; *and see* App. 59-60) Its ruling essentially punished her for that perceived culpability.

Yet, the trial court lacked **any** statutory authority to effectively "go behind" the record of Aneja's felony arrest and the warrant's amendment to consider and decide the "manifest injustice" issue.[5] *See* Va. Code §§19.2-392.1 and 19.2-392.2(A through M).

Aneja located one analogous judicial decision touching upon the trial court's errant methodology. Moss v. State, 1996 WL 110200 (Del. Sup. Ct. 1996)(*also reported as* 1996 Del. Super. LEXIS 24 (1996). Moss arose in the context of a trial court's interpretation of Delaware's expungement statute, which relevant language parallels that of Va. Code §19.2-392.2. *See* 11 Del. Code §4372.

In Moss, the petitioner sought expungement of arrest records pertaining to *nolle prosequi* charges of rape, sexual assault and official misconduct. *Id.*, at *1. The government objected to expungement, contending that the petitioner, when arrested, made certain inculpatory statements. *Id.* The court rejected the

[5] Nor do the trial court's actions comport with the holding in Dressner. 285 Va. at 5-7; *and see* argument subsection "A," above.

government's position, holding that "there appears to be no legal precedent for the proposition that the Court should deny expungement of records based upon alleged admissions made outside of a court proceeding." *Id.*

Similarly, no statutory provision or decision of this Court supports the trial court's focus on the facts surrounding Aneja's felony arrest and the warrant's amendment. Those facts bore no relevancy to the manifest injustice inquiry required by the plain language of Va. Code §19.2-392.2(F). Laws, 283 Va. at 598-99 (plain meaning rule of statutory interpretation).

Nor was that focus germane to the legislative purposes of Virginia's statutory scheme for criminal records expungement. Va. Code §19.2-392.1; Gregg, 227 Va. at 507 (the "purpose for which a statute is enacted is of primary importance in its interpretation or construction"); Laws, 283 at 598-99 (the Court seeks to interpret statutes in accord with legislative intent).

In Daniel, the petitioner, in the underlying criminal proceeding, pled not guilty to a misdemeanor assault and battery charge. 268 Va. at 525. During his bench trial, the court recessed at the close of the Commonwealth's evidence so that the parties might "negotiate an

agreed disposition." *Id.* They did so, and the trial court thereafter found the evidence sufficient for a guilty verdict, but withheld any finding. *Id.* The trial court entered an order requiring Daniel to pay restitution, perform community service and abide the law pending dismissal on a later date. *Id.* Daniel complied with those terms and several months later the trial court dismissed the charge. *Id.*

Daniel thereafter petitioned for expungement. 268 Va. at 526. He asserted that the trial court's disposition of the misdemeanor charge qualified as "otherwise dismissed" under Va. Code §19.2-392.2(A)(2). Alternatively, he "asserted that the trial court's…finding that the evidence would justify a finding of guilt 'doesn't mean that an acquittal would not have occurred.' Thus Daniel contended that he was entitled to challenge that finding in an evidentiary hearing, which he maintained was required by Va. Code §19.2-392.2(F)." *Id.*

The trial court denied the petition for expungement, and, in relevant part, ruled that the statute did not entitle Daniel to an evidentiary hearing. 268 Va. at 527. On appeal, this Court framed the issue, "whether the trial court was required under Code §19.2-392(F) to conduct an evidentiary hearing to determine the guilt or innocence of the petitioner." *Id.*, at 525.

In an unanimous decision, the Court affirmed the trial court. 268 Va. at 531. The Court held that while "the trial court must necessarily review the records of the petitioner's arrest and trial," that review is limited. *Id.*, at 530. The *sole* purpose of that review is to enable the trial court to determine whether the charge was subject to acquittal, nolle prosequi, or was "otherwise dismissed." *Id.*; *and see* Va. Code §19.2-392.2(A)(1) and (2).

With respect to the hearing required by Va. Code §19.2-392.2(F), the Court directly quoted the subpart's content to define the scope of a trial court's manifest injustice inquiry. Daniel, 268 Va. at 531. The Court concluded, "[t]his statutory scheme does not contemplate a hearing to permit the petitioner to assert his innocence of the original criminal charge." *Id.*

In Daniel, the Court therefore determined that a petitioner for expungement may not seek to collaterally revisit the record of the underlying criminal proceeding. 268 Va. at 531. Aneja asserts that Va. Code §19.2-392.2 likewise forbids the trial court (and the Commonwealth) from collaterally revisiting the record of her underlying proceeding to focus on the facts surrounding her arrest or the warrant's amendment. Those historical facts do not relate to the

"manifest injustice" issue, which orientation is to the petitioner's present and future abilities to obtain employment, an education or credit. *See* Va. Code §§19.2-392.1 and 19.2-392.2(F).

Aneja presented substantial probative evidence on the "manifest injustice" issue. The trial court misinterpreted the applicable statutory provisions and erroneously disregarded Aneja's evidence. It reversibly erred in doing so.

C. Aneja established as a matter of law that the continued existence and possible dissemination of information relating to her felony arrest causes or may cause circumstances that constitute a manifest injustice to her.

Aneja here asserts that her evidence, as a matter of law, sufficiently met the applicable statutory standard on the "manifest injustice" issue. Va. Code §19.2-392.2(F). *See* Brown, 278 Va. at 103.

She refers here to the facts disclosed by her testimony during the hearing, and the exhibits she introduced. For example, information about her felony arrest: (1) already delayed her internship with Disney ABC, when its existence was discovered in a criminal background check; (2) necessarily will be disclosed in applying to law schools, or to take a Bar examination; (3) deterred Aneja from applying to work with children in the Buddy Program of an elementary

school; and (4) may well affect her ability to secure (i) the unique and highly competitive employments and (ii) the advanced education for which she is qualified and to which she aspires. *See Aneja testimony* (App. 28-42, 48); *and* P-1 through P-4 (App. 69-97).

In Brown, an unanimous Court ruled that Matthew Paul Brown's charges had been "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2). 278 Va. at 102. The Court then turned to the "manifest injustice" issue. *Id.*, at 103. The Court held:

> Upon review of the record, we conclude as a matter of law that [Brown's] evidence also establishes that "continued existence and possible dissemination" of the police and court records relating to Brown's charge for assault and battery "causes or may cause circumstances which constitute a manifest injustice" to Brown. Code § 19.2-392.2(F).

Id., at 103. [Clarification added].

The Court's decision did not expressly discuss Brown's evidence on the "manifest injustice" issue. Aneja therefore researched the record in Brown.[6] She below summarizes that evidence as found in the Appendix of that case, and will cite to it as "(Brown App. ___)".

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[6] Matthew Paul Brown v. Commonwealth of Virginia, Record No. 081417. The Appendix and the parties' briefs are located in the Court's library.

During the timeframe relevant to his case, Brown was a junior at Roanoke College. (Brown App. 45-46) He aspired to attend law school or to obtain a "Series Seven License," enabling him to work in the securities field. (Brown App. 46)

Brown testified at his April 11, 2008 expungement petition hearing that law school admissions and Series Seven licensing processes required criminal background checks. (Brown App. 46-47) Although he possessed no direct evidence of it, Brown strongly believed that dissemination of information about his misdemeanor charge would bear negatively on his prospects to attain the education and employment to which he aspired. (Brown App. 47-48, 50-51)

Despite his concerns, Brown twice had obtained employment requiring criminal background checks. (Brown App. 48-49) In one instance, he summer-interned with a Roanoke accounting firm. (Brown App. 49, 51) He also worked for Bank of America. (Brown App. 49)

At the conclusion of Brown's hearing the trial court ruled against him on the "manifest injustice" issue. (Brown App. 59-60) Applying legal reasoning strikingly similar to that employed in this case, the court held:

> I don't find it to be a manifest injustice for him to have to explain that he was charged with the offense that, that, we're not trying the case here today, but this is not something that would occur on somebody who was innocent of the offense…If he was innocent, he should have tried it then.

(Brown App. 59-61)

This Court completely disagreed with the trial court. It reversed on the "manifest injustice" issue as a matter of law. 278 Va. at 103. Aneja respectfully asserts that the strength of her evidence on the "manifest injustice" issue surpasses, or at least matches, the strength of Brown's evidence.

The trial court erred to disregard Aneja's probative evidence on the "manifest injustice" issue. Va. Code §19.2-392.2(F); Brown, 278 Va. at 103.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The records of Aneja's felony arrest are expungeable, because the underlying charge was "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2). To the extent that the trial court's rulings may be interpreted to the contrary, it committed reversible error.

The trial court misinterpreted the language of Va. Code §19.2-392.2(F). It failed to consider the statutory factors relevant to the

"manifest injustice" issue. Instead, it incorrectly considered the facts surrounding Aneja's felony arrest and the amendment of the warrant. It erred in finding those facts dispositive of the "manifest injustice" issue.

The trial court incorrectly disregarded Aneja's evidence on the "manifest injustice" issue. Her evidence established as a matter of law that the continued existence and possible dissemination of information relating to her felony arrest causes or may cause circumstances constituting a manifest injustice to her.

Aneja requests the following relief:

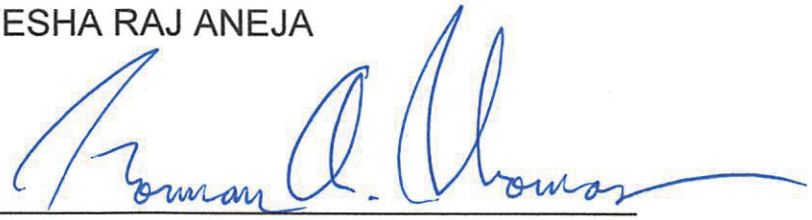
(a) that the Court reverse the trial court's judgment that partially denied her expungement petition; and

(b) that the Court remand the case to the trial court with a directive that it forthwith enter an order of expungement respecting her felony arrest.

In the alternative, if the Court determines not to enter the relief requested in (b), above, Aneja requests that the Court reverse the trial court and remand the case with a directive that it further consider her evidence on the "manifest injustice" issue according to a correct interpretation of Va. Code §19.2-392.2(F).

Respectfully submitted,

AYESHA RAJ ANEJA

By 
Norman A. Thomas

CERTIFICATE

1. On the 10th day of July, 2017, the appellant, Ayesha Raj Aneja, filed with the Clerk of this Court three printed copies of this brief, and an electronic version of it in Portable Document Format (PDF) in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES). In addition, an electronic (PDF) version of the brief was transmitted to counsel for the Commonwealth of Virginia, the Honorable Nathan R. Green, Commonwealth's Attorney for the City of Williamsburg, 5201 Monticello Avenue, Suite Four, Williamsburg, VA 23188-8213, at the following email address: ngreen@wjcc-ca.hrcoxmail.com.

2. This brief complies with the limitations of Rule 5:26(b). It does not exceed 50 pages or 8,750 words. It otherwise complies with the requirements of Rule 5:6. Rule 5:26(e) was complied with.

3. Aneja requests oral argument of her appeal before the Court.

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