IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26997

IN THE MATTER
OF THE EXPUNGEMENT OF RECORDS
RELATED TO BRANDON MICHAEL TALIAFERRO

BRANDON MICHAEL TALIAFERRO,

Petitioner and Appellant,

vs.

STATE OF SOUTH DAKOTA,

Respondent and Appellee.

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

THE HONORABLE GEAN PAUL KEAN
CIRCUIT JUDGE

BRIEF OF APPELLANT

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NOTICE OF APPEAL FILED: FEBRUARY 14, 2014

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PRELIMINARY STATEMENT

References to Petitioner and Appellant Brandon M. Taliaferro will be "Taliaferro." References to Respondent and Appellee State of South Dakota will be "State." References to witness will be by last name (i.e., "Black"). References to transcripts and records will be referred to as follows:

Settled Record……SR

Trial Transcript……..TT

Taliaferro Motions Hearings Transcript……..TMT

Mette Motions Hearing Transcript……MMT

Expungement Hearing Transcript……..EHT

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REQUEST FOR ORAL ARGUMENT

Brandon Michael Taliaferro respectfully requests the privilege of appearing before this Court for oral argument.

JURISDICTIONAL STATEMENT

This is a civil appeal from the findings of fact, conclusions of law and order dated the 15th day of January, 2014, and filed the 15th day of January, 2014. Notice of appeal was timely filed and served February 14, 2014, pursuant to SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the circuit court erred in denying expungement of the two dismissed charges when the two dismissed charges were inextricably intertwined with the five charges of which Taliaferro was acquitted and expungement was granted.

The circuit court denied expungement of the two dismissed charges on the basis that the prosecutor refused to consent pursuant to SDCL 23A-3-27(2).

- *Matter of Oliver*, 2012 SD 9, 810 N.W.2d 350
- *Higgins v. State*, 2010 OK CIV APP 29, 231 P.3d 757
- *State v. Goulding*, 2011 S.D. 25, 799 N.W.2d 412
- SDCL § 23A-3-27

STATEMENT OF THE CASE

The criminal case of State of South Dakota v. Brandon Taliaferro (Cr.12-427 Brown County) was tried to a Brown County jury commencing on January 7, 2013. Taliaferro stood trial on six criminal charges. (ER-1) At the close of the State's evidence, the State dismissed the obstructing charge against Taliaferro. (ER-6) Taliaferro then moved for a judgment of acquittal on the remaining five charges. (ER-1) Judge Kean granted the motion on January 10, 2013. (ER-6) Immediately after the acquittals, the State dismissed the one remaining charge of conspiracy to commit perjury that was not brought to trial on January 7, 2013. (ER-6) On July 15, 2013, Taliaferro moved for expungement of his arrest record pursuant to SDCL 23A-3-26, *et seq.* (ER-1) A hearing was held on November 19, 2013. (ER-1) On January 15, 2014, the trial court granted expungement of the five charges Taliaferro

was acquitted of. (ER-9) The trial court denied expungement of the two charges dismissed because State refused to consent. (ER-9)

This appeal followed.

STATEMENT OF THE FACTS

On April 20, 2012, State obtained the first of several indictments against Mr. Taliaferro. On September 14, 2012, State obtained the last indictment against Mr. Taliaferro. In total, Mr. Taliaferro was indicted on the following charges:

1. Witness Tampering
   SDCL § 22-11-19(1)
2. Subornation of Perjury
   SDCL § 22-29-6; SDCL § 22-29-5(2)
3. Subornation of Perjury
   SDCL § 22-29-6; SDCL § 22-29-5(2)
4. Subornation of Perjury
   SDCL § 22-29-6; SDCL § 22-29-5(2)
5. Conspiracy to Commit Perjury
   SDCL § 22-29-1; SDCL § 22-3-8
6. Unauthorized Disclosure of Confidential Abuse and Neglect Information
   SDCL § 26-8A-13
7. Obstructing Law Enforcement
   SDCL § 22-11-6

Mr. Taliaferro was arraigned on the above indictments on May 1, 2012, August 22, 2012 and October 29, 2012. Mr. Taliaferro entered his plea of Not Guilty to all charges contained within the Indictments. The case was regularly brought to trial beginning January 7, 2013, with Special Prosecutor Michael Moore representing the State of South Dakota and Michael J. Butler representing Defendant Brandon Michael Taliaferro. A jury was duly impaneled and sworn on January 7, 2013, to try the case. (ER-1) State rested its case in chief on January 9,

2013. (ER-6) At that time, Special Prosecutor Moore dismissed, with prejudice, the Obstructing Law Enforcement charge against Defendant Taliaferro contained in Count II of the July 20, 2012 Corrective Indictment. (ER-9)

Taliaferro made an oral Motion for Judgment of Acquittal. The trial court recessed for the day and the following morning in open court, granted Taliaferro's Motion for Judgment of Acquittal of all remaining Counts set forth in the indictments dated May 1, 2012 and September 14, 2012. (ER-6) Immediately after the acquittals, while still on the record, Special Prosecutor Moore then dismissed, with prejudice, the final remaining count against Defendant Taliaferro of Conspiracy to Commit Perjury. (TT-452; ER-6) The order of Judgment of Acquittal was signed by Judge Kean on January 16, 2013 and filed on January 18, 2013 with the Brown County Clerk of Courts. The trial court was well informed of the facts and the State's evidence, or lack thereof, against Mr. Taliaferro. During its ruling from the bench granting the Judgment of Acquittal, the trial court expressed its concerns that this case was one of "office politics" and "substandard investigation." (TT-443) In its *Memorandum Decision* regarding expungement, the trial court stated: "There was no evidence in the remotest sense to show how Taliaferro committed a crime." (ER- 7) (A 7).

On July 15, 2013, Mr. Taliaferro filed a Motion for Expungement pursuant to SDCL § 23A-3-27. (ER-1) On August 7, 2013, State filed a two-sentence response opposing the motion on the basis that the state would not consent under SDCL § 23A-3-27(2) and that the alleged "victims" also oppose the motion.

Through later communications, the alleged "victim" State was referring to was Wendy Mette. State indicated its desire to waive the hearing and briefing and requested the trial court make a decision based solely upon its memory of the case. (EHT-2) Neither the trial court nor Mr. Taliaferro agreed with State's request to waive the hearing and briefing. (ER-1)

All of the charges against Mr. Taliaferro that were brought to trial on January 7, 2013, except the obstructing charge, were disposed of by the trial court's entry of a judgment of acquittal. The obstructing charge was dismissed with prejudice by State after it rested its case-in-chief and before Taliaferro's motion for judgment of acquittal. The sole charge against Mr. Taliaferro that was not brought to trial on January 7, 2013 was the charge of conspiracy to commit perjury. While that charge was not brought to trial on January 7, 2013, State dismissed it, with prejudice, immediately after the trial court granted judgments of acquittal on the other charges.

PRE-TRIAL HEARING IN STATE V. RICHARD METTE

Five weeks before Mr. Taliaferro was indicted, a pre-trial hearing was held before the Honorable Jon S. Flemmer on March 13, 2012 in the case of *State v. Richard Mette* (Cr. 10-1113). [1] Mr. Moore was also prosecuting that case and called DCI Agent Mark Black[2] to testify regarding his investigation into Taliaferro.

---

[1] Richard Mette's Original Indictment and Wendy Mette's original Indictment were obtained by Taliaferro acting in his capacity as Brown County Deputy State's Attorney. Both cases were still pending at the time of the March 13, 2012 pre-trial hearing.

[2] DCI Agent Mark Black, the lead agent spear-heading the investigation into Taliaferro, has since been terminated from his position with the South Dakota Department of Criminal Investigation.

[By Michael Moore]

Q. Through your investigation ***you haven't found that anybody committed perjury*** under oath ***or said something that was not true***?

A. [Agent Black] ***No. No. I don't have evidence of perjury.***

(MMT March 13, 2012 p. 27) (emphasis supplied).

Then Mr. Moore elicited this testimony from Agent Black:

Q. And did you ask KM about the truthfulness of her statements she made regarding Wendy to Fran Sippel.

A. Yes, sir, I did.

Q. And what did she tell you?

A. She stated that her statements about Wendy Mette were true. [3]

Q. And again, can you state that KM never said anything to Fran Sippel about Wendy Mette that's not true?

A. According to KM, no, and to the documentation I have, no.

(MMT March 13, 2012 p. 30.)

At the close of *Richard Mette's* pre-trial hearing, Prosecutor Moore made this representation to the circuit court:

…I submit to the Court the only thing that is arguably relevant is the statement KM made and KM is going to be witness in that case and they can definitely go into whether she felt pressured by Fran Sippel and whether she made statements that were not true ***but the investigation that they have and that's been presented here***

[3] Agent Black was referring to his interview of KM in November 2011, approximately 8 months after the Wendy Mette grand jury proceeding, where the alleged perjury took place concerning KM allegations against her mother. Agent Black wrote in his report of November 21, 2011, in part: "I asked KM if what she disclosed and stated about her mother Wendy Mette was true or not. KM stated "that everything that she has told her counselor or law enforcement about Wendy Mette is the truth."

today, there's no evidence that any of these girls said anything that was not true.

Id. at 38. (emphasis supplied)

Five weeks after declaring in court that, "there's no evidence that any of these girls said anything that was not true," Mr. Moore obtained an *Indictment* charging Mr. Taliaferro, among other charges, with suborning perjury a year earlier, in March of 2011, concerning accusations made by KM about Wendy Mette and testified to by Dr. Fran Sippel. State brought charges against Mr. Taliaferro despite the children each categorically denying Taliaferro did anything wrong:

> [By Mike Butler]
>
> Q. And to be clear, in your interviews with these girls they were all asked whether or not Mr. Taliaferro ever attempted to get them to say something that wasn't true; is that correct?
>
> A. [Agent Black] That's correct.
>
> Q. All categorically denied that ever occurred.
>
> A. In the initial interviews; correct.
>
> Q. Well, I'm talking about Brandon Taliaferro.
>
> A. Oh, I'm sorry. You are correct, yes, sir.
>
> Q. Okay. And they've never said he either pressured them or tried to get them to say something that wasn't true; is that correct?
>
> A. That is correct.
>
> Q. And on that day, who I'll refer to as A. M. and M. M. and K. M., all said Mr. Taliaferro never attempted to get them to say something that wasn't true and never pressured them to say something that wasn't true; is that correct?
>
> A. That's correct.

TMT August 22, 2012, p. 87-88.

During the 14 months this case persisted, no investigative reports, or other forms of evidence, were provided to Taliaferro that would explain what changed in the five weeks from the *Richard Mette* pre-trial motion hearing to the grand jury proceedings in *State v. Taliaferro* that could reconcile the testimony of Agent Black on March 13, 2012, "***I have no evidence of perjury"*** with Black's grand jury testimony on April 20, 2012 leading to the first Indictment against Taliaferro, Sippel, and Schwab charging subornation of perjury and witness tampering regarding the charges against Richard and Wendy Mette. Indeed, Agent Black admitted under oath on August 22, 2012 that there was ***no*** further investigation in this matter from the time Black testified on March 13, 2012 and the time he testified on April 20, 2012 and August 22, 2012. (TMT August 22, 2012 p. 106) Similarly, no investigative reports or other forms of evidence, were provided that could reconcile Mr. Moore's in court representations to Judge Flemmer on March 13, 2012, ***"…there's no evidence that any of these girls said anything that was not true."***

STANDARD OF REVIEW

Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶15, 727 N.W.2d 808, 812. This Court reviews the interpretation and application of each de novo. *See State v. Goulding*, 2011 S.D. 25, ¶5, 799 N.W.2d 412, 414 ("Statutory interpretation and application are questions of law that we review do novo."); *Kraft v. Meade Cnty. ex rel. Bd. of Cnty. Comm'rs*, 2006 S.D.

113, ¶2, 726 N.W.2d 237, 239 ("Constitutional interpretation is a question of law reviewable de novo."). Whether a circuit court had jurisdiction is a question of law reviewed by this Court de novo. *See State v. Neitge*, 2000 SD 37, ¶ 10, 607 N.W.2d 258, 260.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING EXPUNGEMENT OF THE TWO DISMISSED CHARGES WHEN THE TWO DISMISSED CHARGES WERE INEXTRICABLY INTERWINED WITH THE FIVE CHARGES OF WHICH TALIAFERRO WAS ACQUITTED AND EXPUNGEMENT GRANTED.

A. Because the two charges dismissed with prejudice by State were inextricably intertwined with the five charges of which Taliaferro was acquitted, the trial court had statutory authority to grant expungement of all seven charges under SDCL § 23A-3-27(3).

Under certain circumstances, SDCL § 23A-3-27 authorizes an arrested person to apply to the court for an order expunging the same. SDCL § 23A-3-27 provides:

> 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:
>
> (1) After one year from the date of any arrest if no accusatory instrument was filed;
>
> (2) With the consent of the prosecuting attorney at any time after the prosecuting attorney formally dismisses the entire criminal case on the record; or
>
> (3) At any time after an acquittal.

The case at bar presents a unique procedural posture. A judgment of acquittal disposed of five of the charges and State dismissed the sixth charge after it

rested its case-in-chief at trial. The seventh and final charge of conspiracy to commit perjury was dismissed with prejudice by State, on the record, immediately after the acquittals.

State opposed Taliaferro's motion for expungement stating it refused to consent to expungement under SDCL § 23A-3-27(2), which allows expungement "with the consent of the prosecuting attorney at any time after the prosecuting attorney formally dismisses the entire criminal case on the record." Taliaferro contends that a prosecutor's consent, while relevant under subsection (2) of the statute, is not required in this case because there was also an acquittal of all other related charges. Subsection (2) provides a vehicle for expungement for those individuals that do not fall within the confines of subsection (1), "after one year from the date of any arrest if no accusatory instrument was filed" or subsection (3), "at any time after an acquittal." SDCL § 23A-3-27. Since Prosecutor Moore did not dismiss the "entire case" against Taliaferro, it is questionable whether subsection (2) is even applicable under these special circumstances.

Wendy Mette, however, was arrested and indicted on eleven counts of felony child abuse in the case of *State v. Wendy Mette* (Cr.11-274). Because an accusatory instrument was filed against Wendy Mette, expungement under subsection (1) was not available to her. Because Wendy Mette was not acquitted of her charges at a trial, expungement under subsection (3) was not available to her. In *State v. Wendy Mette*, only subsection (2) of the expungement statute would be available to her "with the consent of the prosecuting attorney at any time after the prosecuting

attorney formally dismisses the entire criminal case on the record." Mr. Moore was also prosecuting the Wendy Mette criminal case. No hearing was held in *State v. Wendy Mette* wherein prosecutor Moore formally dismissed the entire case against her on the record. Instead, a dismissal was filed by Mr. Moore with the clerk of courts. (A-21) While it is unclear whether filing a dismissal, without having a hearing on the record, satisfies the requirements of subsection (2), Mr. Moore nevertheless consented to expungement of Wendy Mette's record for eleven felony child abuse charges utilizing a stipulation and order. (A-25)

Here, there was an acquittal. Taliaferro contends that fact is dispositive and authorizes the trial court under subsection (3), in the exercise of its discretion, to grant expungement of the two legally and factually related dismissed charges against Mr. Taliaferro, despite State's refusal to consent, "if satisfied 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." SDCL § 23A-3-30; *Matter of Oliver*, 810 N.W.2d 350 (S.D. 2012); *See also Higgins v. State*, 2010 OK CIV APP 29, ¶ 11, 231 P.3d 757 (Okla. 2010)(Expungement allowed when prosecutor has dismissed all charges upon the merits and the prosecutor's consent is not an issue considered.)

B. When faced with an acquittal of charges and dismissal of charges against a Defendant in a case, the expungement statutes should be liberally construed with a view to effect its objects and to promote justice.

In conducting statutory interpretation, the court gives "words their plain meaning and effect, and reads statutes as a whole … ." *State v. Miranda*, 776 N.W.2d 77, 81 (S.D. 2009). "[R]esorting to legislative history is justified only when legislation

is ambiguous, or its literal meaning is absurd or unreasonable." *In re Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984). Pursuant to SDCL § 2-14-12, statutes should be "liberally construed with a view to effect its objects and to promote justice."

State's only explanation for why it refused to consent to expungement was because Wendy Mette did not believe Taliaferro should receive expungement. Unquestionably, Taliaferro would have been acquitted of the two charges State dismissed. While the obstruction charge was brought to trial on January 7, 2013, State dismissed it after resting its case-in-chief. State did not present any testimony or evidence related to this charge.[4] But for the dismissal by State, Taliaferro would have been acquitted of the obstructing charge by directed verdict. The conspiracy to commit perjury charge, on the other hand, was not brought to trial on January 7, 2014. However, Mr. Taliaferro was acquitted at trial of all three felony counts of suborning perjury, which alleged the same "perjury" that formed the basis of State's conspiracy charge against Taliaferro. Mr. Taliaferro never had the opportunity to be acquitted of the conspiracy charge because State dismissed it.

State's refusal to consent to expungement of the two dismissed charges and the trial court's strict interpretation of subsection (2) of the expungement statute, has led to an absurd result. All of the charges brought against Mr. Taliaferro arose

[4] Prosecutor Moore did not mention the obstructing charge at all during Taliaferro's trial and stated: "Your Honor, I agree with the Defense on the obstruction . . . the State did not present any evidence on those counts, and those counts should be dismissed by the Court."

from the same facts. The police reports were the same. The witnesses were the same. The "evidence" was the same. The trial court granted expungement on the five (5) charges Mr. Taliaferro was acquitted of at trial. Denying expungement of the two dismissed charges, under the facts of this case, frustrates the purpose of the expungement statutes and makes the result unreasonable. *See Krukow*, 2006 SD 46 at ¶ 12, 716 N.W.2d at 124 ("it is presumed that the Legislature did not intend an absurd or unreasonable result.")

It is likely, and understandable, that the legislature did not envision the exact factual and procedural situation this case presented. However, guidance for how this Court can address this unique situation is found in this Court's decisions interpreting and applying the suspended imposition of sentence statute.

C. The legislature left the courts with the discretion to apply SDCL § 23A-3-27 in a manner that best achieves the goals of the statute when faced with an acquittal of charges and dismissal of charges against a Defendant in a case.

Similar to the expungement statutes, under certain circumstances, a suspended imposition of sentence may be authorized by the court, in the exercise of its discretion, "if satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." SDCL § 23A-27-13. An important aspect of the suspended imposition statute is it is commonly understood to be available only one time for a Defendant.

However, a unique factual and procedural scenario arose in the case of *State v. Schempp*, 498 N.W.2d 618 (S.D. 1993) and prompted this Court to provide guidance on the interpretation of the suspended imposition of sentence statute to

the unique circumstances in *Schempp*. In *Schempp*, the defendant was convicted of two crimes. Each crime occurred within approximately one hour of the other; both were tried in the same action; and, the sentences for both were handed down almost simultaneously. Relying on a strict construction of the statute, the trial court concluded that it had the discretion to grant a suspended imposition on one of the convictions but it was prohibited by a strict application of the statute from granting a suspended imposition on the second conviction.

This Court reversed and explained:

> The legislature did not specify how to deal with the situation where there are simultaneous convictions for a first-time offender. However, the purpose of suspended imposition of sentence is "to allow the first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of a conviction record." *State v. Marshall*, 247 N.W.2d 484, 487 (S.D. 1976) (interpreting a prior version of the statute).
>
> When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals. *Friese v. Gulbrandson*, 8 N.W.2d 438 (1943). We conclude that the legislature left the courts with discretion to apply SDCL 23A-27-13 in each case in the manner best suited to achieve the goals of that statute. We reverse the trial court and hold, when presented with simultaneous convictions of a first-time offender, the trial court has discretion to suspend imposition of those simultaneous convictions.
>
> *State v. Schempp*, 498 N.W.2d at 621.

There are two competing constructions of the expungement statute being offered in the case at bar. Taliaferro submits that pursuant to SDCL 23A-3-27(3), the trial court does have discretion to grant expungement of factually and legally related but dismissed charges, despite a prosecutor's refusal to consent, when the

Defendant was acquitted of all other factually and legally related charges arising from the same case. The trial court's reliance on a strict reading of SDCL 23A-3-27(2) to require a prosecutor's consent to expunge dismissed charges *even if* the Defendant is acquitted of all other related charges, frustrated the purpose of the expungement statute. As this Court stated in *Marshall, supra,* the purpose of a suspended imposition of sentence is "to allow the first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of a conviction record." *State v. Marshall*, 247 N.W.2d at 487. The expungement process advances similar goals, including but not limited to, "restoring the defendant to the status he occupied before his arrest or indictment." SDCL § 23A-3-32. The Oklahoma Court of Appeals noted that:

> The plain purpose of (Oklahoma's expungement laws) is to afford special relief in the form of a full or partial sealing of records relating to a person's involvement or suspected involvement in a crime. It is clearly intended to aid those who are acquitted, exonerated, or who otherwise deserve a second chance at a clean record.
>
> *State v. McMahon*, 1998 OK CIV APP 103, 959 P.2d 607.

Denying expungement of the two related criminal charges dismissed by State in the same case where Taliaferro was acquitted of all other related criminal charges, based on the same underlying facts, frustrates the purpose of the expungement process and produces an unreasonable result.

Mr. Taliaferro further argues that because there was an acquittal, the legislature left it to the courts to determine whether to grant an expungement of related dismissed charges, because the court should construe the expungement

statutes "liberally with a view to effects its objects and to promote justice." SDCL § 2-14-12. Granting expungement on only the five charges Taliaferro was acquitted of will result in an injustice.

If the ruling below is affirmed, Mr. Taliaferro will have a felony conspiracy to commit perjury arrest record for the rest of his life despite being acquitted of every charge the state did not dismiss, including related subornation of perjury charges. For attorneys, especially those as young as Mr. Taliaferro, few things create a bigger black mark on one's permanent record than an arrest for a felony crime of moral turpitude.

Under a strict construction of SDCL § 23-A-3-27(2), the prosecutor would have absolute power to taint the permanent record of an innocent defendant simply by dismissing a charge following a defendant's acquittal on related charges based on the same evidence and then refuse to consent to expungement. Surely the legislature did not intend the expungement statutes to be used by a prosecutor as a sword to permanently tarnish an innocent Defendant's record. This was not a close case where the Defendant won on a technicality. During its ruling granting the Judgment of Acquittal, the trial court expressed its concerns that this case was one of "office politics" and "substandard investigation." (TT-443) The trial court also stated in its *Memorandum Decision* regarding expungement, "There was no evidence in the remotest sense to show how Taliaferro committed a crime." (ER-7) (A7)

State based its refusal to consent on its constant claim that Wendy Mette was a victim. The trial court found that Wendy Mette was not a victim under the statute. (ER-8) Regarding Wendy Mette's unsworn affidavit, the trial court found:

> In her conclusion, Wendy writes: "Mr. Taliaferro altered our lives forever, and he has not even begun to show any type of understanding of what exactly happened, nor has he made any offer or attempt to take any responsibility for his direct part in it." **The reaction this court has is: Really? Taliaferro altered her life forever? Has Wendy forgotten about Richard who is in prison for sexual assaults on the children? Richard, who Katrina indicated was continuously assaulting her and at one time indicated that Wendy saw the episode and did nothing which was reported to DSS?** While Wendy disagrees with this report, it was the information that the Brown County States Attorney's Office had at hand when the cases were commenced. **Obviously Wendy is highly selective in recalling the history of events. This court should and does give little weight to this affidavit which is self-serving and inconsistent with the facts from the various cases involving her, Richard and the children.**
>
> (ER-9)(emphasis added).

State's case against Taliaferro was so deficient that it warranted Judge Kean granting a judgment of acquittal for only the third time in nearly thirty (30) years on the bench. Judge Kean stated:

> [T]hen the Defense made motions to dismiss the Indictment -- or dismiss the counts in the Indictment, and that leaves three perjury charges for the Court to consider. There is also a charge of -- against Shirley Schwab of witness tampering; one against both Defendants of witness tampering; and one against both Defendants for unauthorized disclosure of information. And I'm telling everybody this morning as to what I'm going to be doing on those motions. And this is what's called a motion for judgment of acquittal. And what the motion is based on is the concept that the testimony that's been presented, the evidence that's presented, **is so lacking that as a matter of law the case should be dismissed at this time**. It's a little rare that this motion be granted; highly unique. **I can tell you that, I believe, in**

> **the 30 years I've been doing judicial work I've done it twice. This morning would be the third time.** And I want to give you my reasoning and analysis for why I'm doing this, and I want you members of the jury to understand this. And this is my record that I'm making on my point so you have an understanding as to where I'm coming from.
>
> And I had to the start with a point, and my consideration was that we can get bogged down in a lot of side issues in this case. We can get bogged down in what I'll call **office politics at the Brown County State's Attorney**. We can get bogged down in **Agent Black's substandard performance investigating the case**. We can get bogged down in maybe some disputes going on between the Department of Social Services and the CASA organization.
>
> (TT-442-443)(emphasis added).

During its ruling granting the judgments of acquittal, the trial court noted the deficiencies in State's case regarding the perjury charges:

> On the [suborning] perjury counts -- and they're all related, they're all strung together -- there is a claim that they're all related to Fran Sippel who didn't testify. And the State had to show that the Defendants procured or solicited Fran Sippel to intentionally and falsely testify to material information. This is the same thing that runs through Counts One, Two and Three. Each count is different. One has to do with Richard giving oral sex to -- or getting oral sex from Katrina when Wendy walks in. The same situation on a single time when Wendy walked in when Richard was raping Katrina, and the issue concerning the birth control pills.
>
> We do know that -- from the testimony – that Fran Sippel was charged and then the Indictment was dismissed, which tells me quite strongly that the State must have believed that she didn't testify falsely. [5] She could have been called to testify about what happened. The State made a decision not to. They made a decision not to call Katrina. They're relying upon a lot of records that were produced. The one thing that has never been disputed in this case, and Agent Black testified to this, no matter what you think about his testimony -

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[5] After dismissing the perjury charges against Sippel, Prosecutor Moore proceeded under a contorted reading of the perjury statutes and asserted that Sippel committed perjury but didn't know she committed perjury.

- and everybody else who has testified who was asked this question -- is that Fran Sippel testified, and when she testified the State had to show that she testified falsely before the grand jury. And I know there is some emails that go back and forth -- not emails, but reports from agencies that go back and forth of Child's Voice, and there is another one. But they had to show that she testified falsely, meaning one of two things: Either she knew she did or somebody got her to testify falsely.

Well, they can't call the Defendants. They have a right to remain silent, not testify. So they had to call somebody, in my opinion, to testify about what was false, and this never occurred in this case. There is something else, too, that occurred, and I think it's a lack of evidence in this case, and I'm not sure --maybe Counsel were so, I guess, dug into your presentation and your defense of the case, but I cannot recall -- this is a very key component of perjury, is you have to testify falsely. But not only that, you have to be under oath or affirmation. I've never heard any witness testify, and I received no documents, that indicated that Fran Sippel had testified under oath. I know there was an offer made on an exhibit, which was refused. Some pages of that exhibit were received, but I can't recall anybody testifying that she was placed under oath or affirmation during this proceeding. That may have occurred and it may have come up in another proceeding, Counsel, but I didn't hear it at trial and that's why we're here. And you may believe that it is in. It's a refused exhibit, but a refused exhibit is not an exhibit you can use for testimony. And so I think that is an important factor, too, as to why I think Counts One, Two and Three should be dismissed.

(TT-443-445)

Regarding the deficiencies in State's allegation of witness tampering against Taliaferro, the trial court stated:

As to Count Five, this was the claim that there were benefits conferred on the Mette children, and there are three categories here that these gifts were called. And other times they would have said they were bribes, but they have called them benefits now. . . . Concerning what the Defendant Taliaferro gave to the children, a body scrubber -- or foot scrubber, I guess it was, a candy bar, a bottle of water; I mean, that just doesn't fall in the gamut within the parameters of what the statute's about. More importantly than that, even if the gifts are benefits, we also have this lack of evidence, as I

> never heard what these children testified or were asked to testify falsely about. We assume the proceeding was the A&N proceeding. I never heard any testimony that this was supposed to be what they were testifying about. Again, they could have called somebody forward like the children. I don't like children witnesses to have to come into court, but if you have to prove your case, then you need to call them into court and they can be treated properly and appropriately in their examination by the State. That didn't happen in this case, so I think actually there is also a deficiency on that charge, too.
>
> (TT-447-448).

The deficiencies in State's allegation of unauthorized disclosure of A&N information against Taliaferro were likewise apparent. Judge Kean stated:

> As far as the Defendant Taliaferro, I mean, he's got a couple documents in his office. This is a crime of unauthorized disclosure. If he's got them, he didn't disclose. I don't know how he can be blamed or, you know, anybody can say you committed a crime.
>
> (TT-449).

The utter lack of evidence against Taliaferro on all charges brought against him further underscores that denial of expungement on the two dismissed charges has led to a manifestly unjust result.

D. *Matter of Oliver*, South Dakota's seminal case on expungement, provides guidance even though it is materially distinguishable both factually and procedurally.

Our State's seminal case on expungement is *Matter of Oliver*, 810 N.W.2d 350 (S.D. 2012). In *Oliver*, the defendant had two convictions on her record. She moved the trial court for an expungement pursuant to SDCL §23A-3-27. The trial court granted the same. The State appealed arguing the trial court was without jurisdiction to expunge records of Oliver's convictions. This Court agreed and held

that a trial court did not have statutory authority to grant the expungement of *Oliver's* convictions. *Id.* This Court stated: "the plain language of SDCL §23A-3-27 provides that a court's ability to enter an order of expungement is limited to: (1) individuals who have been arrested but have never been charged with a crime; and (2) individuals who have been acquitted." *Id.* This Court stated that "had the legislature intended to allow expungement of a conviction, it would have included that language in the statute." *Id.*

Here, it is undisputed that Taliaferro was acquitted of all other related charges in the case. The legislature explained how the court should handle expungement after an acquittal. The legislature explained how the court should handle expungement after the state dismisses charges. The legislature did not explain how the court should handle expungement when the Defendant is acquitted of charges and State dismisses related charges in the same case. Taliaferro urges the view that SDCL § 23A-3-27(3) gives the trial court the discretion to enter an order of expungement on the related dismissed charges, despite a prosecutor's refusal to consent, "if satisfied 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." SDCL § 23A-3-30. Taliaferro's interpretation of the statute, when faced with an acquittal and dismissal in the same case, advances the goals of the expungement statutes and promotes justice. *Friese v. Gulbrandson*, 8 N.W.2d 438 (1943)(When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals.)

CONCLUSION

WHEREFORE, Appellant Brandon Michael Taliaferro, respectfully requests that this Honorable Court *reverse* the circuit court's order denying expungement of the two criminal charges dismissed by State based solely on the prosecutor's refusal to consent and *remand* with instructions that the trial court is vested with authority to consider a request for expungement of related dismissed charges when there is also an acquittal of factually and legally related charges. Notwithstanding the prosecutor's refusal to consent, if "satisfied 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."

Dated this 2nd day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via electronic mail upon the following at their last known addresses as follows:

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on this 2nd day of June, 2014.

_____
Michael J. Butler, Esq.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5614 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

_____
Michael J. Butler, Esq.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26997

IN THE MATTER OF THE EXPUNGEMENT
OF CERTAIN ARREST RECORDS RELATED
TO BRANDON MICHAEL TALIAFERRO

BRANDON MICHAEL TALIAFERRO,

Petitioner and Appellant,

v.

STATE OF SOUTH DAKOTA

Respondent and Appellee.

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

THE HONORABLE GENE PAUL KEAN
Circuit Court Judge

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

DID THE TRIAL COURT PROPERLY DENY TALIAFERRO'S PETITION TO EXPUNGE ARREST RECORDS PERTAINING TO TWO DISMISSED CRIMINAL CHARGES WHEN THE SUBJECT CHARGES DID NOT MEET ANY OF THE STATUTORY CRITERIA FOR EXPUNGEMENT

In The Matter of Oliver, 2012 SD 9, 810 N.W.2d 350

SDCL 23A-3-27

The trial court denied Taliaferro's petition to expunge the records of his arrest on two of seven crimes charged in a seven count indictment that were dropped and/or dismissed prior to Taliferro's acquittal on the five remaining charges.

STATEMENT OF THE CASE

Appellant's brief sets forth an accurate statement of the case.

STATEMENT OF THE FACTS

As in many cases, but especially this one, there is more to the picture than meets the eye. Taliaferro's statement of facts contains much that is argument in furtherance of embedding an emotional appeal within a straightforward case of statutory construction. This is not the forum for revisiting the "ongoing disagreement between [Wendy Mette] and Taliaferro." A-9. Nor should either of these two parties' subjective notions of justice even inform the analysis in this case. For purposes of the statutory analysis at hand, the material facts are very limited.

Former Brown County Deputy State's Attorney Brandon Taliaferro was charged in a seven count indictment with one count of witness

tampering, three counts of suborning perjury, one count of conspiracy to commit perjury, one count of unauthorized disclosure of confidential information, and one count of obstructing justice. The conspiracy count was dropped prior to trial and dismissed by the prosecutor afterward. The prosecutor dismissed the obstruction count at the close of his case-in-chief.

Proof of the remaining charges against Taliaferro depended on the testimony of one of Richard Mette's child sex abuse victims, who would have had to revisit the ordeals of her abuse and the fallout from Taliaferro's trumped-up charges against her mother in her testimony. When Special Prosecutor Michael Moore resolved, at the expense of his case, to spare this indispensable witness from giving testimony, Taliaferro moved for and was granted a judgment of acquittal as to the remaining five counts. TT at 443-445, 447-448; EHT at 10.

Taliaferro thereafter filed a petition pursuant to SDCL 23A-3-27 to expunge the records of his arrest on all seven charges. Special Prosecutor Moore, whose consent was required by statute to expunge the records of the two dismissed charges, objected as to those charges. SDCL 23A-3-27(2). Judge Gene Paul Kean granted the petition as to the five charges on which Taliaferro was acquitted, but denied the petition as to the two dismissed charges. Taliaferro now appeals.

ARGUMENT

A. Standard Of Review

Statutory interpretation and application are questions of law that this court reviews *de novo. State v. Goulding,* 2011 SD 25, ¶5, 799 N.W.2d 412, 414.

B. The Trial Court Properly Denied Taliaferro's Petition To Expunge Arrest Records Pertaining To The Two Dismissed Charges

According to Taliaferro, his nominal acquittals on five charges "inextricably intertwined" with the two dismissed charges vested the trial court with the discretion to expunge the dismissed charges so long as "the ends of justice and the best interests of the public as well as the defendant or arrested person [would] be served by the entry of the order." SDCL 23A-3-30. Taliaferro's "strained reading" of 27A-3 *et seq.* is not supported by either the plain words of the statute or a fair reading of its intent. A-6.

As this court observed in *Oliver,* "the plain language of SDCL 23A-3-27 provides that a court's ability to enter an order of expungement is limited to" specific circumstances enumerated in the statute. *In The Matter Of Oliver,* 2012 SD 9, 810 N.W.2d 350. Per the statute, a court may expunge the arrest records of dismissed charges only "[w]ith the consent of the prosecuting attorney," which was not granted here. SDCL 23A-3-27(2). There is no statutory recognition of, or exception for, a sub-category of dismissed charges "intertwined" with charges on which an

arrestee obtains an acquittal. Thus, without the requisite prosecutorial consent, the Judge Kean properly denied Taliaferro's petition to expunge the arrest records pertaining to the dismissed charges. Case closed.

Taliaferro argues, however, that this "absurd," "manifestly unjust," and "unreasonable" result, which allegedly "frustrates the purpose of the expungement statute," must be further examined by this court in the interests of justice. APPELLANT'S BRIEF at 12, 14, 15. According to Taliaferro, this court should read an unstated but plenary and morally imperative "discretion" to purge this "black mark" from Taliaferro's record into the statute. APPELLANT'S BRIEF at 11, 15, 16. Taliaferro's arguments for stretching SDCL 23A-3-27's reach beyond its narrow legislative prescriptions are infirm in three respects.

First, the statute does not, as Taliaferro claims, vest this court with general authority or unfettered "discretion" to expunge arrest records simply to satisfy "the ends of justice." Rather, that statutory language is but the standard applied to judging whether a qualifying arrest record should be expunged. *Oliver,* 2012 SD 9 at ¶ 12, 810 N.W.2d at 353. Stripped of its ostensible statutory basis, Taliaferro's appeal to justice is no more than an appeal to emotion. Logically, however, if Taliaferro's arrest records on his dismissed charges do not even qualify under SDCL 23A-3-27(2), there is no "injustice" in denying Taliaferro what the law does not allow.

Second, Taliaferro reads SDCL 23A-3-27's intent and purpose overbroadly. The statute's purpose is not, as Taliaferro suggests, an open path for arrestees at large to reclaim "the status [they] occupied before [their] arrest or indictment;" the path is open only to three enumerated classes of arrestees. Arrestees whose charges are dismissed qualify for expungement and civil restoration only with the prosecutor's consent. SDCL 23A-3-27(2). Thus, in giving Special Prosecutor Moore's veto its due effect, Judge Kean acted in full conformity with SDCL 23A-3-27(2)'s express limitations and purposes. By contrast, gratuitously restoring Taliaferro "to the status he occupied before his arrest or indictment" over the prosecutor's veto would not only frustrate the statute's limiting constructs, it would nullify them. SDCL 23A-3-32.

Third, the statute's prosecutorial veto is not as "absurd" as Taliaferro suggests, even as applied to him. Since legislatures are presumed to know what they are doing, this court cannot embark on a proper analysis starting from Taliaferro's premise that "the legislature did not envision the exact factual and procedural situation" of this case. APPELLANT'S BRIEF at 13; *Krukow v. South Dakota Board of Pardons and Paroles,* 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124. As this court observed in *Oliver,* it is not "facially absurd" for the legislature to have perceived "a qualitative difference in conduct resulting in charges (unless acquitted) and conduct that does not result in charges being filed." *Oliver,* 2012 SD 9 at ¶ 14, 810 N.W.2d at 353.

Thus, one can easily envision common scenarios that could have influenced the legislature to conclude that automatically expunging an arrest record of dismissed charges might be undesirable from a law enforcement and public records standpoint even if a defendant is later acquitted on related charges. For example, in a domestic abuse case, a prosecutor may have the physical evidence to prosecute a trespass or breaking and entering that was the prelude to a domestic abuse incident, but be forced to dismiss the abuse charge itself because the victim refuses to testify. Or, a blood test SNAFU may force a prosecutor to dismiss a DUI charge and settle for prosecuting a related secondary offense like eluding law enforcement or leaving the scene of an accident.

In either of these examples, an offender may ultimately be acquitted of the secondary charge. But since the record of an arrest may in and of itself serve legitimate law enforcement and judicial functions – such as deterring offenders from re-offending, assisting law enforcement's monitoring of certain offenders, or serving as evidence relevant to sentencing should an undeterred offender re-offend – the legislature naturally would have to be concerned that automatically expunging arrest records could deprive police, prosecutors, and courts of useful information. Hence, the prosecutorial veto.

These deterrent and law enforcement principles apply with equal, if not added, force to a public official charged with abusing his office where,

as here, he secured an acquittal short of a full airing of the evidence against him. EHT at 10.

By enacting a prosecutorial veto, the legislature very obviously believed that arrest records should not automatically be expunged simply because a charge could not be proved. *Oliver,* 2012 SD 9 at ¶ 14, 810 N.W.2d at 353. This notion, while presently inconvenient for Taliaferro, cannot fairly be characterized as "absurd," either in the abstract or even as applied to him. *Oliver,* 2012 SD 9 at ¶ 14, 810 N.W.2d at 353.

CONCLUSION

As South Dakota's late government lawyer *emeritus,* Max Gors, often observed, men who work in government must cut square corners. At least two duly-elected State's Attorneys concluded that Taliaferro flouted this tenet in an effort to frame Wendy Mette. While Taliaferro's subsequent dismissals and acquittals made him legally innocent, his innocence was clinched by virtue of Special Prosecutor Moore's compassion for an already-traumatized young witness, not by virtue of a full airing and adjudication of the evidence against him.

When called to take a position on Taliaferro's expungement petition, Special Prosecutor Moore did not feel that he could, in professional good conscience, give his consent knowing what he knew of the evidence, the impact of Taliaferro's misconduct on Wendy Mette, and the empty significance of an acquittal by default. TT at 443-445, 447-448; EHT at 10. Where Taliaferro sees "injustice" in permitting records

of dismissed charges to outlast records of related charges that end in acquittal, he loses sight of the fact that he is still better off than if all charges had been dismissed before trial and Special Prosecutor Moore had vetoed expungement of the records of seven arrests rather than two.

Nor should Taliaferro's membership in a licensed profession make him more deserving of expungement than an ordinary DUI or domestic abuse offender. If anything, like a DUI arrestee who holds a CDL, the privilege of holding a special license arguably adds impetus to keeping a record of conduct that led to a licensee's arrest.

There are sound law enforcement considerations for subjecting the expungement of records of dismissed charges to prosecutorial consent, even when a defendant is ultimately acquitted on related charges. Special Prosecutor Moore acted within his statutory authority and official discretion in withholding his consent, as did Judge Kean in denying Taliaferro's petition as to the dismissed charges when prosecutorial consent was not given.

Dated this 11th day of June 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's Brief contains 1,667 words.

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

_____
Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of June 2014 a true and correct copy of the foregoing appellant's brief was served on Beadle County States Attorney Michael Moore via first class mail at P.O. Box 116, Huron, SD 57350 and via e-mail on Michael J. Butler at mike.butlerlaw@midconetwork.com.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26997

IN THE MATTER
OF THE EXPUNGEMENT OF RECORDS
RELATED TO BRANDON MICHAEL TALIAFERRO

BRANDON MICHAEL TALIAFERRO,

Petitioner and Appellant,

vs.

STATE OF SOUTH DAKOTA,

Respondent and Appellee.

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

THE HONORABLE GEAN PAUL KEAN
CIRCUIT JUDGE

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PRELIMINARY STATEMENT

Citations in this Reply Brief will follow the same format used in Appellant's Brief. Additionally, citations to Appellant's Brief will be designated as "AB" and citations to Appellee's Brief will be designated as "SB." All references will be followed by the appropriate page number(s).

STATEMENT OF THE FACTS

State claims that Prosecutor Moore "dropped" the conspiracy charge before Taliaferro's trial. (SB-2) State's claim is not supported by the record; it is undisputed that Prosecutor Moore dismissed the conspiracy charge immediately after Judge Kean granted Taliaferro's Motion for Judgment of Acquittal on all remaining counts. (TT-452; ER-6) State writes that "proof of the remaining charges against Taliaferro depended on the testimony of one of Richard Mette's child sex abuse victims" and that "Prosecutor Moore resolved, at the expense of his case, to spare this indispensable witness from giving testimony." (SB-3) Again, State's claim is not supported by the record. Proof of the remaining charges against Taliaferro did not depend on KM. State's choice not to call KM as a witness was based neither on compassion nor empathy for KM, but rather, because KM's testimony exonerates Taliaferro. State's theory was that Taliaferro got KM to lie to Dr. Sippel about Wendy's Mette's knowledge of Richard Mette's sexual abuse of KM. Former DCI Agent Mark Black interrogated KM on November 4, 2011 on that very

point. Agent Black testified at Richard Mette's pre-trial hearing on March 13, 2012 and stated, in relevant part:

> [Mr. Moore]:
>
> Q. And did you ask KM about the truthfulness of her statements she made regarding Wendy to Fran Sippel.
>
> A. [Agent Black] Yes, sir, I did.
>
> Q. And what did she tell you?
>
> A. She stated that her statements about Wendy Mette were true.
>
> Q. And again, can you state that KM never said anything to Fran Sippel about Wendy Mette that's not true?
>
> A. According to KM, no, and to the documentation I have, no.

(MMT March 13, 2012 p. 30.)

At Taliaferro's pre-trial hearing on August 22, 2012, Agent Black testified regarding his interrogations of KM and her three little sisters and stated:

> [By Mike Butler]
>
> Q. And to be clear, in your interviews with these girls they were all asked whether or not Mr. Taliaferro ever attempted to get them to say something that wasn't true; is that correct?
>
> A. [Agent Black] That's correct.
>
> Q. All categorically denied that ever occurred.
>
> A. In the initial interviews; correct.
>
> Q. Well, I'm talking about Brandon Taliaferro.
>
> A. Oh, I'm sorry. You are correct, yes, sir.

> Q. Okay. And they've never said he either pressured them or tried to get them to say something that wasn't true; is that correct?
>
> A. That is correct.
>
> Q. And on that day, who I'll refer to as A. M. and M. M. and K. M., all said Mr. Taliaferro never attempted to get them to say something that wasn't true and never pressured them to say something that wasn't true; is that correct?
>
> A. That's correct.

(TMT August 22, 2012, p. 87-88.)

State's decision not to call KM as a witness was made because KM's testimony was exculpatory to Taliaferro. Had State's charges survived Taliaferro's Motion for Judgment of Acquittal, Taliaferro would have called KM to the stand as a witness for the defense. Of note, State makes no mention of Dr. Sippel in its brief although she was indispensable to the subornation of perjury charges against Taliaferro. State alleged that Dr. Sippel committed the perjury Taliaferro allegedly suborned. State dismissed all charges against Dr. Sippel the day Taliaferro was arraigned, however. (AB-18) State's choice not to call Dr. Sippel as a witness was because her testimony also exonerates Taliaferro.

In reality, State hoped to "prove" its case by calling Wendy Mette to the stand and have her deny[1] what KM disclosed to authorities about Wendy's

[1] Richard Mette denied abusing the children too. For sixteen (16) months, Richard denied, denied and denied. Then Richard pled guilty to 1st Degree Rape of his eight (8) year old

knowledge and participation in KM's abuse. Despite Wendy's denials being wholly irrelevant to the legal issues involved in State's charges against Taliaferro, State attempted to call Wendy as a prosecution witness.

The trial court prohibited Wendy[2] from testifying due to numerous violations of the court's discovery orders. The trial court's *Memorandum Decision* on expungement explained the violations of the court's discovery orders:

> In Taliaferro's criminal case, various pretrial motions were submitted and considered by this court. The only motion which needs to be mentioned is Taliaferro's discovery request of a pertinent DSS records in the Mette A&N. The motion was granted, but first there was to be an *in camera* inspection. It took DSS a long time to send the records to the Court. Finally, after this court reviewed the voluminous records *in camera,* the parties were informed that Taliaferro could inspect the DSS files. Mr. Moore contacted DSS, now with the case being monitored from Sioux Falls, and sent DSS a copy of this court's decision and order. This court has never had any question about Mr. Moore's integrity and compliance with giving DSS notice of the order.
>
> Unfortunately, Mr. Moore was not DSS' legal advisor and DSS obviously balked at compliance with discovery. Soon, DSS through Mr. Golden filed a motion with Judge Von Wald in the A&N case as there was an existing order in that case restricting access to the DSS files. The result of the hearing before Judge Von Wald on the question of access to the DSS records in order to comply with due process in the criminal case was at best ambivalent. The restrictive order remained in place and Mr. Golden was to work on some accommodation as to access. Nothing happened. Access to the DSS records remained restricted until late December 2012. At this time DSS relented a bit and told Mr. Butler he could look at the records, but apparently was not to share what he learned with Taliaferro. This limitation was never part of this court's discovery order and was imposed by DSS *sua sponte* without explanation. There were two problems. One, the trial was set for January 7, 2013 and there were

---

daughter and State dismissed twenty-two (22) other felony charges against him and jointly recommended only a fifteen (15) year sentence.

[2] After State dismissed Wendy's eleven felony child abuse charges, consented to expungement of her record and placed the child abuse victims back in her legal and physical custody, State called Wendy as a witness at the grand jury that indicted Taliaferro.

> hundreds of pages to review. Thus, an impossible time issue existed just to review the voluminous records. Next, the limitation newly imposed by DSS on sharing information gleaned from the records with the client was not compliance with the order and would inhibit the accused from actively participating in his defense. In effect, DSS did not comply with the order.

(AB; A-9)

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING EXPUNGEMENT OF THE TWO DISMISSED CHARGES WHEN THE TWO DISMISSED CHARGES WERE INEXTRICABLY INTERWINED WITH THE FIVE CHARGES OF WHICH TALIAFERRO WAS ACQUITTED AND EXPUNGEMENT WAS GRANTED.

A. A plain reading of SDCL § 23A-3-27(2) demonstrates that subsection (2) of the statute was not triggered in this case as State did not formally dismiss the entire case on the record.

State argues that "without Prosecutor's Moore's consent to expungement" of the two related but dismissed charges, the trial court properly denied Taliaferro's motion to expunge. (SB-4) State then emphatically asserts, "case closed." (SB-4) State bases its argument on a plain reading of subsection (2). However, a plain reading of subsection (2) indicates that there are two prongs to the prosecutor's purported veto power: 1) consent of the prosecuting attorney; and 2) at any time after the prosecuting attorney formally dismisses the entire criminal case on the record. SDCL § 23A-3-27(2).

Here, State satisfied prong one of subsection (2) by refusing to consent. State did not satisfy prong two of subsection (2) as State did not

formally dismiss the entire criminal case on the record. Taliaferro contends that because State failed to satisfy both prongs of subsection (2), the prosecutorial veto power was not triggered and subsection (2) was not a proper basis for the trial court to deny Taliaferro's request for expungement of the two related but dismissed criminal charges.

B. Even if SDCL § 23A-3-27(2) was triggered in this case, the scope of the prosecutorial veto needs clarification.

State argues that Taliaferro claims "the trial court is vested with general authority or unfettered discretion to expunge arrest records simply to satisfy the ends of justice." (SB-4) This is an inaccurate representation of Taliaferro's argument. Taliaferro's argument has never suggested that the statute provides the trial court with unfettered discretion to expunge arrest records simply to satisfy the ends of justice.

Rather, Taliaferro contends that given the facts in the case at bar, denying expungement of the two related criminal charges dismissed by the state in the same case where Taliaferro was acquitted of, and expungement granted upon, all other related criminal charges, frustrates the purpose of the expungement process and produces an unreasonable result. (AB-15) Mr. Taliaferro argues that because there was an acquittal in this case, the legislature left it to the courts to determine whether to grant an expungement of related dismissed charges in a case where the Defendant was acquitted of all other related charges. (AB-15)

Additionally, State argues that Taliaferro claims "the statute's purpose is an open path for arrestees at large to reclaim the status they occupied before their arrest and indictment." (SB-5) Again, this is an inaccurate representation of Taliaferro's argument. Rather, Taliaferro contends that like a suspended imposition of sentence, which is to allow the first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of a conviction record, the expungement advances similar goals, including but not limited to, "restoring the defendant to the status he occupied before his arrest or indictment." SDCL § 23A-3-32. (AB-15) Contrary to State's assertion, Taliaferro has never suggested that the expungement statutes "provide an open path for arrestees at large to reclaim the status they occupied before their arrest or indictment."

Essentially, State argues that Taliaferro should consider himself lucky that Prosecutor Moore did not dismiss all seven charges before trial and refuse to consent to expungement thereby saddling Taliaferro with an arrest record for seven charges rather than two. (SB-8) Such an unbridled and cavalier interpretation of subsection (2) by State is rife with potential for abuse by prosecutors. The need for clarification from this Court regarding the scope of subsection (3) to the unique facts in this case is apparent. Taliaferro urges the view that the scope of subsection (3) allows the trial court to consider a request for expungement of related but dismissed charges, despite a prosecutor's refusal to consent, where, as here, the defendant was acquitted of

all other legally, factually and inextricably intertwined charges "if satisfied 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." SDCL § 23A-3-30.

Given the unique circumstances of the case at bar, both factually and procedurally, it is likely that trial courts in our state will rarely, if ever, encounter a similar situation. Taliaferro's urged interpretation of the statute promotes justice and will in no way open the floodgates to unworthy expungements.

C. State's analogies to a domestic violence case and a DUI case are misplaced and State's reliance on deterrent law enforcement principles is spurious.

State attempts to bolster its position by analogizing this case to a "domestic violence case where a victim refuses to testify" and a "DUI/Eluding law enforcement case where a blood test SNAFU may force a prosecutor to dismiss a DUI charge and settle for prosecuting a related secondary offense like eluding law enforcement." (SB-6) State's analogies are misplaced.

Regarding the domestic violence analogy, the case at bar did not involve a "victim" refusing to testify. This case involved the "victim's" testimony exonerating Taliaferro which is why State chose not to call KM as a witness during its case-in-chief. The DUI/Eluding Law Enforcement analogy is misplaced as well. State did not dismiss certain charges after convicting

Taliaferro on other related charges. What distinguishes this case from State's analogies is that Taliaferro was convicted of nothing. Taliaferro was acquitted of every single charge State didn't dismiss and would have been acquitted of the related charges but for dismissal by State.

State's argues that legitimate law enforcement principles support denial of Taliaferro's request for expungement because Taliaferro "secured an acquittal short of a full airing of the evidence against him." (SB-7) State's attempts to belittle the significance of Taliaferro's acquittals by referring to them as "nominal" and "empty" and insinuating the same were obtained short of a full airing of the evidence against him are disingenuous, at best. State presented its case-in-chief over the course of two and a half days. During its case-in-chief, State called the following witnesses:

1. Deputy State's Attorney Lori Ehlers
2. DCI Agent Dave Lunzman
3. DCI Agent Mark Black
4. Counselor Ellen Washenberger
5. DSS Worker Heather Sieh
6. Foster Parent Jennifer Treichel
7. Children's Attorney Kari Bartling
8. DSS Worker Ashley Hofland
9. Medical Records Custodian Bonita Sumption

Additionally, State offered a plethora of exhibits in an attempt to "prove" its case. Despite everything presented by State, State was unable to survive Taliaferro Motion for Judgement of Acquittal. It rings hollow for State to now argue Taliaferro secured his acquittal "short of a full airing of the evidence against him." The unavoidable reality is State had no case to begin with.

CONCLUSION

WHEREFORE, Appellant Brandon Michael Taliaferro, respectfully requests that this Honorable Court *reverse* the circuit court's order denying expungement of the two criminal charges dismissed by the state and *remand* with appropriate instructions.

Dated this 24th day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing reply brief was served via electronic mail upon the following at their last known addresses as follows:

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on this 24th day of June, 2014.

/s/Michael J. Butler, Esq.
Michael J. Butler, Esq.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this reply brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,181 words from the Statement of the Facts through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/Michael J. Butler, Esq.
Michael J. Butler, Esq.