ALAN WILSON
ATTORNEY GENERAL

May 21, 2013

Robert L. McCurdy, Assistant Director
South Carolina Court Administration
1015 Sumter Street, Suite 200
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Dear Mr. McCurdy,

You have asked for an opinion of this Office concerning the expungement of records pertaining to criminal charges in summary courts. By way of background, you state as follows:

> Several questions have arisen concerning expungements in the summary courts. Act No. 36 of 2009 amended several statutes relating to the expungement of criminal records. Included in the Act was an amendment to § 17-22-950, which requires that a summary court immediately expunge the criminal records of an accused if the person is found not guilty or if the charges are dismissed or nolle prossed pursuant to § 17-1-40.
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> Act No. 36 of 2009 also added § 17-1-45 to the Code, which provides that Court Administration include on all bond paperwork and courtesy summons the following notice: "If the charges that have been brought against you are discharged, dismissed, or nolle prossed or if you are found not guilty, you may have your record expunged." The courtesy summons referenced in § 17-1-45 is a noncustodial criminal charging document. A defendant served with a courtesy summons is allowed to proceed without being formally arrested, booked and fingerprinted, unless subsequently convicted of the charge (see §§ 22-5-110 and 115).
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> In 2010, Act No. 167 of 2010 added subsection (C) to § 17-1-40, so as to provide that "[t]his section does not apply to a person who is charged with a violation of Title 50, Title 56, an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5, **or any other state criminal offense if the person is not fingerprinted for the violation.**" Therefore, pursuant to Act No. 167 of 2010, only charges disposed of in summary courts pursuant to § 17-1-40 **and fingerprinted** are subject to automatic expungement. This enactment creates a conflict between § 17-1-40(C) and § 17-1-45, in that the courtesy summons now contains the language regarding the expungement of criminal records required by § 17-1-45, but the defendant is never fingerprinted

> as required by § 17-1-40(C) when the charge is dismissed, nolle prossed or found not guilty....

(emphasis in original).

With this information in mind, you ask the following two questions:

> 1) Can [§§ 17-1-40 and -45] be reconciled to allow for the expungement of a non-fingerprinted defendant charged on a courtesy summons whose case was disposed of pursuant to § 17-1-40, or would the 2010 amendment to that statute requiring fingerprinting prevail and prevent the expungement? While no record of the courtesy summons charge is sent to SLED unless a conviction occurs, record of the charge does go on the internet via the public index in each county and currently remains even if the charge is disposed of pursuant to § 17-1-40.
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> 2) [W]hether offenses written on a uniform traffic ticket (simple possession of marijuana, possession of beer by a minor, etc.) are subject to expungement under § 17-1-40 where the defendant was served but not placed in custody or fingerprinted, and the charge is later discharged or dismissed, or the defendant was found not guilty. Again, SLED has no record of the charge, but it is listed on the public index of the entity in which the charge was made. Would those dispositions be subject to expungement or would legislation be necessary to address this issue?

Law/Analysis

As you indicate, with the passage of Act No. 36 of 2009 the Legislature enacted the Uniform Expungement of Criminal Records Act (the "Act"). The Act added § 17-22-950(A) which provides, in relevant part, the following with regards to the expungement of criminal records in summary court:

> (A) When criminal charges are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, **pursuant to Section 17-1-40**, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records of the accused person unless the dismissal of the charges occurs at a preliminary hearing or unless the accused person has charges pending in summary court and a court of general sessions and such charges arise out of the same course of events....

§ 17-22-950(A) (emphasis added).

As of 2009, the relevant portion of § 17-1-40, the statutory section referenced in the above provision, provided the following with regards to the automatic destruction of criminal records upon dismissal of the charge or a verdict of not guilty:

> (A) A person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found

> not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency....

§ 17-1-40(A) (Supp. 2009).

In addition, the Act added § 17-1-45 which states:

> South Carolina Court Administration shall include on all bond paperwork and courtesy summons[1] the following notice: "If the charges that have been brought against you are discharged, dismissed, or nolle prossed or if you are found not guilty, you may have your record expunged."

§ 17-1-45 (emphasis added).

Particularly relevant to the matter at hand, in 2010 the Legislature passed Act No. 167 which amended § 17-1-40 by adding subsections (C) and (D):

> (C) **This section does not apply to a person who is charged with a violation of** Title 50, Title 56, an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5, or **any other state criminal offense if the person is not fingerprinted for the violation.**
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> (D) The State Law Enforcement Division is authorized to promulgate regulations that allow for the electronic transmission of information pursuant to this section.

§ 17-1-40(C), (D) (Supp. 2010) (emphasis added).

In responding to your questions, a number of rules of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007). "[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). Courts will reject an interpretation of a statute which leads to an absurd result not intended by the Legislature. See Lancaster County Bar Ass'n v. S.C. Com'n on Indigent Defense, 380 S.C. 219, 222 670 S.E.2d 371, 373 (2008); State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011).

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[1] The issuance of a courtesy summons is statutorily provided for in § 22-5-110(B)(2) which states, "[i]f an arrest warrant is sought by someone other than a law enforcement officer, the court must issue a courtesy summons."

Furthermore, "[t]here is a presumption that the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects." City of Camden v. Fairfield Elec. Co-op., Inc., 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007). Pursuant to the Last Legislative Expression Rule, "in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment." Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993); see also City of Newberry v. Pub. Serv. Comm'n of S. Carolina, 287 S.C. 404, 407, 339 S.E.2d 124, 126 (1986) ("Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, *being the latest expression of the legislative will,* will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy") (emphasis in original) (citation omitted). However, as explained in Hodges, 341 S.C. at 88-89, 533 S.E.2d at 583:

> The law does not favor the implied repeal of statute. Butler v. Unisun Ins., 323 S.C. 402, 475 S.E.2d 758 (1996). Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Id. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would ... expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct.App.1998) (quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

Moreover, "[s]tatutes of a specific nature are not to be considered as repealed by a later general statute unless there is a direct reference to the former statute or the intent of the legislature to repeal the earlier statute is implicit." Rhodes v. Smith, 273 S.C. 13, 16, 254 S.E.2d 49, 50 (1979).

Considering the language of § 17-1-45 in isolation, it is clear that as of 2009 it was the Legislature's intent and understanding that an individual charged with an offense pursuant to a courtesy summons could have the charged expunged upon dismissal or a verdict of not guilty. Otherwise, it would have been completely unnecessary for the Legislature to statutorily require Court Administration to include language in all courtesy summons notifying the individual that they may have the record against them expunged "[i]f the charges ... are discharged, dismissed, or nolle prossed or if you are found not guilty ...." § 17-1-45.

However, the Legislature's intent with regards to the expungement of records pertaining to charges issued pursuant to a courtesy summons became ambiguous in 2010 with the addition of subsection (C) to § 17-1-40. As previously mentioned, that provision provides that the automatic destruction of records upon the dismissal of a charge or a finding of not guilty under subsection (A) does not apply "to a person who is charged with a violation of ... any state criminal offense if the person is not fingerprinted for the violation." § 17-1-40(C). Generally, an individual charged with a state criminal offense is only fingerprinted if he or she are subjected to a custodial arrest or ultimately convicted. See § 23-3-120(B) ("A person subjected to a lawful custodial arrest for a state offense must be fingerprinted at the time the person is booked and processed ...."); § 23-3-40 ("All sheriff's and police departments in South Carolina shall make available to the Criminal Justice Records Division of the State Law-Enforcement Division ... all fingerprints taken in criminal investigations resulting in convictions"); Op. S.C. Att'y Gen., 2006 WL 703689 (Mar. 15, 2006) (stating when an individual is charged with an offense, "unless there is a custodial arrest, no fingerprinting is required"). With this in mind, it is clear

from the above-quoted language of § 17-1-40(C) that the Legislature sought to create a distinction among individuals charged with a state criminal offense which is dismissed or for which the person is found not guilty based on whether they were subjected to a custodial arrest for the alleged violation; those subjected to a custodial arrest are entitled to the automatic destruction of records pertaining to the charge, while those not arrested are excluded.

As you indicate, an individual served with a courtesy summons is not subjected to a custodial arrest. As opposed to an arrest warrant, a person served with a courtesy summons is simply give notice to appear in court to answer for the charges against him or her.[2] Since a person served with a courtesy summons is not taken into custody and fingerprinted when charged, it appears at first glance that such person would not be entitled to the automatic destruction of records pertaining to the charge upon dismissal or a finding of not guilty pursuant to § 17-1-40(C). Thus, there is an apparent conflict between § 17-1-40(C) and § 17-1-45 as they relate to charges issued pursuant to a courtesy summons.

To resolve this apparent conflict, one could argue that § 17-1-40(C), as the later enacted provision, supersedes § 17-1-45. Under such a construction, § 17-1-40(C) would prevail and implicitly repeal § 17-1-45 as it concerns courtesy summons, thus prohibiting the automatic destruction of records pertaining to a courtesy summons charge upon dismissal or a verdict of not guilty. For several reasons, however, we do not believe the Legislature intended such a result.

As previously mentioned, the implied repeal of a statute is disfavored under the law. Presuming, as we must, that the Legislature had knowledge of § 17-1-45 when it subsequently enacted § 17-1-40(C), it is further presumed that the Legislature would have expressly repealed § 17-1-45 if it intended to so. Furthermore, § 17-1-45 is specific in nature with regards to the expungement of a courtesy summons charge whereas § 17-1-40(C) applies generally to wide variety of criminal charges. Finding no language in § 17-1-40(C) which directly references or manifests an implied intent to repeal § 17-1-45, we do not believe the repeal of § 17-1-45 was intended by the Legislature. Instead, we believe Legislature intended for § 17-1-45 to continue to be given effect independent of, and without consideration to, § 17-1-40(C). Accordingly, it is our opinion that the records pertaining to a charge issued pursuant to a courtesy summons should be automatically destroyed upon dismissal of the charge or a verdict of not guilty.

That being said, we believe legislative action is still warranted to clarify the apparent conflict between § 17-1-40(C) and § 17-1-45. We note that there is currently legislation pending which, if enacted, may resolve this apparent conflict. See H. 3184, 120th Gen. Assem. (2013).[3]

As we understand your second question, you are generally asking whether a person charged with any state criminal offense other than those found in Title 50 or 56 of the Code, which are written on a

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[2] See § 22-5-115(A) ("Notwithstanding any other provision of law, **a summary court or municipal judge may issue a summons to appear for trial instead of an arrest warrant**, based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case, if the sworn statement establishes probable cause that the alleged crime was committed....") (emphasis added). As further stated in a July 7, 2008 Memorandum issued by Court Administration: "[§ 22-5-115] **does not allow for a custodial arrest when serving the courtesy summons**. The individual must be given a court date by the law enforcement officer serving the document and allowed to proceed...." (Emphasis in original).

[3] This bill can be viewed in its current for at http://www.scstatehouse.gov/sess120_2013-2014/bills/3184.htm.

Uniform Traffic Ticket ("UTT") and for which the person charged is not subjected to a custodial arrest, may have his or her record expunged pursuant to § 17-1-40 upon dismissal of the charge or a verdict of not guilty. By way of example, you reference the charges of simple possession of marijuana[4] and possession of beer by a minor.[5] See § 56-7-10 (providing that a UTT shall be used for traffic offenses and other offenses including the "Purchase or Possession of Beer or Wine by a Person Under Age" pursuant to § 63-19-2440); § 56-7-15(A) (providing that a UTT "may be used by law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrates court and municipal court....").

Looking back to the plain language of § 17-1-40(C), records pertaining to state criminal offenses which are not violations of Titles 50 or 56 and for which a person is merely issued a UTT are expressly excluded from automatic destruction under § 17-1-40(A) if the person was not subjected to a custodial arrest and fingerprinted. Therefore, we believe the Legislature did not intend for charges such as simple possession of marijuana or possession of beer by a minor to be expunged upon dismissal or a verdict of not guilty under § 17-1-40 if the person charged was merely issued a UTT and not subjected to a custodial arrest.

However, in light of other statutory provisions which provide for the expungement of records pertaining to such charges under different circumstances, we must note that such a result raises constitutional concerns under equal protection. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. As stated by our State Supreme Court:

> The guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions .... The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated....

Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 471, 229 S.E.2d 718, 722 (1976) (citation omitted); see also Denis J. O'Connell High Sch. v. Virginia High Sch. League, 581 F.2d 81, 84 (4th Cir. 1978) ("Where ... there is no fundamental right or suspect classification involved, the test to determine the validity of the state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose").

To use one of the examples presented, a person charged with simple possession of marijuana in violation of § 44-53-370(d)(4) may eventually have the records pertaining to such charge destroyed or expunged by conditional discharge pursuant to § 44-53-450, completion of a pretrial intervention program pursuant to § 17-22-150, or three years after a first offense conviction pursuant to § 22-5-910. We are

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[4] § 44-53-470(d)(4) provides that "[a] person who violates this subsection with respect to twenty-eight grams or one ounce or less of marijuana or ten grams or less of hashish is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than thirty days or fined not less than one hundred dollars no more than two hundred dollars...."

[5] § 63-19-2440(A) provides that "[i]t is unlawful for a person under the age of twenty-one to ... knowingly possess beer [or] wine," and "[a] person who violates the provisions of this section is guilt of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars no more than two hundred dollars or must be imprisoned for not more than thirty days, or both."

doubtful as to whether a court would find a rational basis exists to allow records pertaining to such a charge to be expunged in the above situations, but not where an individual charged with the same offense is found not guilty or the charge is dismissed. Notions of equity and fairness dictate that a person who has a charge against him or her dismissed or is found not guilty is most entitled to have the records pertaining to such charge destroyed or expunged. Furthermore, in situations where a charge for simple possession of marijuana has been dismissed or the person charged has been found not guilty, we see no reason why the determination of whether the records pertaining to such charge may be expunged should rest on the question of whether the individual was subjected to a custodial arrest or simply issued a UTT. Thus, we believe the principles of equal protection dictate that expungement should be permitted in all cases in which the charges are disposed of in favor of the defendant, not just those in which the officer at the scene decided to arrest the individual for the violation as opposed to simply issuing a UTT. Such concerns do not apply to violations of Titles 50 or 56, however, since the plain language of § 17-1-40(C) excludes such offenses from being expunged regardless of whether the individual charged was arrested or issued a UTT.

For the foregoing reasons, we believe the Legislature should consider amending § 17-1-40(C) as it applies to "state criminal offenses if the person is not fingerprinted for the violation." As it does with violations of Title 50, Title 56, or county or municipal violations enacted pursuant to Titles 4 or 5, the provision should either expressly exclude certain state offenses from being expunged upon disposition in favor of the accused or allow it. To otherwise predicate expungement under § 17-1-40 on the question of whether or not the person charged was fingerprinted may result in the unfair treatment of different individuals in like circumstances in violation of equal protection.

Conclusion

It is the opinion of this Office that the records pertaining to a charge issued against a person pursuant to a courtesy summons should be destroyed upon the dismissal of the charge or a verdict of not guilty. It is clear that when § 17-1-45 was enacted in 2009 it was the Legislature's intent and understanding that that an individual issued a courtesy summons could have the records pertaining to such charged expunged upon dismissal or a verdict of not guilty. This intent became ambiguous, however, in 2010 when the Legislature added subsection (C) to § 17-1-40 providing that the destruction of records pertaining to a charge disposed of in favor of the accused under subsection (A) does not apply, *inter alia*, to a "state criminal offense if the person is not fingerprinted for the violation." Although it could be argued that § 17-1-40(C), as the later enactment, supersedes § 17-1-45 as it pertains to courtesy summons, the implied repeal of a state is disfavored under the law. It is also presumed that the Legislature was aware of § 17-1-45 when it enacted § 17-1-40(C), and thus would have expressly repealed § 17-1-45 if it intended to do so. Furthermore, § 17-1-45 is specific in nature with regards to the expungement of charges issued pursuant to a courtesy summons whereas § 17-1-40(C) applies generally to a wide variety of criminal offenses. As § 17-1-40(C) makes no direct reference to § 17-1-45 and we are aware of no other statutory enactment manifesting an implied intent to repeal that section, we do not believe the repeal of § 17-1-45 was intended by the Legislature. Accordingly, we believe § 17-1-45 continues to be given effect despite the enactment of § 17-1-40(C); thus, records pertaining to a charge issued against a person pursuant to a courtesy summons should be destroyed upon dismissal of the charge or a verdict of not guilty. That being said, we believe legislative action is still warranted to clarify the apparent conflict between § 17-1-40(C) and § 17-1-45.

As for your second question, we believe the plain language of § 17-1-40(C) excluding "any ... state criminal offense if the person is not fingerprinted for the violation" applies to any state criminal offense outside of Titles 50 or 56 of the Code for which a person is merely issued a UTT but not subjected to a custodial arrest. This exclusion would apply to persons charged pursuant to a UTT with the possession offenses mentioned in your letter. However, we must note that applying § 17-1-40(C) as excluding such charges from expungement upon disposition in favor of the accused is problematic under principles of equal protection. For example, a person charged with simple possession of marijuana may have records pertaining to such charge expunged by conditional discharge, completion of a pretrial intervention program, or three years after a conviction for a first offense. We must express doubt as to whether a court would find a reasonable basis exists to permit expungement in the foregoing circumstances, but not in cases where someone charged with the same offense is found not guilty or the charge is dismissed. Furthermore, in situations where a state criminal charge against a person has been disposed of in his or her favor, we see no reason why expungement should be predicated on the determination of whether or not the individual was subjected to a custodial arrest. A court could find that conditioning expungement on this basis results in the disparate treatment of individuals charged with the same offense. Thus, to avoid potential equal protection violations we believe the Legislature should consider amending § 17-1-40(C) as it applies to "state criminal offenses if the person is not fingerprinted" to ensure that all individuals charged with the same state criminal offense are either entitled to have the records pertaining to such charge expunged upon disposition in their favor or excluded entirely.

Sincerely,

Harrison D. Brant
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REVIEWED AND APPROVED BY:

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