ALAN WILSON
ATTORNEY GENERAL

October 29, 2013

Chief Mark Keel
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221-1398

Dear Chief Keel:

This Office received your request for an opinion on several issues regarding expungement of criminal records. Each issue and its analysis follows.

LAW/ANALYSIS:

I. Whether a defendant who meets the definition of a "youthful offender" at time of his conviction is eligible for an expungement under section 22-5-920(B) even though the defendant was not sentenced as a youthful offender pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act?

Our understanding of the facts regarding this question is that defendant Milton Muckenfuss was convicted of housebreaking on either September 10, 1974 or May 10, 1974 (the date is unclear in the letter). As his birthdate is July 16, 1956, he was either 17 or 18 years old on the date of his conviction. He applied for expungement under Section 22-5-920(B). SLED denied his request on February 12, 2013 due to the fact that he was not sentenced pursuant to the Youthful Offender Act. Muckenfuss's attorney argues that he is eligible for expungement because he was a youthful offender, as defined in Section 24-19-10(d)(ii) at the time of his arrest who turned 18 at the time of conviction. He also argues that Muckenfuss is eligible for expungement based on Section 22-5-920 and Gay v. Ariail, 381 SC 341, 673 S.E.2d 418 (2009).

The applicable law is Sections 24-19-10(d)(ii) and 22-5-920(B) of the South Carolina Code. Section 24-19-10(d)(ii) defines a "youthful offender" as "seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor, a class D, class E, or Class F felony, or a felony which provides for a maximum term of imprisonment of fifteen years or less." S.C. Code Ann. § 24-19-10(d)(ii) (1976 Code, as amended).

Muckenfuss appears to meet the definition of youthful offender. According to the dates you provided, he was seventeen or eighteen years old at the time of his conviction for housebreaking. Although the crime of housebreaking has been repealed, it does not appear to be a violent crime, as it is not defined as a violent crime in Section 16-1-60 and it is a "lesser included offense of burglary," according to the court in State v. Suttles, 279 S.C. 87, 302 S.E.2d 338 (1983). At the time the offense was committed,

housebreaking was a felony punishable by imprisonment for fifteen years or less. See S.C. Code § 16-332 (1952) (repealed 1985).

Section 22-5-920(B) provides:

> Following a first offense conviction as a youthful offender for which a defendant is sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the defendant, after five years from the date of completion of his sentence, including probation and parole, may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to an offense involving the operation of a motor vehicle, to a violation of Title 50 or the regulations promulgated under it for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses authorized, to an offense classified as a violent crime in Section 16-1-60, or to an offense contained in Chapter 25, Title 16, except as otherwise provided in Section 16-25-30. If the defendant has had no other conviction during the five-year period following completion of his sentence, including probation and parole, for a first offense conviction as a youthful offender for which the defendant was sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the circuit court may issue an order expunging the records. No person may have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred before the effective date of this section. A person eligible for a sentence pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, and who is not sentenced pursuant to those provisions, is not eligible to have his record expunged pursuant to the provisions of this section.

S.C. Code Ann. § 22-5-920(B)(1976 Code, as amended).

The statute is clear that a defendant can not have his arrest and conviction records expunged if he was not sentenced under the Youthful Offender Act. Therefore, Muckenfuss, although he meets the definition of a youthful offender, is not eligible for expungement.

Muckenfuss' attorney argues that Muckenfuss is eligible for expungement based on Gay v. Ariail, 381 SC 341, 673 S.E.2d 418 (2009). Section 22-5-920(B) was amended in 2010 to add the last sentence relating to a person who was eligible but was not sentenced pursuant to the provisions of the Youth Offender Act. Gay interpreted Section 22-5-920(B) as it existed in 2009 prior to the amendment. Although Gay has not been overruled by a subsequent case, it is not in line with the current statute. See Lindsay v. National Old Line Insurance Co., 262 S.C. 621, 207 S.E.2d 75 (1974) ("The construction of a statute is a judicial function and responsibility. Subject to constitutional limitations, the legislature has plenary power to amend a statute. Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716. However, a judicial interpretati[on] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively."); Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142

(1999) "(legislature may enact a statute to modify, for the future, the law as declared by decisions of the courts") (quoting 16 C.J.S. *Constitutional Law* § 115 – 116 (1984)).

II. Whether a defendant is eligible for an expungement under Section 22-5-920(B) where he received a YOA sentence for some, but not all, convictions at a single court appearance? Whether a defendant can receive expungements for multiple convictions if the YOA sentencing occurs at a single court appearance?

South Carolina law has not addressed the issue of whether a defendant can receive an expungement for multiple convictions if the YOA sentencing occurs at a single court appearance. And this Office could not find any law in other jurisdictions. There is persuasive authority in North Carolina. In Op. N.C. Atty. Gen., August 28, 1979 (1979 WL 31161), the North Carolina Attorney General stated:

> Your inquiry is directed to a case in which three [misdemeanor] charges were consolidated for disposition and the sentence imposed within the statutory limit for a single offense. In those circumstances and in the light of the purposes of G.S. 15-223[1], we think the convictions should be

[1] G.S. 15-223 provided:

> Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.—(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:
> 1. An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
> 2. Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
> 3. A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
> 4. Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at

> treated as a single misdemeanor for the purpose of expung[e]ment. It would be ironic and unjust that one youthful defendant could plead guilty to a single charge, have two other charges dismissed, receive sentence and be entitled to expungement while a second youthful offender who pleads guilty to three charges and receives an identical sentence would be ineligible for the remedy.

The North Carolina Attorney General further explained:

> [I]f multiple misdemeanor charges against a youthful offender are consolidated for judgment and sentence, the sentence imposed cannot exceed the authorized sentence for conviction of a single offense. The sentencing judge, by consolidating the charges for judgment has indicated his intent to treat the charges as a single offense for the purpose of sentencing, even though the judgment may recite pleas of guilty to or conviction of more than a single offense.

The North Carolina Attorney General opinion meets the purpose of expungement of youthful offender convictions, which is remedial rather than punitive. While various state and federal expungement statutes take a wide variety of forms, "all are directed to the basic purpose of assisting an ex-[youthful]offender to overcome the stigma of a criminal record." Stephens v. Van Arsdale, 227 Kan. 676, 608 P.2d 972 (1980). "We think it clear that K.S.A. 1972 Supp. 21-4616 was enacted to relieve youthful offenders from the social and economic stigma resulting from criminal convictions and to offer them an added incentive to conform to social norms and to participate in our society without the added burden of a criminal conviction." Id. "[T]he purpose of that federal statute [Federal Youth Corrections Act] is to relieve the youthful offender not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction." Id (citing Mestre Morera v. U.S. Immigration & Nat. Serv., 462 F.2d 1030 (1st Cir. 1972)). "An increasing number of courts have recognized that there can be a right to the expunction of records and have granted motions to expunge in individual cases. The courts in these cases have recognized that the maintenance of arrest and court records is a substantial detriment. This court agrees. The prejudice and hardship resulting from these records has been well documented. The records may prevent, hinder or delay the consideration of the arrested person for

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> any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.
> The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.
> The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

N.C.G.S.A. § 15-223.

Section 15-223 has been recodified as sections 15A-145 and 15A-146 in the North Carolina General Statutes but the language has changed little.

employment, referral by employment agencies, acceptance into colleges and apprenticeship programs, public housing, the armed forces, and obtaining a license. These records may also be used to determine whether to make a subsequent arrest, to deny release prior to trial or an appeal and to determine sentence." In the Matter of Terrance J., 78 Misc.2d 437, 353 N.Y.S.2d 695 (1974).

Pursuant to the North Carolina Attorney General opinion and the cases cited above, the purpose of expungement for youthful offenders is remedial. Your office informed us during a telephone conversation that you are currently expunging multiple convictions if sentencing occurs at a single court appearance. This appears to meet the purpose of expungement for youthful offenders. Please be aware, however, that instruction regarding expungement of multiple convictions rests with the South Carolina Legislature or with a court. We can only assist you by providing you with the law regarding such matters.

III. Whether SLED should consider convictions from other states when determining a defendant's eligibility for an expungement pursuant to Section 22-5-910(A)?

Section 22-5-910(A) is the adult expungement statute. South Carolina law does not appear to have addressed the issue of whether convictions from other states should be considered when determining if expungement for an adult defendant would be appropriate. Other jurisdictions have addressed this issue. The Superior Court of New Jersey, Appellate Division, in construing the New Jersey expungement statute regarding disorderly persons offenses,[2] concurred with the trial court that it would be inconsistent "with the spirit and letter of the expungement statute" and with what "the [New Jersey] legislature meant to accomplish when it enacted that laudable statute" if disorderly persons offenses in other jurisdictions were disregarded in determining relief under the expungement statute. State v. Ochoa, 314 N.J.Super. 168, 714 A.2d 349 (1998). The Supreme Court of Tennessee denied a defendant who had convictions in other states expungement although the convictions had been expunged in the other states on the basis that they were "evidence of prior bad acts or evidence of social history even if expungement [in the other states] is later obtained." See State v. Schindler, 986 S.W.2d 209 (1999). Pursuant to these decisions, SLED should consider out-of-state convictions when determining eligibility for expungement.

IV. Whether a defendant is entitled to the expungement of more than one fraudulent check conviction under Section 34-11-90(e) where the defendant was arrested at the same time for multiple counts of fraudulent check and/or was convicted of multiple counts of fraudulent check on the same day?

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[2] The New Jersey disorderly persons offenses statute states as follows:

> Any person convicted of a disorderly persons offense or petty disorderly persons offense under the laws of this State who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, or of another three disorderly persons or petty disorderly persons offenses, may, after the expiration of a period of 5 years from the date of his conviction, payment of fine, satisfactory completion of probation or release from incarceration, whichever is later, present a duly verified petition as provided in section 2C:52–7 hereof to the Superior Court in the county in which the conviction was entered praying that such conviction and all records and information pertaining thereto be expunged.

N.J.S.A. 2C:52-3.

Section 34-11-90 of the South Carolina Code states the following:

> A person who violates the provisions of this chapter, upon conviction, must be punished as follows:
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> If the amount of the instrument is one thousand dollars or less, it must be tried exclusively in a magistrates court. A municipal governing body, by ordinance, may adopt by reference the provisions of this chapter as an offense under its municipal ordinances and by so doing authorizes its municipal court to try violations of this chapter. If the amount of the instrument is over one thousand dollars, it must be tried in the court of general sessions or any other court having concurrent jurisdiction. Notwithstanding the provisions of this paragraph, a person who violates the provisions of this chapter, upon conviction for a third or subsequent conviction, may be tried in either a magistrates court or in the court of general sessions.
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> (a) Convictions in a magistrates court are punishable as follows:
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> (1) for a first conviction, if the amount of the instrument is five hundred dollars or less, by a fine of not less than fifty dollars nor more than two hundred dollars or by imprisonment for not more than thirty days;
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> (2) for a first conviction, if the amount of the instrument is more than five hundred dollars but not greater than one thousand dollars, by a fine of not less than three hundred nor more than five hundred dollars or by imprisonment for not more than thirty days, or both;
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> (3) for a second or subsequent conviction, if the amount of the instrument is five hundred dollars or less, by a fine of two hundred dollars or by imprisonment for not more than thirty days;
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> (4) for a second or subsequent conviction, if the amount of the instrument is more than five hundred dollars but not greater than one thousand dollars, by a fine of not more than five hundred dollars or by imprisonment for not more than thirty days, or both.
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> (b) Convictions in the court of general sessions or any other court having concurrent jurisdiction are punishable as follows: for a first conviction by a fine of not less than three hundred dollars nor more than one thousand dollars or by imprisonment for not more than two years, or both; and for a second or subsequent conviction by a fine of not less than five hundred dollars nor more than two thousand dollars and imprisonment for not less than thirty days nor more than ten years.
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> (c) After a first offense conviction for drawing and uttering a fraudulent check or other instrument in violation of Section 34-11-60 within its jurisdiction, the court shall, at the time of sentence, suspend the

> imposition or execution of a sentence upon a showing of satisfactory proof of restitution and payment by the defendant of all reasonable court costs accruing not to exceed forty-one dollars. For a second or subsequent conviction for a violation of Section 34-11-60, the suspension of the imposition or execution of the sentence is discretionary with the court.
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> (d) After a conviction or plea for drawing and uttering a fraudulent check or other instrument in violation of Section 34-11-60 and the defendant is charged or fined, he shall pay in addition to the fine all reasonable court costs accruing, not to exceed forty-one dollars, and the service charge provided in Section 34-11-60.
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> (e) After a conviction under this section on a first offense, the defendant may, after one year from the date of the conviction, apply, or cause someone acting on his behalf to apply, to the court for an order expunging the records of the arrest and conviction. This provision does not apply to any crime classified as a felony. If the defendant has had no other conviction during the one-year period following the conviction under this section, the court shall issue an order expunging the records. No person has any rights under this section more than one time. After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of its expungement to ensure that no person takes advantage of the rights permitted by this subsection more than once. This nonpublic record is not subject to release under Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need this information in order to prevent the rights afforded by this subsection from being taken advantage of more than once.
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> As used in this section the term "conviction" shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail. A conviction is classified as a felony if the instrument drawn or uttered in violation of this chapter exceeds the amount of five thousand dollars.
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> Each instrument drawn or uttered in violation of this chapter constitutes a separate offense.

S.C. Code Ann. § 34-11-90 (1976 Code as amended).

The last sentence of Section 34-11-90 states that "each instrument drawn or uttered in violation of this chapter constitutes a separate offense." And Section 34-11-90(e) is clear that expungement may only be had on a "first offense." Therefore, a defendant is not entitled to the expungement of more than one fraudulent check conviction.

V. Whether a defendant can receive an expungement under Section 34-11-90(e) and then subsequently obtain an expungement for a second conviction under Section 22-5-910? Also, whether a defendant can receive an expungement under Section 22-5-910 and then subsequently obtain an expungement for a second conviction under Section 34-11-90(e)?

In Op. S.C. Atty. Gen., January 21, 2004 (2004 WL 235412), our interpretation of section 22-5-910 (the adult expungement statute)[3] was that "[t]here is no intent expressed in the legislation that the General Assembly did not intend for **all** convictions to be considered for purposes of whether an offense is a first offense conviction" (emphasis added). Pursuant to our opinion, a defendant could not receive an expungement under section 22-5-910 if he had a prior conviction under section 34-11-90(e).

In Op. S.C. Atty. Gen., Opinion No. 90 – 34, April 9, 1990 (1990 WL 514338), we opined that "a defendant is entitled to expungement only once. Such construction is based on the fact that Section 34-11-90(e) provides for expungement following conviction on a first offense." Based on our opinion, a defendant could not receive an expungement under Section 22-5-910 and then subsequently obtain an expungement for a second conviction under Section 34-11-90(e).

VI. Whether a charge for failure to appear should be counted as a magistrate level expungeable offense so as to preclude the expungement for a subsequent offense?

"Failure to appear" is in the South Carolina Code of Laws. The statute states:

> A person released pursuant to the provisions of Chapter 15, Title 17 who wilfully fails to appear before the court as required must:
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> (1) if he was released in connection with a charge for a felony or while awaiting sentencing after conviction, be fined not more than five thousand dollars or imprisoned for not more than five years, or both; or

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[3] At the time of our opinion Section 22-5-910 stated:

Following a first offense conviction in a magistrate's court or a municipal court, the defendant after three years from the date of the conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to an offense involving the operation of a motor vehicle, to a violation of Title 50 or the regulations promulgated under it for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses authorized, or to an offense contained in Chapter 25 of Title 16, except first offense criminal domestic violence as contained in Section 16-25-20. If the defendant has had no other conviction during the three year period following the first conviction in a magistrate's court or a municipal court, the circuit court may issue an order expunging the records. No person shall have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred prior to June 1, 1992.

S.C. Code Ann. § 22-5-910.

The legislature has amended the statute since our opinion was issued. The primary change is that the statute now provides that expungement is for a "first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both" instead of for a "first offense conviction in a magistrate's court or a municipal court." See 2013 South Carolina Laws Act 75 (H.B. 3184) (amending S.C. Code Ann. § 22-5-910).

> (2) if he was released in connection with a charge for a misdemeanor for which the maximum possible sentence was at least one year, be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

S.C. Code Ann. § 17-15-90 (1976 Code, as amended).

According to one of our prior opinions, Section 17-15-90 "is an offense which would fall within the jurisdiction of the Court of General Sessions;" it is not a magistrate offense. Op. S.C. Atty. Gen., April 21, 1995 (1995 WL 803377).

In Op. S.C. Atty. Gen., February 1, 1979 (1979 WL 42792), we stated the following:

> [T]here is some question as to whether an individual released pursuant to Sections 17-15-10, et. seq., who willfully fails to appear before a court as directed may be considered to have committed a crime. Please be advised that in State v. Parker, 227 S.E. 2d 677 (1976) the South Carolina Supreme Court was faced with the question of whether the section now codified as Section 17-15-90 states a crime or should be construed as a 'condition subsequent to the accused's failure to perform the terms of the contract of recognizance.' The Court in Parker stated specifically that:
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> > 'It is our opinion that Section 17-300.8 . . . [now codified as Section 17-15-90] . . . creates a substantive crime independent of contempt and, therefore, in prosecutions under it, all requisite constitutional guaranties must be observed.' 227 S.E. 2d at 680.

Accordingly, a conviction for "failure to appear" would preclude expungement of a subsequent offense.

CONCLUSION

In conclusion, this Office believes that the law is as follows:

1. Even if a defendant meets the definition of a youthful offender, he is not eligible for expungement if he was not sentenced under the Youthful Offender Act.

2. Expungement for youthful offenders is remedial and not punitive. SLED's current practice of expunging multiple convictions if sentencing occurs at a single court appearance appears to meet the purpose of expungement for youthful offenders. However, there is not law on this yet in South Carolina and only the legislature or a court can provide instruction on this matter.

3. SLED should consider out-of-state convictions when determining eligibility for expungement.

4. A defendant is not entitled to the expungement of more than one fraudulent check conviction under Section 34-11-90(e).

5. A defendant is not able to receive an expungement under Section 34-11-90(e) and then obtain an expungement for a second conviction under Section 22-5-910 or vice versa.

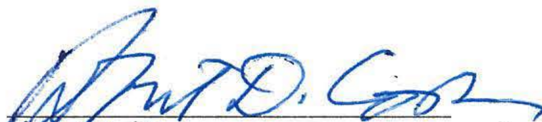
6. A conviction for "failure to appear" would preclude expungement of a subsequent offense.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General