IN THE

SUPREME COURT of VIRGINIA

RECORD NO. 170199

AYESHA RAJ ANEJA,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

AMMENDED BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The Commonwealth agrees with the Statement of the Case presented in the Opening Brief of Appellant.

STATEMENT OF FACTS

The Commonwealth agrees with the Statement of the Facts presented in the Opening Brief of Appellant with the following addition:

In the General District of Williamsburg & James City County the felony offense of assault and battery of a law enforcement officer was the subject of a negotiated plea agreement where in the felony offense was reduced by agreement to a misdemeanor offense of disorderly conduct. Aneja then plead guilty to the agreed upon reduced charge of disorderly conduct. (Appendix pg. 29, line 19 through pg. 30, line 5).

ASSIGNMENT OF ERROR

1. Did the trial court err in partially denying Aneja's expungement petition when the felony charge for which Aneja sought expungement was the subject of a negotiated plea agreement where in Aneja plead guilty to the agreed upon reduced charge?

2. Did the trial court err in partially denying Aneja's expungement petition when the court found that the continued existence and possible dissemination of information relating to the arrest of Aneja on the charge of assault and battery of a law enforcement officer does not cause and may not cause circumstances which constitute a manifest injustice to Aneja.

ARGUMENT

1. The trial court did not err in denying Aneja's expungement petition on the felony charge when that charge was the subject of an agreed upon reduction of a felony offense, assault on a law enforcement officer, to a substantially similar and related misdemeanor offense, disorderly conduct.

STANDARD OF REVIEW : Whether a charge is "otherwise dismissed" and thus subject to expungement is a question of law that is to be reviewed de novo. *Dressner v. Commonwealth*, 285 Va. 1, 736 S.E.2d 735 (2013); *See Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011).

The case at hand presents circumstances that lie between those addressed by this Court in its opinions in *Dressner v. Commonwealth,* 285 Va. 1, 736 S.E.2d 735 (2013); and *Necaise v. Commonwealth,* 281 Va. 666, 708 S.E.2d 864 (2011). In *Dressner* this court found that when the Commonwealth amended a possession of marijuana charge to an unrelated and completely separate charge of reckless driving ""the elements of the offense of which [Dressner] was convicted" were not subsumed within the [possession of marijuana charge]" and did not "form the sole basis for the conviction". *Dressner at pg. 6*. In that case, the

record was void as to the reason for the amendment from a narcotics offense pursuant to Section 18.2 to a traffic offense pursuant to Section 46.2.

Prior to the ruling in *Dressner*, in the case of *Necaise v. Commonwealth,* this Court affirmed the circuit court's decision to deny the petitioner's expungement request under circumstances and a factual scenario far more applicable to the facts presented by Aneja. In *Necaise* this Court was presented with a scenario in which the individual sought expungement on felony offenses that had been reduced to lesser included misdemeanor offenses to which the individual plead guilty. *Necaise at pg. 668.* The Court's reasoned in part:

> "Because 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 form the sole bases for the convictions. Expungement of the felony charges would distort the record by leaving the convictions without any foundation, suggesting that they had been arbitrarily imposed. The record as it stands contains a true account of the events that actually occurred and creates no injustice to either party." *Id. at pg. 669*.

If the Court's decision in *Necaise* is predicated solely on the fact that the reduced charges which were plead guilty were lesser included offenses, and this is the only circumstance in which a court may find that the elements of the offense were subsumed within the felony for which expungement is sought, the Commonwealth must concede that the misdemeanor offense of disorderly conduct is not a lesser included offense of the felony of assault on a law enforcement officer. However, such a narrow and strict interpretation of this Court's ruling in *Necaise* would seem to place a disproportionate emphasis on the first clause of the cited paragraph and ignore the remainder of the reasoning articulated throughout the Court's opinion. Surely there are other examples where all of the elements of the amended offense of which an individual is convicted are subsumed within the original felony charge and form the sole bases for the conviction.

Selling or distributing stolen property, a violation of Virginia Code § 18.2-108.01(B) is not a lesser included offense of larceny with the intent to sell or distribute, a violation of subsection (A) of the same code section, 18.2-108.01. *Bryant v. Commonwealth,* Record No. 0092-11-1, Va. App. (212). If a defendant was charged with a larceny with the intent to sell, a

violation of subsection (A) with a sentencing range of up to 20 years incarceration, and after negotiating with the prosecutor agreed to plead guilty to selling stolen property pursuant subsection (B), is he then entitled to expunge the all of the police and court records of the original charge? To do so would be inconsistent with the legislative intent underlying the expungement statutes made clear by the Statement of Police in Code § 19.2-392.1:

> "The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education ad to obtain credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such person from the unwarranted damage which may occur as a result of being arrested and convicted." Virginia Code § 19.2-392.1.

"One who is found guilty is not an "innocent citizen" entitled to the benefit of the expungement statues. *Necaise at pg. 269.* Similar to Aneja, the petitioner in *Necaise* plead guilty to the amended reduced charges, not to the original felony offense. Due to the plea to the reduced misdemeanor, the court in *Necaise* never made a finding on all elements of

the originally charged felony offenses. Despite the absence of a plea, or a finding that the evidence was sufficient for the felony offense, this Court refused to treat the petitioner in *Necaise* as an "innocent citizen" entitled to the benefit of the expungement statutes. *Id. at pg. 670.* Similarly, Aneja plead guilty to the misdemeanor, not the felony. Because of the negotiated agreed upon plea, there was no opportunity to test the merits of the evidence on all elements of the felony offense. However, just like *Necaise*, Aneja was found guilty and therefore is not an innocent citizen and should similarly be refused the benefits of the expungement statutes.

While the circumstances of Aneja's case are easily compared to the circumstances in *Necaise*, they can also be distinguished from the circumstances in *Dressner*. The petitioner in Dressner also plead guilty and was found guilty of an amended charge. *Dressner at pg. 1*. This Court identified that the amendment in Dressner of a misdemeanor possession of marijuana charge to the charge of reckless driving not only involved an amendment to an offense that was not a lesser included offense of the original, but was additionally an amendment to a completely separate and unrelated charge. *Id. at pg. 6*. A recitation of the facts that would support a charge of reckless driving have absolutely no overlap with the facts needed

to support a charge of possession of marijuana, save for jurisdiction and identification of the defendant. Therefore the facts of one could not form the bases for a conviction of the other.

By contrast, the offenses of assault on a law enforcement officer and disorderly conduct consistently involve similar and related facts, where minor but relevant details dictate which charge is appropriate. The offense of disorderly conduct involves "conduct having a direct tendency to cause acts of violence by the person or person at whom, individually, such conduct is directed." *Virginia Code § 18.2-415*. If that conduct escalates into a violent or unwanted touching, and the individual being touched is a law enforcement officer, then the conduct rises from disorderly conduct to the felony offense of assault on a law enforcement officer. While not a lesser included offense, disorderly conduct and assault on a law enforcement officer are factually related and similar. It is difficult to imagine a scenario in which an individual in a public location is subject to arrest for assault on a law enforcement officer without also meeting the elements for disorderly conduct.

Aneja's conduct on the night in question formed the bases of the original felony offense of assault on a law enforcement officer as well as

the agreed upon offense of disorderly conduct for which Aneja plead guilty and was subsequently convicted of. On the night in question, Aneja had "drank a lot". *Appendix pg. 40* In Aneja's own words this is what followed:

> "So I was walking down the street. I was with a friend and I got stopped and a bunch of questions he asked about where I lived, where my dorm is.
>
> Anyways, I was screaming out, and I was handcuffed to put my hands behind my head, and I was scared, and I was moving my hands, but I was just moving them behind my - - behind my back, and I - - I was just scared, and, you know, I didn't mean to, you know, physically try to hit anyone or anything. An I think my hands bothered me, and I like jiggled them, and I probably shouldn't have, but I - - I consumed alcohol, and as they were moving - -"
>
> **Aneja's Counsel's Question**: Let me ask you this. Um, moving your hands while being handcuffed was not what the officer wanted you to do; correct?
>
> **Aneja Answer**: "Yes"
>
> **Aneja's Counsel's Question**: Okay. And would you admit that you didn't have the best attitude towards him?
>
> **Aneja Answer**: "Yes"

The agreed upon reduction from the felony assault on a law enforcement officer to the misdemeanor disorderly conduct was the subject

of a negotiated plea agreement where the Commonwealth agreed to reduce and Aneja agreed to plead guilty. *Appendix pg. 29, line 19 through pg. 30, line 5.* Unlike the amendment in *Dressner,* which appears arbitrary or at a minimum involved the reliance on unrelated facts, here while the offense was reduced from the felony to the misdemeanor the bases of both centers around the same facts.

Because the felony charge as well as the misdemeanor for which Aneja plead and was found guilty are not only similar and related, but identical, the Court's reasoning in this case should be consistent with its reasoning in *Necaise* and distinguished from the holding in *Dressner.* Although the reduced misdemeanor is not a lesser included offense of the original felony, all of the elements of the offense of which Aneja was convicted were subsumed within the original felony and form the sole bases for the misdemeanor conviction. Accordingly, Aneja,, having plead guilty to a negotiated and agreed upon reduction of the felony charge to a misdemeanor offense, is not an ""innocent citizen entitled to the benefit of the expungement statutes". *Necaise at pg. 670.*

2. The trial court did no err in denying Aneja's expungement petition when the court found that the continued existence and possible dissemination of information relating to the arrest of Aneja on the charge of assault and battery of a law enforcement officer does not cause and may not cause circumstances which constitute a manifest injustice to Aneja.

STANDARD OF REVIEW : Whether the facts presented by Aneja made the required showing that the continued existence and possible dissemination of information relating to the arrest on the charge of assault and battery of a law enforcement officer causes or may cause circumstances which constitute a manifest injustice is a question of law that is to be reviewed de novo. *Dressner v. Commonwealth*, 285 Va. 1, 736 S.E.2d 735 (2013); *See Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011).

If it is determined that the agreed upon reduction of the felony offense to a misdemeanor, one that is not a lesser included offense, meets the definition of "otherwise dismissed" required by the expungement statute, the court must then move to the second prong of the statute and determine whether the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner.

Brown v. Commonwealth, 278 Va. 92, 677 S.E.2d 220 (2009). This inquiry into whether the facts of the particular case satisfy the requirement of this second prong of the statute is not simply a nicety, but a burden the petitioner bears and requires evidence rather than supposition.

Unlike the provision of the expungement code which entitles the petitioner to the expungement of an eligible misdemeanor charge absent a showing of good cause by the Commonwealth, in the case of a felony offense, the petitioner must show the existence of circumstances that are or may be a manifest injustice. *Virginia Code § 19.2-392.2*. There must be a showing of an unfair negative impact, or at a minimum, evidence that there may be an unfair negative impact. Disregarding at this time whether "fair" or not, Aneja fails to make a showing that there has been or will be a negative impact. The testimony presented by Aneja was void of any evidence that the continued existence of information relating to the felony arrest has caused, will cause, or may cause circumstances which constitute a manifest injustice to Aneja.

Rather, Aneja spoke to positive experiences in positions with the Clinton Foundation, *Appendix pg. 30*, with Paramount Pictures, *Appendix pg. 30,* and with Disney in their ABC Entertainment Department, *Appendix*

pg. 33. The record is void of examples where the existence and possible dissemination of information relating to the arrest negatively affected Aneja's ability to obtain and strive in these or any other employment position. The only arguably negative circumstance during her internship with Disney came in the form of a delay in start date that stemmed not from the existence of the felony arrest, but from a delay in the completion of the necessary background check. *Appendix pg. 34 -35, 70 - 72.* In fact, once the background check was completed, the position began and there is no evidence of any negative consequences that resulted from her employer "seeing the record as it stands which contains a true account of the events that actually occurred". *Necaise at 34*.

Aneja did establish that employers in the fields in which Aneja has an interest routinely conduct background checks. *Appendix pg. 38*. But the record is void of any examples or even suggestions that the continued existence and possible dissemination of information relating to the arrest of petitioner may cause or may have a negative impact on the petitioner's ability to obtain the position sought once the results of the background check are reviewed. To allow the evidentiary requirement needed to be met simply by the petitioner's unsubstantiated fears ignores the

legislature's clear intent. The inclusion of the language requiring a showing of manifest injustice in order to expunge a felony offense clearly demonstrates that the legislature intended for there to be a different if not heightened review of felony offenses. Eligibility pursuant to subsection (A) of 19.2-392.2 (regardless of why the offense is eligible, regardless of whether there is any true or potential impact on the petitioner, regardless of why the petitioner may want the charge removed), and the lack of good cause on the part of the Commonwealth is sufficient for the expungement of a misdemeanor. Not so for a felony offense.

For felony offenses, there must be some injustice created by the continued existence of the information of the original arrest. Assuming without conceding that the continued existence of the record of Aneja's original arrest for felony assault on a law enforcement officer may have some negative impact on Aneja, the question that must be answered remains: is that negative impact a manifest injustice in light of the circumstances of this case?

Even if this Court decides that the facts and circumstances of how the felony offense was amended satisfy expungement statute's eligibility requirement as being "otherwise dismissed", those facts and circumstances

should not dismissed as irrelevant when considering what if any injustice is being perpetrated against Aneja by the continued existence of a true account of the events that actually occurred. Aneja cannot stand in the same shoes as those individuals mistakenly arrested, wrongfully convicted, or arbitrarily sentenced. Similar to the petitioner in the *Necaise* case, Aneja is not an "innocent citizen".

This Court found that the petitioner in *Necaise* was not entitled to the benefit of the expungement statutes because his charges involved lesser included offenses, *Necaise at pg. 670.* The fact that disorderly conduct is not a lesser included offense of assault on a law enforcement officer may allow Aneja's felony offense to be eligible for review, but it should not alter this Court's reasoning as to the existence of an injustice. "The record as it stands contains a true account of the events that actually occurred and creates no injustice to either party." *Id at pg. 669*.

Aneja negotiated and agreed to a plea reduction in regards to the felony assault on a law enforcement officer. Aneja then plead guilty to the agreed upon reduced charge. To distort the record by leaving that misdemeanor conviction without any foundation, and thus suggesting that it had been arbitrarily imposed would be inconsistent with the legislative

intent underlying the expungement statues, namely to remove a hindrance to innocent citizens. The record as it stands contains a true account of the events that actually occurred and creates no injustice.

CONCLUSION

For the foregoing reasons, the Commonwealth asks this Court to affirm the judgement of the circuit court.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

BY: S/

Nathan R. Green

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations of Rule 5:26(b). It does not exceed 50 pages or 8,750 words. This brief otherwise complies with the requirements of Rule 5:6.

BY: S/

Nathan R. Green

CERTIFICATE OF SERVICE

I hereby certify that 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 Appellant, Norman Thomas at the following email address: norman@normanthomaslaw.com, as well as mailed to counsel at 1015 East Main Street, Lower Level, Richmond, VA 23219, on this 7th day of August, 2017.

BY: S/

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