RENDERED: AUGUST 28, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000601-MR

WADE A. MCNABB — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00156

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND VANMETER , JUDGES.

ACREE, CHIEF JUDGE: Wade A. McNabb, a formerly accredited teacher, appeals from the December 3, 2012 Opinion and Order of the Franklin Circuit Court, as amended by that court's March 18, 2013 Order, affirming the decision of the Kentucky Education Professional Standards Board (EPSB) not to reconsider its

August 3, 2009 Final Order permanently revoking McNabb's teaching certificate. For the reasons stated below, we reverse.

I. APPLICABLE LAW

Typically, our opinions begin with a recitation of the facts. In this case, we shall keep the facts to a minimum and focus our attention first on the law, particularly, the applicable statutes and regulations.

Those who aspire to teach in Kentucky classrooms are expected to, and must, "exemplify behaviors which maintain the dignity and integrity of the profession." 16 KAR[1] 1:020, Section 1(3)(c)(1). If a teacher fails to satisfy that standard, the EPSB can impose sanctions including revoking his teaching certificate. KRS[2] 161.120.

Of course, a teaching certificate can be revoked only after the teacher is afforded due process. KY. CONST. § 2; *Thompson v. Board of Educ. of Henderson County*, 838 S.W.2d 390, 393 (Ky. 1992). The legislature assured such due process by enacting KRS 161.120 which states, in pertinent part, that the EPSB "shall schedule and conduct a hearing in accordance with KRS Chapter 13B . . . [b]efore revoking . . . any certificate[.]" KRS 161.120(5)(a)1.

Chapter 13B, the Albert Jones Act of 1994, sets out the requirements for the hearing the EPSB shall conduct. Among other things, the Act provides that:

[1] Kentucky Administrative Regulations.

[2] Kentucky Revised Statutes.

> [a]ll testimony shall be made under oath or affirmation[; however, a]ny part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.

KRS 13B.090(2).

Meshing with this provision of the Albert Jones Act, KRS 161.120 says, in pertinent part:

> the [EPSB] may revoke . . . any certificate . . . issued under any previous law to . . . teachers . . . for the following reasons:
>
> (a) Being convicted of . . . [a] felony . . . .
>
> A certified copy of the conviction . . . shall be conclusive evidence of the conviction . . . .

KRS 161.120(1)(a). This language, coupled with the rest of the statutory scheme cited, provides the EPSB with a short-cut to due process: when a teacher is convicted of a felony, a certified copy of the conviction is all the proof necessary to justify revoking a teacher's license.

However, the case before us teaches the lesson that there is a risk in taking this short-cut. That risk is revealed by asking the question: what is the effect on this "short-cut revocation" of the teaching certificate if the conviction on which it is based is reversed and all records of the conviction are expunged? We cannot

answer that question without next considering the expungement statute, KRS 431.076.

The expungement statute, as it relates to the case now before us, states as follows:

> (1) A person who has been charged with a criminal offense and . . . against whom charges have been dismissed with prejudice, and not in exchange for a guilty plea to another offense, may make a motion, in the District or Circuit Court in which the charges were filed, to expunge all records.
>
> . . .
>
> (4) If the court finds that there are no current charges or proceedings pending relating to the matter for which the expungement is sought, the court may grant the motion and order the expunging of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records. . . .
>
> (5) After the expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall delete or remove the records from their computer systems so that any official state-performed background check will indicate that the records do not exist. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.
>
> (6) This section shall be retroactive.

KRS 431.076(1), (4)-(6).

With this law in mind, let us now consider the facts.

II. FACTS

In March of 2003, McNabb was indicted in Lewis Circuit Court on felony charges; two years later, he was found guilty of those charges by a jury of his peers. His direct appeal to this Court in 2006 was unsuccessful and the Supreme Court declined to review this Court's opinion affirming. *McNabb v. Commonwealth*, No. 2005-CA-001016-MR, 2006 WL 751305 (Ky. App. March 24, 2006), *review denied* (August 17, 2006) (hereafter, "*McNabb I*"). His conviction became final on August 29, 2006. Less than a year later, on June 30, 2007, McNabb's teaching certificate expired.

In January of 2009, and notwithstanding the expiration of McNabb's certificate to teach, the EPSB filed administrative charges to permanently revoke his teaching certificate. The charges set out the history of McNabb's criminal conviction and stated that the EPSB "shall hold a hearing" to address them. The evidence of McNabb's conviction was "to be supplemented by evidence at the hearing of this matter . . . ." However, no hearing was ever held and no supplemental evidence was proffered.

Taking advantage of the permissible short-cut to due process afforded by KRS 161.120(1)(a) and KRS 13B.090(2), the EPSB revoked McNabb's teaching certificate solely on the basis of a certified copy of his criminal conviction; no other evidence was presented. The EPSB's final order permanently revoking was entered on August 3, 2009. The EPSB believes it is a critical, even decisive, procedural fact that McNabb did not pursue an appeal of this final order. As we

further address later, it is also important that the only section of KRS 161.120 that could be substantiated by a criminal conviction, and the only one McNabb was found to have violated, was section (1)(a) – felony conviction.

Having exhausted his direct appeal rights, McNabb collaterally attacked his criminal conviction pursuant to RCr[3] 11.42. In 2010, this Court concluded that McNabb was denied his constitutional right to a fair trial as afforded by the Counsel Clause of the Sixth Amendment of the United States Constitution. *McNabb v. Commonwealth*, No. 2008-CA-001967-MR, 2010 WL 476023, at *3 (Ky. App. Feb 12, 2010), *review denied* (Aug 18, 2010) (hereafter, "*McNabb II*"); *see Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052 (1984) ("Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."). The opinion reversed McNabb's conviction and granted him the right to a new trial. However, the prosecutor declined to try the case again and, on February 23, 2011, the charges against McNabb were dismissed with prejudice.

Dismissal of the charges with prejudice was the prerequisite to McNabb's motion in Lewis Circuit Court to expunge the records of his conviction. In July 2011, pursuant to KRS 431.076, the court entered an order (amended in January 2012) expunging McNabb's conviction and all related records that were in the custody of the court and any such records that were in the custody of certain other agencies, including the EPSB.

[3] Kentucky Rules of Criminal Procedure

In November 2011, McNabb filed a motion with the EPSB to rescind the 2009 order and reinstate his teaching certificate. Without explanation, the EPSB denied the motion. McNabb appealed the decision to the Franklin Circuit Court and that court remanded the matter to the EPSB to make findings of fact.

On June 1, 2012, the EPSB issued a new order stating "[t]he evidence that the jury [in the criminal matter] used to find McNabb guilty was not found to be inadmissible or lacking in credibility" and that the EPSB based its 2009 order not only on the conviction, but also on "the underlying evidence [in the criminal trial] that led to his conviction[.]" The EPSB then went further, stating the same underlying evidence justified finding McNabb in violation of additional sections of KRS 161.120, namely, "section (1)(a), (b), (c), (d), and (m)[.]" No hearing had been conducted before denying McNabb's motion under KRS 161.120(9) or before finding he violated the additional provisions. The EPSB relied solely on this Court's recitation in *McNabb I* of the criminal trial record which, at that time, had been expunged.

Denying McNabb's motion, the EPSB leaned heavily on the discretionary nature of its authority under KRS 161.120(9). The agency also found support for its denial in the nature of this Court's reversal of McNabb's conviction, stating it was "not because he was exonerated [but] because his attorney made a mistake . . . ."

As he had with the previous order, McNabb appealed this order to the Franklin Circuit Court. The court entered an order holding "that the EPSB's Final

Order was valid when it was entered in 2009 [and] became final, thirty days following its entry" without McNabb having appealed it. The circuit court went on to say that once McNabb failed to take advantage of judicial review under KRS 161.120(12), his "only recourse for a new decision was pursuant to KRS 161.120(9) under a motion to reconsider [but that] KRS 431.076 is not a statute which can be retroactively applied as Petitioner wishes."

McNabb appealed the Franklin Circuit Court order to this Court arguing that KRS 431.076 has been improperly applied. With this, we agree. He claims relief in the form of a reinstatement of his teaching credentials. With this, we do not agree.

III. STANDARD OF REVIEW

KRS 13B.160 governs this Court's review of a circuit court's prior review of an administrative agency's final order. Our review of an administrative action is generally focused on the question of arbitrariness. *Kaelin v. City of Louisville*, 643 S.W.2d 590-91 (Ky. 1982). If substantial evidence exists to support the agency's findings, those findings must be upheld despite the presence of conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (1981). The administrative agency, as the sole fact finder, has wide discretion in evaluating the evidence. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, (Ky. App. 1998). An administrative agency's conclusions of law, however, are subject to a stricter *de novo* review. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. App. 1990). *De novo* review is also our standard where, as

here, we must engage in statutory interpretation. Our courts have repeatedly held that the primary rule in statutory interpretation is to ascertain and give effect to the intention of the legislature, which must be determined, if possible, from the language of the statute itself. *Moore v. Alsmiller*, 289 Ky. 682, 160 S.W.2d 10, 12 (1942). Further, when the statute itself does not provide a specific definition of a word, the words of the statute shall be construed according to their common and approved usage. *See Kentucky Unemployment Ins. Comm. v. Jones*, 809 S.W.2d 715, 716 (Ky. App. 1991).

IV. ANALYSIS

McNabb argues that KRS 431.076 clearly authorized the Lewis Circuit Court to enter an order expunging all records of all matters relating to his conviction in the possession of all agencies, including the EPSB; the Lewis Circuit Court issued that order. Because McNabb has correctly described the statute and the order, and because both are so direct and uncomplicated, we turn to consider the EPSB's reasons for declining to follow the statute and the order. There is a variety of contentions and arguments. We will address each.

EPSB's 2009 order was lawful when it was entered

It is irrelevant that the EPSB's order revoking McNabb's teaching credentials was lawful at the time it was entered. The fact is, McNabb's felony conviction was also lawful when it was entered. However, in our judicial system, there is a procedure authorizing an aggrieved party to collaterally challenge that lawful conviction and to compel its reversal under some circumstances. RCr

11.42. Similarly, in EPSB's system of administrative adjudications, there is a procedure authorizing an aggrieved party to collaterally challenge a lawfully entered final order and, again under some circumstances, to compel its reversal. KRS 161.120(9). As we will explain, this is one such circumstance.

The fact that the 2009 order was lawful when entered does not prohibit the EPSB from exercising its discretion under KRS 161.120(9), nor does it prevent McNabb from seeking relief by means of that provision. The once-lawful nature of the 2009 order is simply irrelevant.

McNabb did not appeal the August 2009 order and it became final the next month

The EPSB is correct that McNabb did not appeal its 2009 order permanently revoking his teaching credentials. This fact is another red herring.

The appeal McNabb might have pursued in 2009 would have been authorized by KRS 161.120(12). The legislature granted that right to judicial review in 1996 by amending the original statute to provide for the appeal of the EPSB's final orders to the Franklin Circuit Court. 1996 Kentucky Acts, ch. 343, § 7, eff. 7-15-96 (H.B. 327) (codified as KRS 161.120(7), recodified in 1998 as KRS 161.120(12) by 1998 Kentucky Acts, ch. 362, § 5, eff. 7-15-98 (H.B. 714)). However, that right came with a time limitation: pursuit of judicial review must be initiated within thirty (30) days of the EPSB's final order. KRS 13B.140(1). We make note of this only because, as we discuss below, the relief McNabb sought in this case was not subject to such a limitation. In any event, the success of an appeal initiated by McNabb within that thirty-day window was highly unlikely

considering, as has been pointed out, his criminal conviction was lawful at that time and it created, in effect, an irrebuttable presumption justifying revocation of McNabb's teaching certificate.

But McNabb did not seek relief pursuant to KRS 161.120(12). He sought relief pursuant to a newer provision that authorizes the EPSB to reconsider, modify, or reverse *any* disciplinary action. That provision was codified in 2000 as KRS 161.120(9). 2000 Kentucky Acts, ch. 269, § 1, eff. 7-14-00 (H.B. 623). Why the legislature believed this additional avenue of relief was necessary we do not know, nor need we know. It is, however, significant that it is not subject to a time limitation nor does it require prior pursuit of judicial review under KRS 161.120(12) as a prerequisite.

Because KRS 161.120(9) is without limitation, the EPSB's third argument – *McNabb's felony conviction was not expunged until two years after his credentials were revoked* – is also entirely irrelevant.

The expungement statute is silent as to administrative orders and, therefore, the EPSB's 2009 final order is unaffected

Let us here clarify the issue before us. We are *not* addressing the effect of the expungement statute on an administrative order revoking a license that was entered after a due process hearing, grounded in evidence adduced pursuant to the administrative agency's own independent investigation, and applying a standard different than the reasonable-doubt standard of a criminal conviction. The administrative record memorializing that kind of due process hearing might well

rely on no criminal records. But if it does, as it did in this case, KRS 431.076 makes it clear that a circuit court has authority to order law enforcement agencies, and "*any other agency*" including the EPSB, to expunge all "records relating to the arrest, charge, or other matters arising out of the arrest or charge[.]" KRS 431.076(4). The Lewis Circuit Court did so order, but the EPSB failed to follow it.

In this case, in 2009, the EPSB did not conduct the kind of due process hearing that might have yielded an order revoking teaching privileges without reliance on McNabb's expungeable criminal records. Instead, the agency rolled the dice on the admittedly good bet that McNabb's conviction would not be reversed and his records would not be expunged. The sole basis for the EPSB's revocation order was the certified record of his felony criminal conviction. The Lewis Circuit Court's expungement order, expressly identifying EPSB as a subject agency, compelled the purging of that certified copy of McNabb's conviction and all "records relating to . . . matters arising out of the arrest or charge" to include the EPSB's final order revoking his teaching privileges. Furthermore, the EPSB should have "certif[ied] to the [Lewis Circuit C]ourt within sixty (60) days of the entry of the expungement order, that the required expunging action has been completed." KRS 431.076(4). Nothing in this record indicates that the EPSB complied with that statutory mandate.

Contrary to the EPSB's contention, the expungement statute simply is not silent as to the orders of administrative agencies.

EPSB's 2012 final order is supported by substantial evidence and does not abuse the discretion it is afforded under KRS 161.120(9)

We cannot agree with the EPSB that substantial evidence supported its 2012 order, nor can we agree that the EPSB did not abuse the discretion granted by KRS 161.120(9) in refusing to set aside the 2009 final order.

When the legislature granted teachers the right of judicial review of EPSB decisions in 1996, it required the courts of this Commonwealth, in proper cases to "reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is . . . [i]n violation of . . . statutory provisions [or is w]ithout support of substantial evidence on the whole record [or is a]rbitrary, capricious, or characterized by abuse of discretion[.]" KRS 13B.150(2)(a), (c), (d) (made applicable to the EPSB by KRS 161.120(12)).

To begin, we consider whether the 2012 order is in violation of a statutory provision. If it is not yet clear, we have concluded that the EPSB failed to obey the Lewis Circuit Court order to comply with KRS 431.076(4) and purge its records of McNabb's conviction. There is nothing suspect regarding the validity of that order or that statute. Violation of this statute would be enough to reverse and remand.

Next, we consider the EPSB's claim of substantial evidence. The agency says its 2012 order is based upon the substantial evidence described in the first two paragraphs of *McNabb I*. But as with the man who built his house on sand, the EPSB's foundation is not substantial. The argument fails for several reasons.

First, this Court did not sit as a factfinder in *McNabb I* and did not adjudicate as facts the statements in the opinion's first two paragraphs, which the EPSB correctly calls "a summation of the evidence presented to the jury" in McNabb's criminal trial. Only so long as there existed a jury verdict to convict McNabb could this summation of evidence be considered adjudicative facts, and that brings us to the second flaw in the substantial evidence argument – reversal of the conviction.

Reversal of the conviction eradicates whatever qualitative or quantitative degree of factfinding *McNabb I*'s first two paragraphs may have represented at one time. Once the conviction was reversed, however, the paragraphs were relegated to their original status as mere allegations, no longer adjudicated facts.

The third weakness in this argument is the manner by which the so-called substantial evidence, drawn from *McNabb I*, was placed before the EPSB. While "evidence may be received in written form[,]" it must be "without substantial prejudice to the interests of any party." KRS 13B.090(2). Since the EPSB held no hearing before entering the 2012 order, McNabb was deprived of an opportunity to explain the substantial prejudice, except to rely on the expungement statute and the Lewis Circuit Court's order. And, although *McNabb I* might have been received into evidence as a judicially noticed adjudicative fact, admissibility requires that such a fact be one "not subject to reasonable dispute[.]" KRE[4] 201(b). Given that this Court in *McNabb II* determined that the factfinding in *McNabb I* occurred

[4] Kentucky Rules of Evidence.

during a constitutionally defective judicial proceeding, depriving McNabb of the due process of a fair trial, we conclude that what the EPSB describes as substantial evidence certainly was subject to reasonable dispute. Therefore, it could not be judicially noticed by the agency.

Additionally, it is disconcerting that, notwithstanding the expungement statute and order, the EPSB (and the public) can still access *McNabb I* and *McNabb II*. That is possible because, as currently written, the expungement statute does not require the sealing, modification, or destruction of appellate court records or appellate court opinions.[5] This shortcoming diminishes, if not eliminates, the benefits of KRS 431.076, and thwarts legislative intent that "[a]fter the expungement, the proceedings in the matter shall be deemed never to have occurred." KRS 431.076(5).[6] It is an unavoidable side-effect of the internet age

[5] Other jurisdictions have attempted to address the issue of sealing or expunging appellate records by statute or appellate rule. *See*, *e.g.*, Oklahoma Rules of the Court of Criminal Appeals 14.1 ("Persons who have obtained an order of expungement from a district court, pursuant to Title 22, Sections 18 and 19, may seek expungement of related criminal appellate records in this Court."). An Oregon rule, in particular, stands out as an approach that, if adopted in Kentucky, could address some of the concerns raised in this type of case in the future. That rule provides:

> If the circuit court order sets aside all convictions or expunges all delinquency adjudications in the case, the Administrator will seal the appellate court record and modify the version of the court's opinion published on the Judicial Department's website to avoid use of the party's name in the case title and body of the opinion.

Oregon Rules of Appellate Procedure 8.55(1). As a practical matter such a rule is likely to never be fully effective. Appellate court opinions are collected and published, both in book form and electronically, by a number of persons and entities, including private legal research entities. The Court has no control over whether those persons and entities would honor a modification or expungement even a few months after rendering, much less the more common expungement years later.

[6] The Court has recognized, though, that in the absence of necessary statutory language, expungement may be available – at least as to trial court records – in "extraordinary circumstances, such as illegal prosecutions, arrests under unconstitutional statutes, or where

that once an appellate opinion becomes part of the digital discourse, it can never truly be expunged. But an agency, such as the EPSB, which is subject to the statute and a court's expungement order, cannot be permitted to exploit this impracticality of the statute. To the extent we can carry out legislative intent we must do so. Therefore, despite the accessibility to appellate decisions from electronic databases, KRS 431.076(5) remains our polestar so that *all* the "proceedings in the matter [including appellate opinions] shall be deemed never to have occurred." KRS 431.076(5). In keeping with that concept, the EPSB is prohibited from replacing an expunged certified copy of a conviction with this Court's opinion in order to salvage its 2009 order.

Indicative of the EPSB's willingness to flout the expungement statute's intent is its decision in 2012 to find violations of five (5) provisions of KRS 161.120(1) when in 2009 it found only one. The sole basis for finding violations of KRS 161.120(1)(b), (c), (d), and (m) was the language of *McNabb I*. Such piling on does not strengthen the EPSB's argument. Since the original violation cannot survive on the basis of *McNabb I*, neither can any of the four new charges against which McNabb was afforded no meaningful due process.

Each of these infirmities in the EPSB's substantial evidence argument is reason to reverse. Together, they compel it.

---

necessary to vindicate constitutional or statutory rights." *Commonwealth v. Holloway*, 225 S.W.3d 404, 406 (Ky. App. 2007), *citing U.S. v. Gillock*, 771 F. Supp. 904, 908 (W.D. Tenn. 1991); *see also Coles v. Levine*, 561 F. Supp. 146, 153 (D. Md. 1983). The Court has subsequently characterized this inherent authority as "very narrow" and has emphasized that it is generally limited to "the purpose of correcting constitutional infractions." *Commonwealth v. Smith*, 354 S.W.3d 595, 598 n.5 (Ky. App. 2011).

Lastly, a reviewing court must reverse an administrative agency's decision if it is characterized by abuse of discretion. KRS 13B.150(2)(d). As noted above, KRS 161.120(9) grants the EPSB discretion to reconsider and reverse, or not. But the discretion is not unbridled. "The test for an abuse of discretion is whether the . . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). The foregoing analysis has summarized how the EPSB's 2012 order was all of these. That order is based on the EPSB's abuse of its discretion under the statute and, therefore, we must reverse it.

Evidence in the criminal case was not ruled inadmissible or lacking in credibility

The EPSB argues that none of the evidence presented in McNabb's criminal trial was ruled inadmissible or lacking in credibility. The problem with that assertion is that it presumes to rely on a transcript of a criminal trial that has been deemed never to have occurred. As we have earlier suggested, if the EPSB had held its own hearing and presented such evidence independently of the criminal proceeding that has now been expunged, this might well be a winning argument. *See*, *e.g.*, *Walton v. Turlington*, 444 So.2d 1082, 1084 (Fla. Dist. Ct. App. 1984) ("expungement . . . does not mean, of course, that appellant may not be held responsible for his actions in a non-criminal proceeding" where police officers testified independently of the criminal action). It did not; instead, it chose the due process short-cut.

When it comes to evidence deemed never to have been presented anywhere, its admissibility and credibility is irrelevant. This argument fails to persuade us that we should affirm.

Reversal was based on an attorney's mistake; McNabb was not exonerated

The EPSB sees gradations in reversals of criminal convictions – some kinds of reversals indicating more innocence than others – and notes that McNabb's criminal conviction was reversed for attorney error and not because he was exonerated. While the court of public opinion may enjoy the privilege of speculating whether an individual is guilty or innocent, our judicial system does not. Except in certain capital cases, our criminal justice system is designed only to determine legal guilt, or not.[7] "There is no parallel procedure for deciding that a convicted defendant is innocent. . . . A defendant who wins on appeal is not declared innocent . . . . [W]e just don't know whether a defendant is guilty or innocent, before trial or after." National Registry of Exonerations, Exonerations in the United States, 1989–2012, p. 6 (2012) (defining exoneration), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last accessed August 1, 2015).

[7] Efforts by groups of lawyers, such as the Innocence Project, demonstrate that in capital cases:

> exoneration came about . . . as a consequence of the functioning of our legal system. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Kansas v. Marsh, 548 U.S. 163, 193, 126 S.Ct. 2516, 2535-36 (2006) (Scalia, J., concurring) (emphasis omitted).

Since we cannot *know* whether a criminal defendant is innocent, we must and we do *presume* his innocence. "[T]he defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt [and it is not until] a defendant has been *afforded a fair trial* and convicted of the offense for which he was charged [that] the presumption of innocence disappears." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69, 129 S.Ct. 2308, 2320 (2009) (citation and internal quotation marks omitted; emphasis added).

This Court determined in *McNabb II* that McNabb has yet to be afforded a fair trial. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]" *Strickland*, 466 U.S. at 684-85. In accordance with *Osborne*, McNabb is still entitled to the presumption of innocence.

Because we are convinced that McNabb is entitled to the benefits of KRS 431.076, and because none of the EPSB's arguments persuade us otherwise, we reverse the EPSB's June 1, 2012 Final Order with instructions that the EPSB comply with the expungement statute and the Lewis Circuit Court's expungement order by "certify[ing] to the [Lewis Circuit C]ourt within sixty (60) days . . . that the required expunging action has been completed." KRS 431.076(4).

This opinion, however, does not justify granting McNabb the relief he seeks – reinstatement of his credentials. As we noted earlier, McNabb's teaching

credentials expired on June 30, 2007, before the EPSB pursued the permanent revocation. Reversal of the EPSB's 2012 order has no effect on that fact.

We agree with the circuit court that there is nothing to prevent McNabb from reapplying for a teaching certificate in accordance with the appropriate statutory and regulatory procedure. *See* KRS 161.030; 16 KAR 1:030(2). The statute also provides for a hearing should the EPSB deny his application for a certificate. *See* KRS 161.120(5)(a)2. If he chooses to reapply, nothing prevents the EPSB from introducing evidence independent from that which is the subject of the expungement, including independent evidence of the same subject matter addressed in his reversed criminal conviction. *See Walton*, 444 So.2d at 1084 (applicant "sought reinstatement . . . based upon the expungement of his criminal records, and it was therefore pertinent for the court to observe that it was his misconduct, rather than the existence of a record of a judgment of conviction, with which the [credentialing authority] was properly concerned" (citing *McDowell v. Goldschmidt*, 498 F.Supp. 598 (D.C. Conn. 1980)).

V. CONCLUSION

For the foregoing reasons, the Franklin Circuit Court's December 3, 2012 Opinion and Order, as amended by its March 18, 2013 Order, is reversed and this case is remanded to the Kentucky Education Professional Standards Board for proceedings consistent with this opinion.

J. LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Christopher A. Spedding
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert E. Stopher
Robert D. Bobrow
Louisville, Kentucky