

1979 S.C. Op. Atty. Gen. 57 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-42, 1979 WL 29048

Office of the Attorney General

State of South Carolina

Opinion No. 79-42

March 8, 1979

**\*1 SUBJECT Criminal Identification and Investigation, Law Enforcement, Identification, Magistrates, Municipal Courts, and Courts**

(1) A magistrate is without authority to order the expungement of criminal records after a case has been nolle prossed by the State, a defendant is found innocent after trial in a magistrate's court, or the defendant is discharged upon a finding of insufficient probable cause at a preliminary hearing.

(2) A person seeking expungement of such criminal record information permitted to be expunged by Section 17-1-40 must apply to the circuit court with proper notice to the solicitor for an order of expungement which is then served upon all authorities maintaining such records.

TO: NEAL M. FORNEY, JR.  
Assistant Director  
S. C. Court Administration

QUESTION

Do magistrates have the authority to order that criminal records be destroyed after they have discharged the accused at a preliminary examination, the case has been nolle prossed by the State, or the defendant has been found innocent after trial in the magistrate's court?

AUTHORITIES

[Section 17-1-40, Code of Laws of South Carolina](#), 1976; Op. Att'y. Gen., dated February 26, 1979 from Mr. Funkhouser to Mr. Wilson; Op. Att'y. Gen. dated December 12, 1978 from Mr. Funkhouser to Chief Strom.

DISCUSSION

You have asked whether pursuant to [Section 17-1-40 of the Code of Laws of South Carolina](#), 1976, magistrates may order criminal records destroyed after an accused is discharged after a preliminary examination, after a case has been nolle prossed by the State, or the defendant was found innocent after trial in a magistrate's court. Section 17-1-40 states:

Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such person shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency.

In response to your request, reference is made to a previous opinion of this Office dated February 26, 1979 from Mr. Funkhouser of this Office to Mr. Wilson with the South Carolina Law Enforcement Division issued in response to the question of which judicial authorities may order records to be expunged by the South Carolina Law Enforcement Division. The opinion also

detailed the manner of proceeding to obtain an order of expungement directed to the South Carolina Law Enforcement Division. As explained in the following portions of this opinion, such procedure should be followed in all efforts to expunge such criminal record information permitted to be expunged by Section 17–1–40.

The opinion stated in part that as to the expungement of criminal record information maintained by the State Law Enforcement Division that:

\*2 (i)t is also the opinion of this Office that a person seeking expungement of criminal record information must apply to the Circuit Court with jurisdiction over the charge in question to obtain the Order of Expungement. The application should be served upon the Circuit Solicitor and the Solicitor may consent to the Order, if appropriate, or the Order may be rendered without such consent if the Solicitor has been served and given an opportunity to appear on behalf of the State. The Order must then be served upon SLED.

A Magistrate Court or Municipal Court does not have authority to take action for expungement against the South Carolina Law Enforcement Division, an agency of the State government performing a state-wide function inasmuch as such action would amount to an unlawful extension of those Courts beyond their territory limits. See [Martin v. Ellisor](#), 264 S.C. 202, 213 S.E.2d 732 (1975).

The opinion further stated that:

(t)he aforesaid rule would apply to a finding of insufficient probable cause at a preliminary hearing, inasmuch as a magisterial official may not acquit or accept a plea from a defendant, but, rather, may only release a defendant from custody at such hearing until he is indicted. [State v. Scott](#), S.C. 237 S.E. 2d 886 (1977). [Williams v. South Carolina](#), 237 F. Supp. 360 (D.S.C. 1965), rev'd on other grounds, [Morris v. South Carolina](#), 356 F. 2d 432 (4th Cir. 1966). Therefore, the ruling of the Magistrate will not serve as a dismissal or discharge of the formal proceedings against a defendant, and will not apply to the aforesaid statutes.

In answer to your question concerning the authority of a magistrate to order the destruction of criminal record information after the discharge of an accused at a preliminary examination, in the opinion of this Office, a magistrate is without such authority. Instead, it is the recommendation of this Office that a person seeking expungement of his criminal record at such a stage in a criminal proceeding must apply as detailed in the above referenced opinion to the circuit court with proper notice to the solicitor for an order of expungement. Such order may then be served upon all authorities maintaining such records.

As to the other two situations outlined in your letter concerning criminal records after a case has been nolle prossed or the defendant is found innocent after trial in the magistrate's court, it appears that [Section 17–1–40 of the 1976 Code of Laws](#) applies in these situations. (See referenced opinion of Mr. Funkhouser and Op. Att'y. Gen., dated December 13, 1978, copies of which are enclosed). However, in the opinion of this Office, inasmuch as a magistrate's court is not a court of record and is a court of limited jurisdiction, a magistrate is without authority to order the destruction of criminal records maintained by any authority, county or municipal, in such instances. Furthermore, as was indicated in the referenced opinion, a magistrate does not have the authority to take action in regard to expungement of records maintained by the South Carolina Law Enforcement Division. Even if a magistrate could order certain records expunged, it is apparent that the inability of a magistrate to order the destruction of criminal record information maintained by the South Carolina Law Enforcement Division would create potential problems and confusion for a person seeking expungement of his records. Therefore, in the opinion of this Office, for purposes of the expungement of criminal record information of an individual whose case was nolle prossed or who was found innocent after trial in the magistrate's court, the individual should apply to the circuit court to obtain an order of expungement in the manner detailed in the referenced opinion of February 26, 1979.

## CONCLUSION

\*3 For reasons indicated above, a magistrate is without authority to order the expungement of criminal record information of an individual after his case is nolle prossed, he is found innocent after trial in the magistrate's court, or he is discharged after a

finding of insufficient probable cause at a preliminary hearing. However, a circuit court could properly order the expungement of such information upon application by the individual with proper notice to the circuit solicitor. Such order would then be served upon all authorities maintaining such records.

Charles H. Richardson  
Assistant Attorney General

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