No. 19-1051

In the Supreme Court of Texas

Roberto Pasquale-Gualtieri Petitto,

Petitioner,

v.

Texas Department of Public Safety,

Respondent.

On Petition for Review
from the Fourth Court of Appeals, San Antonio

Respondent's Brief on the Merits

Jeanine C. Hudson
Manager-CRS Legal Operations
State Bar No. 24048960
jeanine.hudson@dps.texas.gov
Texas Department of Public Safety
CRS Legal
P.O. Box 4143
Austin, Texas 78765
Tel.: (512) 424-7273
Fax: (512) 424-5666

Amanda B. Morrison
Crime Records Attorney
State Bar No. 24059420
amanda.morrison@dps.texas.gov
Tel.: (512) 424-5836

Counsel for Respondent

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

Statutes

STATEMENT OF THE CASE

Nature of the Case:	This case involves a petition for expunction of records concerning an arrest for driving while intoxicated and possession of marijuana.
Trial Court:	216th Judicial District Court of Kerr County, Texas The Honorable N. Keith Williams
Disposition in the Trial Court:	The trial court denied Petitto's petition for expunction. CR 76.
Parties in the Court of Appeals:	Petitto was the appellant. The Department of Public Safety was the appellee.
Disposition in the Court of Appeals:	A panel of the Fourth Court of Appeals, consisting of Chief Justice Marion, and Justices Alvarez and Rodriguez affirmed the trial court's denial of Petitto's expunction petition. *Ex parte Petitto*, No. 04-18-00539-CV, 2019 Tex. App. LEXIS 4603 (Tex. App.—San Antonio June 5, 2019, reh'g denied) (mem. op.). On July 31, 2019, the same Court of Appeals panel denied Petitto's motion for rehearing, but acting sua sponte to clarify the applicable analysis, the Court withdrew the June 5, 2019 opinion and judgment and substituted a new opinion and judgment which also affirmed the district court's denial of Petitto's expunction. *Ex parte Petitto*, 2019 Tex. App. LEXIS 6531 (Tex. App.—San Antonio Jul. 31, 2019, pet. filed)(op. on r'hrg). They found the motion for en banc reconsideration moot.

ISSUES PRESENTED

Texas Code of Criminal Procedure Art. 55.01(a) grants an individual who has been placed under arrest the right to "have all records and files relating to the arrest expunged" if certain conditions are met. The two (2) issues presented are:

> Whether a Class B offense for which a petitioner served community supervision constitutes "the commission of a misdemeanor offense based on the person's arrest" such that it bars expunction of the other Class B offense from that same incident.
>
> Whether requesting and being granted an order of nondisclosure after an answer objecting to an expunction is filed allows expunction of an offense that would otherwise not be subject to expunction.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Legislature determined long ago that individuals who have been arrested should, under certain circumstances, be given the ability to have the records and files from that arrest expunged. This could be for reasons such as an individual eventually being acquitted of the charges against him or having the charges dismissed. *See* TEX. CODE. CRIM. PROC. art. 55.01. Different from the nondisclosure orders common to deferred adjudication actions, expunctions remove the records entirely, even from the sight of law enforcement officers who are able to review nondisclosed records to ensure public safety goals.

Because an expunction of an arrest record is a statutory privilege, an individual seeking expunction is entitled only to what the Texas legislature has provided. However, to clarify the statute and interpret legislative intent, this Court's decision in *State v. T.S.N.* addressed acquittals under Article 55.01(a)(1) and concluded that subarticle (a)(1) is offense-based or charge-based when "the charge for which expungement is sought is wholly unrelated to any final conviction arising from the arrest." 547 S.W.3d 617, 623-624 (Tex. 2018) (*quoting Tex. Dep't of Pub. Safety v. G.B.E.,* 459 S.W.3d 622, 629 (Tex. App.—Austin 2014, pet. denied). This Court declined to address whether Article 55.01(a)(2) was arrest-based, but did state that "Article 55.01 is neither entirely arrest-based nor offense-based." *T.S.N.,* 547 S.W.3d at 623.

Here, Petitioner argues that the Fourth Court erred by interpreting Article 55.01(a)(2) as arrest-based and thus not allowing him to expunge a dismissed charge when he was placed on deferred adjudication community supervision for a related misdemeanor charge based on the same arrest and resolved under the same plea bargain. He also argues that the Fourth Court erred by allowing nondisclosed records to be disclosed to the trial court for purposes of determining eligibility under the expunction statute.

STATEMENT OF FACTS

Petitto was arrested in Kerr County, Texas on March 11, 2015 and charged with both driving while intoxicated, a class B misdemeanor, and possession of marijuana, a class B misdemeanor. CR 35-38. Pursuant to a plea agreement, Petitto entered into a pretrial intervention program for the driving while intoxicated charge, pleaded nolo contendere to the possession of marijuana charge, and was sentenced to 9 months deferred adjudication. CR 39-45.

On August 1, 2017, Petitto filed a Petition for Expunction seeking to expunge the driving while intoxicated offense "because an indictment or information was presented, but the same was subsequently dismissed or quashed on 3/21/2017, due to the completion of a pretrial intervention program authorized under the Texas Government Code. Petitioner further

states that he has been released, that the charge has not resulted in a final conviction and is no longer pending, and there was no court-ordered community supervision under Article 42.12 of the Texas Code of Criminal Procedure." CR 4-9. In response, the Department of Public Safety filed an original answer & general denial, specifically alleging that Petitto served deferred adjudication community supervision for the possession of marijuana offense based on the same arrest as his driving while intoxicated offense, attaching court documents for each offense. CR 31-46.

At the time of the Department's answer, no application for nondisclosure had been filed, but on February 21, 2018, over five months *after* the Department's answer and general denial, the district court signed an order of nondisclosure for the possession of marijuana case. Petitioner's Brief on the Merits ("BOM"), page 6. At a hearing in July 2018, at which the Kerr County Attorney appeared, but the Department of Public Safety did not, the district court denied Petitto's petition for expunction. RR 2, CR 76. The district court stated at the hearing that the "*Ryerson* case appears to be applicable and especially consistent with 55.01, so the petition for expunction is respectfully denied." RR 28.

The next day, Petitto filed a notice of appeal. CR 82. The Fourth Court of Appeals issued an opinion, a dissent, and a judgment in Petitto's case affirming the denial of his expunction in *Ex parte Petitto*, 2019 Tex. App. LEXIS

4603 (Tex. App.—San Antonio June 5, 2019, reh'g denied). The Court of Appeals then denied Petitto's motions for rehearing and en banc reconsideration, but acting sua sponte to clarify the applicable analysis, the Court of Appeals withdrew the original opinion and substituted a new opinion and judgment which also affirmed the district court's denial of Petitto's expunction. *Ex parte Petitto*, 2019 Tex. App. LEXIS 6531 (Tex. App.—San Antonio Jul. 31, 2019, pet. filed)(op. on r'hrg). Petitto then filed this Petition for Review.

SUMMARY OF ARGUMENT

Under the plain terms of Article 55.01(a)(2) of the Texas Code of Criminal Procedure, taken together with case law from all the various courts of appeal that have addressed this issue, Petitioner cannot obtain an expunction for a dismissed offense when it is based on the same arrest as a misdemeanor offense for which he served community supervision. Where, as here, the two offenses are related, and they were both dealt with pursuant to the same plea bargain, this issue is even more clear. The text of Article 55.01(a)(2), when taken together with this Court's opinion in *T.S.N.*, has been interpreted by various courts of appeals to be either offense-based or arrest-based, with various interpretations of how to define those classifications. However, under

the reasoning of all of the courts of appeals that have considered this question, Petitto is not entitled to an expunction.

Additionally, under the plain language of § 411.0765 of the Texas Government Code, the district court properly denied Petitto's expunction by permitting information regarding a nondisclosed offense to be considered in determining eligibility for expunction under Article 55.01 and ultimately denying Petitto's petition for expunction. It should be noted that there is existing precedent from the Fourth Court of Appeals and this Court deciding this same issue. *Tex. Dep't of Pub. Safety v. Ryerson*, 2016 Tex. App. LEXIS 13707, 2016 WL 7445063 (Tex. App.—San Antonio Dec. 28, 2016, pet. denied).

ARGUMENT AND AUTHORITIES

1. The text of Chapter 55 of the Code of Criminal Procedure, taken in conjunction with this Court's decision in *State v. T.S.N.*, supports the arrest-based interpretation of the statute for Article 55.01(a)(2), under which Petitto's expunction was denied.

"Expunction is not a right; it is a statutory privilege." *In re State Bar*, 440 S.W.3d 621, 624 (Tex. 2014). Texas courts have uniformly held that there is no equitable power to grant an expunction because the right to an expunction is available only by statute. *Bargas v. State*, 164 S.W.3d 763, 772 (Tex. App.—Corpus Christi 2005, no pet.). It is the petitioner's burden to prove that all of the statutory requirements have been met, and when the petitioner fails to carry

this burden, the expunction must be denied. *In re Expunction*, 465 S.W.3d 283, 286 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Petitto argues that he was entitled to an expunction of his arrest because his DWI offense was dismissed due to completion of a pretrial intervention program. Petitioner's Petition for Review, pages 10-12. While it would normally be the case that a person completing a pre-trial intervention program is entitled to expunction, it is not true when there is another offense from the same arrest that resulted in a final conviction or community supervision, such as Petitto's possession of marijuana charge which resulted in deferred adjudication community supervision. TEX. CODE OF CRIM. PROC. Art. 55.01(a)(2)(A) and CR 35-38. Petitto argues that the "only argument against this reading is that the statute is entirely "arrest-based" and that nothing can be expunged unless everything can" and urges this Court to overturn precedent and expand its decision in *State v. T.S.N.* to the facts at hand. BOM, page 14. Petitioner asks this Court to expand the precedent in *T.S.N.* to apply an "offense-based" analysis to Article 55.01(a)(2), regardless of whether the charges are related or not, which is inconsistent not only with this Court's opinion in *State v. T.S.N.,* but all opinions flowing from it by every appellate court since *T.S.N.* 547 S.W.3d 617 (Tex. 2018).

This Court stated in *T.S.N.* that article 55.01, when viewed as a whole, is neither entirely arrest-based nor offense-based. *Id.* at 623. In that same case,

this Court held that T.S.N. was entitled to an expunction of her acquitted offense under Article 55.01(a)(1) using the offense-based framework because the offenses based on her same arrest were unrelated to the acquitted offense. *Id.* The same day that this Court's opinion was issued in *T.S.N.* finding that 55.01(a)(1) was offense-based, this Court also denied the Petition for Review and left intact the 4th Court of Appeals' arrest-based interpretation of 55.01(a)(2) in *Tex. Dep't of Pub. Safety v. Ryerson*, 2016 Tex. App. LEXIS 13707 at *2.

Since the decision in *T.S.N.*, the 2nd, 5th, 7th, 12th, and 13th appellate courts have all interpreted Article 55.01(a)(2) as still being arrest-based. *See, e.g.*, *Ex parte J.L.*, 2018 Tex. App. LEXIS 7303 (Tex. App.—Fort Worth, Aug. 31, 2018, no pet.); *In re Hoover*, 2018 Tex. App. LEXIS 4138 (Tex. App.—Dallas June 7, 2018, pet. denied); *Ex parte Bradshaw*, 2018 Tex. App. LEXIS 9505 (Tex. App.—Dallas Nov. 20, 2018, no pet.); *Tex. Dep't of Pub. Safety v. F.A.V.*, 2019 Tex. App. LEXIS 11104 (Tex. App.—Dallas Dec. 20, 2019, pet. filed); *Ex parte J.D.F.*, 2019 Tex. App. LEXIS 3536 (Tex. App.—Amarillo May 1, 2019, no pet.); *Ex parte C.Z.D.*, 2018 Tex. App. LEXIS 4598 (Tex. App.—Tyler June 20, 2018, no pet.); *Ex parte N.T.L.*, 2019 Tex. App. LEXIS 7699 (Tex. App.—Corpus Christi, Aug. 27, 2019, no pet.); *Tex. Dep't of Pub. Safety v. Schuetze*, 2019 Tex. App. LEXIS 92 (Tex. App.—Corpus Christi, Jan. 10, 2019, pet. denied);

Tex. Dep't of Pub. Safety v. Alfaro, 2019 Tex. App. LEXIS 6838 (Tex. App.—Corpus Christi, Aug. 8, 2019, no pet.).

Additionally, while Petitto cites one 14th Court of Appeals opinion, *Ex parte N.B.J.*, which initially interpreted *T.S.N.* to apply an offense-based framework to Article 55.01(a)(2), he ignores *Ex parte Brown* from that same court which clarified that (a)(2) should be considered offense-based only in the limited circumstances where expunction is sought under subsection (a)(1) such as *T.S.N.* or under subsection (a)(2)(b) such as *N.B.J.* where there is no misdemeanor based on the same arrest or felony arising from the same transaction. BOM 15; *Ex parte N.B.J.*, 552 S.W.3d 376, at 384 (Tex. App.—Houston [14th Dist.] June 5, 2018, no pet.); *Ex parte Brown*, 2018 Tex. App. LEXIS 6572 at *5 and footnote 4 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.). The *N.B.J.* opinion assumed that N.B.J.'s custody constituted a single arrest, from which two unrelated charged arose. *N.B.J.* at 381. This follows the clear language in Article 55.01(a)(2)(A) that "regardless of whether any statute of limitations exists for the offense and whether any limitations period for the offenses has expired," if there is a "misdemeanor offense based on the person's arrest" or "any felony offense arising out of the same transaction for which the person was arrested," then that related offense cannot be expunged. And vice versa, if the only other offense is unrelated, either because it is a misdemeanor but based on another arrest or because it is a

felony but arising out of a different transaction (as was the case with *N.B.J.*), then it is unrelated and could be expunged. In this case, Petitto's two misdemeanors were based on a single arrest, so they do not fall under the "unrelated" exception found in *N.B.J.* CR 35-45.

Meanwhile, the 8th Court of Appeals has found the 14th Court of Appeals decisions post-*T.S.N.* instructive in their analysis of Article 55.01(a)(2), but added a "plea-bargain" analysis to (a)(2) to determine if the charges are related. *In re Expunction of J.G.*, 588 S.W.3d 290 (Tex. App.—El Paso 2019). Although it "withhold[s] judgment on the ultimate question of whether Subsection (a)(2) is charge-based or arrest-based," the 8th Court of Appeals states that if the charges are related, "or they are dealt with as part of the same plea deal, then even under a charge-based framework, pleading guilty or obtaining community supervision as to one charge prevents expunction as to other related charges that were otherwise disposed of in a plea deal." *J.G.* at 294 (internal citations omitted).

Despite Petitto's statements that *T.S.N.* is new case law, this expunction was originally denied by the district court two months after this Court issued its opinion in *T.S.N.* and denied review in *Tex. Dep't of Pub. Safety v. Ryerson. T.S.N.*, 547 S.W.3d at 617; *Ryerson*, 2016 Tex. App. LEXIS 13707. The district court explicitly stated at the hearing that the "Ryerson case appears to be applicable and especially consistent with 55.01, so the petition for expunction is

respectfully denied." RR 28. Although the trial court did not address this Court's reasoning in *T.S.N.* or any case applying *T.S.N.* to (a)(2), the 4th court of appeals clearly did so and concurred with the trial court that Petitto was not entitled to an expunction of his arrest. *Petitto*, 2019 Tex. App. LEXIS 6531 at *4-32.

Regardless of what reasoning this Court adopts, Petitto is not entitled to an expunction of his arrest because he served community supervision for a misdemeanor offense based on the same arrest and arising from the same criminal transaction as his dismissed offense. If this Court were to adopt the reasoning of any cases cited above, Petitto would not be entitled to an expunction of his arrest. Applying the arrest-based framework followed by the 2nd, 5th, 7th, 12th, and 13th appellate courts, Petitto would not be entitled to an expunction of his DWI because he served deferred adjudication community supervision for a misdemeanor possession of marijuana offense based on the same arrest as his dismissed offense. *See J.L.*, 2018 Tex. App. LEXIS 7303; *Hoover*, 2018 Tex. App. LEXIS 4138; *J.D.F.*, 2019 Tex. App. LEXIS 3536; *C.Z.D.*, 2018 Tex. App. LEXIS 4598; and *Schuetze*, 2019 Tex. App. LEXIS 92. Application of the offense-based-but-unrelated framework followed by the 14th Court of Appeals in *N.B.J.* and *Brown* would prohibit Petitto's expunction since the DWI originated in the same transaction as the POM. *N.B.J.*, 552 S.W.3d 376; *Brown*, 2018 Tex. App. LEXIS 6572. Applying the maybe-offense-based-

unless-related-or-part-of-a-plea-bargain framework followed by the Eighth Court of Appeals in *J.G.* would also prohibit expunction of Petitto's arrest because his DWI and possession of marijuana charges are related, having occurred pursuant to the same transaction (he was possessing marijuana at the same time he was arrested for driving while intoxicated) and were disposed of as part of the same plea bargain. BOM, page 6, RR 11-12) and *J.G.,* 588 S.W.3d 290 at 294. Therefore, under any analysis so far put forth by any of the courts of appeal, Petitto's argument fails.

2. The Fourth Court correctly interpreted TEX. GOV'T CODE ANN. § 411.0765 and TEX. CODE OF CRIM. PROC. Art. 55.01 to permit information subject to an order of nondisclosure to be disclosed at an expunction hearing.

As the Fourth Court of Appeals explained, "the expunction statute necessarily requires an inquiry into any and all offenses or charges stemming from the same transaction from which an individual seeks an expunction...[and]...to allow Petitto to circumvent the criminal transaction prohibition under the expunction statute, by obtaining an order of [non]disclosure, would lead to "an improper manner of interpreting statutory language." *Ex parte Petitto,* 2019 Tex. App. LEXIS 6531 (internal citations omitted). In his brief on the merits, Petitto argues that because he obtained an order of nondisclosure regarding an offense arising out of the arrest he seeks to expunge, information relating to his nondisclosed charge is unavailable under

TEX. GOV'T CODE ANN. § 411.0765(b)(7), so that information cannot be used by the court to prohibit him from obtaining an expunction. (*see* BOM, page 13).

Petitto does not dispute that he served community supervision for the possession charge stemming from the DWI arrest. He instead proposes that the court should ignore the fact of that supervision since it has now been nondisclosed. Petitto also ignores the fact that filing an expunction petition for another offense out of that same transaction necessarily brings the topic of the nondisclosed records before the court. RR 9-10. The court's awareness of the records does not disappear just because the original case gets nondisclosed. CR 31. The nondisclosure does not change the fact Petitto is required to prove that he did not serve community supervision for a "misdemeanor offense based on [his] arrest" and if he cannot prove that, then expunction of all records and files related to the arrest is prohibited. TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2)(A), *see also Tex. Dep't of Pub. Safety v. T.R.W.*, No. 14-17-00572-CV, 2019 Tex. App. LEXIS 6911, 2019 WL 3724707 (Tex. App.—Houston [14th Dist.] Aug. 8, 2019)(mem. op.).

a. Prior precedent from the 14th and 4th Court of Appeals deals with this same issue and has previously held that nondisclosed records are permitted to be disclosed to deny an expunction.

The court in *T.R.W.* heard nearly the exact same argument that Petitto is making here. *Id.* In that case, T.R.W. was arrested and "charged with both misdemeanor theft and misdemeanor possession of a controlled substance,"

with both offenses occurring on the same date. *Id.* at *2. While T.R.W. completed a pretrial intervention program for the theft charge, she served deferred adjudication community supervision for the possession charge. *Id.* Similar to the case at hand, T.R.W. obtained an order of nondisclosure for the possession charge and sought an expunction of the theft charge. *Id.* at *2-3.

Similar to *T.R.W.,* Petitto is correct that nondisclosed records are generally unavailable to the public and may only be disclosed under limited circumstances. However, Petitto also "ignores the fact that it is [his] burden to affirmatively prove that all of the statutory requirements for expunction have been met." *T.R.W.* at 17. T.R.W. made the same argument that, "due to the nondisclosure order, DPS could not use evidence regarding her community supervision sentence as evidence in an expunction proceeding, which is a civil matter." *Id.* But as the 14th Court of Appeals explains:

> [I]n drafting the expunction statute, the legislature drew the line at not permitting expunction if a person received community supervision. See TEX. CODE CRIM. PROC. art. 55.01(a)(2). Nothing in the statute entitles a person to expunction when the person does not actually meet the requirements of the expunction statute. *See Tex. Dep't of Pub. Safety v. Ryerson*, No. 14-16-00276-CV, 2016 Tex. App. LEXIS 13707, 2016 WL 7445063, at *3 (Tex. App.—San Antonio Dec. 28, 2016, pet. denied) (explaining key differences between expunction orders and nondisclosure orders and rejecting argument that it was inconsistent to prohibit expunction of an offense while permitting a nondisclosure order regarding the offense). Consequently, we reject T.R.W.'s argument that because she received a nondisclosure order pertaining to the possession charge, she was entitled to expunge records pertaining to her theft charge. *T.R.W.* at 17-18.

Even if T.R.W.'s argument been accepted by the court to allow expunction of the second offense when the first offense had been nondisclosed, which it was not Petitto is even less able to justify the result he seeks. Unlike in *T.R.W.,* in this case the Department filed an original answer and general denial enclosing records relating to Petitto's arrest for possession of marijuana on September 22, 2017, which was about six months *prior* to Petitto obtaining an order of nondisclosure on February 21, 2018. CR 31-46, BOM, page 6. Regardless of the timing of his nondisclosure, Petitto was not entitled to an expunction of his arrest for reasons stated below, but in this case the expunction court had actual and undisputedly authorized notice of the deferred adjudication long before those records were nondisclosed. CR 31-46.

In this case, the 4th Court of Appeals correctly held that "an expunction is a statutory privilege, and not a right" and that "the evidence contained in the order of nondisclosure was properly before the trial court." *Ex parte Petitto*, No. 04-18-00539-CV, 2019 Tex. App. LEXIS 4603, at *29. While the majority opinion failed to state a reason for its finding that disclosure was permitted, it should be noted that there is prior 4th Court of Appeals precedent regarding this issue. *Ryerson*, 2016 Tex. App. LEXIS 13707.

In both *Ryerson* and *T.R.W.,* it was clear that a nondisclosure is not meant to be used to shield records from the court and allow an expunction

where the petitioner cannot meet the statutory requirements. This makes sense given that not every agency with records in an expunction would also receive notice of a petition for nondisclosure; the court in receipt of a petition for nondisclosure only "shall provide notice to the state." TEX. GOV'T CODE ANN. § 411.0745(e). Further undermining Petitto's argument that a nondisclosure order should hide records in an expunction hearing is the fact that a nondisclosure order is un-appealable by the State, even if it is improperly granted. *See Huth v. State,* 241 S.W.3d 206, 208 (Tex. App.—Amarillo 2007, no pet.); *Rado v. State,* No. 05-06-00200-CV, 2007 Tex. App. LEXIS 4984, 2007 WL 1829648, at *1 (Tex. App.—Dallas June 27, 2007, no pet.) (mem. op.)); *Bergin v. State,* No. 06-06-00089-CV, 2006 Tex. App. LEXIS 7571, 2006 WL 2456302, at *1-2 (Tex. App.—Texarkana Aug. 25, 2006, no pet.) (mem. op.); *State v. L.P.*, 525 S.W.3d 418 at 419-420 (Tex. App.—Fort Worth 2017, no pet.). So if a nondisclosure is improperly granted, and there is no remedy, it should not then allow a petitioner to also circumvent the requirements of the expunction statute.

b. The analysis put forth in the dissenting opinion of *Petitto* is incorrect when taken in context of various non-expunction matters.

The dissent in *Petitto* erroneously concluded that the district court must not be a "criminal justice agency" because TEX. GOV'T. CODE ANN. § 411.0765(b)(7) specifies that "a district court regarding a petition for name

change" is a "noncriminal justice agency" and § 411.076 specifies when a court may disclose information subject to a nondisclosure order. *Petitto*, 2019 Tex. App. 6531, at *33-39. (Rodriguez, J., dissenting). However, this ignores the fact that a district court may hear criminal cases, civil cases, or both, depending on that county's organization. While it may be true that a district court regarding a petition for name change is a noncriminal justice agency, it cannot be true that a district court adjudicating a criminal case is a noncriminal justice agency. Therefore, it is reasonable to conclude that a district court is only a "noncriminal justice agency" when it is hearing cases unrelated to criminal matters, such as family law, personal injury, real property, tax, or employment law.

It thus follows that the specific exceptions listed under TEX. GOV'T. CODE ANN. § 411.0765 would extend only to a district court when it is both serving in a "noncriminal justice agency" capacity and when it is not serving a "criminal justice purpose." For example, when a district court hears a family law case, it might not be considered a "criminal justice agency," but the exception in TEX. GOV'T. CODE ANN. 411.0765(b)(7) would allow it to view nondisclosed records for a name change under Family Code chapter 45. The dissent's reasoning is incorrect because many district courts have criminal jurisdiction, even if they do not always have criminal dockets. TEX. CONST. art. V, § 8; TEX. CODE CRIM. PROC art. 4.01; and TEX. CODE CRIM. PROC. art. 4.05.

In this specific case, the Kerr County District Courts hear criminal cases, civil cases, and family law cases. The dissent states that the language of 411.0765(a)(2) and the definition of "administration of criminal justice" suggest that records may be disclosed only for "an administrative purpose ... rather than the use of the information in an adversarial open court proceeding," but this ignores the fact that both criminal justice and regulatory licensing matters can include open court adversarial proceedings and a court would still have "an administrative purpose" relevant to the "administration of criminal justice" when considering them. *Petitto*, 2019 Tex. App. 6531, at *38. (Rodriguez, J., dissenting). For example, regulatory licensing of handgun permits entails adversarial hearings in justice of the peace courts or appeals to the county court at law. TEX. GOV'T CODE ANN. § 411.180. Since those hearings are subject to the Civil Practice and Remedies Code and the justice acts as an administrative hearing officer, those courts would be considered "noncriminal justice agencies" during those hearings, they are serving a "criminal justice purpose" because they are involved in the "administration of criminal justice" when they hold a hearing for a regulatory licensing matter (handgun licenses).

A district court hearing juvenile cases under TEX. FAM. CODE ANN. § 51.04 would necessarily be a criminal justice agency and serving a criminal justice purpose. TEX. GOV'T CODE ANN. §411.082(3). Similarly, a district court, a justice court, a county court, or a municipal court hearing a criminal docket is

a criminal justice agency because it adjudicates an offender and disseminates the disposition of the case—criminal history record information—to the Department of Public Safety, the jail, the clerk's office, and/or community supervision office. TEX. CODE OF CRIM. PROC. art. 66.001(1). By this same logic, a district court (or justice of the peace or municipal court) hearing expunction or nondisclosure cases qualified as a "criminal justice agency." Even if such a court were not a "criminal justice agency," just the single act of holding a hearing that seeks to control the dissemination of criminal history record information falls under the definition of "administration of criminal justice." Further, "an activity that is included in the administration of criminal justice" means they are serving a "criminal justice purpose" which would thus entitle those courts to receive nondisclosed records. TEX. GOV'T CODE ANN. §§ 411.0765(a)(1) OR (a)(2), 411.082(4)(A), and TEX. CODE CRIM. PROC. § 66.001(1). That definition applies even if the court is not a "criminal justice agency," such as the prosecutor or TXDPS, due to not allocating a substantial part of its annual budget to the administration of criminal justice. TEX. GOV'T CODE ANN. §411.082(3)(A). As long as there is a "criminal justice purpose," then a "criminal justice agency" may disclose "criminal history record information that is the subject of a nondisclosure" to further that criminal justice purpose. TEX. GOV'T CODE ANN. §411.0765(A)(2). Contrary to the reading by Petitto and the dissent, 411.0765(a)(2) stands separate from

411.0765(b) which allows disclosure of nondisclosed records to noncriminal justice agencies (including district courts for a name change) for other purposes and 411.0765(a)(2) allows disclosure to anyone as long as it is for a "criminal justice purpose" as that term is defined in 411.082 or for a "regulatory licensing purpose". TEX. GOV'T CODE ANN. §411.071 and 411.0765(a)(2).

A plain reading of the statute suggests that the legislature intended the expunction court to have access to all of the criminal history record information including nondisclosed records, so a trial court would be able to make a determination as to whether a Petitioner is entitled to an expunction in cases where: 1) there is a misdemeanor offense arising from the same arrest or a felony offense arising out of the same transaction for which the person was arrested (TEX. CODE CRIM. PROC. ANN. art. § 55.01(a)(2)(A)), 2) there is another offense from the same criminal episode as an offense for which the person is acquitted (TEX. CODE CRIM. PROC. ANN. art. § 55.01(c)), or 3) the offense Petitioner seeks to expunge has itself been previously nondisclosed. *Tex. Dep't of Pub. Safety v. Foster,* 398 S.W.3d 887 at 889-891 (Tex. App.—Dallas 2013, no pet.). Respondent agrees with the Fourth Court of Appeals that to deny the trial court access to nondisclosed records would not lead to "a just and reasonable result." *Petitto,* 2019 Tex. App. LEXIS 6531 at *7. (*citing Sommers v. Sandcastle Homes, Inc.,* 521 S.W.3d 749, 754 (Tex. 2017)).

It is an absurd interpretation of the statute that a person choosing to have a record nondisclosed before seeking expunction would be entitled to an expunction that he would be statutorily denied had he chosen to seek expunction before having the record nondisclosed. It would be even more absurd to allow an expunction that doesn't meet the statutory requirements to be granted just because the petitioner realized he couldn't meet his burden of proof after a respondent filed an answer and then tried to force the court to ignore the information that would deny his expunction (as Petitto did here).

c. Petitto's legislative intent argument fails because the Legislature had the opportunity to amend Article 55.01(a)(2) in 2017 when it added Tex. Gov't Code Ann. § 411.0731 and 411.0736, and again in 2019, but chose not to do so.

Petitto essentially argues in his brief on the merits that because in 2017 the Legislature added both Tex. Gov't Code Ann. § 411.0731 and 411.0736 to allow "many first-time DWI offenders to have their records non-disclosed," this Court should assume that it intended to allow for the expunction of offenses for which a petitioner completed a pretrial diversion program, regardless of whether the petitioner was convicted or served deferred adjudication for an offense based out of the same arrest, transaction, or plea bargain. BOM, page 17. However, this ignores that the Legislature had the opportunity to amend the language of Article 55.01(a)(2) in 2017 and/or in 2019 to allow for those diversionary-program-completed-charges to be

expunged regardless of circumstance, and chose not to do so during either legislative session. "When the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it to reach what the parties or we might believe is a better result." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010) (citing *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 847 (Tex. 2009)).

d. Pettito's public policy argument fails because he still received the benefit of his plea bargain.

Finally, Petitto's public policy argument that "individuals actually convicted of DWI end up in a far better position than those who were not" fails for several reasons. BOM, page 18. Just like in *T.R.W.*, Petitto received the benefit of his plea bargain by virtue of having his DWI dismissed following successful completion of the pretrial intervention program, and that dismissal is accurately reflected on his criminal history. This applies even if he cannot get the pretrial intervention record expunged. Petitto does not suffer the collateral consequences of a DWI conviction, such as suspension of his driver's license and does not have a conviction on his criminal history record. His possession of marijuana charge was nondisclosed. Neither the nondisclosed possession nor the DWI offense appears on his public criminal history record since the pretrial intervention is neither a conviction nor a deferred adjudication. TEX.

GOV'T CODE §411.135(a)(2). Further, if Petitto were convicted of the DWI rather than having it dismissed, he would still be unable to expunge it based on Article 55.01(a)(2) under any court's interpretation. Therefore, he is not in a worse position for having completed a pretrial intervention program, as Petitto seems to indicate in his Petition.

PRAYER

The Court should affirm the court of appeals' judgment.

Respectfully submitted,

/s/ Amanda B. Morrison
Amanda B. Morrison
State Bar No. 24059420
Texas Department of Public Safety
Crime Records Service (MSC 0234)
P.O. Box 4143
Austin, Texas 78765-4143
Tel. (512) 424-5836
Fax (512) 424-5666
amanda.morrison@dps.texas.gov

CERTIFICATE OF RULE 9 COMPLIANCE

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/s/ Amanda B. Morrison

Amanda B. Morrison
Crime Records Attorney
Texas Department of Public Safety

CERTIFICATE OF FILING AND SERVICE

I certify that a true and correct copy of this brief was electronically served on counsel for the opposing party at the below address on July 27, 2020.

/s/ Amanda B. Morrison

Amanda B. Morrison
Crime Records Attorney
Texas Department of Public Safety

Eserved

Harold Danford
Attorney for Petitto
danfordlaw@gmail.com

Courtesy Copy

Abigail Hurt
Kerr County Attorney
hstebbins@co.kerr.tx.us