IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30770

IN THE MATTER OF THE EXPUNGEMENT OF
THE RECORD OF JARRETT OWEN JONES

APPEAL FROM THE CIRCUIT COURT
5th JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
Circuit Court Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The State of South Dakota appeals from an order expunging the records of Jarrett Owen Jones' arrest and charge for first-degree murder. This Court has jurisdiction pursuant to SDCL 15-26A-3(2) and (4).

STATEMENT OF THE LEGAL ISSUE

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT EXPUNGED RECORDS OF JONES' ARREST AND CHARGE FOR FIRST-DEGREE MURDER PER SDCL 23A-3-26 *et seq.*

People v. Carroccia, 817 N.E.2d 572 (Ct.App.Ill.3rd 2004)

Meinken v. Burgess, 426 S.E.2d 863 (Ga. 1993)

In re Kollman, 46 A.3d 1247 (N.J. 2012)

In re LoBasso, 33 A.3d 540 (N.J.Super. 2012)

The trial court granted Jones' petition for expungement.

STATEMENT OF THE CASE

Jarrett Owen Jones was charged with first-degree murder in the death of Jon Schumacher. *State v. Jones*, 06 CRI 20-22 (5th Jud.Cir.). Jones was tried by a jury and was acquitted on the ground of self-defense. Jones petitioned for expungement of the records relating to his arrest and trial on the murder charge. *In re Expungement of Records of Jarrett Jones*, 06 CIV 23-518 (5th Jud.Cir.).

The trial court granted the motion. See TRANSCRIPT, Appendix at 6. At the hearing on Jones' motion, the court repeatedly emphasized that Jones had been "acquitted." TRANSCRIPT at 31/19, 31/20, 32/16. In the trial court stated it was unwilling to "second guess the jury" by

denying Jones' motion. TRANSCRIPT at 32/1. The state appeals pursuant to SDCL 15-26A-3(2) and (4).

STATEMENT OF THE FACTS

The shooting and killing of Jon Schumacher was captured on video. One must see the video to appreciate what a magnanimous act of jury clemency Jones' acquittal was. See TRIAL EXHIBIT 6/SHOOTING VIDEO; TRANSCRIPT at 4/4 (taking judicial notice of criminal file including shooting video). The shooting occurred in a shop building owned by Jones. The video depicts nothing less than a deliberate, premeditated killing:

- 1:23:34 – Jones, in a black jacket and gray pants, is seen walking across the floor of the shop toward the exterior wall. He exits the frame of the video on the left edge. There, just outside of the left edge of the video, he meets a drunken Schumacher at the door to the shop. Schumacher wants to see Jones' daughter Makayla. Jones refuses and the two start arguing.
- 1:24:25 – Jones' employee, Nathan Milstead, enters the video from the right edge and walks across the shop toward Jones and exits the video on the left edge.
- 1:25:05 – Milstead reenters the video on the left edge and walks across the shop and exits the video on the right edge, leaving Schumacher alone with Jones the first time.
- 1:25:33-1:26:30 – Makayla enters the video from the right edge

and walks across the floor away from Jones to retrieve Schumacher's jacket from elsewhere in the shop then exits the video on the right edge.

- 1:26:57-1:27:36 – Makayla reenters the video from the right edge carrying the jacket toward Jones and Schumacher and exits the video on the left edge to hand the jacket to Schumacher. Makayla reenters the video from the left edge and walks to the right edge of the video no longer carrying the jacket.
- 1:27:38 – Milstead reenters the video from the right edge and he and Makayla walk over to where Jones is standing just outside of the left edge of the video.
- 1:27:46 – Milstead stands near the left edge of the video behind Jones and appears to be listening to and participating in Jones' argument with Schumacher.
- 1:27:51 – Makayla walks back across the shop exits the video on the right edge.
- 1:28:30 – Makayla reenters the video from the right edge and stands with Milstead in the center of the shop looking in the direction of Jones and Schumacher.
- 1:29:02 – Milstead exits the video on the right edge leaving Schumacher alone with Jones (and Makayla) a second time.
- 1:29:09 – Makayla exits the video on the right edge as Milstead reenters from the right and walks to the left edge and stands

behind Jones occasionally stepping beyond the left edge of the frame in the direction of Jones and Schumacher.

- 1:32:08 – Milstead walks back across the shop and exits on the right edge of the video leaving Schumacher alone with Jones a third time.
- 1:32:30 – Milstead reappears on the right edge of the video and walks back toward Jones and resumes standing behind him.
- 1:33:30 – Milstead walks back across the shop and exits the video on the right edge leaving Schumacher alone with Jones a fourth time.
- 1:33:45-1:35:47 – Milstead reappears on the right edge of the video and walks back toward Jones with pizza in his hand. Milstead exits the video on the left edge, eats his pizza and then reenters and exits the video on the left several times, sometimes moving his arms as though making a point in the argument.
- 1:35:48 – Jones appears from the left edge of the video and walks across the shop.
- 1:35:55 – Makayla enters the video from the right edge and meets and talks to Jones about midway through the shop. Jones appears to have a gun in his right hand.
- 1:36:20 – Jones points to Makayla, ordering her to leave the shop. Makayla exits the video on the right edge. Jones turns and walks back toward the left edge of the video. Schumacher is still outside

the left edge of the video.

- 1:36:27 – Jones assumes a shooting stance with both arms outstretched in front of him pointing the gun at Schumacher. Milstead reenters the video from the left edge to get himself out of the line of fire and positions himself behind Jones to Jones' left.
- 1:36:42 – A flash is seen as Jones fires the gun into Schumacher's chest. Schumacher falls to the floor inside the left edge of the video.
- 1:36:48 – Schumacher is seen rolling on the floor in agony, holding his wound while Jones stands over him. Milstead walks back across the shop and exits the video on the right edge.
- 1:36:51 – Jones is seen standing over Schumacher. Schumacher's hands are both visible. Schumacher has no weapon in his hands and never had a weapon at any time.
- 1:37:00 – Jones aims his gun at Schumacher, light from a laser sight appears near Schumacher's neck and Jones fires a second shot into Schumacher's neck. Schumacher instantly goes limp.
- 1:37:19 – Milstead reenters the video on the right and walks toward Jones. Milstead then appears to make a call on his cellphone.
- 1:37:53 – Video terminates.

From the video it is evident: (1) that Schumacher was not in view of the camera throughout most of the video because he never entered the shop more than a couple steps from the door; (2) that Jones and Milstead

outnumbered Schumacher two to one; (3) that, consistent with Milstead's testimony that he did not feel that Schumacher posed any threat to anyone, Milstead is seen leaving Schumacher alone with Jones several times while they were arguing; (4) that Jones had plenty of time to call law enforcement (or have Milstead or Makayla call law enforcement) to come and remove Schumacher from the property but did not; (5) that nothing prevented Jones and the burly Milstead from simply pushing Schumacher out of the door of the shop and locking the door and calling 911; (6) that Jones could have walked away from Schumacher, and in fact did walk away from Schumacher once to tell Makayla to leave; (7) that rather than continue to walk away, Jones walked back over to Schumacher and shot him in the torso; and (8) that Schumacher was incapacitated and lying helpless on the ground when Jones aimed at him with a laser sight and shot him a second time in the neck, killing him.

In view of this evidence, and Jones' record of public intoxication and oppositional behavior in the community before and since the Schumacher shooting, the state considers Jones a continuing threat to public safety and opposed his petition for expungement.

ARGUMENT

The trial court abused its discretion in granting Jones' petition for expungement. By its terms, SDCL 23A-3-30 requires more than simply acquittal for an erstwhile criminal defendant to qualify for expungement of the records of his arrest and criminal charges. Because the trial court

failed to apply the correct standards, and because Jones failed to satisfy SDCL 23A-3-30's conditions for expungement according to the correct standards, his petition should have been denied.

1. Expungement Law Generally

In South Dakota, an acquitted criminal defendant may obtain expungement of the records of his arrest and charges by "showing . . . by clear and convincing evidence that the ends of justice and the best interest of the public . . . will be served by the entry of the order." SDCL 23A-3-30. Explicit or implicit in SDCL 23A-3-30's text are several conditions upon obtaining expungement: (1) that acquittal alone does not entitle an applicant to expungement; (2) that expungement is conditional, not presumptive; (3) that the ends of justice and the public interest are two conditions that must be met; (4) that an applicant bears the burden of satisfying these conditions; (5) that to carry this burden an applicant must provide specific evidence of adverse consequences; and (6) that these adverse consequences must outweigh the state's interest in maintaining accurate criminal and judicial records.

Such conditions align South Dakota's expungement statute with states like Georgia, Illinois, Missouri and New Jersey where expungement is conditional, in contrast to Pennsylvania where expungement is automatic following acquittal.[1] States where expungement is conditional

[1] *Meinken v. Burgess*, 426 S.E.2d 876 (Ga. 1993)(expungement conditioned on demonstrating inaccurate, incomplete or misleading records (per old Georgia statute)); *Doe v. State*, 819 S.E.2d 58, 65 (Ct.App.Ga. 2018)

have identified several considerations relevant to determining whether the ends of justice and the public interest are served by expunging a petitioner's records.

Generally, ends of justice considerations focus on the adverse impact of maintaining the records on a petitioner's reentry into society, such as lost opportunities for schooling, employment, credit or professional licensing. *In re LoBasso*, 33 A.3d 540, 549 (N.J.Super. 2012). Expungement is intended to "reward efforts at rehabilitation . . . and to provide relief to certain one-time offenders who have rejected their criminal past." *In re Kollman*, 46 A.3d 1247, 1260 (N.J. 2012). Ends of justice considerations are not satisfied by raising hypothetical "disabilities that *might* result from . . . having an arrest record," rather there must be "evidence that [a petitioner] is actually suffering . . . such ills." *People v. Carroccia*, 817 N.E.2d 572, 578 (Ill.App.3d 2004)(requiring showing of "specific adverse consequences"). Adverse impacts are most compelling when a petitioner was "arrested or indicted for a criminal

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(expungement conditioned on applicant demonstrating that privacy interest outweighs public interest in maintaining criminal records (per new Georgia statute)); *People v. Carroccia*, 817 N.E.2d 572 (Ct.App.Ill.3rd 2004)(expungement conditioned on demonstrating "good cause"); *Martinez v. State*, 24 S.W.3d 10 (Ct.App.Mo. 2000)(expungement conditioned on demonstrating that there was no probable cause for the arrest); *In re Kollman*, 46 A.3d 1247 (N.J. 2012)(expungement conditioned on showing of public interest and orderly conduct for five years since arrest). But see *Commonwealth v. D.M.*, 695 A.2d 770 (Pa. 1997)(acquitted defendant entitled to expungement per common law rule).

offense as a result of mistake, false information, or other reasons indicating an absence of probable cause for arrest or indictment." *Bargas v. State*, 164 S.W.3d 763, 769 (Ct.App.Tex. 2005).

Ends of justice conditions on expungement reflect that the legislature did not intend for expungement to be "routine." *LoBasso*, 33 A.3d at 549. At the same time, "[i]t would defeat the statute's purpose to set the threshold so high that virtually no one qualifies." *LoBasso*, 33 A.3d at 549. In evaluating the ends of justice, courts consider a petitioner's character and conduct, such as the "facts related to an arrest that did not lead to conviction" and "whether he or she has engaged in activities that have limited the risk of re-offending, or has avoided activities that enhanced that risk." *LoBasso*, 33 A.3d at 550; *Kollman*, 46 A.3d at 1259 ("[f]acts related to an arrest that did not result in conviction . . . may also offer insight in an applicant's character and conduct"). Also, courts can consider whether a petitioner "has obtained job training or education, complied with other legal obligations (such as child support and motor vehicle fines), and maintained family and community ties that promote law abiding behavior, as well as whether the petitioner has severed relationships with persons in the criminal mileau." *LoBasso*, 33 A.3d at 550.

Public interest considerations tend to focus on the imperative of ensuring public safety through the maintenance of a complete and accurate state criminal database. "[T]he 'public interest' . . . is broader

than the personal desires of an applicant." *Kollman*, 46 A.3d at 1259. Consequently, the ends of justice and public safety can be "competing interests," requiring the balancing of the interests of "the state in maintaining extensive arrest records to aid in effective law enforcement and those of the individual in being free from the harm that may be caused by the existence of those records." *Kollman*, 46 A.3d at 1260; *Meinken v. Burgess*, 426 S.E.2d 863, 866 (Ga. 1993).

SDCL 23A-3-30 incorporated a public interest standard in recognition of the state's responsibility for maintaining "a complete and systematic record" of "crimes committed in the state," including any "information concerning particular criminal offenders as . . . may be helpful to other public officials or agencies dealing with them." SDCL 23-6-8, -4, -5. This database is to include not just records of criminal convictions but also "such information as may be useful . . . for the administration of criminal justice, and for the apprehension, punishment and treatment of criminal offenders" and information concerning "the operations of the police, prosecuting attorneys, courts and other public agencies of criminal justice." SDCL 23-6-4. The expungement statutes reflect the importance of this database by placing the burden to prove public interest on the defendant or arrested person rather than on the state to prove the necessity for maintaining the subject records. SDCL 23A-3-30.

To carry this burden, an applicant must demonstrate that being free of any disabilities associated with having a record outweighs the public's need for access to the records. *LoBasso*, 33 A.3d 548; *Kollman*, 46 A.3d at 1253 (court "weigh[s] the risks and benefits to the public of allowing or barring expungement"). The public's interest in maintaining records depends on the nature of the offense and the petitioner's conduct. *Kollman*, 46 A.3d at 1258. This involves examining the known facts about the crime and its commission, including "basic information about the definition, grade, and elements of an offense" and "what the petitioner did, how and with whom he acted, and the harm" he caused. *Kollman*, 46 A.3d at 1258.

Public safety imperatives can be frustrated when records are expunged, particularly when, despite a petitioner's acquittal, "his arrest was not based on false information . . . and there was 'probable cause' to believe [the petitioner] had committed the charged offense." *Martinez v. State*, 24 S.W.3d 10, 14 (Ct.App.Mo. 2000). The fact that expungement following acquittal is conditional reflects that the "legislature attached little significance to the presumption of innocence *per se*" in the expungement calculus. *Carroccia*, 817 N.E.2d at 579 ("legislature did not intend to create an entitlement to expungement following an acquittal").

Consequently, the state's interest in compiling and maintaining an accurate criminal database is a strong consideration even in cases of acquittal. In *Meinken*, a defendant was charged with child molestation

based on a videotaped interview with the alleged 3-year-old victim. *Meinken*, 426 S.E.2d at 867. The defendant was acquitted and then sought expungement of his arrest record which the trial court granted. The *Meinken* court reversed, however, finding that "the state has a vital interest" in maintaining arrest records "to aid in effective law enforcement." *Meinken*, 426 S.E.2d at 879. The court reasoned that expungement based simply on Meinken's acquittal risked "defeat[ing] the very purpose for which" the legislature created the state criminal database. *Meinken*, 426 S.E.2d at 879.

As in South Dakota, expungement in Georgia is reserved for "exceptional cases." *Meinken*, 426 S.E.2d at 879. "[B]ecause potential harm to individuals is the natural consequence of the maintenance and dissemination of criminal records by the [state], the balancing test should not be tipped in the defendant's favor solely on the basis of the potential harm that could accrue to a defendant in any given case. Instead special factors must exist that either diminish the state's interest in maintaining the records or heighten the impact of the existence of those records on the defendant and thus warrant expungement." *Meinken*, 426 S.E.2d at 879.

The *Meinken* court observed that such special circumstances could arise if "an arrest results from any illegality or misconduct on the part of the police" such as a lack of probable cause. In such cases, "the arrest record may not be indicative of the individual's criminal propensity and

the maintenance of that record may therefore be of little value to law enforcement." *Meinken*, 426 S.E.2d at 879. "[A]s the 'apparent utility of the records decreases, there is a concomitant increase in the [defendant's] interest in being insulated from the possible adverse consequences of the existence and dissemination of the records." *Meinken*, 426 S.E.2d at 879. Thus, absence of probable cause to arrest "may tend to diminish the interest of the state in maintaining the arrest record and to heighten [a defendant's] interest in having the record expunged." *Meinken*, 426 S.E.2d at 880; *Bargas*, 164 S.W.3d at 769 (expungement "designed to provide a means for those persons who have been arrested and indicted for a criminal offense as a result of mistake, false information or other reason indicating the absence of probable cause for arrest or indictment").

2. The Trial Court Abused Its Discretion

The trial court's order granting Jones' expungement petition was an abuse of discretion.[2] An abuse of discretion occurs when a court makes a decision that is a fundamental error of judgment, a choice outside the range of permissible choices. *In the Matter of an Appeal by an Implicated Individual*, 2023 SD 16, ¶ 12, 989 N.W.2d 517, 522. An abuse of discretion also occurs when the court bases its ruling on an

[2] Conditional expungement states review the grant or denial of a petition for expungement for an abuse of discretion. *Kollman*, 46 A.3d at 1252; *Bargas*, 164 S.W.3d at 770; *LoBasso*, 33 A.3d at 552; *Meinken*, 426 S.E.2d at 880; *Carroccia*, 817 N.E.2d at 579.

erroneous view of the law. *Smizer v. Drey*, 2016 SD 3, ¶ 14, 873 N.W.2d 697, 702.

The most conspicuous error in the trial court's view of the law was its belief that acquittal automatically entitled Jones to expungement. The trial court went so far as to say it did not "know what else a person could do over and above" acquittal to warrant expungement. TRANSCRIPT at 32/17. According to SDCL 23A-3-30, proving "by clear and convincing evidence that [expungement serves] the ends of justice and the best interest of the public" is what a person is must do "over and above" being acquitted. But, in the trial court's view, to impose any conditions beyond Jones' acquittal would be "second-guess[ing] the jury." TRANSCRIPT at 31/25. Granting automatic expungement because of Jones' acquittal was outside the range of choices permitted by SDCL 23A-3-30.

The most conspicuous error in the trial court's application of the law was its disbelief "that you could ever find a situation where you're going to find clear and convincing evidence that it's in the public's best interest" to expunge. TRANSCRIPT at 32/3. *Meinken*, *Kollman*, *LoBasso*, *Bargas* and *Carroccia* identify several scenarios where the public interest is served by expungement. Because the trial court did not acquaint itself with how the public interest standard is met, the court allowed Jones to prevail on admittedly "weak" showings of public interest and the ends of justice. TRANSCRIPT at 25/2, 31/17, 32/10. But "weak" evidence is, by definition, not clear and convincing. Granting expungement without

requiring Jones to satisfy the ends of justice and the public interest standards by clear and convincing evidence was outside the range of choices permitted by SDCL 23A-3-30.

Unlike here, the trial court in *Carroccia* applied the ends of justice and the public interest standards correctly under similar circumstances and ruled that the petitioner was not entitled to expungement. *Carroccia*, 817 N.E.2d at 579. Like Jones, Carroccia was tried on a charge of first-degree murder that resulted in an acquittal. Carroccia sought expungement of the record of his arrest and charge. The trial court denied the request on the grounds that "there was a lot of circumstantial evidence" implicating Carroccia in the murder so the state "had every right to proceed [with the case against him] on the basis of the evidence." *Carroccia*, 817 N.E.2d at 579.

The *Carroccia* court affirmed. The court observed that "acquittal on criminal charges does not prove that the defendant is innocent" and that, while some states' expungement laws provide "that a defendant who is acquitted is automatically entitled to expungement," Illinois' statute (like South Dakota's) does not. *Carroccia*, 817 N.E.2d at 578, 580. Illinois' statute (like South Dakota's) "by its terms strongly suggests that there is no presumptive right to expungement even after an acquittal." *Carroccia*, 817 N.E.2d at 579.

Here, as in *Carroccia*, despite Jones' acquittal, considerations of the ends of justice and the public interest do not weigh in his favor.

With respect to the ends of justice, Jones produced no evidence that his arrest or indictment were intrinsically unjust because they were based on false information or a lack of probable cause. *Martinez*, 24 S.W.3d at 14. Jones produced zero evidence that he has suffered any "disabilities . . . from . . . having an arrest record." *Carroccia*, 817 N.E.2d at 577, 578 (requiring showing of actual rather than hypothetical consequences). While Jones made an amorphous argument that having a record infringes on his Second Amendment right to self-defense, he did not develop this argument at all or support it with authority. TRANSCRIPT at 31/1, 31/7, 32/6. The Second Amendment guarantees the right to keep and bear arms, but Jones offered no evidence that his record has impaired his ability to keep and bear arms. With respect to employment, Jones, like Carroccia, "worked for a family business [so] expungement was not necessary for 'employment purposes.'" *Carroccia*, 817 N.E.2d at 579. Jones produced "no specific evidence of any adverse consequences" to his credit, business, or efforts to reenter society. *Carroccia*, 817 N.E.2d at 579. And, as in *Carroccia*, "not much time had passed since [Jones'] arrest" – and Jones has not disavowed disorderly conduct in the little time that has passed. *Carroccia*, 817 N.E.2d at 579.

Nor did Jones (or the trial court) identify how expunging his records served the public interest. The existence of probable cause to arrest heightens the state's interest in maintaining an offender's arrest

records and diminishes an offender's right to have the record expunged. *Meinken*, 426 S.E.2d at 880. Unlike in *Meinken*, where Meinken sought expungement because the video implicating him in the abuse of a child was allegedly "leading" and "very suggestive," "plac[ing] in doubt whether there was any foundation whatsoever for Meinken's arrest," no such concerns exist here. *Meinken*, 426 S.E.2d at 880. The shooting video provided ample probable cause to arrest and charge Jones with first-degree murder.

On the video, Jones, Milstead and Makayla do not act in any way as though they feel threatened. Schumacher has no weapon, Jones has a gun and is in control of the shop. Makayla takes Schumacher's jacket to him without any hesitancy to approach him or haste to get away from him (1:27:36). Milstead comes and goes, leaving Schumacher alone with Jones, with no apparent concern for Jones' safety and, when with Jones, is seen casually eating pizza and having a smoke (1:35:47, 1:36:34). For his part, Jones calmly makes preparations to kill Schumacher – turning his back on Schumacher and walking across the shop to tell Makayla to leave (1:36:21), walking back toward Schumacher and directing Milstead to step away from Schumacher (1:36:28), and activating his laser sight and assuming a firing posture (1:36:29). Through all this, Schumacher is doing nothing physically threatening. The testimony at trial established that Schumacher only made empty verbal threats that he

was incapable of carrying out. Thus, unlike the *Meinken* video, the Jones video does not raise "doubt whether there was any foundation" for Jones' arrest and charging him with first-degree murder. *Meinken*, 426 S.E.2d at 867. The trial court judge, who also presided over Jones' criminal trial and saw the video, stated that he was "never going to say that you were innocent, but you were found not guilty," and that "the jury found you not guilty; not innocent." TRANSCRIPT at 31/24.

The public has an interest in preserving such evidence in aid of "the administration of criminal justice" and the punishment of offenders. SDCL 23-6-4; *State v. Kieffer*, 187 N.W. 164 (S.D. 1922)(returning bootleg whiskey to its owner "deprived the state of . . . the right to offer such property into evidence"). Jones' record of his arrest on a first-degree murder charge is potential evidence at trial under SDCL 19-19-404(b), or at sentencing in relation to future dangerousness and other considerations, should Jones again be charged in a criminal case. SDCL 23-6-4 (maintaining criminal records for "punishment" purposes). Maintenance of such records for such uses is the "very purpose" the legislature instructed the state to form a criminal database. *Meinken*, 426 S.E.2d at 865. Thus, expungement infringes on the public's interest in preserving vital records that are informative to members of the public and law enforcement who may end up "dealing with" Jones in the future

and as evidence in aid of the state's administration of the criminal justice system. SDCL 23-6-5, -4.

Jones produced no evidence demonstrating that his personal interest in expungement outweighed the public's interest in maintaining records of his case. *Doe*, 819 S.E.2d at 65. When asked point blank "how is it in the best interest of the public to have the expungement," Jones could not identify anything other than the "stigma on myself." TRANSCRIPT at 15/11; FINDING OF FACT 9. But public interest is more than Jones' personal interest. *Kollman*, 46 A.3d at 1259. Being acquitted "does not automatically establish that [a defendant] is innocent." *Martinez*, 24 S.W.3d at 21; *New v. Weber*, 1999 SD 125, ¶ 16, 600 N.W.2d 568, 575. More to the point here, not guilty does not mean that Jones is not a threat to public safety. As far as the state is concerned, Jones poses a continuing risk to public safety, which stems not simply from the conduct captured on the shooting video but from his character and conduct prior to and since the murder trial.

Jones has a record of oppositional behavior in Brown County. He was charged with driving under revocation in 2013 (*State v. Jones*, 06 CRI 13-816 (5th Jud.Cir.)) and obstructing a law enforcement officer in 2018 (*State v. Jones*, 05 CRI 18-1478 (5th Jud.Cir.)). In 2023, Jones was charged with and convicted of DUI and with violating 24/7 conditions imposed incidental to that offense (*State v. Jones*, 06 CRI 23-761 (5th

Jud.Cir.)). In 2022, Jones was charged with and convicted of operating a boat while under the influence (*State v. Jones*, 43 CRI 22-41 (5th Jud.Cir.)). What is concerning about this latter incident is that Jones was combative when approached by law enforcement. Jones pulled the old "Do you know who I am?" line before identifying himself with "Brown County, Aberdeen, South Dakota. Murder. Jon Schumacher. I shot the mother fucker." TRANSCRIPT at 11/6, 11/20. This statement encapsulates the state's concern with expungement in this case. Jones' implication that law enforcement should mind themselves around him because he's a killer, and that he feels entitled to shoot anyone he considers a "mother fucker," raises public safety concerns.

Expungement is not "routine;" it depends on a "petitioner's 'conduct and character,' whether he or she has engaged in activities that have limited the risk of re-offending, or has avoided activities that enhanced that risk." *LoBasso*, 33 A.2d at 550; *Kollman*, 46 A.3d at 1261 (expungement meant "to reward efforts at rehabilitation" and "provide relief to certain one-time offenders"). Expungement is appropriate when an arrestee/defendant can affirmatively demonstrate that he has "permanently turned away from criminal activity and will not re-offend." *LoBasso*, 33 A.2d at 550. By these standards, Jones was not an appropriate candidate for expungement.

Jones killed someone under circumstances that exhibited a volatile nature, a sense of entitlement, and a sense of impunity. Jones exhibited these characteristics again during his encounter with law enforcement following the boating incident. Jones exhibited these characteristics yet again when he violated his 24/7 conditions after getting a DUI after his BUI. Jones' record suggests it is not safe to assume that the Schumacher shooting was a "one-off." TRANSCRIPT at 32/23. With his record of public intoxication and oppositional conduct, it is not hard to imagine Jones again being in a situation of overreacting to a "threat" or to someone the Jones clan considers a "terrible person" while armed. TRANSCRIPT at 21/7. Despite his acquittal, the public should be able to educate itself concerning the circumstances of the Schumacher shooting in order to decide if and how it chooses to deal with Jones in the future. SDCL 23-6-5; *Kollman*, 46 A.3d at 1261.

Finally, the public's interest in the integrity and efficacy of its criminal justice system counsels against expungement in Jones' case. A man was gunned down in Aberdeen, South Dakota, and his killer walked free. That person now tells the world that he was brought up on "false charges," was "falsely accused," and that any reporting on the murder charge is "false news" and "not true." TRANSCRIPT at 17/15, 6/15, 7/25, 8/20, 6/25. Public confidence in the criminal justice system requires that citizens be "armed with enough information to know what

questions to ask." *United States v. Kott*, 380 F.Supp.2d 1122, 1124 (C.D.Cal. 2004). Expungement in Jones' case would render the public "unable to learn" whether or not Jones was brought up on "false charges." *Kott*, 380 F.Supp.2d at 1124. If the citizenry of Aberdeen is to "keep a watchful eye on the workings" of its criminal justice system, is to inform itself of whether Jones is "innocent" as he claims or just "not guilty," it must have the information necessary to confirm or dispel Jones' allegations of misconduct by public officials. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-598 (1978).

CONCLUSION

The circuit court abused its discretion ordering the expungement of the records of Jones' arrest and murder charge for the killing of Jon Schumacher. The trial court erroneously viewed expungement as automatic upon acquittal and erroneously allowed Jones to meet his burden under SDCL 23A-3-30 with "weak" evidence. Jones produced no evidence of any disability he is living under as a result of his record or how expunging his record is in the *public's* interest. Meanwhile, Jones' record of oppositional and disorderly conduct since the shooting indicates that the records of the Schumacher killing have not lost their utility to the public or law enforcement for determining if and how they "deal with" Jones. *Meinken*, 426 S.E.2d at 879; SDCL 23-6-5. The records also have continuing utility as SDCL 19-19-404(b) and

aggravating evidence relevant to Jones' prosecution and sentencing should he re-offend. Accordingly, the state respectfully requests that this court reverse the trial court's order expunging Jones' records.

Dated this 31st day of October 2024.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's brief contains 5,149 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 31st day of October 2024.

Paul S. Swedlund
Paul S. Swedlund
SOLICITOR GENERAL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of October 2024 a true and correct copy of the foregoing appellant's brief was served electronically through Odyssey File and Serve on David Geyer at david@delaneylawfirm.com.

Dated this 31st day of October 2024.

Paul S. Swedlund
Paul S. Swedlund
SOLICITOR GENERAL

APPENDIX

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF THE EXPUNGMENT OF THE RECORD CONCERNING: JARRETT OWEN JONES	06CIV23-000518 EXPUNGEMENT ORDER

The above entitled action having come before the Court pursuant to a motion for expungement brought by Petitioner Jarrett Owen Jones. Petitioner was represented by his attorney, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota. Respondent was represented by the Assistant South Dakota Attorney General, Kelly Mamette. The Court having read Petitioner's motion, having heard the argument of the parties, and for good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the expungement of the criminal charge in 06CRI20-000022 satisfies the ends of justice and is in the best interests of the public as well as the Petitioner;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that expungement is granted as to the criminal charge found in 06CRI20-000022;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this order of expungement shall be reported to the Division of Criminal Investigation pursuant to SDCL 23A-5, and 23A-6;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall forward a nonpublic record of disposition to the Division of Criminal Investigation which shall be retained solely for use by law enforcement agencies, prosecuting attorneys, and courts in sentencing for subsequent offenses;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all official records, other than the nonpublic record of disposition to be retained by the Division of Criminal Investigation, shall be sealed along with all records relating to the Petitioner's arrest, detention, indictment, or information, trial, and disposition;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the effect of this expungement order is to restore the Petitioner to the status he occupied before his arrest or indictment,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no person as to whom an order of expungement has been entered shall be held thereafter under any provision of any

law to be guilty of perjury or giving a false statement by reason of the person's failure to recite or acknowledge the person's arrest, indictment or information, or trial in response to any inquiry made of the person for any purpose.

7/18/2024 4:13:33 PM

BY THE COURT:

Honorable Richard Sommers
Circuit Court Judge

Attest:
Young, Rebecca
Clerk/Deputy

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF THE EXPUNGMENT OF THE RECORD CONCERNING: JARRETT OWEN JONES.	06CIV23-000518 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on June 26th, 2024 at 9:00 o'clock a.m., on Jarrett Owen Jones' Motion for Expungement pursuant to SDCL 23A-3-27(3). Mr. Jones appeared personally and with his attorney of record, David A. Geyer. The State was represented by Assistant Attorney General, Kelly Marnette. The Court heard testimony and took evidence and being advised of the circumstances and upon review of the pleadings it makes the following:

FINDINGS OF FACT

1. This Court has jurisdiction over this matter.
2. On January 03, 2020, Mr. Jones was charged via Complaint with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022.
3. On January 09, 2020, Mr. Jones was re-charged via Indictment with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022.
4. On February 04, 2020, Mr. Jones was re-charged via Superseding Indictment with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022.
5. On February 07, 2020, the State filed a Part II Information for Habitual Offender against Mr. Jones in Brown County File #06CRI20-000022.
6. On March 08, 2022, a Brown County Jury returned a verdict finding Mr. Jones Not Guilty on all charges.
7. On March 10, 2022, this Court entered a Judgment of Acquittal.
8. Mr. Jones's acquittal was based upon his defense of self-defense with a firearm.

Filed on: 7/18/2024 Brown County, South Dakota 06CIV23-000518

9. Even though Mr. Jones was acquitted, he still is burdened with a stigma associated with his arrest and the charges pressed against him.

10. The heinous nature of the charges against Mr. Jones carries an inherent stigma that even after acquittal fails to dissipate.

11. That when one is charged with a crime in an indictment, their only recourse is to proceed to trial and seek acquittal.

12. That Mr. Jones's self-defense with a firearm is one of the pillars constitutionally guaranteed to Mr. Jones as well as the other citizens of South Dakota and this great nation pursuant to the 2nd Amendment of the United States Constitution.

13. That Mr. Jones's arrest record and charging documents are available to anyone with an internet connection across the world. Additionally, social media has exacerbated the ease at which the stigma associated with Mr. Jones's arrest record and charging documents can be perpetuated, albeit falsely.

14. That the ends of justice will be served by entry of an order of expungement in this matter as Mr. Jones was acquitted of all charges by a jury of his peers in Brown County, South Dakota.

15. That the best interest of the public will be served by entry of an order of expungement in this matter because it serves the public interest not to have its citizens carry with them the stigma of such a heinous nature after they asserted their constitutional right to a trial and were acquitted. This is especially true for a citizen who was acquitted after they asserted their constitutional right pursuant to the 2nd Amendment to self-defense.

16. That the best interest of Mr. Jones will be served by entry of an order of expungement in this matter because it serves his interest not to carry the stigma of being associated with such a heinous crime when he asserted his constitutional rights and was acquitted.

17. That any findings of fact deemed to be a conclusion of law shall be treated as such.

Based upon the above findings of fact, the Court enters the following:

CONCLUSIONS OF LAW

1. That Mr. Jones has established by clear and convincing evidence that the ends of justice will be served by the Court entering an order of expungement regarding Brown County Criminal file No. 06CRI20-000022.

Filed on: 7/18/2024 Brown County, South Dakota 06CIV23-000518

2. That Mr. Jones has established by clear and convincing evidence that the best interest of the public will be served by the Court entering an order of expungement regarding Brown County Criminal file No. 06CRI20-000022.

3. That Mr. Jones has established by clear and convincing evidence that the best interest of Mr. Jones will be served by the Court entering an order of expungement regarding Brown County Criminal file No. 06CRI20-000022.

4. That any conclusion of law deemed to be a finding of fact shall be treated as such.

Let judgment be entered accordingly.

7/18/2024 8:01:53 AM

BY THE COURT:

Attest:
Rathert, Carissa
Clerk/Deputy

Honorable Richard A. Sommers

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

* *

IN THE MATTER OF THE EXPUNGEMENT OF THE RECORD CONCERNING:

JARRETT OWEN JONES.

06CIV23-518

MOTION HEARING

* *

DATE & TIME: June 26, 2024
9:00 a.m.

BEFORE: THE HONORABLE RICHARD A. SOMMERS
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota, 57401

LOCATION: BROWN COUNTY CIRCUIT COURTROOM
BROWN COUNTY COURTHOUSE
Aberdeen, South Dakota

APPEARANCES: For the Petitioner, Jarrett Jones:

Mr. David A. Geyer
DELANEY, NIELSON & SANNES
Attorneys at Law
PO Box 9
Sisseton, SD 57262

For the State:

Ms. Kelly Marnette
Assistant Attorney General
22 Court Street, Suite 1
Aberdeen, SD 57401

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THE COURT: All right, this is the time set for a motion to expunge the record of Jarrett Jones, Civil File 23-518. Mr. Jones is present, along with his attorney David Geyer. State is represented by Assistant Attorney General Kelly Marnette.

I guess, preliminarily, Mr. Geyer, the court has reviewed your motion; however, in your prayer for relief it appears that you have cited the wrong subdivision. It's correct in the body, but in the prayer for relief you ask that the matter be dismissed pursuant to one year expiring from the dismissal of the charges by the prosecuting attorney. So I would assume, at a minimum, on that --

MR. GEYER: Yes, Your Honor, we would move to amend.

THE COURT: What is the State's position?

MS. MARNETTE: No objection.

THE COURT: All right. So the court would then amend the motion to provide for the relief being sought pursuant to 23A-3-27(3) versus (2).

Does either party wish to call witnesses today, Mr. Geyer?

MR. GEYER: Yes, we have two witnesses, Your Honor.

THE COURT: All right. You may call your first witness.

MR. GEYER: Before I do that, Your Honor, I just have a couple requests. One is we would ask that the court take judicial notice of underlying criminal file, that being State of South

Dakota versus Jarrett Owen Jones, 06CRI20-22. I don't believe the State has an objection.

MS. MARNETTE: No objection, Your Honor.

THE COURT: All right. Court would take judicial notice of that.

MR. GEYER: Then, Your Honor, any State witnesses would request be sequestered.

MS. MARNETTE: State has no witnesses.

THE COURT: State asking that Petitioner's witnesses be sequestered?

MS. MARNETTE: Yes, Your Honor.

MR. GEYER: We just have one other one, Makayla Jones.

THE COURT: I didn't understand a word you said.

MR. GEYER: We just have one other witness, Your Honor, Makayla Jones.

THE COURT: All right. So she'll have to step out.

You'll have to step out, Ms. Jones.

All right, you may call your first witness.

MR. GEYER: Thank you, Your Honor. Call Jarrett Jones.

THE COURT: Please come forward and I'll swear you in.

JARRETT OWEN JONES,

called as a witness, being first duly sworn, testified as follows.

THE COURT: State your name.

THE WITNESS: Jarrett Owen Jones.

THE COURT: Ms. Jones, please have a seat. Speak into the microphone. Speak slowly. Wait until Mr. Geyer or Ms. Marnette finish their questions before you begin your answer.

DIRECT EXAMINATION

BY MR. GEYER:

Q. Please state your name.

A. Jarrett Owen Jones.

Q. And, Mr. Jones, are you the same individual that was charged initially by complaint in file -- Brown County Criminal File 06CRI20-22 with first degree murder?

A. Yes.

Q. Okay. Where do you reside?

A. Excuse me?

Q. Where do you live?

A. Bath, South Dakota.

Q. And what is your date of birth?

A. July 23, 1971.

Q. And you were arrested on the offense of first degree murder in Brown County?

A. Yes.

Q. Do you remember what date you were arrested?

A. I do not.

Q. After that arrest you then retained now Honorable Marshall Lovrien, at the time, attorney Marshall Lovrien, to

represent and you, defend you in a first degree murder trial; correct?
A. Correct.
Q. That murder trial was conducted here in Brown County.
A. Yes.
Q. And you were acquitted on all charges; correct?
A. Correct.
Q. And you're asking the court today to, based on that acquittal, expunge your arrest record for that arrest; correct?
A. Correct.
Q. You believe that that serves the ends of justice in the best interest of the public, as well as yourself?
A. Yes.
Q. Why do you believe that?
A. I was falsely accused of a crime I didn't do.
Q. Do you feel a stigma associated with that arrest for that crime that you were acquitted of?
A. Absolutely, yes.
Q. Do you have concerns, specifically in this day and age regarding social media, as well as internet access of the public to arrest records?
A. Yes.
Q. What concerns do you have?
A. It's available to anybody that's got an internet connection; something that's not true.

Q. And you're aware, obviously, that there was media coverage of your charges, as well as your trial here locally; correct?
A. Correct.
Q. Does your concern extend beyond local coverage into the national sphere as it associates with your arrest?
A. Yes.
Q. Is part of that associated with the fact that anybody in the world with an internet connection, unless there is some state block, can access that arrest record?
A. Correct.
Q. Do you have concerns that people will continue to stigmatize you even though you were acquitted based on that arrest record?
A. Yes.
Q. Why?
A. People assume things and just -- they look at that and judge.
Q. Do you think that that puts an unfair stigma or undue hardship or punishment on you?
A. Yes.

MR. GEYER: I have no further questions, Your Honor.

THE COURT: Ms. Marnette.

CROSS-EXAMINATION

BY MS. MARNETTE:

Q. Sir, is your testimony today that you were falsely accused?
A. Yes.

Q. You admit that you shot and killed someone; correct?
A. Correct.
Q. Okay.
A. In self-defense.
Q. Okay. And that's what the jury found.
A. Yep.
Q. And in these records that you want expunged is proof that you were acquitted; correct?
A. Correct.
Q. And you say that there is a stigma?
A. Yes.
Q. And so how is it in the best interest of the public, not you, that these records be expunged?
A. Because I was acquitted.
Q. That's in the best interest of you that they be expunged; correct? That's your position?
A. Yes.
Q. How is it in the best interest of the public to take away their knowledge of what occurred here in Brown County?
A. Because it's false news.
Q. It's false news that you were arrested?
A. No, I was arrested.
Q. Okay. So you agree that that's true that you were arrested.
A. Yes.
Q. You were indicted. Yes?

A. Yes.
Q. You stood trial.
A. Yes.
Q. Social media, including your own family members, broadly broadcast the events of the trial; correct?
MR. GEYER: Objection as to calls for information -- objection. Calls for information that may be outside the personal knowledge.
The question I understand asked that he understand and know every social media post from every family member. I don't believe that anybody knows that.
THE COURT: Overruled.
MS. MARNETTE: You can answer, sir.
THE WITNESS: Repeat the question.
Q. Are you aware that -- including your family members -- that there was extensive social media on your arrest, your indictment, your trial, your immunity hearing; correct?
A. Correct, there was all sorts of people.
Q. Okay. And the news media reported quite heavily on this whole process, including your arrest, indictment, immunity hearing, trial and acquittal; correct?
A. Correct.
Q. And this expungement, if it were granted, wouldn't change those items, wouldn't it? It wouldn't erase what's been on the news and what you can now find on the internet that you

talked about earlier.
A. You're saying it wouldn't change anything?
Q. I'm asking you if the court file is expunged, does that erase social media?
A. No.
Q. Does it erase what the newspapers wrote about you?
A. Doesn't erase the past.
Q. You're not able to erase that you killed somebody; correct?
MR. GEYER: Objection.
THE COURT: Overruled.
Q. Is that correct?
A. Correct.
Q. Or that you stood trial.
A. Correct.
Q. Or that you were acquitted.
A. Correct.
Q. Since your acquittal have you made statements out in the public about your acquittal?
A. I have not made any public statements.
Q. Have you been out in the public -- I'm not talking a public press release, but in the public, outside of your own home, have you made statements about your acquittal to other people?
A. I'm very private, so within the family.
Q. Okay. Do you recall when you were arrested for boating under the influence?

A. Yes.
Q. Do you recall what you stated to the officer that day about your acquittal and what you had done to Jon Schumacher?
A. No.
Q. Let me remind you. Do you recall asking the officer who was doing the boat check if he knew who you were?
A. Okay.
Q. And then when he didn't know, do you recall saying, quote -- excuse my language, but I'm going to quote him directly, Your Honor.
MR. GEYER: I'd object to -- I'd object, Your Honor, as her statement. It's a quote from him. He says -- my recollection of his testimony minutes ago is he does not recall. She's saying that this is verbatim what he said. I don't have a copy of it. I don't believe it's been authenticated by an officer and I don't believe it's a transcript.
THE COURT: I think she's asking him if he recalls saying this to the officer, so he can answer that. The objection is overruled.
Q. (MS. MARNETTE) Jones said, quote, "Brown County, Aberdeen, South Dakota. Murder. Jon Schumacher. I shot the mother fucker."
A. I do not recall.
Q. Are you saying that you didn't say it?
A. Yes. I do not recall that.

Q. You don't recall it or there is no way that you ever would have said it?
A. It's not something I would say.
Q. So if this is on the body cam from the officer, you -- what would be your explanation for that?
MR. GEYER: Objection. Relevance.
THE COURT: Overruled.
Q. You can answer.
MR. GEYER: I'd object, Your Honor. She's asking him something that he does not recall saying, and my understanding she's asking him, well, if, hypothetically, you did say it, why would you say it, which I would say calls for speculation.
THE COURT: Mr. Geyer, no speaking objections, please. You can certainly come back and direct -- redirect.

She's asking him what the reason it would be -- that would be on the body camera if he did not say it. I don't know that he knows, but nonetheless, it's overruled. He can answer, if he knows.

MR. GEYER: I just want to clarify, Your Honor, just for the record, my objection is based on lack of knowledge and speculation, and my understanding is you're overruling those.
THE COURT: Well, I don't live in a vacuum, Mr. Geyer. I know that this was a Marshall County case. I presided over it. I know that the discovery was shared with both yourself and Mr. Jones, presumably. So he can answer, if he knows.

A. I do not recall.
Q. Would it refresh your memory if we played the body cam?
A. I was under the influence. I don't recall.
Q. So since you were acquitted, you broke the law; correct?
A. Yes.
Q. On more than one occasion.
A. Yes.
Q. So since you were acquitted, I think your testimony was that you have not been out and ever talked about this acquittal and bragged about it in the public.
A. Never bragged about anything to do with this.
Q. If you said those words does that sound like a brag to you?
MR. GEYER: Objection. Asked and answered. He said he does not recall saying that.
THE COURT: Overruled.
Q. The question is, if you said that, does that sound like a brag to you?
A. No.
Q. If you then talked about how you got exonerated and you were able to give the date to the officer, does that sound like something that, if you were under the influence, you would be able to do?
A. I do not recall.
Q. And if you were able to talk about the date of the offense, does that sound like you would have been under the influence?

A. I know I was.
Q. So if you had gone out and made these statements, you're saying that would not be a brag?
MR. GEYER: Objection. Asked and answered.
THE COURT: Sustained.
Q. So it's true you were arrested; correct?
A. Correct.
Q. And it's true you were acquitted.
A. Correct.
Q. So as you referenced earlier, "false news," neither of those things were false, were they?
A. I'm not sure how to answer that.
Q. You claimed earlier that this -- it was false news. So I'm asking you, what was false news about the fact that you were arrested?
MR. GEYER: Objection. Asked and answered.
THE COURT: Overruled.
A. I did not murder anybody.
Q. You were arrested for murder.
A. Yes.
Q. That is not false news; correct?
MR. GEYER: Objection. Asked and answered.
THE COURT: Overruled.
Q. That is not false news; correct?
A. Correct.

Q. And the fact that you were acquitted, that's not false news.
A. Correct.
Q. So you want to actually erase the acquittal from the public record?
MR. GEYER: Objection. Asked and answered.
THE COURT: Sustained.
Q. So, again, I'm going to go back, because I don't think you've answered the question, and I'm not talking about the best interests of you personally; how is it in the best interest of the public to have the expungement?
A. It's unfair stigma on myself.
Q. That sounds like it's something that you think it's in the best interests of you, but that doesn't sound like something that's in the best interest of the public, would you agree?
A. No.
Q. Do you agree that it's in the best interest of the public that records be open?
A. No.
Q. Ever?
MR. GEYER: Object as to vague.
THE COURT: Overruled.
A. No.
Q. They should never be open?
A. Why would they be?
Q. You believe it's in the best interest of the public that they

have the ability to review things that happened in the court system?
A. I don't know whose business it is.
Q. Is it important that people know about the facts when they're encountering you, whether in a business or personal matter, that they know you shot and killed someone?
A. No.
Q. You don't think it's in the best interest that it helps the public to understand what self-defense is?
A. Say that one more time.
Q. You don't believe it's in the best interest of the public to understand what self-defense is and when it applies?
A. Yes.
Q. And that it's in the best interest of the public to understand the criminal justice system?
A. Yes.

MS. MARNETTE: I have no further questions.

THE COURT: Mr. Geyer.

MR. GEYER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. GEYER:
Q. Mr. Jones, Ms. Marnette was asking questions about a BUI in Marshall County. Do you remember that?
A. Yes.
Q. And did you enter a plea of guilty to that charge?

A. Yes.
Q. Okay. So you're not disputing that you got a BUI in Marshall County after the acquittal; correct?
A. Correct.
Q. And that's a crime that you admitted to and accepted punishment; correct?
A. Correct.
THE COURT: Mr. Geyer, you've got to slow down.
Q. Now do you think that it's in the best interests of the public to have speculation regarding your situation?
A. No.
Q. And do you believe that the prominence of social media and the far-reaching nature of that would promote that?
A. Yes.
Q. Do you believe that the charges against you were false and should have never been brought?
A. Yes.
Q. Now the arresting -- or charging documents against you don't mention anything about you defending yourself, do they?
A. No.
MR. GEYER: I have no further questions, Your Honor.
MS. MARNETTE: Just one follow-up.

RECROSS EXAMINATION

BY MS. MARNETTE:
Q. You talked about speculation. Doesn't the court file contain

the full transcripts of the court -- of the jury trial?
A. I'm not sure.
Q. Well, I believe that the court has already taken judicial notice and can look and see that the entire transcript of the jury trial is there.

So if that is true that would alleviate speculation because the public could read everything that happened, everything you pled to. They can look at all the exhibits, and they can make their own mind up on the truth; correct?
A. I suppose.

MS. MARNETTE: Nothing further.

MR. GEYER: One follow-up, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. GEYER:
Q. Mr. Jones, do you think the individuals out in the general public are searching through hundreds of pages of court documents to ascertain the truth about the allegations that were made against you by the State?
A. Start that question again.
Q. Sure. Do you think somebody is more likely in the public to take the snidbit of the arrest date and the charge against you and draw conclusion or --
A. Yes.
Q. -- do you think that they're more likely to, as the State is eluding, print off hundreds of pages of documents, pay for

that with their own credit card, and actually go through and do it logically and legally; what do you think is more likely, they're going to jump to conclusions or dig through thousands of pages?

A. Jump to conclusions.

MR. GEYER: Thank you.

FURTHER RECROSS EXAMINATION

BY MS. MARNETTE:

Q. Sir, would you agree they only need to look at one document, and that would be Judgment of Acquittal?

A. Excuse me?

Q. They would only need to look at one document, the Judgment of Acquittal, correct, to know what happened to you; that you were acquitted.

A. Yes, that I was acquitted.

MS. MARNETTE: Okay. Nothing further.

MR. GEYER: Nothing further, Your Honor.

THE COURT: You may step down, sir.

(Whereupon, the witness is excused.)

THE COURT: You may call your next witness.

MR. GEYER: Thank you, Your Honor. We would call Makayla Jones.

THE COURT: Please come forward and I'll swear you in. Raise your right hand.

MAKAYLA JONES,

called as a witness, being first duly sworn, testified as follows:

THE COURT: State your name.

THE WITNESS: Makayla Jones.

THE COURT: Ms. Jones, please have a seat there. Please speak loudly into the microphone, and please speak slowly and wait until the attorneys finished with their questions before you begin your answer.

DIRECT EXAMINATION

BY MR. GEYER:

Q. Please state your name.

A. Makayla Jones.

Q. And, Makayla, do you know Jarrett Owen Jones?

A. Yes, I do.

Q. Okay. Are you related to him?

A. Yes.

Q. How are you related to him?

A. He's my father.

Q. And you're familiar with the charge of first degree murder that was levied against him by the State?

A. Yep.

Q. And you're familiar with the whole trial and the acquittal; correct?

A. Yes.

Q. Okay. Do you believe that your father, even after the acquittal, is being stigmatized because of his arrest for the charge of first degree murder?
A. Yes, I do.
Q. Why do you believe that?
A. What my dad did that night was protect his daughters against a terrible person, so I think that the satisfaction that it might give a few people to keep this on his record shouldn't trump his rights guaranteed him by the constitution.
Q. Do you think it's in the best interest of the public?
A. Yes, I do.
Q. Why?
A. Because my dad's not a dangerous person. Ask anybody who knows anybody that -- his family, his friends, he's one of the most amazing people I've ever met.
Q. And do you think that the stigma that follows your father, that that's a detriment to public?
A. No.
Q. Do you feel it's in the best interest for your dad to have the arrest records sealed?
A. Yes.
Q. Why?
A. Because he was found innocent in this courtroom.
Q. Do you think that the charges that he has have a serious and heinous nature to...

A. What was your question? Sorry.
Q. Do you believe that the charges, the allegations that the State made against your dad of first degree murder, do you think the severity of that has a pretty heinous insinuation towards your father?
A. Yes.
Q. More so than like a speeding ticket or DUI?
A. Very much so.
Q. Do you feel that in today's climate of social media, internet access, that that raises the issue regarding -- or the stigma against your father?
MS. MARNETTE: Your Honor, objection. This is getting very leading.
THE COURT: Sustained.
Q. Does the climate regarding social media have any bearing on your decision that you made regarding the stigma against your father?
A. No.
MR. GEYER: No further questions.
THE COURT: Ms. Marnette.

CROSS-EXAMINATION

BY MS. MARNETTE:
Q. Your father was not found innocent, would you agree?
MR. GEYER: Objection. He was acquitted. He's maintained his innocence.

THE COURT: The court knows what the definition of innocent and not guilty is, and there is a big difference between innocent and not guilty. I think I know that, so, anyway...

Just so everybody's aware, we don't need to spend a lot of time on whether he was innocent or not guilty, because he was not found innocent, he was found not guilty.

Q. (MS. MARNETTE) Ms. Jones, do you understand what an expungement does?

A. Yes.

Q. Does it erase what's on social media?

A. No.

Q. Does it erase what's in the news?

A. No.

Q. Does it erase what's in people's opinions already about your father?

A. No.

Q. What does it do?

A. It helps his life go on.

Q. How?

A. If he gets pulled over by police officers, they see that immediately. If he goes through TSA at an airport, they see that immediately. If he goes to a bank to get funding for his business, they see that.

Q. Okay. Has he, at any time, been denied to get through the airport security because of it?

A. No.
Q. Has he ever had a business loan or anything denied because of this?
A. Not that I'm aware, but I'm not going to answer yes or no.
Q. Okay. You're not aware of any.
A. No.
Q. So your in-the-best-interest-of-the-public is really just in the best interest of your father that this be expunged, would you agree?
A. I agree.
Q. Okay. So it's not in the best interest of the public to be denied access to information about what occurred?
A. I guess I could agree to that.
Q. Okay.

MS. MARNETTE: Nothing further.

THE COURT: Mr. Geyer.

MR. GEYER: No further questions.

THE COURT: You may step down. Thank you.

Does the State have any witnesses?

MS. MARNETTE: No, Your Honor.

THE COURT: Mr. Geyer, argument.

MR. GEYER: Thank you, Your Honor. Your Honor, we would move that the court expunge Mr. Jones' arrest record pursuant to the amended motion under subsection three of the applicable statute.

Mr. Jones established by clear and convincing evidence --

THE COURT: What has he established about the rights of the public? Because if you read the statute, that actually comes before the best interests of the defendant. So what would be the public's best interest by clear and convincing evidence that this be expunged?

MR. GEYER: Because I don't believe that it serves the best interest of the public --

THE COURT: That's a conclusionary statement, Mr. Geyer. Just tell me why. What testimony is there; what evidence is there that it's in the best interest of the public?

MR. GEYER: Mr. Jones testified that having the stigma on him, having these speculations in social media, would be alarming on the public. I think that's true.

THE COURT: I have no problem that it's a stigma on Mr. Jones, I understand that. And I understand that it would probably be in his best interests. But I'm asking -- because the statute is twofold. The statute clearly says -- and I'm not looking at your motion language -- clear and convincing evidence that the ends of justice and the best interests of the public, as well as the defendant.

I would agree that the ends of justice for Mr. Jones' standpoint would be -- from looking at it from his perspective it certainly would be the ends of justice. But I can't stop there, I have to look at the best interests of the public by

clear and convincing evidence.

MR. GEYER: I think the evidence establishes that in today's nature I think the court can obviously use its common knowledge that people -- the UJS, these arrest records are available to anybody on the internet that has access to it, and a credit card, can file, create an eCourts account; that's the way I understand.

And so the issue with that is the public is hurt when people go on, can see this arrest record, such heinous crime that didn't occur. I understand the State's assertion that -- what I mean is self-defense negates murder, that's why Mr. Jones was acquitted. So first degree murder did not occur, and so to allow this to stay on there harms the public discourse.

That's the problem we have here, Your Honor. That's the stigma that carries over into the public sphere, especially in today's climate where anybody can get a hold of this information and anybody can post it.

And I would propose that this is exact kind of case which this court should expunge in the best interest of not only Mr. Jones, but also the interest of the public for the reason stated, but also for the broader reason of -- this is obviously on the books -- the statute -- for a reason, and I don't think it's so people can avoid having an arrest record on a DUI, avoid having a speeding ticket. I think they have

to deal with those, you know, through explaining it.

I think it's for most heinous crimes that didn't occur, and in this case, according to the law, according to this court, it didn't occur.

Mr. Jones didn't murder anybody. He acted in self-defense. As this court is aware, this court held a fair trial with 12 jurors. Based upon the evidence, based upon the rulings, entered an acquittal, and that's the law.

And so cases like this, when you have an allegation of murder, which he was acquitted of; cases where you have a matter of child abuse, which aren't true and a person would be acquitted of; a case where you have somebody that was accused of rape and got acquitted, I don't think it helps the public, and obviously not the defendant that went to trial, got acquitted, to have this still in the public sphere.

Obviously there is First Amendment rights that the media exercised, and other people did during the trial, and we know we can't change that. But this court, in my opinion, should limit access and seal the arrest record based upon that.

I think these are one of the cases where a person is charged with such a heinous crime that they were acquitted of, I think it rises to that level and should be granted. Thank you.

THE COURT: Ms. Marnette.

MS. MARNETTE: Your Honor, if it was that simple it would be

automatic. It would be like if you've been acquitted, it would automatically be expunged, and that is not what the legislature said. They said that the court has to find by clear and convincing evidence that it's in the best interest of the public. There is no exception for what Mr. Geyer calls a heinous crime. I agree, this was a very heinous crime. That's one thing I will agree with Mr. Geyer on.

But if you look at what's in the best interest of the public, open records, the ability to know what happened, the right to know when they're encountering Mr. Jones the facts of what happened. Yes, he was acquitted and he can tell people, I was acquitted, I was found not guilty.

It's in the best interest of the public to understand the criminal justice system and the court file. Expunging this case, in particular this case, is not in the best interest of the public. They have presented no evidence, absolutely no evidence that it's in the best interest of the public; only that it's in the best interest of Mr. Jones because he feels there's this stigma. But if he felt there was a stigma, why would he be out announcing and bragging to the world about it?

Nothing further.

THE COURT: Under what circumstances, Ms. Marnette, would it -- would a court be able to reach the conclusion that expungement is in the best interest of the public if there was -- after an acquittal. I'm not talking about dismissals,

but I'm talking about after an acquittal.

MS. MARNETTE: I don't believe -- I think it could happen in a mistaken identity case. I think -- I mean, there are cases that it could happen. Not in self-defense case. Absolutely never in a self-defense case.

THE COURT: Why is that?

MS. MARNETTE: Why is that? Because we're not disputing the fact that he shot and killed somebody, okay. The question is whether the jury believed that it was in self-defense or believed that the State did not prove beyond a reasonable doubt that it was in self-defense -- or that it wasn't in self-defense.

THE COURT: The public here has all drawn their own conclusions about Mr. Jones, guilty or not guilty. There's people that agree with the jury verdict, there's people that would disagree.

But as to what he speaks of, and what his daughter speaks of, being stopped, or TSA, things that are never going to change anybody's opinion here, how is it that that doesn't come into play; that it if leads to a false perception about what they're dealing with.

MS. MARNETTE: It's not a false perception, it's a fact that this is someone who killed someone. And, yes, they were acquitted. That doesn't make it that, all of a sudden, the world shouldn't know about it. This doesn't expunge anything.

I mean, if there was some issue where he had to try to fill out an application for a bank loan and there is a question of, were you ever arrested for first degree murder, and he had to say, "yes," I mean, that might be something. They could have brought something like that here today, but there's -- those are questions that aren't going to get asked.

When you're going through the TSA they don't ask you, have you ever been arrested for a murder? They might ask, have you been convicted of a murder, and obviously he can say, "no," because he wasn't. But he was arrested, and this is looking at arrest records that he can't erase what happened.

And this is not going to erase social media, and it actually would be better for him to have the public court file available than to have just social media and some, you know, news media that may have been biased one way or the other.

This is the best record of what happened to him, so I would go so far as to say expunging this could actually hurt Mr. Jones.

THE COURT: All right.

Mr. Geyer, any rebuttal to any of that?

MR. GEYER: Just shortly, Your Honor. I would address Ms. Marnette's claim that open records laws means that nobody should have any arrest record expunged. Clearly that's not the case, otherwise the legislature would not allow this.

I think that the court is correct to highlight the

Second Amendment issue here, which is the public has -- everybody has the Second Amendment right, and I think when you carry that stigma for somebody that exercises that right it does damage the public.

I think that that right should be preserved, and I think that expunging Mr. Jones' arrest record here would preserve that and bolster that Second Amendment right, which is -- frankly, can be under attack by the State.

THE COURT: All right. Well, there is a different -- there is different issues at play here. The statute is not very helpful. There is really no case law to speak of that's helpful.

Mr. Jones was found not guilty by a jury of his peers. My personal feelings can't play a role in how I rule on this case or on this request. There is merit to both sides' arguments, but I think that -- I don't know that there is necessarily clear and convincing evidence, but I'm not sure that that should carry the day, either, of public's right.

He was acquitted. I think these statutes came about as a result of cases where individuals were acquitted and they had no recourse to try and get their record cleared.

In this case, Mr. Jones, the jury found you not guilty; not innocent. Because as I sit here, I'm never going to say that you were innocent, but you were found not guilty. And I think that based upon that finding, the court is not going to

second-guess the jury.

I don't know that you could ever find a situation where you're going to find clear and convincing evidence that it's in the public's best interest. Mr. Geyer may have a better argument that it's appropriate because people do exercise a right of self-defense or alleged right of self-defense. They have that right to do so and don't have to worry about somehow, some day, after being found not guilty, having this bite them.

So even though I think it's weak on the clear and convincing evidence, and even though I may or may not disagree with the jury verdict and what was arrived at, I think that this is an appropriate case for an order for expungement based upon the statute and the lack of case law involved in this matter.

He was acquitted by a jury of his peers. I don't know what else a person could do over and above that. That's the ultimate decision-making process that we use in our system to say that somebody is not guilty and if they're found not guilty.

This is not an allegation or a type of case where Mr. Jones was accused of repeated offenses of this nature, it was a one-off, and so I'm going to grant the relief. I may be wrong on that, but, but I think that this is one of those odd cases where it is appropriate based upon the singular nature

of the offense and the result is reached by the jury.

Mr. Geyer, you can draft the appropriate order.

MS. MARNETTE: Your Honor, the State is requesting Findings. Specifically you stated that it's weak on the clear and convincing evidence, so I'm going to ask you exactly what is the clear and convincing evidence in case we decide it appeal this.

THE COURT: Sure. Mr. Geyer, you can prepare the first round of Findings, and Ms. Marnette can object to whatever she feels is appropriate.

MR. GEYER: Gladly, Your Honor. Thank you.

THE COURT: All right. We'll be adjourned.

(Whereupon, the proceedings were adjourned at 9:46 a.m.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF BROWN)

I, Sara J. Zahn, Notary Public and Official Court Reporter in the above-named County and State, do certify that I reported in stenotype the proceedings of the foregoing matter; that I thereafter transcribed said stenotype notes into typewriting; that the foregoing pages, 1 through 33, inclusive, are a true, full and correct transcription of my stenotype notes of said proceedings.

Dated at Aberdeen, South Dakota this 2nd day of July, 2024.

/s/ Sara J. Zahn
Sara J. Zahn, RPR
Official Court Reporter
My Commission Expires:
January 2, 2028

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30770

IN THE MATTER OF THE EXPUNGEMENT OF
THE RECORD OF JARRETT OWEN JONES

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
Circuit Court Judge

BRIEF OF THE APPELLEE

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NOTICE OF APPEAL FILED JULY 24, 2024

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PRELIMINARY STATEMENT

Throughout this brief, Appellant will be referred to as the "State", and Appellee/Petitioner will be referred to as "Mr. Jones". All references herein to the transcript of the motion hearing held on June 26, 2024 will be referred to as "HT" followed by the page and line number. Citations to the Appellant's Appendix will be designated as "App." followed by the page number.

JURISDICTIONAL STATEMENT

The State is not an aggrieved party, and no substantial right is affected, so it does not have standing to appeal the Order Granting Expungement. Subsections (2) and (4) of SDCL § 15-26A-3 both require that a substantial right be affected to proceed with appeal. "As a general rule, an appellant must not only have an interest in the subject matter in controversy but must also be prejudiced or aggrieved by the decision from which [it] appeals." Smith v. Rustic Home Buildings, 2013 SD 9, ¶9. "In the absence of an aggrieved party it is appropriate to dismiss the attempted appeal." Id.

In this case, the State was given notice, and it appeared at the hearing, but beyond the hearing, the State has no standing to appeal because it is not an aggrieved party, and no substantial right was affected. The jury decides what the evidence proves. In this case, a jury determined that the evidence failed to prove Mr. Jones was guilty of murder beyond a reasonable doubt, and therefore he did not commit the crime of First-Degree Murder.

The State has no right to maintain records of criminal proceedings, but it does have a duty to maintain criminal statistics. The distinction between criminal records and

criminal statistics is important, because a review of the statutes cited by the State for keeping criminal statistics refers to "crimes", but not "arrests". SDCL 23-6-4, -5, -8.

Because the State is not an aggrieved party and a substantial right is not affected, this Court lacks jurisdiction and the appeal should be dismissed.

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXPUNGED THE RECORDS OF MR. JONES' ARREST AND CHARGE FOR FIRST-DEGREE MURDER PER SDCL 23A-3-26 *et seq.*

   The trial court granted Mr. Jones' motion for expungement because he established by clear and convincing evidence that the ends of justice will be served, the best interest of the public will be served, and the best interest of Mr. Jones will be served by the expungement of the records of arrest and charge for first degree murder.

   Most relevant authorities:

   SDCL 23A-3-27
   SDCL 23A-3-30

STATEMENT OF THE CASE

On January 03, 2020, Mr. Jones was charged via Complaint with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022. On January 09, 2020, Mr. Jones was re-charged via Indictment with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022. On February 04, 2020, Mr. Jones was re-charged via Superseding Indictment with First Degree Murder in violation of SDCL 22-16-4(1) in Brown County File #06CRI20-000022.

On February 07, 2020, the State filed a Part II Information for Habitual Offender against Mr. Jones in Brown County File #06CRI20-000022. The case went to jury trial. On March 08, 2022, a Brown County Jury returned a verdict finding Mr. Jones Not Guilty on all charges. On March 10, 2022, the Honorable Richard A. Sommers entered a Judgment of Acquittal.

On December 11, 2023, Mr. Jones moved the trial court to expunge the records pertaining to the Brown County file 06CRI20-000022 pursuant to SDCL 23A-3-27(3). The trial court held a hearing on June 26, 2024. The trial court granted Mr. Jones' Motion for Expungement. On July 18, 2024, the trial court entered its Findings of Fact and Conclusions of Law and Expungement Order. On July 24, 2024, the State appealed said Expungement Order.

STATEMENT OF THE FACTS

In its Appellant's Brief, the State includes many alleged facts that it likely used in the prosecution of Mr. Jones at his trial. However, those alleged facts are not relevant to the expungement of Brown County file #06CRI20-000022.

The only facts relevant to whether this Court affirms the expungement of Brown county file #06CRI20-000022 are as follows:

Mr. Jones was tried by a jury for First-Degree Murder in March of 2022. The State rested its case, and Mr. Jones then provided the defense of self-defense. On March 8, 2022, the jury returned a verdict of "Not Guilty" on all charges. On March 10, 2022, the Honorable Richard A. Sommers entered a Judgment of Acquittal.

On December 11, 2023, Mr. Jones moved to expunge Brown County file 06CRI20-000022. The State was noticed of the hearing, and the State appeared to cross-examine Mr. Jones and his witness, and to make an argument to the court. Despite the State's argument, the trial court granted Mr. Jones' motion for expungement. It found that the ends of justice will be served because Mr. Jones was acquitted. (App. 3). It also found that the best interest of the public will be served because it serves the public interest not to have its citizens carry with them the stigma of such a heinous nature after they asserted their constitutional right to a trial and were acquitted, especially for a citizen who was acquitted after they asserted their constitutional right of self-defense. (App. 3). It also found that the best interest of Mr. Jones will be served because it serves his interests not to carry the stigma of being associated with such a heinous crime when he asserted his constitutional rights and was acquitted. (App. 3, Findings of Fact, ¶¶ 14-16). The trial court concluded that Mr. Jones established by clear and convincing evidence that the ends of justice will be served and that the best interests of the public and of Mr. Jones will be served by expunging the record of Brown County file #06CRI20-000022. (App. 3, Conclusions of Law, ¶¶ 1-3).

STANDARD OF REVIEW

SDCL 23A-3-30 ultimately leaves expungement to the discretion of the trial court if the other requirements of the statute have been met. The State appeals arguing abuse of discretion. "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." Ronan v. Sanford Health, 2012 SD 6, ¶ 8, 809 N.W.2d 834, 836. "An abuse of discretion occurs only if no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." Hofeldt v. Mehling, 2003 SD 25, ¶ 9, 658 N.W.2d 783. 787.

ARGUMENT

1. Expungement law, generally

Mr. Jones moved to have Brown County file #06CRI20-000022 expunged pursuant to SDCL § 23A-3-27(3), which states:

> An arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested, for entry of an order expunging the record of the arrest:
>
> ...
>
> (3) At any time after an acquittal...

This statute does not apply to criminals who have been convicted. See In re Expungement of Oliver, 2012 SD 9, ¶¶ 12-13, 810 N.W.2d 350, 353.

SDCL § 23A-3-30 provides the standard for the arrested person to be granted expungement, which states in its entirety:

> The court may enter an order of expungement upon a showing by the defendant or the arrested person by clear and convincing evidence that the ends of justice and the best interest of the public as well as the defendant or the arrested person will be served by the entry of the order.

Unfortunately, there is no South Dakota case law comparable to the case at bar. SDCL § 23A-3-30 provides the standard to be applied by the court in determining if

expungement is appropriate. The first condition listed is that the ends of justice will be served by expungement of the arrest records. SDCL § 23A-3-30. "By justice we mean that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts." Sioux Falls v. Marshall, 48 S.D. 378, 384-85, 204 N.W. 999, 1002 (1925) (citing Meeks v. Carter, 5 Ga.App. 421, 63 S.E. 517 (1909)). The second condition is that the best interest of the public will be served by expungement of the arrest records. SDCL § 23A-3-30. The last condition is that the best interest of the defendant will be served by expungement of the arrest records. SDCL § 23A-3-30.

Suspension of the imposition of sentence carries the same standard as expungement. See SDCL § 23A-27-13 ("... a court having jurisdiction of the defendant, if satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may, without entering a judgment of guilt, and with the consent of the defendant, suspend the imposition of sentence..."). "The granting of suspended imposition of sentence ... is strictly a matter of grace and rests solely within the discretion of the court." State v. Divan, 2006 SD 105, ¶ 16, 724 N.W.2d 865, 872 (citation omitted). Like SDCL § 23A-27-13, the trial court has the discretion whether to grant expungement under SDCL § 23A-3-30.

The State includes a large amount of case law from other states in an attempt to expand the standard that Mr. Jones is required to meet in order to be granted expungement of his arrest records. However, most, if not all, of the State's cited case law is inapplicable to this matter.

Contrary to the State's assertion, SDCL § 23A-3-30 does not imply that the applicant must provide specific evidence of adverse consequences, and that the adverse consequences must outweigh the state's interest in maintaining accurate criminal and judicial records. The State does not cite any South Dakota case law to support the need for an adverse consequence resulting from an arrest record to justify expungement. Rather, it cites case law from other states that are distinguishable from the case at bar, and whose case law is not applicable to this matter because of the difference in expungement statutes from the South Dakota expungement statutes.

One case the State cites is In re LoBasso, 423 N.J. Super. 475, 33 A.3d 540 (Super. Ct. App. Div. 2012). This is a New Jersey case where the petitioner attempted to get records of his conviction of third-degree eluding expunged early, pursuant to NJSA 2C:52-2(a)(2)(2010) [1], which enacted that the waiting period for expungement can be decreased from ten years to five years if "the court finds in its discretion, that expungement is in the public interest, giving due consideration to the nature of the offense, and the applicant's character and conduct since conviction." NJSA 2C:52-2(a)(2)(2010). This early pathway to expungement in New Jersey carries a higher burden than the ten year expungement standard under NJSA 2C:52-2(a)(2010). It must be noted

[1] "In all cases, except as herein provided, *wherein a person has been convicted of a crime* under the laws of this State and who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of 10 years from the date of his conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later, present a duly verified petition as provided in section 2C:52-7 to the Superior Court in the county in which the conviction was entered praying that such conviction and all records and information pertaining thereto be expunged." N.J. Stat. § 2C:52-2(a)(2010). (emphasis added).

that this New Jersey statute applies to *convicts*, not to individuals that have been tried and acquitted. In LoBasso, the court needed proof to grant the "extraordinary exceptional relief" to the petitioner for expungement of his *conviction* after only five years, rather than the typical ten years. The only similarity between this New Jersey standard for expungement and South Dakota's standard for expungement is that it should be in the public interest. However, the considerations for expunging a convicted criminal's record must be stricter than the considerations for expunging an acquitted individual's record. The considerations used in LoBasso to determine whether that petitioner met the high standard for granting early pathway expungement of a *conviction* record should not be applied to this case, when South Dakota has its own standard for expunging records for *acquitted* defendants.

Another case cited by the State is In re Kollman, 210 N.J. 557, 46 A.3d 1247 (2012). This is also a New Jersey case, where the petitioner had plead guilty to third-degree distribution of a controlled substance, and petitioned for expungement using the five-year early pathway to expungement. The trial court denied the petition due to the serious nature of the offense, but New Jersey Supreme Court reversed and remanded since the petitioner met the burden of proving why expungement is in public interest. Id. Again, New Jersey's heightened standard for early pathway expungement of conviction records should not be applied here because it is different than the standard set forth in SDCL § 23A-3-30. However, it should be noted that the New Jersey Supreme Court held, "[T]he statute does not allow judges to reject expungement applications based on categorical or generic grounds." Kollman, 46 A.3d at 1258. Likewise, SDCL § 23A-3-30 does not allow the denial of expungement based on categorical or generic grounds.

It must be noted that the State is patching together non-persuasive case law to argue that SDCL § 23A-3-30 implies something that it does not. In the Appellant's Brief, the State writes, "In evaluating the ends of justice, courts consider a petitioner's character and conduct, such as the 'facts related to an arrest that did not lead to conviction' and 'whether he or she has engaged in activities that have limited the risk of-reoffending, or has avoided activities that enhanced that risk.'" (See Appellant's Brief, p. 9). The State cites LoBasso and Kollman to support its statement. However, neither LoBasso nor Kollman use the term "ends of justice". The LoBasso and Kollman courts consider "facts related to an arrest that did not lead to a conviction, if supported by cognizable evidence, and the court makes an appropriate finding, after a hearing if necessary" which may "offer insight into an *applicant's character and conduct*", and not in consideration of the ends of justice. LoBasso, 33 A.3d at 550; Kollman, 46A.3d at 1259 (emphasis added). The LoBasso and Kollman courts also consider whether a petitioner has engaged in activities that limit the risk of re-offending, or has avoided activities that enhance that risk in connection with *the petitioner's character and conduct since conviction,* and not in consideration of the ends of justice. Kollman, 46 A.3d at 1259. Likewise, the LoBasso court considers job training or education, compliance with legal obligations, maintenance of relationships that promote law abiding behavior, and severing of relationships with persons in the criminal milieu *in connection with a petitioner's character and conduct,* and not in consideration of the ends of justice. LoBasso, 33 A.3d at 550. A petitioner's character and conduct since conviction is a required consideration spelled out in New Jersey's expungement statute. NJSA 2C:52-2(a)(2)(2010). This consideration is not spelled out in SDCL § 23A-3-30.

Another case cited by the State is Meinken v. Burgess, 262 Ga. 863, 426 S.E.2d 876 (1993) to support its argument that the State maintaining arrest records is incorporated into SDCL § 23A-3-30 because of said statute's public interest standard. The Georgia Legislature reserved expungement of records for exceptional cases. Meinken, 262 Ga. at 865. Under O.C.G.A. 35-3-37(c)(1993)[2], if criminal records were inaccurate, incomplete or misleading, then the court may either order that the records be expunged, modified, or supplemented. Georgia has expressed a public policy favoring the maintenance and dissemination of criminal records. Meinken, 262 Ga. at 865. However, South Dakota has no such established public policy. The Georgia expungement statute clearly favors maintaining criminal records, but SDCL § 23A-3-30 has a completely different goal – "to restore the defendant or arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest or indictment or information." SDCL § 23A-3-32. The plain language of SDCL § 23A-3-30 does not support implementing the requirement that "special factors must exist that either diminish the state's interest in maintaining the records or heighten the impact of the existence of

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[2] "If an individual believes his criminal records to be inaccurate or incomplete, he may request the original agency having custody or control of the detail records to purge, modify, or supplement them and to notify the [Georgia Crime Information Center] of such changes. Should the agency decline to act or should the individual believe the agency's decision to be unsatisfactory, the individual or his attorney may, within 30 days of such decision, enter an appeal to the superior court . . . to acquire an order by the court that the subject information be expunged, modified, or supplemented by the agency of record. The court shall conduct a de novo hearing and may order such relief as it finds to be required by law. . . . Should the record in question be found to be inaccurate, incomplete, or misleading, the court shall order it to be appropriately expunged, modified, or supplemented by an explanatory notation."
O.C.G.A. § 35-3-37(c)(1993).

those records on the defendant and thus warrant expungement." Meinken, 426 S.E.2d at 879.

While SDCL §§ 23-6-8, -4, and -5 govern the maintenance of criminal statistics, these statutes simply require the statistics to be kept and organized "in order to permit easy interchange of information and records." SDCL § 23-6-8. The expungement of records does not imply destroying the records, *see* SDCL § 23A-3-26, so criminal statistics taken from judicial records and already recorded in a database would not be destroyed except in certain circumstances. *See* SDCL § 23-6-8.1. Therefore, the expungement of records would not alter recorded criminal statistics. Also, in this case, the administration of criminal justice has been completed since Mr. Jones was tried and acquitted, and therefore is not a criminal offender from the first-degree murder charge. See SDCL § 23-6-4. These statutes do not imply that the public's interest in maintaining criminal statistics outweighs the best interest of Mr. Jones. Nor does SDCL § 23A-3-30 place the public's interest in maintaining criminal statistics above the best interest of Mr. Jones. Rather, the best interest of both the public and Mr. Jones must be considered together.

The State adds a burden onto Mr. Jones, stating that he must "demonstrate that being free of any disabilities associated with having a record outweighs the public's need for access to the records." (Appellant's Brief, p. 11). Again, the State uses non-instructive case law to support its contention. New Jersey's law on expungement concerns those who have been convicted of crimes. The public's interest in knowledge of crimes that were actually committed is not the same as the public's interest in knowledge of acquittals. When a defendant is acquitted, it means that there was a reasonable doubt that the

defendant committed the crime with which he was charged. "Reasonable doubt is that state which after the consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." State v. Brewer, 86 S.D. 434, 438, 197 N.W.2d 409, 411 (1972). New Jersey Legislature may feel that its citizens need to be informed of convicted criminals. South Dakota Legislature has not burdened acquitted individuals with proving their interests outweigh the public's need for access to their judicial records.

It also must be noted that the State misstates the case law in Martinez v. State, 24 S.W.3d 10 (Ct.App.Mo. 2000). The State writes, "Public safety imperatives can be frustrated when records are expunged, particularly when, despite a petitioner's acquittal, 'his arrest was not based on false information ... and there was 'probable cause' to believe [the petitioner] had committed the charged offense" citing Martinez, 24 S.W.3d at 14. (See Appellant's Brief, p. 11). The Martinez case has nothing to do with public safety, nor does it state that expunged records may frustrate public safety imperatives. The State's quotation of Martinez is simply the court identifying the prosecutor's grounds for its motion to dismiss the expungement action. Martinez, 24 S.W.3d at 14. The standard for expungement in Missouri[3] is vastly different than South Dakota's standard for

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[3] Notwithstanding other provisions of law to the contrary, any record of arrest recorded pursuant to section 43.503, RSMo, may be expunged if the court determines that the arrest was based on false information and the following conditions exist:

(1) There is no probable cause, at the time of the action to expunge, to believe the individual committed the offense;

(2) No charges will be pursued as a result of the arrest;

(3) The subject of the arrest has no prior or subsequent misdemeanor or felony convictions;

(4) The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest; and

expungement. Also, public safety is not a consideration in expunging records in South Dakota. See SDCL § 23A-3-30. Rather, Missouri courts recognize that a case resulting in acquittal "is one of the rare 'extraordinary circumstances' that may warrant an equitable order of expungement." Martinez, 24 S.W.3d at 17.

Lastly, the State cites People v. Carroccia, 352 Ill. App. 3d 1114, 817 N.E.2d 572 (2004), where the petitioner was charged with first-degree murder, acquitted, and still denied expungement. However, Carroccia is also distinguishable from the case at bar. The standard for expungement in Illinois is "good cause shown"[4], which is not the same as South Dakota's standard. Also, the court in Carroccia denied expungement in part because there was an ongoing civil suit concerning the underlying criminal charges, and the court held that the petitioner could again seek expungement once the federal civil suit was resolved. Carroccia, at 1123-1124. In the case at bar, the State is not asserting that a federal civil suit or an ongoing need by another court for Mr. Jones' arrest records exists.

Again, many courts recognize that acquittal is one of the extraordinary circumstances that may warrant expungement of records. Martinez, 24 S.W.3d at 17.

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(5) No civil action is pending relating to the arrest or the records sought to be expunged.

§ 610.122 R.S.Mo. (1998).

[4] "Whenever an adult ... charged with a violation of ...a felony or misdemeanor, is acquitted or released without being convicted[,] ... the Chief Judge of the circuit wherein the charge was brought, any judge of that circuit designated by the Chief Judge, or ... the presiding trial judge at the defendant's trial may upon verified petition of the defendant order the record of the arrest expunged from the official records of the arresting authority and the Department [of State Police] and order that the records of the clerk of the circuit court be sealed until further order of court upon good cause shown and the name of the defendant obliterated on the official index required to be kept by the circuit court clerk under Section 16 of the Clerk of Courts Act."

20 ILCS 2630/5(a) (West 2000).

Expungement after an acquittal is commonly written into many states' legislation. *See* Commonwealth v. Lutz, 2001 PA Super 331, ¶ 10, 788 A.2d 993, 998 ("Our Supreme Court has held that in cases terminated by reason of a trial and acquittal, a petitioner is automatically entitled to the expungement of his arrest record.") (Pennsylvania); 8 G.C.A. § 11.10(a) ("The official records of the court, the Attorney General, and the police reports in connection therewith dealing with a violation or attempted violation by an adult of territorial law or a regulation having the force and effect of law *shall* be expunged when the subject of the report is acquitted of the offense charged...") (Guam); Miss. Code Ann. § 99-19-71(4) ("Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and ... the person was found not guilty at trial.") (Mississippi); Ky. Rev. Stat. § 431.076 ("if a court enters an order of acquittal of criminal charges against a person, ... the court shall order the record expunged upon the expiration of thirty (30) days") (Kentucky); Tex. Code Crim. Proc. Art. 55.01(a) ("A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if: (1) the person is tried for the offense for which the person was arrested and is: (A) acquitted by the trial court ...") (Texas); Iowa Code § 901C.2(1)(a)(1) ("the court shall enter an order expunging the record of such criminal case if the court finds that the defendant has established that all of the following have occurred, as applicable: (1) The criminal case contains one or more criminal charges in which an acquittal was entered for all criminal charges, or in which all criminal charges were otherwise dismissed...") (Iowa).

While SDCL § 23A-3-30 does not offer an automatic expungement based on acquittal, it does not place a high burden on an acquitted petitioner. Again, it has the same standard as the suspension of imposition of sentence, which is commonly granted by trial court judges. See SDCL § 23A-27-13. Further, there is ample law, as shown above, that supports the expungement of arrest records and criminal charges following acquittal.

2. The trial court did not abuse its discretion in granting expungement.

The issue presented to this Court is whether the trial court abused its discretion in granting Mr. Jones' motion for expungement. The trial court did not abuse its discretion, and properly granted said motion because Mr. Jones' proved by clear and convincing evidence that the expungement of Brown County file #06CRI20-000022 will serve the ends of justice, the best interest of the public, and the best interest of Mr. Jones.

The State argues that the trial court believed that acquittal automatically entitled Mr. Jones to expungement. (Appellant's Brief, p. 14). However, a review of the record would show that the trial court was well aware of SDCL § 23A-3-30 and the standards that must be met under it. The trial court specifically mentioned that it needs to look at the ends of justice and the best interests of the public in making its decision on Mr. Jones' motion.

> COURT: I have no problem that it's a stigma on Mr. Jones, I understand that. And I understand that it would probably be in his best interests. But I'm asking – because the statute is twofold. The statute clearly says – and I'm not looking at your motion language – clear and convincing evidence that the ends of justice and the best interests of the public, as well as the defendant.
> I would agree that the ends of justice for Mr. Jones' standpoint would be – from looking at it from his perspective it certainly would be the ends of justice. But I can't stop there, I have to look at the best interests of the public by clear and convincing evidence.

(HT 25:15-26:1).

Furthermore, the trial court found in its Findings of Fact that "the ends of justice will be served by entry of an order of expungement in this matter as Mr. Jones was acquitted of all charges by a jury of his peers", that "the best interest of the public will be served by entry of an order of expungement in this matter because it serves the public interest not to have its citizens carry with them the stigma of such a heinous nature after they asserted their constitutional right to a trial and were acquitted. This is especially true for a citizen who was acquitted after they asserted their constitutional right pursuant to the 2nd Amendment to self-defense." (See Findings of Fact, ¶¶ 14-15). The trial court also found that "the best interest of Mr. Jones will be served by entry of an order of expungement in this matter because it serves his interest not to carry the stigma of being associated with such a heinous crime when he asserted his constitutional rights and was acquitted." (See Findings of Fact, ¶ 16). The trial court concluded in its Conclusions of Law that Mr. Jones established by clear and convincing evidence that the ends of justice, the best interest of the public, and the best interest of Mr. Jones will be served by the Court entering an order of expungement. (See Conclusions of Law, ¶¶ 1-3).

The State contends that the trial court should have applied the public interest standards of expungement outlined in People v. Carroccia, 352 Ill. App. 3d 1114, 817 N.E.2d 572 (2004), to this matter. First, it must be noted that the trial court asked the State, "Under what circumstances … would it – would a court be able to reach the conclusion that expungement is in the best interest of the public if there was – after an acquittal[?]" (HT 28:22-25). The State responded that expungement would never be in the best interest of the public in a self-defense case. (HT 29:2-5). The State opts for a categorical decision that expungement would never be allowed in a self-defense case, but

the State offers no law to support this. In fact, the New Jersey court specifically ruled against this. Kollman, 46 A.3d at 1258. Further, at the hearing, the State could not provide an example of when it is in the best interest of the public to expunge records after an acquittal, pursuant to the trial court's question.

Second, the Carroccia case is not instructive here because of the difference in statutory law from South Dakota, as explained above, and because of the difference in facts. The defendant in Carroccia was acquitted of the charge of First-Degree Murder, but the trial court there said there was a lot of circumstantial evidence of the crime. Carroccia, at 1116. Here, Mr. Jones exercised his right to self-defense pursuant to the Second Amendment of the United States Constitution and SDCL 22-18-4.1 ("A person is justified in using ... deadly force if the person reasonably believes that using ... deadly force is necessary to prevent imminent death or great bodily harm to himself, herself, or another, or to prevent the imminent commission of a forcible felony. ...") Most importantly, the jury agreed that Mr. Jones was defending himself and therefore did not commit First-Degree Murder.

This case was not determined on circumstantial evidence and did not leave the question of who is guilty of murder, but it confirmed that Mr. Jones was acting in self-defense. Citizens who exercise their right to defend themselves and are charged with murder have only one option: to proceed to trial and seek acquittal. If a jury finds them not guilty, then it is in the public's best interest that those citizens stop incurring the stigma of murder charges, and not be labelled as a dangerous murderer by the rest of the public who do not have all the facts of the case. Citizens who defend themselves with a

firearm pursuant to the Second Amendment and SDCL 22-18-4.1 should not be burdened with a categorically inexpungeable murder charge after they were acquitted.

Mr. Jones did not need to produce evidence that his arrest or indictment was intrinsically unjust, such as being based on false information or lack of probable cause, like the petitioner in Martinez v. State, 24 S.W.3d 10 (Ct.App.Mo. 2000). (See Appellant's Brief, p. 16). Missouri's expungement statute specifically requires such a showing, but SDCL § 23A-3-30 does not. The State repeatedly attempts to place other states' burdens of proof onto Mr. Jones; burdens that are not outlined in South Dakota's legislation.

The State also believes that it had probable cause to charge Mr. Jones, so expungement would not be proper pursuant to Meinken v. Burgess, 262 Ga. 863, 426 S.E.2d 876 (1993). As explained above, Meinken is not instructive here, either, because of the difference in law and facts. The question in Meinken was "what is an exceptional case warranting expungement." Meinken, at 866. This is not the issue in the case at bar, nor is it the law in South Dakota. South Dakota does not require "exceptional cases" to warrant expungement. Whether there was probable cause for the arrest of Mr. Jones is not a consideration required under South Dakota law for expungement.

Again, whether to expunge an acquitted individual's record falls within the discretion of the trial court, similar to that of the suspended imposition of a sentence. See SDCL § 23A-27-13; State v. Divan, 2006 SD 105, ¶ 16, 724 N.W.2d 865, 872. Here, the trial court considered all the facts presented to it by the State and by Mr. Jones. In its discretion, the trial court determined that the standards of SDCL § 23A-3-30 were met and granted Mr. Jones' motion for expungement.

In its brief, the State spends a lot of time explaining the alleged contents of the video it offered at the trial of Mr. Jones. The State obviously disagrees with Mr. Jones' acquittal, and it is trying to keep Mr. Jones burdened by the indictment even after his acquittal. The State leaves out the defense's evidence and argument, trying to convince this Court of Mr. Jones' guilt. However, simply because the State says the video does not show threatening behavior or fear, it does not mean that the threatening behavior, fear, and tension were not present. A video does not always tell the whole story. More importantly, the jury found Mr. Jones' not guilty by self-defense.

The State also contends that Mr. Jones' record of the first-degree murder charge is potential evidence at trial under SDCL § 19-19-404(b), or at sentencing in relation to potential future criminal charges, and should not be expunged. (See Appellant's Brief, p. 18). However, "An expungement returns the individual to the same legal status they occupied prior to the 'arrest or indictment or information' that was expunged." In re Jarman, 2015 SD 8, ¶ 11, 860 N.W.2d 1, 6. "[E]xpungement does not erase the underlying conduct or behavior." Id. Therefore, the events that led to Mr. Jones' first-degree murder charge may be permitted as "other acts" evidence at trial pursuant to SDCL 19-19-404(b) regardless of expungement. If SDCL § 19-19-404(b) provided reason not to expunge records, then no records would ever be expunged. This was not the intent of the Legislature when it enacted SDCL § 23A-3-27 and SDCL § 23A-3-30. Further, the expunged records are still available to "law enforcement agencies, prosecuting attorneys, and courts in sentencing the arrested person for subsequent offenses." SDCL § 23A-3-31. Mr. Jones should not be denied expungement based on the potential relevance of his charges in the future should he be charged again.

Mr. Jones does not need to provide evidence that his personal interest in expungement outweighs the public's interest in maintaining records of his case, contrary to the State's position. (See Appellant's Brief, p. 19). Rather, Mr. Jones needed to show that it would serve the ends of justice, the best interest of the public, and the best interest of Mr. Jones that his record be expunged. SDCL § 23A-3-30. The trial court found that Mr. Jones met these standards by clear and convincing evidence. (See Findings of Fact and Conclusions of Law).

Mr. Jones is not a threat to public safety. The State mentions charges against Mr. Jones in 2013 and 2018, yet fails to mention that both cases were dismissed by the prosecutor. Further, the State's opinion that Mr. Jones' statement to law enforcement during a boating incident in 2022 implied that law enforcement should mind themselves around him, and that Mr. Jones feels entitled to shoot anyone he considers a "mother f*****", is a complete misinterpretation of Mr. Jones' alleged statement. It must be noted that Mr. Jones was not charged with obstruction or resisting arrest during the boating incident in 2022. Also, Mr. Jones' convictions were misdemeanor offenses, not violent felonies. Lastly, Mr. Jones does not request expungement of any convictions; he only requests expungement of the records of the first-degree murder charge, Brown County file #06CRI20-000022. Mr. Jones' convictions do not change the fact that he was acquitted of first-degree murder by a jury of his peers.

Finally, the State believes that the public's interest in the integrity and efficacy of its criminal justice system prohibits expungement in this matter. It is true that the public has a common law right to access certain judicial records. However, if expungement was improper because the public would not be able to learn about Mr. Jones' charges and the

disposition of the case, then no expungement would ever be proper. "It is uncontested … that the right to inspect and copy judicial records is not absolute." Nixon v. Warner Communications, 435 U.S. 589, 598 (1978). Mere interest in accessing judicial records is not enough to show that it does not serve the public interest in expunging Brown County file #06CRI20-000022. This is especially true because Mr. Jones exercised his right to self defense and his right to a jury trial, and it is in the public interest to preserve those rights, not to punish those who exercise them. The public's access to Mr. Jones' records should not prevent Mr. Jones' expungement.

CONCLUSION

The trial court properly found that Mr. Jones showed by clear and convincing evidence that it will serve the ends of justice, the best interest of the public and the best interest of Mr. Jones to grant his Motion for Expungement. The State incorrectly placed other states' burdens for expungement onto Mr. Jones; burdens that are not included in South Dakota's statutes. Mr. Jones met his burden under SDCL § 23A-3-30. As such, Mr. Jones respectfully requests this Court to affirm the trial court's Order Granting Expungement.

Date this 16 day of December 2024.

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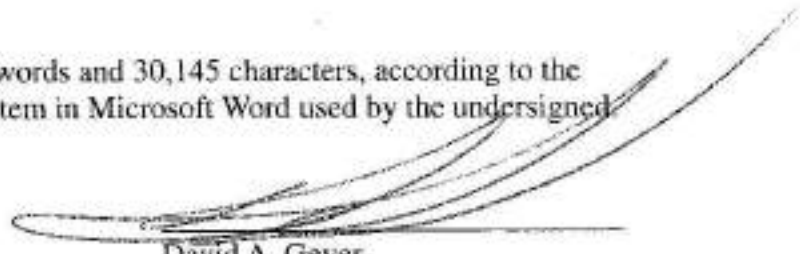
CERTIFICATE OF COMPLIANCE

David A. Geyer, one of the attorneys for Appellee, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellee's brief does not exceed 32 pages;

b. The body of Appellee's brief was typed in Times New Roman 12 point typeface; and

c. Appellee's brief contains 5,967 words and 30,145 characters, according to the word and character counting system in Microsoft Word used by the undersigned.



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CERTIFICATE OF SERVICE

I certify that on the 16 day of December 2024, a true and correct copy of the Brief of the Appellee was electronically transmitted by the Clerk's Office or mailed first class mail, postage prepaid, emailed, hand delivered or faxed by the undersigned this date to the parties listed below:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30770

IN THE MATTER OF THE EXPUNGEMENT OF
THE RECORD OF JARRETT OWEN JONES

APPEAL FROM THE CIRCUIT COURT
5th JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
Circuit Court Judge

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Notice of Appeal Filed July 24, 2024

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The State of South Dakota files this reply brief in support of its appeal of the trial court's order expunging the record of appellee Jarrett Jones' arrest and charges for the shooting and killing of Jon Schumacher. Because the trial court abused its discretion in granting Jones' petition, the expungement order appealed from must be vacated.

ARGUMENT

Jones' response argues that expungement law supports his petition for expungement and further argues that the trial court did not abuse its discretion in granting the petition. Reduced to its essence, Jones continues to contend that his acquittal is the overriding consideration. But acquittal is nothing more than an eligibility criterion under SDCL 23A-3-27. Even in cases of acquittal, conditions imposed by SDCL 23A-3-30 must be satisfied. Because of Jones' mistaken belief that acquittal creates a presumption in favor of expungement, his response is long on touting his acquittal but short on demonstrating how the ends of justice or the public interest (as opposed to simply his own interest) are served by expungement in his case.

1. Expungement Law Generally

Jones argues that out-of-state cases cited by the state are distinguishable, and therefore "inapplicable," because they interpret statutes which (unlike South Dakota's) provide expungement to convicted persons or have different standards. These are distinctions

without a difference here. For purposes of this case, the only distinction of consequence between South Dakota's and other states' laws is whether expungement for cases of arrests resulting in acquittal is automatic or conditional. Beyond that, once expungement is made conditional, state legislatures can adopt whatever standards they see fit to apply to whatever form of expungement they choose to offer.

Thus, the central point of Jones' effort to distinguish South Dakota's expungement laws from those of other states, *e.g.* that "the high standard for granting . . . expungement of a *conviction* record should not be applied" here, is merely aspirational. RESPONSE at 6 (italics in original). The law is the law regardless of what Jones thinks it "should" be. South Dakota's legislature saw fit to adopt the same high "public interest" standard to arrests resulting in acquittals that other states apply to convictions. *In re LoBasso*, 33 A.3d 540 (N.J.Super. 2012). Thus, how other states interpret the "public interest" standard is informative here whether applied to an arrest or a conviction.

The state does not pretend that cases from other jurisdictions are controlling. But how other states interpret or apply their statutes is certainly instructive and persuasive. Nor is the state claiming that the eligibility criteria used in other states control Jones' eligibility in South Dakota. South Dakota's eligibility criteria are spelled out in SDCL 23A-3-27. But, as in other states, those criteria are subject to standards, and those standards are in turn judged by factors developed by courts.

LoBasso, 33 A.3d at 544, 551. The diversity of expungement jurisprudence reveals that an eligibility criterion in one state, may be a factor in another. For example, in Texas the lack of probable cause for an arrest is a statutory eligibility criterion whereas in Georgia lack of probable cause ("illegality" of the arrest) is simply a factor that is considered in determining whether "exceptional circumstances" exist. Compare *State v. Arellano*, 801 S.W.2d 128, 130 (Tex.App. 1990), with *Meinken v. Burgess*, 426 S.E.2d 876, 879 (Ga. 1993).

South Dakota is not asserting that Jones is ineligible for expungement because there was probable cause for his arrest, it is simply asserting that probable cause for his arrest is an appropriate factor to consider when determining if Jones has met the "public interest" standard. *Meinken*, 426 S.E.2d at 879; *People v. Carroccia*, 817 N.E.2d 572, 578 (Ill.App.3d 2004)("the strength of the prosecution's case against the defendant is . . . one factor to consider" in determining if there is "good cause" to expunge).

The criteria and standards of SDCL 23A-3-27 and -30 are plain enough. But, as in *LoBasso*, this case occupies "an area . . . of the law where we don't have a lot of guidance" concerning factors. *LoBasso*, 33 A.3d at 547. As in *LoBasso*, it is up to "courts [to] identify relevant factors as they gain experience applying the new law." *LoBasso*, 33 A.3d at 550. As in *LoBasso*, it may be necessary to "consider factors in addition to those" identified in the expungement statute to determine if a

petitioner has met the "public interest" standard. *LoBasso*, 33 A.3d at 544. This being a case of first impression, eligibility criterion, standards and factors used in other states can certainly inform this court's development of expungement law in South Dakota. Courts have "wide latitude" in determining "whether expungement serves the public interest in a particular case." *In re Kollman*, 46 A.3d 1247, 1259 (N.J. 2012). The fact that phrases like "lack of probable cause" or "public interest" are used somewhat interchangeably as eligibility criterion, standards or factors in the expungement jurisprudence of various states does not render those authorities "inapplicable" to this case as Jones claims. RESPONSE at 4.

Finally, according to Jones, South Dakota, unlike other states, has not "established" or "expressed a public policy favoring the maintenance and dissemination of criminal records." RESPONSE at 8. According to Jones, the statutes in question "simply require th[at] statistics be kept and organized" rather than records of individual cases. RESPONSE at 9. According to Jones it follows that the state's interest in maintaining its records is not a valid factor to consider when gauging public interest or a reason to require a petitioner to produce evidence of specific harms. RESPONSE at 8-9.

Jones is wrong. First, the act of creating the state database is in and of itself an "express[ion of] a public policy favoring the maintenance and dissemination of such records." *Meinken*, 426 S.E.2d at 865.

Second, in referring to "the *record* of the arrest," rather than the bare statistic of it, the expungement statute also reflects a general policy and presumption of maintaining individual arrest records even after acquittal. SDCL 23A-3-27. Consequently, factors developed by other states to weigh the public's interest in maintaining a criminal records database against a petitioner's interest in expunction are instructive here.

Finally, the fact that the statute places a high burden on the petitioner to prove by clear and convincing evidence that expungement is in the public interest, rather than on the state to prove that it is not, literally does "place the public's interest in maintaining criminal statistics above the best interest" of a petitioner, unless a petitioner is able to carry his burden (which Jones has not). RESPONSE at 9. Thus, as in other states, a petitioner must do more than "raise all manner of disabilities that *might* result from his having an arrest record" to overcome South Dakota's codified interest in maintaining a comprehensive and accurate state criminal database. *Carroccia*, 817 N.E.2d at 578 (italics in original)(requiring "specific evidence of . . . adverse consequences" to meet "good cause" standard); *Meinken*, 426 S.E.2d at 879 (petitioner must demonstrate more than "potential harm" from maintenance of arrest record).

Though authorities from other states are certainly not controlling here, how those decisions balance the interests of petitioners and the

state can inform this court's formulation of an analytical framework for applying South Dakota's expungement statute. Other states' case authorities are not "inapplicable" as Jones claims.

2. The Trial Court Abused Its Discretion

In response to the state's position that the trial court abused its discretion in granting expungement in this case, Jones argues that the trial court understood the standards and did not view expungement as automatic in cases of acquittal, that denying expungement would violate his 2nd Amendment right to self-defense, and that the public's interest in accessing his record is "not enough" to deny him expungement because he "is not a threat to public safety." RESPONSE at 18. Jones also argues that the public interest is not actually implicated because the fact of the shooting can be introduced in potential future court proceedings even if his record is expunged. These arguments do not save the court's expungement order from being an abuse of discretion.

With regard to Jones' first argument, it is true that at one point in the hearing the trial court correctly described the operation of the statute and its requirements that expungement serve both the ends of justice and the public interest. RESPONSE at 13; TRANSCRIPT at 25/15-26/1. Even so, the trial court confessed confusion about how the standards worked. As a result, the court's ruling was based on two erroneous views of the law, namely (1) that the public interest standard was pointless because the court could see no "situation where you're going to find clear

and convincing evidence that it's in the public's best interest" to expunge and (2) that there is nothing a person need "do over and above" acquittal to warrant expungement. TRANSCRIPT at 32/3, 32/17. As detailed in appellant's opening brief, cases from other jurisdictions identify situations where a petitioner's interest in expungement outweighs the public's interest in maintaining records. *Kollman*, 46 A.3d at 1261; *Doe v. State*, 819 S.E.2d 58 (Ct.App.Ga. 2018). Those same cases also identify situations where acquittal does and does not warrant expungement. *Carroccia*, 817 N.E.2d at 578. Given the availability of persuasive case authorities from other states, applying SDCL 23A-3-30's standards should not have confounded the trial court any.

So while it is true the court knew what the standards were, by the court's own admission it was confounded by how to apply them and, consequently, applied them erroneously by (1) discounting the vital public interest in maintaining a public record of the Schumacher shooting, (2) inflating the weight of Jones' acquittal in the balancing of interests, and thereby (3) allowing Jones to satisfy the ends of justice standard on "weak" evidence. TRANSCRIPT at 32/10. Thus, the decision to grant expungement is not based on a proper application of the statutory standards and, therefore, is outside the range of permissible choices.

Jones also argues that his 2nd Amendment right of self-defense entitles him to expungement. First, this argument is waived because

Jones has not supported it with legal authority here or in the trial court. *Veith v. O'Brien*, 2007 SD 88, ¶50, 739 N.W.2d 15, 29 (failing to cite authority on appeal waives issue); *Weber v. Weber*, 2023 SD 64, ¶24, 999 N.W.2d 230, 236 (specific argument must be made to trial court to preserve it for appeal). Jones cites no authority for the proposition that expungement implicates any right guaranteed by the 2nd Amendment and has proffered no evidence that his arrest record has impaired his ability to keep and bear arms. Clearly, if a state can opt to provide no opportunity for expungement at all without offending the 2nd Amendment, a state opting to provide for expungement need not require it in self-defense cases in order to satisfy the 2nd Amendment. The scope of expungement, if any, is purely a matter for state legislatures to decide.

Second, while the 2nd Amendment guarantees the right to keep and bear arms for lawful purposes, it does not shield a person from arrest and prosecution for using a gun for an unlawful purpose. If an act of self-defense is not clear enough to foreclose an arrest and trial on a criminal homicide charge, then it is subject to expungement law the same as any other offense. While self-defense can certainly be a factor for a court to consider in expungement cases, the expungement statute does not treat a self-defense situation different from any other homicide or battery case. So long as there was probable cause to arrest Jones and charge him with criminal homicide, his arrest was valid as far as the 2nd

Amendment is concerned and thereafter subject to the operations of the expungement statute the same as any other case.

Jones further claims that the public has no continuing interest in preserving the records in question because he "is not a threat to public safety." RESPONSE at 18. The state disagrees. Anyone who would walk up to a wounded and defenseless man inert on the floor, aim the laser sight of his gun at his neck, and calmly pull the trigger is dangerously lacking in self-control and basic empathy. Add to that Jones' record of public intoxication, and identifying himself as Schumacher's killer during an arrest on one such occasion as a thinly-veiled threat to the arresting officer, and Jones is the paradigm of a threat to public safety.

Finally, Jones argues that the public interest is not actually implicated here because the fact of the shooting could still be introduced in future proceedings against him per *In re Certifiability of Brett Jarman*, 2015 SD 8, 860 N.W.2d 1, and SDCL 23A-3-31. Jones minimizes the adverse impact expungement has on the availability of the record of the Schumacher shooting for use in any future proceedings.

First, per SDCL 23A-3-26, expungement results in "the sealing of all records within any court . . . law enforcement agency [or] criminal justice agency." Though, as noted in *Jarman*, this does not expunge the "underlying conduct," it does make "expunged records" unavailable in any subsequent official proceedings. *Jarman*, 2015 SD at ¶ 14. In *Jarman* this handicap could be overcome by calling the victim to testify

to the "underlying conduct," but here the state cannot call Jon Schumacher to testify to the circumstances of his killing. Without the video and other record evidence that will be sealed if Jones' record is expunged there will be no way for the state to provide a court with a "complete picture" of the shooting at any potential future proceeding. *Kollman*, 46 A.3d at 1260.

Second, SDCL 23A-3-31 does not, contrary to Jones' argument, make expunged records available to prosecutors and courts "in sentencing the defendant or arrested person for subsequent offenses." SDCL 23A-3-31 makes only the "record of [the] disposition" of the expungement petition available. Thus, as in *Jarman*, a sentencing court would know that a defendant had previously received an expungement, but the remainder of the record, such as the shooting video or trial testimony, would be under seal and could not be used at in any potential future proceeding. *Jarman*, 2015 SD at ¶ 14 (public agency could not base actions on "expunged records").

Furthermore, the public interest standard is concerned with more than state and law enforcement interests. Criminal records are also maintained to provide information to other public agencies and the general public for use in "dealing with" persons like Jones. SDCL 23-6-5; *Kollman*, 46 A.3d at 1261 (finding that making a petitioner's "offense . . .known to those who might allow him to volunteer" for community service could be weighed along with other factors). Thus, for example,

were Jones, like Jarman, ever to run for public office or apply to serve as an auxiliary police officer, the public would have a strong interest in seeing the video of the Schumacher shooting in order to have a "complete picture" of his temperament and suitability for such office. *Kollman*, 46 A.3d at 126. The public interest would not be served by sealing Jones' record under the circumstances of this case.

CONCLUSION

Here, as in New Jersey, "the legislature did not intend to create an entitlement to expungement following an acquittal. *Carroccia*, 817 N.E.2d at 579. In some jurisdictions expungement for an arrest following acquittal is automatic, but in South Dakota and other jurisdictions it is not. There are as many approaches to expungement as there are states in the union. But since all states' expungement laws share the same goal of balancing a petitioner's interest in reentering society against the state's interest in public safety, other states' laws can provide guidance in applying the standards set by South Dakota's law. Under these standards, Jones is not a proper candidate for expungement.

Accordingly, the state requests that this court reverse the trial court's order expunging Jones' records.

Dated this 30th day of December 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's brief contains 3,053 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 30th day of December 2024.

Paul S. Swedlund
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December 2024 a true and correct copy of the foregoing appellant's brief was served electronically through Odyssey File and Serve on David Geyer at david@delaneylawfirm.com.

Dated this 30th day of December 2024.

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