NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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October 6, 2023

LETTER OPINION

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RE: *J. A. S. v. Commonwealth of Virginia*
Case No. CL-2023-10266

Dear Counsel:

The question before the Court is whether the amended charge of reckless driving, of which Petitioner was convicted, is conceptually dissimilar to the original offense of driving under the influence of alcohol ("DUI"), so that the original charge may be deemed

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"otherwise dismissed" and expunged. To make this determination, the Supreme Court of Virginia directs "a court should (1) compare the conceptual similarities and differences between the original charge and the amended charge and (2) examine whether the two charges share a common nucleus of operative facts." *Williams v. Commonwealth*, 885 S.E.2d 457, 461 (Va. 2023). This Court finds the charges in the instant case are conceptually dissimilar because the seven reasonably derived comparative factors below summarized inform the offenses are aimed at addressing fundamentally different conceptual considerations. DUI and reckless driving are conceptually dissimilar in that they spring from distinct originating factors, reflect unalike volitional intention, differ in locational scope, proscribe different behaviors, are of diverse criminal categories, occasion divergent minimum consequences, and stir varying societal perspectives.

Accordingly, Petitioner, whose DUI charge was later amended to reckless driving, may have the original charge expunged because the two charges do not share conceptual similarity, and based on the withdrawal and repudiation of all factual allegations respecting intoxication in the convicting order, the two offenses are thereby deemed not to share a common nucleus of operative fact.

FACTS

Petitioner was charged in the Fairfax County General District Court ("GDC") with DUI as a first offense, a violation of Virginia Code § 18.2-266, which charge was thereafter amended to reckless driving *general*, a violation of § 46.2-852. Petitioner pled guilty to the amended charge, and as part of the sentence, suffered a 6-month driver's license

suspension and referral to the Virginia Alcohol Safety Action Program ("VASAP"). On the date of such conviction, the GDC struck all factual references relevant to the DUI charge, and further rescinded an administrative license suspension entered pursuant to § 46.2-391.2.

The Petitioner submitted a proposed order, agreed to by the Commonwealth of Virginia, wherein this Court is called upon to expunge an original charge of DUI, which was amended to reckless driving. Because of recent precedent from the Supreme Court of Virginia applicable to whether courts have the authority to enter such an order, this Court undertook to examine the question in detail, as set forth in this opinion.

ANALYSIS

A petitioner may expunge a charge that has been "otherwise dismissed." Va. Code § 19.2-392.2(A)(2). A continual question has remained how to apply such standard in the context of one offense amended to a differing offense.

> The Supreme Court reads the term "otherwise dismissed" very narrowly. It held the expungement statute applies only to those innocent of the offense they seek to expunge. *Id.* at 459-460 ("we have considered the purpose of the statute, which is to allow 'innocent citizens' to avoid the consequences that flow from the existence of arrest records"); *Dressner v. Commonwealth,* 285 Va. 1, 10 (2013) (Powell, J., Goodwyn, J., and McClanahan, J. dissenting) ("The policy is clear: expungement should only be available to an *innocent* citizen.") (Emphasis in original); *Gregg,* 227 Va. at 507 (denying expungement of a Possession of Marijuana charge dismissed through a deferred disposition program where the defendant pled guilty); *Daniel v. Commonwealth,* 268 Va. 523, 528 (2004) (denying expungement of an Assault charge after a court found facts sufficient to find the defendant guilty, but never made a finding of guilt).

W.H.D. v. Commonwealth, No. CL-2022-9997, 2023 WL 5277796, at *2 (Va. Cir. Ct. Aug. 15, 2023).

Despite the historical trend of restrictive interpretation of the meaning of "otherwise dismissed," the Supreme Court of Virginia has nevertheless "construed the phrase . . . to encompass more than a literal dismissal," as detailed below. *Williams*, 885 S.E.2d at 459.

> When a charge is not a lesser included offense, the inquiry turns on whether the charge is a "completely separate and unrelated charge." *Dressner*, 285 Va. at 6, 736 S.E.2d 735. In *Dressner*, the petitioner was originally charged by summons with possession of marijuana. *Id.* at 3, 736 S.E.2d 735. The charge was amended to reckless driving. *Id.* at 3-4, 736 S.E.2d 735. The petitioner sought to expunge the police and court records related to the marijuana charge. *Id.* at 4, 736 S.E.2d 735. We concluded that the petitioner was entitled to seek expungement, reasoning that the marijuana charge was "otherwise dismissed." *Id.* at 7, 736 S.E.2d 735. We observed that reckless driving is a "completely separate and unrelated" charge compared to possession of marijuana. *Id.* at 6, 736 S.E.2d 735. Furthermore, "[r]eckless driving is not a lesser-included offense of possession of marijuana." *Id.* We observed that " 'the elements of the offense[ ] of which [Dressner] was convicted' were not 'subsumed within the [possession of marijuana charge]' and did not 'form the sole bas[i]s for the conviction[ ].' " *Id.* (alterations in original) (quoting *Necaise*, 281 Va. at 669, 708 S.E.2d 864). Consequently, the petitioner "*occupie[d] the 'status of "innocent"* ' " with respect to that charge. *Id.* at 7, 736 S.E.2d 735 (quoting *Brown v. Commonwealth*, 278 Va. 92, 102, 677 S.E.2d 220 (2009)).

Williams, 885 S.E.2d at 460 (emphasis added) (alteration in original). Implicit in the Supreme Court's precedent is that the "status of innocent" is distinguished from actual innocence. This has led to the discordant application of the law, so persons actually guilty may occupy the status of innocent, while some actually innocent may occupy the status of guilty.

As a starting proposition to application of the new *Williams* test by this Court, the Supreme Court has held defendants convicted of lesser included offenses do not occupy the status of innocent.

> In determining whether a charge qualifies for expungement on the basis that it was "otherwise dismissed," a court should examine whether the charge for which the petitioner was convicted is a lesser included offense of the original charge. If it is, the petitioner does not occupy the status of innocent, and the original charge cannot be expunged.

Id. (citing *Necaise v. Commonwealth,* 281 Va. 666, 670 (2011). Applying this unforgiving rule, when a person is *wrongly* charged with a greater offense and is later convicted of only a lesser included charge, expungement is per se unavailable by precedent. The Supreme Court of Virginia applied its precedent in exactly such manner when it held a person charged with felony DUI 3rd, who had only one prior conviction, could not expunge the felony charge upon conviction of misdemeanor DUI, notwithstanding the defendant was *actually innocent* of the felony on the day it was originally charged. *See Forness v. Commonwealth,* 882 S.E.2d 201 (Va. 2023).

The General Assembly has enacted policy guidance as to the mischief expungements are directed to ameliorate.

> § 19.2-392.1. Statement of policy. — The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such persons from the *unwarranted damage* which may occur as a result of being arrested and convicted. (1977, c. 675; 1984, c. 642.).

Va. Code § 19.2-392.1 (emphasis added). The unwarranted existence of a felony charge on a person's record may pose a particularly unjust hindrance because of the human inclination sometimes to assume that where there is smoke, there must be fire, even when the original fumes were but a mirage. The damaging inuendo that a person must have been guilty of an amended greater offense when it was merely erroneously placed on that person's record is a fundamentally unfair consequence of a careless charging decision.

> Virginia follows the "'mischief rule' of statutory construction." *Rector & Visitors of Univ. of Virginia v. Harris*, 239 Va. 119, 124 (1990). Remedial statutes must be "'construed liberally, so as to *suppress the mischief* and advance the remedy' in accordance with the legislature's intended purpose." *Id.* (emphasis in original) (citation omitted); *see Greenberg v. Commonwealth ex. rel. Att'y Gen. of Virginia*, 255 Va. 594, 600 (1998).

Commonwealth v. Burkard, No. FE-2021-475, 2023 WL 2069610, at *13 (Va.Cir.Ct. Feb. 16, 2023). Reliance on precedent "is not 'a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *Edwards v. Omni International Services, Inc.,* 301 Va. 125, 132 (2022) (Kelsey J. dissenting) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

> Stare decisis "is not an inexorable command." *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)) (internal quotation marks omitted). *It "was never meant to prevent a careful evolution of the law.* Stare decisis, pushed to extremes, would mean the law, once stated by the courts, could never be changed by the courts." *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 276, 355 S.E.2d 579, 588 (1987) (Poff, J., dissenting).

Home Paramount Pest Control v. Shaffer, 282 Va. 412, 419 (2011) (emphasis added).

It would thus be consistent with application of the mischief rule and with warranted departure from precedent for the Supreme Court to allow expungement of a wrongly charged greater offense, later amended to its lesser included progeny. However, the Supreme Court of Virginia's chosen fealty to precedent when it comes to expungement jurisprudence has dictated a different result.

The Supreme Court's precedent binding on this Court, in effect, directs the General Assembly's concept of "unwarranted damage" applies only to the fact "[a] citizen who *occupies the status of innocent* should not face the prospect of hindrance in employment, housing or credit from a government arrest record." *A.R.A. v. Commonwealth*, 295 Va. 153, 161 (2018) (emphasis added). In contrast to this long-standing precedent, the General Assembly in 2020 moved policy in the opposite direction, making expungements available to some defendants who do not occupy the status of innocent. The legislature added to the tool kit of prosecutors the greater ability to induce guilty pleas in deferred finding cases, by allowing original charges to be expunged by agreement of the parties even in cases resulting in later conviction of lesser included offenses. *See* Va. Code § 19.2-298.02(D) (effective March 1, 2021).

Under guiding precedent applicable to expungements not covered by § 19.2-298.02, ironically, guilty parties sometimes plead guilty to offenses they did not commit to avoid pleading to a greater offense of which they are in fact guilty, to achieve the "status of innocent" with respect to the original offense. Such was inferably the case in *Dressner v. Commonwealth*. *See* 285 Va. 1 (2013) (permitting expungement of a marijuana charge amended to reckless driving). This is perfectly permissible under law

for "[a] legal fiction plea, like an *Alford* plea or a lesser offense plea, is a tool parties in a criminal case may use as part of a compromise." *Commonwealth v. Ayala,* 99 Va. Cir. 374, *5 (Fairfax 2018).

Addressing how precedent was applied in *Forness*, the dissent lamented it was "confounding" how the case was even before the Supreme Court. 882 S.E.2d at 203 (Mann J. dissenting). The increasingly complex labyrinth of expungement jurisprudence can be explained by the Supreme Court of Virginia's consistent application of the doctrine of stare decisis, which is generally essential to promoting stability and predictability of the law. With respect to expungement precedent though, this has led, despite the best efforts of the Supreme Court, to an effect opposite of the goal of the doctrine—i.e., an increasingly complex, unpredictable, and unstable body of law, with litigants trepidatious about suggesting a better course.[1] As the Supreme Court noted in *Williams*,

> In their briefs and at oral argument, both sides draw from existing precedent. *Neither party has asked [the Court] to discard our existing approach* in favor of a radically new test. Stare decisis, therefore, not only applies as it ordinarily would, *Selected Risks Insurance Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579 (1987), it applies with all the more force when neither side has asked us to overturn our precedent.

Williams, 885 S.E.2d at 459 n. 1 (emphasis added). Thus, the Supreme Court again added legal complexity to precedent in resolution of the question presented in *Williams*.

In assessing what the further limiting principle may be in application of the Supreme Court of Virginia's new test of conceptual similarity, this Court is required to give

[1] The Supreme Court of the United States has suggested factors to be considered whether to depart from precedent include "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362-63 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)).

voice to any appellate precedent that has not been expressly overruled and is in harmony with the new rule. It is clear lesser included offenses would necessarily also be conceptually similar by precedent. *See Forness,* 882 S.E.2d 201. At the same time, an offense remains expungable if amended to a "completely separate and unrelated charge" where "the elements of the offense" of which the defendant is convicted are not "subsumed" within the original charge, and do not "form the *sole basis* for the conviction." *Dressner*, 285 Va. at 6 (emphasis added) (alteration omitted). A DUI charge amended to reckless driving is not barred from expungement merely by the holding in *Forness,* as the Supreme Court "has observed that 'no case . . . holds that one driving under the influence of an intoxicant must necessarily be driving recklessly.'" *Bishop v. Commonwealth*, 20 Va. App. 206, 210 (1995) (quoting *Spickard v. City of Lynchburg,* 174 Va. 502, 505 (1940)).

It bears asking whether the fact the Virginia Code allows for the concurrent prosecution but not conviction of both DUI and reckless driving *general*, a violation of Virginia Code § 46.2-852, is of significance to the *Williams* rule. *See* Va. Code § 19.2-294.1. The only suggestive answer thereby is that both offenses could, under the right circumstances, share a common nucleus of operative fact, and that the General Assembly has made the policy choice that, when such is the case, the defendant is not to be convicted of both offenses. The bar only applies to the concurrent conviction of DUI and reckless driving *general,* when the charges are found to be "*growing* out of the same act or acts." Va. Code § 19.2-294.1 (emphasis added). Thus, section 19.2-294.1, by the plain and ordinary reading of the statute pertains only to the second element of the

Williams test, whether there may be a common nucleus of operative fact, and not to its first, whether the offenses are conceptually similar.

Reading section 19.2-294.1 as dispositive proof of conceptual similarity between DUI and reckless driving *general* would also lead to functional inconsistencies.

> If a proposed construction would create "functional inconsistencies" within a statute, *Cuccinelli*, 283 Va. at 430, courts must select the definition that allows the statute to be viewed "as a consistent and harmonious whole so as to effectuate the legislative goal." *Virginia Elec. & Power Co. v. Bd. of Cnty. Supervisors*, 226 Va. 382, 387-88 (1983).

Burkard, No. FE-2021-475, 2023 WL 2069610, at *5. Amending a DUI charge to a whole host of other offenses deemed to be "reckless driving" but not to § 46.2-852, would then in stark contrast make the DUI charge per se expungable in those instances by virtue of their exclusion from § 19.2-294.1. *See, e.g.,* Va. Code § 46.2-829 (overtaking or passing a moving emergency vehicle giving an audible signal and displaying activated warning lights); § 46.2-853 (driving a vehicle which is not under proper control or which has inadequate or improperly adjusted brakes); § 46.2-854 (overtaking and passing another vehicle proceeding in the same direction, on or approaching the crest of a grade or on or approaching a curve in the highway, where the driver's view along the highway is obstructed); § 46.2-855 (driving a vehicle when it is so loaded, or when there are in the front seat such number of persons, as to obstruct the view of the driver to the front or sides of the vehicle or to interfere with the driver's control over the driving mechanism of the vehicle); § 46.2-856 (passing two other vehicles abreast); § 46.2-857 (driving two abreast in a single lane); § 46.2-858 (passing at a railroad grade crossing); § 46.2-859 (passing a stopped school bus); § 46.2-860 (failing to give proper signals); § 46.2-861

(driving too fast for highway and traffic conditions); § 46.2-861.1 (drivers to yield right-of-way or reduce speed when approaching stationary vehicles displaying certain warning lights on highways); § 46.2-862 (speeding 20 miles per hour or more in excess of the applicable maximum speed limit or in excess of 85 miles per hour); § 46.2-863 (failure to bring vehicle to a stop immediately before entering a highway from a side road when there is traffic approaching on such highway within 500 feet of such point of entrance); § 46.2-864 (reckless driving on parking lots); § 46.2-865 (racing).

The notion the General Assembly has found reckless driving *general* to be conceptually similar to DUI simply by enacting § 19.2-294.1 is further rebutted by the fact a defendant may be convicted in parallel of both DUI and reckless driving when occurring in a parking lot, a violation of § 46.2-864. It is logically tenuous to assume the General Assembly found reckless driving *general* to be conceptually like DUI, but not when both offenses occur in a parking lot.

Of closer import is when the DUI, as in the instant case, is amended to reckless driving and the sentence on the amended charge includes the discretionary imposition of referral to the Virginia Alcohol Safety Action Program ("VASAP"). The convicting court has the discretion to refer to VASAP a person convicted of "*any* reckless driving violation under Article 7 (§ 46.2-852 et seq.) of Chapter 8 of Title 46.2" when "such person was initially charged with a violation of § 18.2-266." Va. Code § 18.2-271.1(G) (emphasis added). Section 18.2-271.1(G) could be read to apply whether reckless driving results from amendment of the DUI charge or is concurrently charged. With respect to all the possible iterations of reckless driving offenses already denoted above, the convicting

court has the *discretion* to order VASAP. However, the ability of a court to sentence a defendant to complete VASAP is not necessarily derivative of an amended DUI charge. The trial court can also impose the condition of completion of VASAP in a reckless driving case for "any person convicted of a reckless driving offense which the court has *reason to believe* is alcohol-related or drug-related." Va. Code § 46.2-392 (emphasis added). The "reason to believe" standard is conceptually distinct from and more attenuated than the requirement the defendant first be charged with DUI under § 18.2-271.1(G).

Unlike for a DUI conviction, referral to VASAP is not required for reckless driving. "Conceptual similarity" depends on comparison of offense characteristics rather than on the *optional* exercise of a sentencing term. It would be functionally inconsistent and thus impermissible to find reckless driving is conceptually like DUI when the convicting court imposes VASAP, but dissimilar when it does not. *See Burkard*, No. FE-2021-475, 2023 WL 2069610, at *5 ("[C]ourts must select the definition that allows the statute to be viewed 'as a consistent and harmonious whole.'"). The action of a court in imposing a *discretionary* remedy with respect to a reckless driving conviction, does not thereby affect "the elements of the offense" of which the defendant is convicted. Therefore, this cannot by itself impart such elements are "subsumed" within the original charge, and "form the *sole basis* for the conviction" to bar expungement of the DUI charge. *See Dressner*, 285 Va. at 6 (emphasis added) (alteration omitted).

The Supreme Court of Virginia has not stated what *degree* of conceptual similarity offenses must share to bar expungement of the original charge. "[W]here a statute is fairly open to two constructions, it should be given that construction which will prevent

absurdity." *Harvey v. Hoffman,* 108 Va. 626, 629 (1908). Interpreting "conceptual similarity" in a manner that depends on fluctuating factors for the same offense could lead to the absurdity and functional inconsistency that the same offense could be deemed both "otherwise dismissed" or "not otherwise dismissed," depending on ad hoc circumstances rather than the innate characteristics of the offenses charged. *See id.*; *Burkard*, No. FE-2021-475, 2023 WL 2069610, at *5 ("[C]ourts must select the definition that allows the statute to be viewed 'as a consistent and harmonious whole.'"). Moreover, precedent dictates comparison of the conceptual similarity of offenses is to be done in the abstract, as *Dressner* was not overruled by *Williams*. *Dressner* found the amended offense of possession of marijuana to be "completely separate and unrelated" to the charge of reckless driving, as a general matter. *Dressner*, 285 Va. at 6. *Dressner* imparts that in comparing the "conceptual similarity" of offenses, this Court is to liken the offenses generally before analyzing the facts attendant to the instant case in application of the second prong of whether there is a "common nucleus of operative fact."

Turning to detailed comparison of whether DUI and reckless driving share conceptual similarities, the Court must thus examine those characteristics the offenses *always* have in common. Conceptual similarities between offenses, logically, may encompass the extent to which criminal charges share common underlying legal principles, elements, and features. "Concept" is defined as "an *abstract or generic idea* generalized from particular instances." *Concept*, Merriam-Webster, https://www.merriam-webster.com/dictionary/concept (last visited Sept. 13, 2023) (emphasis added). A concept is "similar" when "having characteristics in common" and "*alike in* substance or

essentials." *Similar*, Merriam-Webster, https://www.merriam-webster.com/dictionary-/similar (last visited Sept. 13, 2023) (emphasis added). It follows then that offenses are conceptually dissimilar when lacking *essential* characteristics in common.

In comparing DUI and reckless driving in their *essential* manifestations, it is evident from the application of seven factors[2] reasonably derived by the Court that both offenses have a preponderance of conceptual dissimilarities:

1) Distinct Originating Factors: DUI and reckless driving stem from distinct originating factors. DUI tends to originate from alcohol or drug abuse. Reckless driving tends to originate from an attitude of carelessness or aggressive behavior when driving a vehicle.

2) Distinct Volitional Intention: Individuals who engage in DUI typically make a conscious decision to consume alcohol or drugs before operating a motor vehicle. Reckless driving is a careless choice made with awareness of its potential consequences, often stemming from behaviors like aggressive anger, distraction, or willful disregard for traffic laws.

3) Distinct Scope of Offense Location: DUI involves merely "operating," that is, exercising "actual physical control" over a motor vehicle, without the "highway requirement" applied to traffic offenses like reckless driving. *See Enriquez v. Commonwealth,* 283 Va. 511 (2012); *Sarafin v. Commonwealth,* 288 Va. 320 (2014). Reckless driving refers to "driving" on "a highway" (as further defined in precedent), which

[2] These factors are not exclusive nor need they all be applied in comparison of other offenses. They are a framework of concepts courts may consider in determining the degree of similarity among offenses charged.

generally includes public roads, as well as private roads and parking lots when open to unrestricted vehicular travel by the public. Va. Code § 46.2-852; *see Kim v. Commonwealth*, 293 Va. 304 (2017). "Facially, the two crimes have completely different elements." *W.H.D.*, 2023 WL 5277796 at *5.

4) Distinct Proscribed Behaviors: DUI results primarily from voluntary alcohol or drug consumption, which affects cognitive and motor skills, reaction times, and judgment. This impairment is directly related to the substance ingested and can be measured through breath or blood tests. DUI is targeted at behavior that could turn dangerous. The proscription in Virginia Code § 18.2-266(i) against operation of a vehicle with the driver having a "0.08 percent or more by weight by volume" blood alcohol level ("BAC") is to prevent danger from manifesting. So, for instance, a person sleeping in their vehicle in a parking lot after having too much to drink but having the engine on to provide heat is not engaged in actual dangerous behavior. The General Assembly has, however, made the policy judgment that such conduct is one step too close towards placing the vehicle in motion in a potentially dangerous manner. Similarly, a DUI offender otherwise driving in a safe manner because of habituation to alcohol consumption is not thereby excused from culpability for the offense when having a .08% BAC. In contrast, reckless driving does not necessarily involve impairment by a substance, and the offense *always* involves behavior deemed dangerous by statute. Thus, it cannot be said that DUI always incorporates perilous conduct and conversely, reckless driving cannot, absent a fictitious plea, be based solely on DUI conduct when manifest peril is absent. "Facially, the two crimes . . . criminalize different behavior." *Id.*

5) Distinct Criminal Categorization: DUI is listed in the Criminal Code and is targeted to proscribe consumption of drugs or alcohol yielding specific measurable limits, or which render the operator of a vehicle under the impaired influence of such substances. *See* Va. Code § 18.2-266. Reckless driving is listed in the Traffic Code and is a legal concept generally referring to the conduct of driving with a conscious disregard for public safety. *See Powers v. Commonwealth,* 211 Va. 386 (1970).

6) Distinct Minimum Consequences of Conviction: The consequences of a DUI conviction are significant, including at a minimum fines, suspended jail time, probation, substance abuse treatment, and license suspension. The consequences for a reckless driving conviction can be as minimal as a suspended fine. *See* Va. Code § 18.2-270; *cf.* § 46.2-868.

7) Distinct Societal Perspectives: Society generally views DUI as a socially unacceptable behavior due to its inherent risks and the potential for severe consequences, including fatal accidents. Efforts to combat DUI focus on reducing alcohol consumption before driving and increasing awareness of its dangers. Reckless driving is a broader category encompassing various risky behaviors on the road. These behaviors range from those perceived by society as de minimis, such as speeding slightly beyond a certain statutory threshold, to those perceived as more maximalist, such as serious traffic collisions that are the product of engaging in proscribed behaviors.

Though both DUI and reckless driving share the *potential* for encompassing conduct that may harm others and generally involve interaction with motor vehicles, they share few other conceptual similarities. In sum, DUI and reckless driving are conceptually

distinct in terms of originating factors, volitional intention, locational scope, types of behavior, legal categorization, minimum consequences of conviction, and societal perspectives. Thus, applying the Supreme Court's new *Williams* test, the first bar to expungement, "conceptual similarity" between offenses, is not applicable, this Court finding DUI and reckless driving to be conceptually dissimilar.

Though this would normally be enough to grant Petitioner the relief requested, tellingly, this Court also finds the second bar under *Williams*, the existence of "a common nucleus of operative fact," to be rebutted by the contents of the convicting order. The warrant upon which the conviction of reckless driving was entered by the GDC contains the notation from that Court dated the same day as the conviction that, "The Administrative Suspension of Driver's License under Virginia Code Section 46.2-391.2 is hereby rescinded." The effect of such recission is the implicit finding by the GDC, "by a preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for issuance of the petition." Va. Code § 46.2-391.2. However, the GDC's "*findings* are without prejudice to the person contesting the suspension or to any other potential party as to any proceedings, civil or criminal, and *shall not be evidence* in any proceedings, civil or criminal." Va. Code § 46.2-391.2 (emphasis added).

> In determining whether an original charge is "completely separate and unrelated," *a court may consult the underlying records of the petitioner's criminal case*, or related criminal cases, including any transcripts. However, *the presentation of new evidence* to prove the petitioner's guilt or innocence *is not permitted.* The focus of an expungement proceeding is on existing

> court records; its purpose is not to engage in a retrial of a concluded criminal case.

Williams, 885 S.E.2d at 461 (emphasis added) (footnote omitted).

Harmonizing the language in § 46.2-391.2 with *Williams*, this Court is permitted to consult the available record of the GDC, but not to consider the *finding* in the order of recission itself as evidence in these proceedings. At the same time, the legal effect of such a recission is that, as to the administrative license suspension based on the consumption of alcohol, those allegations are withdrawn. *See* Va. Code § 46.2-391.2. While this Court cannot consider as evidence the implicit *finding* under § 46.2-391.2 that there is an absence of probable cause underlying the arrest for DUI in the instant case, this Court can consider the *absence* of an administrative license suspension for alcohol, which is otherwise normally contained in the GDC record, in determining whether there is a common nucleus of operative facts between DUI and reckless driving in terms of intoxication.

Like in *Dressner*, the record in the instant case is sparse. In similarity, the Defendant here

> never entered any plea to the . . . [DUI] charge, nor did the general district court make any finding that the evidence was sufficient to establish guilt on that charge. Nothing in the record suggests that the general district court even heard any [trial] evidence with regard to the . . . [DUI] charge, and the general district court did not take the matter under advisement or defer disposition.

See Dressner, 285 Va. at 7. Looking further at the convicting order, it is notable the GDC struck all the factual allegations referencing intoxication contained in the charging warrant, a specific repudiation thereof. "A court speaks through its orders and those

orders are presumed to accurately reflect what transpired." *McBride v. Commonwealth,* 24 Va. App. 30, 35 (1997). This Court is thus compelled to find, based on the record available, that the second element of the bar to expungement under the *Williams* test, namely, that the offenses share a common nucleus of operative fact, is also rebutted.

CONCLUSION

The Court has considered the question of whether the amended charge of reckless driving of which Petitioner was convicted, is conceptually dissimilar to the original offense of DUI, so that the original charge may be deemed "otherwise dismissed" and expunged. This Court finds the charges in the instant case are conceptually dissimilar because the seven reasonably derived comparative factors below summarized inform the offenses are aimed at addressing fundamentally different conceptual considerations. DUI and reckless driving are conceptually dissimilar in that they spring from distinct originating factors, reflect unalike volitional intention, differ in locational scope, proscribe different behaviors, are of diverse criminal categories, occasion divergent minimum consequences, and stir varying societal perspectives.

Accordingly, Petitioner, whose DUI charge was later amended to reckless driving, may have the original charge expunged because the two charges do not share conceptual similarity, and based on the withdrawal and repudiation of all factual allegations respecting intoxication in the convicting order, the two offenses are thereby deemed not to share a common nucleus of operative fact.

Therefore, the Court will enter the separate order submitted by agreement of the parties granting the petition for expungement.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER