9240/9790

ALAN WILSON
ATTORNEY GENERAL

February 4, 2015

Chief Mark A. Keel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, SC 29221-1398

Dear Chief Keel:

You have requested the opinion of this Office related to the expungement of criminal records of an individual arrested for driving under the influence on three occasions. Specifically, you state:

> on the first DUI charge, Mr. [ ] appears to have been tried in his absence. However, no formal disposition appears on the record and SLED has received no formal documentation that this charge was nol prossed, dismissed, or otherwise discharged. On the second DUI charge, Mr. [ ] appears to have been allowed to plead down the DUI charge to a Reckless Driving. However, the same ticket number is associated with each charge and it does not appear the DUI was nol prossed, dismissed, or otherwise discharged. Rather, it appears that the ticket itself was somehow rewritten to Reckless Driving something akin to pleading a lesser included. Similarly, on the third DUI charge, Mr. [ ] appears to have been allowed to plead down this DUI to a Speeding violation. Again, it does not appear that the DUI was nol prossed, dismissed, or otherwise discharged as these charges also share the same ticket number. Accordingly, it does not appear to SLED that any of these charges are eligible for an expungement as none were ever formally nol prossed, dismissed, or otherwise discharged such that any of the applicable expungement statutes apply.

Regarding the first charge, the criminal history you provided with your letter reflects that the Defendant was arrested for "driving under influence liquor" on May 3, 1978. The criminal history further indicates that the "court charge" of "driving under influence" and "petty [sic] larceny" resulted in "court disp- multiple charge one disposition; tried in absence" on "court date- 05/18/1978."

As to the Defendant's second and third DUI arrests, in addition to the criminal history provided, records of these charges appear on the 13th Judicial Circuit Public Index. The second arrest, written under case number 82073DG, occurred on April 29, 2005 for "Driving Under the Influence, Per Se, 1st offense."[1] The disposition of the case lists "Guilty Bench Trial" held on January 20, 2006 and the "Charge Description" reads "Reckless Driving," also under case number 82073DG. The case "Status" lists "Disposed."

[1] It is our opinion that the arrest for Driving Under the Influence 1st Offense that occurred on April 29, 2005 was treated as a first offense because it occurred over ten years in time from the date Defendant was tried in his absence on May 18, 1978, should that charge have resulted in a conviction for DUI. See S.C. Code Ann. § 56-5-2930(D) (Supp. 2014) ("Only those violations which occurred within a period of ten years including and immediately proceeding the date of the last violation constitute prior violations within the meaning of this section").

Finally, the third arrest, case number 79002DI, occurred on September 4, 2005 for "Driving Under the Influence, Per Se, 1st offense."[2] The disposition lists "Guilty Bench Trial" and the "Charge Description" reads "Speeding, 10 mph or less over the speed limit" on January 20, 2006, also under case number 79002DI. The "Status" of the case lists "Disposed."

Discussions with the Magistrate's Court where both 2005 charges were heard indicate that a guilty plea is reflected on the Judicial Index as a "guilty bench trial"; thus it appears the Defendant pled guilty to reckless driving and speeding, under case numbers 82073DG and 79002DI, respectively.

As we interpret the criminal history pertaining to the 1978 DUI charge as not being dismissed, nolle prossed, or the Defendant found not guilty, our opinion is consistent with yours that the DUI charge cannot be expunged. Analysis of the expungement eligibility for the 2005 charges is twofold, first requiring the determination of whether a conviction on a magistrate level charge for which the defendant was not noticed of by way of arrest warrant or uniform traffic ticket is considered a nullity being that it is not a lesser included offense of the original charge and, second, a determination of the status of the greater charge if the conviction for the lesser charge is considered valid being that the greater and lesser charges are listed under the same case number. Addressing these two issues will allow us to reach a conclusion as to the status of the 2005 DUI charges and therefore their expungement eligibility. We will begin by addressing the 2005 charges in a combined analysis and will follow with analysis of the 1978 charge.

Law/Analysis

I. DUI Arrests Occurring in April and September of 2005

a. Subject Matter Jurisdiction & Sufficiency of Indictment

As outlined above, it appears that both the April and September 2005 DUI charges against the Defendant resulted in convictions of a lesser charge under the same case number issued for the DUI. To prevent any confusion, we will begin by noting that it remains the opinion of this office that in summary court, to properly prosecute an individual for a different offense than that which the subject was originally charged that is separate and distinct, or in other words, that is not a lesser included offense of the other, the original offense must either be nolle prossed or dismissed and the defendant charged anew with a different offense. See Op. S.C. Att'y Gen., 2014 WL 3752137 (July 14, 2014); Op. S.C. Att'y Gen., 2003 WL 21998994 (Aug. 5, 2003); Op. S.C. Att'y Gen., 1982 WL 154971 (Jan. 12, 1982); Op. S.C. Att'y Gen., 1973 WL 27717 (Oct. 5, 1973). While this remains our opinion, this analysis clarifies and elaborates on the narrow issue of the status of a conviction for a charge that a magistrate's court undoubtedly has jurisdiction over but exercises such jurisdiction when a defendant has not been properly noticed of the charge.

In 1974, our Supreme Court addressed whether a magistrate's court could properly accept a plea for reckless driving being that it was not an included offense of driving under the influence, the offense

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[2] We believe the arrest for driving under the influence, first offense that occurred on September 4, 2005 was treated as a first offense because a prior DUI charge must result in a *conviction*, by trial or plea, to constitute a prior violation. Because the April 29, 2005 and September 4, 2005 charges were heard on the same day, the pending April 29, 2005 charge would not have classified as a *conviction*. See S.C. Code Ann. § 56-5-2930(D) (Supp. 2014) ("For purposes of this section, a conviction, entry of plea of guilty or of nolo contendere, or forfeiture of bail for the violation of a law or ordinance of this or another state or a municipality of this or another state that prohibits a person from driving a motor vehicle while under the influence of intoxicating liquor, drugs, or narcotics. . . constitutes a prior offense of this section").

for which the defendant was noticed and charged. See State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). Emphasizing that reckless driving is not a lesser included offense of DUI, the Court held that "[t]he issuance of either a uniform traffic ticket or a warrant charging the respondent with the offense of reckless driving was necessary to give the magistrate jurisdiction to dispose of that particular offense." Id. at 220-21, 209 S.E.2d at 434 (citing State v. Praser, 173 S.C. 284, 175 S.E. 551 (1934); Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953)). Accordingly, the Court concluded that the magistrate was without jurisdiction to accept a plea of reckless driving for a defendant charged with driving under the influence, and the "statutory requirements essential to the magistrate's acquiring jurisdiction of the particular offense" could not be waived. Id. (citing Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (1940)).

Categorized as the current law of our State, Fennell appears to speak directly to the issue raised in your opinion request regarding the Defendant's convictions for speeding and reckless driving. However, further analysis suggests otherwise. Wright, cited by Fennell in support of its holding, held that the issuance of a warrant was mandatory to commence prosecution in magistrate's court and that such requirement could not be waived; however, since the ruling in Fennell, Wright has been implicitly overruled. Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924, 927 (1940), implicit overruling recognized by Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012). In addition, our Supreme Court has conclusively distinguished between a court's subject matter jurisdiction and the sufficiency of an indictment due to the incorrect melding of these two principles in past jurisprudence. See Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012); State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). While Fennell is not categorized as an overruled case, we will expand upon the current posture of the law that indicates a defendant can in fact waive the notice requirements established for magistrate's courts as notice is separate and distinct from the court's subject matter jurisdiction.

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) has been described as "the seminal case in our jurisprudence that deals in concert with subject matter jurisdiction and the sufficiency of an indictment." See Bayly v. State, 397 S.C. 290, 303 n.6, 724 S.E.2d 182, 188 n.6 (2012). In particular, Gentry addressed confusion that has arisen in past jurisprudence between the sufficiency of an indictment and a court's subject matter jurisdiction, explaining the United States Supreme Court's analysis that the "expansive concept of jurisdiction" present in years past was "more a fiction than anything else" and is "not what the term jurisdiction means today." Gentry, 363 S.C. at 99-100, 610 S.E.2d at 498.[3] The Court went on to overrule its holding in State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) that "subject to certain minor exceptions, the trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury is sworn." Id. at 101, 610 S.E.2d at 499. It distinguished that "[t]his language conflated the meaning of subject matter jurisdiction and mixed two separate questions, *i.e.* whether the trial court has the power to hear a case and whether the indictment is sufficient." Id (footnote omitted). Thus, it conclusively held that "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." Id. (citing S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards"). Gentry did clarify, however, that while

[3] Gentry explained the analysis in United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002), which overruled Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781 (1887) on the grounds that a defective indictment does not deprive the court of jurisdiction.

> presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. . . . an indictment is needed to give *notice* to the defendant of the charge(s) against him. . . . A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment."

Id. at 109 n.6, 610 S.E.2d at 503 n.6 (internal citations omitted).

The holding in Gentry has been expounded upon in subsequent cases. In State v. Dickerson, the defendant used Gentry and the United States Supreme Court decision in Beck v. Alabama[4] to argue that the lesser-related offense of accessory after the fact to murder should have been presented to the jury in his case because the trial court had subject matter jurisdiction over the crime of accessory after the fact, such crime had traditionally been considered a lesser-included offense of the greater offense charged, and the charge was supported by the evidence. State v. Dickerson, 395 S.C. 101, 118-19, 716 S.E.2d 895, 904-05 (2011). Rejecting this argument, the Court clarified its holding in Gentry, stating that:

> [i]n Gentry, we held that the concepts of subject matter jurisdiction and sufficiency of an indictment are distinct. 363 S.C. at 101, 610 S.E.2d at 499. A court therefore has subject matter jurisdiction to hear cases even if the indictment fails to allege all elements of the offense. *See id.* Accordingly, if the defendant fails to challenge the sufficiency of the indictment prior to the jury being sworn, he waives that challenge. *Id.* at 102, 610 S.E.2d at 500.
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> . . . While the circuit court may have said subject matter jurisdiction to try [Defendant] as an accessory after the fact, *Gentry* merely held that a defendant must challenge the indictment prior to the swearing of the jury. Because the sufficiency of the indictment is not at issue here, *Gentry* is inapposite.

Id. at 119-20, 716 S.E.2d at 905-06.

Subsequently, in Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012), the Supreme Court further expanded on Gentry's application – this time involving the appeal of a magistrate's court case – when addressing a defendant's challenge of a default conviction on a possession of marijuana charge. As the offense was committed in the presence of the officer, the charge was issued by the officer by way of a uniform traffic ticket. Id. at 300, 724 S.E.2d at 187. The defendant sought to invalidate his conviction on the grounds that the court lacked jurisdiction because he was not issued an arrest warrant for the charge. Id. at 292, 724 S.E.2d at 182. The Court rejected the defendant's argument, finding "no procedural or jurisdictional defects that operated to invalidate Bayly's conviction" because "Section § 56-7-15 authorized the officer to issue a uniform traffic ticket for simple possession of marijuana as this offense was committed in his presence and the punishment for this offense fell within the purview of the magistrate court." Id. at 300, 724 S.E.2d at 187.

In its analysis, the Court provided a summary of a magistrate's court subject matter jurisdiction to explain that, in the defendant's case, either an arrest warrant or a uniform traffic ticket would be proper to provide notice to the defendant of the proceeding. Id. at 295-300, 724 S.E.2d at 183-87. In making this determination, the Court also further distinguished between subject matter jurisdiction and sufficiency of an indictment, stating as follows:

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[4] Beck v. Alabama, 447 U.S. 625, 635-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

> [i]n *State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)*, this Court clarified that "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Id.* at 100, 610 S.E.2d at 498. Based on this clarification, we conclusively recognized that an indictment, which is a notice document, does not confer subject matter jurisdiction on a circuit court. *Id.* at 102, 610 S.E.2d at 500. Thus, an arrest warrant, similar to an indictment, does not operate to vest a magistrate or municipal court with subject matter jurisdiction. Instead, the General Assembly establishes the jurisdiction of these courts in a legislative pronouncement.
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> . . . We find that it is not the service of the uniform traffic ticket that confers subject matter jurisdiction to the magistrate but, rather, the General Assembly's purposeful identification of certain offenses for which the magistrate is authorized to hear.
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> Thus, in accord with our pronouncement in *Gentry*, we find that neither a uniform traffic ticket nor an arrest warrant operates to confer subject matter jurisdiction on the magistrate court. *Conversely, the absence of a uniform traffic ticket or arrest warrant does not render a magistrate's court conviction a nullity.*

Bayly v. State, 397 S.C. 290, 295-96, 724 S.E.2d 182, 184-85 (2012) (emphasis added). The holding in Bayly makes clear that both an arrest warrant and uniform traffic ticket, for offenses for which a uniform traffic ticket is authorized pursuant to S.C. Code Ann. § 56-7-10 and § 56-7-15, is not necessary to confer jurisdiction upon the magistrates court. However, the holding that "the absence of a uniform traffic ticket or arrest warrant does not render a magistrate's court conviction a nullity" left us in question.

Justice Pleicones' concurring opinion in Bayly helps to clarify the majority opinion when he expands on his disagreement with the majority's finding "that the General Assembly's grant of general subject matter jurisdiction in §§ 22-3-540 and 22-3-550 is sufficient to confer the authority to exercise jurisdiction in the face of the requirements of §§ 22-3-710, 56-7-10, and 56-7-15(A)." Id. at 302, 724 S.E.2d at 188. He provided the following basis for his disagreement:

> [t]he majority cites *State v. Gentry, supra,* for the proposition that an indictment is not necessary to confer subject matter jurisdiction on a circuit court; by analogy, neither an arrest warrant nor a uniform traffic ticket is necessary to vest a magistrates court with jurisdiction. Recently this Court, in rejecting a subject matter jurisdiction argument, clarified that "*Gentry* merely held that a defendant must challenge an indictment prior to the swearing of the jury. Because the sufficiency of the indictment is not at issue here, *Gentry* is inapposite." *State v. Dickerson*, 395 S.C. 101, 120, 716 S.E.2d 895, 905–06 (2011). Since we have no challenge to the sufficiency of the uniform traffic ticket here, Gentry is inapposite. Moreover, the General Assembly provided for indictment or waiver. *See* S.C. Code Ann. § 17–23–130 (2003). It has not chosen to provide for a defendant's ability to waive the warrant or ticket. *See Town of Honea Path v. Wright*, 194 S.C. 461, 9 S.E.2d 924 (1940). Whether couched as an issue of subject matter jurisdiction or as the court's jurisdiction, I believe a magistrates court conviction obtained without one of the specified charging documents is a nullity.

Id. at 302-03, 724 S.E.2d at 188 (Pleicones, J., concurring). Justice Pleicones' elaboration of the majority opinion solidifies Bayly's holding that neither a uniform traffic ticket nor an arrest warrant is necessary to vest a magistrates court with jurisdiction, and further, that a defendant can waive the notice requirements

of the warrant or uniform traffic ticket, as set forth in S.C. Code Ann. §§ 22-3-710, 56-7-10, and 56-7-15(A).

Looking back to Gentry, the Court included an appendix of cases "overruled to the extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction, *i.e.* a trial court's power to hear the charge . . . ." State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005). However, it noted that the cases included in the appendix were "perhaps not a complete listing of all the cases affected by this decision . . . ." Id. The list of overruled cases includes instances where courts deemed improper a conviction of a lesser offense that was not included in the offense the defendant was charged, on the basis that the trial court lacked jurisdiction. One example of such a case is State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987), which was also specifically addressed within Gentry's opinion. See id. at 100-01, 610 S.E.2d at 489-99. In Munn, the Defendant was indicted of criminal sexual conduct in the second degree and was convicted in a court of general sessions of criminal sexual conduct with a minor in the second degree, which is not a lesser included offense of criminal sexual conduct in the second degree. State v. Munn, 292 S.C. 497, 498, 357 S.E.2d 461, 462 (1987). The Supreme Court reversed and remanded the case, stating that:

> [d]efects in the indictment which are of such a fundamental character as to make the indictment wholly invalid are not subject to waiver by a defendant. 41 Am.Jur.2d *Indictments and Informations* § 299 (1968). Subject to certain minor exceptions not present here, the trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with the offense when the jury is sworn. *State v. Beachum,* 288 S.C. 325, 342 S.E.2d 597 (1986); *State v. Hann,* 196 S.C. 211, 12 S.E.2d 720 (1940).

Id. at 499, 357 S.E.2d at 463. Because Munn intertwined the concepts of subject matter jurisdiction and sufficiency of an indictment, it was overruled by Gentry. See State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 502 (2005).

Another case included in Gentry's appendix of overruled cases we wish to highlight is In re Jason T., where a juvenile was charged with petit larceny but pled guilty to the charge of receiving stolen goods. In re Jason T., 340 S.C. 455, 457, 531 S.E.2d 544, 545 (Ct. App. 2000). The Court of Appeals vacated the plea, stating that:

> [t]here is no indication in the record that Jason or his parents waived his right to notice. Furthermore, receiving stolen goods is not a lesser included offense of petit larceny. . . . Therefore, the family court lacked subject matter jurisdiction to accept Jason's guilty plea and adjudicate him delinquent for receiving stolen goods.

Id. at 459, 531 S.E.2d at 546. This decision was also overruled by Gentry as it melded the concepts of subject matter jurisdiction and sufficiency of an indictment as one. See State v. Gentry, 363 S.C. 93, 107, 610 S.E.2d 494, 502 (2005).

As in Munn and In re Jason T., Fennell also appears to mix the concepts of subject matter jurisdiction and the sufficiency of an indictment. As stated above, Fennell concluded that since reckless driving is not a lesser included offense of driving under the influence of intoxicants and the defendant was not properly charged with the offense of reckless driving, the magistrate was without jurisdiction to accept a plea of guilty to the offense of reckless driving and dispose of the case. State v. Fennell, 263 S.C. 216, 221, 209 S.E.2d 433, 435 (1974). While not included within the Supreme Court's appendix of cases overruled by Gentry, we fail to see how Fennell is conceptually different than Munn and In re Jason T.

Thus, in our opinion, it is likely that Fennell is among those cases that Gentry was referencing when it noted that the appendix was "perhaps not a complete list" of the cases affected by the Court's ruling. See State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005).

The distinction between the concept of subject matter jurisdiction and the sufficiency of an indictment is of particular importance because a court's lack of subject matter jurisdiction is fundamental, cannot be waived, and can be raised at any time. State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971). Conversely, Gentry clarifies that while presentment or indictment of an alleged offense is a constitutionally and statutorily protected right, such right can be waived as it is a right intended for the benefit of the defendant. State v. Gentry, 363 S.C. 93, 109 n.6, 610 S.E.2d 494, 503 n.6 (2005).[5] While notice requirements in magistrate's courts differ in that the Constitution does not require grand jury indictment and either an arrest warrant, or a uniform traffic ticket for certain offenses and in certain instances, can be issued to notify the accused and commence the judicial proceeding, Bayly indicates that such notice requirements can be waived in its holding that "the absence of a uniform traffic ticket or arrest warrant does not render a magistrate's court conviction a nullity." Bayly v. State, 397 S.C. 290, 296, 724 S.E.2d 182, 185 (2012).

As to when the right to notice is considered waived, citing S.C. Code Ann. § 17-19-90, Gentry conclusively held that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499. For purposes of this opinion, we note that it has been held that § 17-19-90 "is no less applicable because the appellant . . . waived jury trial by his guilty plea" being that it "is as if the jury had returned a verdict of guilty, had he gone to trial, before he questioned the form of the indictment." State v. Phillips, 215 S.C. 314, 318, 54 S.E.2d 901, 903 (1949). We also note that while prior to Gentry our Supreme Court acknowledged the precursor to § 17-19-90 did not apply to magistrate's courts, the Court of Appeals, albeit in an unpublished opinion, has rejected a challenge of the sufficiency of a uniform traffic ticket on the grounds that it was not timely raised to preserve the issue for appeal, citing Gentry as its basis. Compare State v. Williams, 97 S.C. 449, 81 S.E. 154, 155 (1914) (holding that appellant could raise the sufficiency of the indictment on appeal although it was not raised at trial and stating that "section 84 of the Criminal Code [the precursor to S.C. Code Ann. § 17-19-90], which provides that objections to any indictment for defects apparent on the face thereof must be taken by demurrer or motion to quash, before the jury is sworn, does not apply to magistrates' courts") with State v. Rogers, No. 2011-UP-463, 2011 WL 11735724 (Ct. App. Oct. 19, 2011) ("As to Rogers' argument that a uniform traffic ticket was insufficient to confer jurisdiction on the municipal court to try the shoplifting charge, we hold it was incumbent on her to raise this issue before the jury was sworn in order to preserve this issue for appeal"). For purposes of our analysis, the Defendant appears to have waived his right to challenge the notice document under either application presuming it was not raised either prior to his pela or on appeal.[6]

In summary of the above analysis, it is our opinion that Gentry, Dickerson, and Bayly make clear that the concepts of subject matter jurisdiction and the sufficiency of an indictment are separate and while the former cannot be waived, the latter can. Thus, if an offense is within the General Assembly's grant of subject matter jurisdiction afforded to the magistrate's court and a defendant has waived his right to

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[5] Gentry quotes the following authorities in support: S.C. Const. Art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed ..."); S.C. Code Ann. § 17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury; State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971) (individual may waive any provision of the Constitution intended for his benefit). State v. Gentry, 363 S.C. 99, 109 n.6, 610 S.E.2d 494, 503 n.6 (2005).

[6] See S.C. Code Ann. § 18-3-30 (Supp. 2014) ("The appellant, within ten days after sentence, shall file notice of appeal with the clerk of circuit court . . . .").

notice, a conviction would not be considered a nullity despite the absence of an arrest warrant or uniform traffic ticket. It follows that since magistrate's courts have jurisdiction over speeding and reckless driving,[7] it is our opinion that a court would find the Defendant's convictions for speeding and reckless driving are not void.

b. Status of 2005 DUI Charges upon Conviction of Speeding and Reckless Driving

Discussions with the Magistrate's Court where the 2005 charges were heard revealed that its current access to records of the charges appearing under case numbers 82073DG and 79002DI include what appears on the judicial index. However, our discussions further indicated that what is catalogued in the judicial index as a guilty bench trial for an arrest of DUI and court charges of reckless driving and speeding most probably provides an instance where the charge was amended to the lesser charge on the back of the ticket to proceed with a plea on the lesser charge. We were later told that a formal disposition request on behalf of your agency to the court could be requested to obtain further information related to these charges, and doing so is our strong recommendation. If the court's interpretation is correct, this office has written numerous opinions on the deficiency of this process, and we continue to uphold the conclusion reached in those opinions that if the facts of a case better support a lesser charge, the prosecutor or police officer must nolle pros the original ticket and issue a new ticket for the lesser charge. See Op. S.C. Att'y Gen., 2003 WL 21998994 (Aug. 5, 2003); Op. S.C. Att'y Gen., 1982 WL 154971 (Jan. 12, 1982); Op. S.C. Att'y Gen., 1973 WL 27717 (Oct. 5, 1973); Op. S.C. Att'y Gen., 1967 WL 12411 (May 22, 1967). We have also opined and continue to stand by the conclusion that absent specific statutory authorization, "a Judge has no authority to dismiss an indictment or prosecution prior to trial on his motion except at the instance of the prosecutor." Op. S.C. Att'y Gen., 1982 WL 154971 (Jan. 12, 1982) (citing State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977)).

Despite the defects in notice presented in this scenario, Gentry's holding leads to our opinion that a court would likely find any notice challenge not timely raised has been waived. Accordingly, in light of Gentry, Dickerson, and Bayly, it is our opinion that a court in upholding the Defendant's convictions for speeding and reckless driving would consequently uphold the implied dismissal for the DUI charges despite being incorrectly effectuated by amendment of the tickets from DUI to speeding and DUI to reckless driving, should it be confirmed they were part of the plea bargains. However, we take this time to point out that the lack of a notice document in this situation was a potential problem pointed out by Justice Pleicones in his dissenting opinion in Gentry. Specifically, he stated that:

> the majority misapprehends the function of an indictment when it holds that its purpose is merely to serve as notice to the defendant of the charges against him. An indictment serves multiple functions: "to enable the accused to repel or rebut the charge, to protect him for a future prosecution for the same charge, and to *enable the court to pronounce its judgment*." *State v. Halder*, 2 McCord (13 S.C. L.) 377 (1823). While it may be that the first and second reasons for requiring an indictment inure solely to the defendant's benefit, and therefore may be waived by him, the *third requirement is for the benefit of the circuit court, and is not subject to waiver by the defendant.*

[7] S.C. Code Ann. § 22-3-550(A) (Supp. 2014) states that "Magistrates have jurisdiction of all offenses which may be the subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both." The offense of reckless driving is set forth in S.C. Code Ann. § 56-5-2920 (2006) and is punishable "by a fine not less than twenty-five dollars nor more than two hundred dollars or by imprisonment for not more than thirty days." Furthermore, the offense of speeding 10 mph or less over the speed limit is, pursuant to S.C. Code Ann. § 56-5-1520(G)(1) (2006), punishable "by a fine of not less than fifteen dollars nor more than twenty-five dollars." Therefore, both reckless driving and speeding fall within in the requirements of § 22-3-550(A) (Supp. 2014).

State v. Gentry, 363 S.C. 93, 108, 610 S.E.2d 494, 503 (2005) (Pleicones, J., dissenting) (emphasis added). Nonetheless, in application of Gentry's holding, and its application at the magistrate level by Bayly, it is our opinion that a court, in upholding the lesser charges of reckless driving and speeding would consequently uphold the dismissal of the greater charge that occurred as a result of a plea.

c. Expungement Eligibility

Expungement eligibility for the DUI charges resulting in what we believe a court would find as dismissed, is another difficult question. S.C. Code Ann. § 17-22-910 (Supp. 2014) lists statutory provisions authorizing expungement, which includes subsection (6) that provides for expungement pursuant to "Section 17-1-40, criminal records destruction . . . ." Looking to S.C. Code Ann. § 17-1-40, Subsection (B)(1) reads as follows:

> [i]f a person's record is expunged pursuant to Article 9, Title 17, Chapter 22, because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person **must** be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency.

S.C. Code Ann. § 17-1-40(B)(1) (Supp. 2014) (emphasis added). While S.C. Code Ann. § 17-1-40(B)(1) sets forth the general rule, § 17-1-40(E)(1) (Supp. 2014) clarifies that "[t]his section does not apply to a person who is charged with a violation of Title 50, Title 56, or an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5." As driving under the influence is a violation appearing in Title 56 of the South Carolina Code of Laws, it follows that a Defendant would not be entitled to expungement of a non-conviction DUI pursuant to S.C. Code Ann. § 17-1-40 under the current posture of the law. See S.C. Code Ann. § 56-5-2930 (setting forth the offense of DUI within Title 56).[8] This conclusion is strengthened by a recent Court of Appeals decision, although unpublished, interpreting § 17-1-40 in the same manner. See Sabina Animas v. S.C. Dep't Motor Vehicles, No.2011-200866 2012 WL 10862736 (Ct. App. Aug. 29, 2012). Upholding the Administrative Law Court's decision to suspend Appellant's driver's license despite dismissal of a DUI charge and subsequent expungement pursuant to § 17-1-40, the Court of Appeals provided the following law as it basis for affirming the decision:

> [a]s to whether the ALC erred in finding section 17–1–40 does not apply to the DUI charge: S.C. Code Ann. § 17–1–40(A) (Supp.2011) ("A person who after being charged with a criminal offense and the charge is discharged ... [or] proceedings against the person are dismissed ... 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."); S.C. Code Ann. § 17–1–40(C) (Supp.2011) (providing this section does not apply to violations of Title 56); STATE V. JACOBS, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite

[8] Section 17-1-40(E)(2) (Supp. 2014) does require, however, that non-convictions not entitled to expungement under subsection (E)(1) be removed from any internet-based public record. S.C. Code Ann. § 17-1-40(E)(2) (Supp. 2014) ("If a charge enumerated in item (1) is discharged, proceedings against the person are dismissed, the person is found not guilty of the charge, or the person's record is expunged pursuant to Article 9, Title 17, Chapter 22, the charge must be removed from any Internet-based public record no later than thirty days from the disposition date").

> meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation and quotation marks omitted)).

Id. at *1. Thus, concluding that § 17-1-40(C), which has since been renumbered as § 17-1-40(E)(1), is unambiguous, the Court of Appeals affirmed the ALC's finding that § 17-1-40 does not apply to DUI charges. Id.

We also note the Legislature's enactment of S.C. Code Ann. § 17-22-950 in 2009. 2009 Act No. 36. Pursuant to § 17-22-950 a criminal charge brought in summary court where the accused 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 . . . ." S.C. Code Ann. § 17-22-950 (Supp. 2014). However, the prosecuting agency or appropriate law enforcement agency may file an objection to expungement if the: "(a) accused person has other charges pending; (b) prosecuting agency or the appropriate law enforcement agency believes that the evidence in the case needs to be preserved; or (c) accused person's charges were dismissed as part of a plea agreement." S.C. Code Ann. § 17-22-950(A)(1)(a)-(c) (Supp. 2014). While this section's enactment requires summary courts to automatically expunge non-convictions, the South Carolina Judicial Department's most recent direction related to summary court expungement makes abundantly clear that expungement of Title 56 offenses are not eligible for expungement pursuant to § 17-1-40 and § 17-22-950(A). See S.C. Judicial Dep't, Expungements in Magistrate and Municipal Courts (2015). Specifically, it conspicuously states in two places that **"CHARGES MADE PURSUANT TO TITLE 50, TITLE 56, OR THE AUTHORITY OF COUNTIES AND MUNICIPALITIES UNDER TITLE 4 AND TITLE 5 ARE NOT ELIGIBLE FOR EXPUNGEMENT AND CANNOT BE EXPUNGED UNDER ANY CIRCUMSTANCES."** Id (emphasis in original).

Because the Defendant who is the subject of this opinion was charged in 2005, we acknowledge that S.C. Code Ann. §§ 17-22-910 and 17-22-950 were enacted as part of the Uniform Expungement of Criminal Records Act, both effective on June 2, 2009. See 2009 Act No. 36. Furthermore, although S.C. Code Ann. § 17-1-40 was enacted under the Section's precursor, § 17-4, in 1962, it has since been amended on several occasions. At the time the Defendant's charges were heard in January of 2006, § 17-22-910 and § 17-22-950 had not been enacted, and S.C. Code Ann. § 17-1-40 read as follows:

> [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 to be innocent of the charge, the arrest and booking records, 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.

See 2007 Act No. 82, 2007 S.C. Acts 411. It was not until May 12, 2010 that the Legislature's express identification that § 17-1-40 does not apply to a person who is charged with a Title 56 offense took effect upon approval by the Governor. 2010 Act No. 167, 2010 S.C. Acts 1358-59. As this is the case, it is necessary to determine what law should be applied when determining the Defendant's eligibility for expungement.

In reviewing the applicable rules of statutory construction, it is well established that "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). Furthermore, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State

v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "[L]egislative intent is paramount in determining whether a statute will have prospective application." State v. Bolin, 381 S.C. 557, 561, 673 S.E.2d 885, 887 (Ct. App. 2009) (citation omitted). If the legislative intent is not clear, courts "adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application." Id. at 561, 673 S.E.2d at 886-87 (citation omitted). "[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature. Edwards v. State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). "A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only." Id. (citations omitted). "[A] 'procedural' law sets out a mode of procedure for a court to follow, or 'prescribes a method for enforcing rights.' " Id. at 580, 720 S.E.2d at 466 (quoting Black's Law Dictionary 1083 (1979)). Thus, while generally statutes are applied prospectively, "they may be applied retroactively if (1) a specific provision or clear legislative intent requires retroactive application or (2) no clear expression of legislative intent is present but the statute is remedial or procedural in nature." State v. Hilton, 406 S.C. 580, 586-87, 752 S.E.2d 549, 552 (2013) (citations omitted).

In applying the test identified in Hilton, research of cases of foreign jurisdiction shows that expungement statutes are generally treated as remedial or procedural, and as such retroactive application is often times upheld by courts despite ex post facto and due process challenges. See, e.g., In re Expungement of Jacoby, 2005 WL 3338255 (N.J. Super. Ct. App. Div. Dec. 9, 2005); Toia v. People, 333 Ill.App. 3d 523, 776 N.E.2d 599 (Ill. App. Ct. 2002); People v. Acuna, 77 Cal.App.4th 1056, 92 Cal.Rept.2d 224 (Cal. Ct. App. 2000); State v. Comeau, 142 N.H. 84, 697 A.2d 497 (N.H. 1997). Our interpretation of § 17-1-40 is that it is remedial in attempting to clarify that non-convictions of certain offenses are not eligible for expungement, which is supported by the preamble to the Act: "[a]n Act to amend Section 17-1-40. . . so as to provide that the provisions of the section do not apply to certain offenses involving violations of boating and driving laws. . . ." 2010 Act No. 167, 2010 S.C. Acts 1358-59. Confusion that was previously created by § 17-1-40 and § 17-22-950 was in fact addressed in a prior opinion of this Office before § 17-1-40's 2010 amendment. Without the clarifying clause identifying that § 17-1-40 does not apply to Title 56 offenses, we opined that " newly-enacted Section 17-22-950(A) and amended Section 17-1-40 require summary court judges to expunge criminal records that arise out of cases involving Title 56, which deal with motor vehicle violations. . . as to cases brought in summary courts." Op. S.C. Att'y Gen., 2009 WL 2844883 (Aug. 12, 2009). As our 2009 opinion illustrates, Legislative direction was needed, and accordingly, Act No. 167 clarified this misconception. In turn, it is our belief that both Sections 17-1-40 and 17-22-950, setting forth the procedure courts must follow, would be determined as procedural in nature by a court of law.

While it is our opinion that a court would find §§ 17-1-40 and 17-22-950 are procedural and therefore could be retroactively applied, it is our opinion that the intent of the Legislature to apply these statutes prospectively is clearly expressed. Both Act No. 167 (2010), amending § 17-1-40 and Act No. 36 (2009), enacting § 17-22-950 include provisions stating that "[t]his act takes effect upon approval by the Governor." Two opinions of this Office are helpful in providing an example of how our Legislature has identified retroactive application in comparison to prospective application for purposes of expungement. See Op. S.C. Att'y Gen., 1998 WL 746921 (Sept. 15, 1998); Op. S.C. Att'y Gen., 1996 WL 82897 (Jan. 22, 1996). In our 1996 opinion, we opined that an amendment to a statute permitting a person convicted of failure to stop for siren or blue light first offense to expunge his or her records after a three year period with no other convictions should be applied prospectively, not retroactively. Op. S.C. Att'y Gen., 1996 WL 82897 (Jan. 22, 1996). We recognized that the " 'exception for remedial or procedural statutes is generally considered inapplicable . . . to a statute that supplies a legal remedy where formally there was none.' " Id. (quoting Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978)). We also looked to whether

there was clear legislative intent or specific language directing retroactive application and found no such indication. Id. at *3. Specifically, we noted that "Act No. 65 of 1995 'takes effect upon approval of the Governor' (June 12, 1995). Nothing in the statute indicates intent to apply the expungement portion of the enactment to offenses committed prior to this effective date." Id. Thus, we concluded that "based upon our Supreme Court decisions, the presumption against retroactive application of statutes and the fact that the remedy of expungement is a new remedy created by the 1995 Act, it is my opinion that Section 56-5-750 should not be retroactively applied . . . ." Id.

Our September 15, 1998 opinion addressed an amendment to S.C. Code Ann. § 22-5-910, pertaining to first offense convictions in magistrate's court that changed the time period for expungement eligibility from one year to three, if an individual had no convictions during that period. Op. S.C. Att'y Gen., 1998 WL 746921 (Sept. 15, 1998). As part of the amendment, the Legislature included the provision "[a] person may have his record expunged even though the conviction occurred prior to June 1, 1992." 1997 Act No. 37. In our 1998 opinion, we noted that:

> [t]he apparent reason for the second change regarding convictions occurring prior to June 1, 1992 was that, previously, there has been considerable doubt whether the Legislature has intended that persons convicted prior to the earlier version's effective date (June 1, 1992) would have qualified to have their records expunged because such had not been stated in the statute which became effective on June 1, 1992. In response to this ambiguity in this regard, it is evident that the Legislature decided to clarify that this expungement statute allowed expungement for those convicted prior to the statute's effective date.

Op. S.C. Att'y Gen., 1998 WL 746921 (Sept. 15, 1998). In light of the express indication from our Legislature for retroactive application coupled with other jurisdictions' holdings that retroactive application of similar expungement statutes were not considered ex post facto or due process violations, we opined that the statute, including its three year eligibility provision, should be applied retroactively. Id. at * 4-5 (discussing State v. Burr, 696 A.2d 1114 (N.H. 1997); State v. Hartup, 1998 WL 108142 (Ohio App. 8th Dist. 1998); State v. T.M.P., 460 A.2d 167 (N.J. 1983); State v. Link, 225 Mich. App. 211, 570 N.W.2d 297 (1997)).

Being that retroactive application of remedial statutes is the exception rather than the rule, and the clear indication from our Legislature that the 2010 Amendment to § 17-1-40 and § 17-22-950 took effect upon approval by the Governor, it is our opinion that a Court would find that both should be applied prospectively. Therefore, based on the law applicable in 2006, it is our belief that a court would likely find the Defendant would be entitled to expungement of the 2005 charges for DUI – if our conclusion is correct that a court would find the DUIs were dismissed in upholding the two guilty pleas entered on January 20, 2006.

Although your letter does not indicate if the Defendant has applied for expungement and if so, on what date,[9] certain courts in other jurisdictions have held that analysis of retroactive statutory application of certain statutes pertaining to expungement of a conviction was not necessary because the date the *application* for expungement was determinative of what law applies. See, e.g., State v. George, No. 01-

[9] Defendants are responsible for initiating the expungement process of summary court non-convictions occurring before June 2, 2009. See S.C. Judicial Dep't., Frequently Asked Questions (FAQs) about Expungements and Pardons in South Carolina Courts 1 (2011) ("To get an expungement for a non-conviction in Magistrate of Municipal Court that occurred before June 2, 2009, apply directly to the Court").

CA-100-2, 2002 WL 1881159 (Ohio Ct. App. Aug. 12, 2002) (explaining that in State v. Bottom, No. 95 CA 101, 1996 WL 132284 (Ohio Ct. App. Feb, 29, 1996) "we held application of the expungement statute is prospective in nature if the petition is filed after the effective date of the statute. We found it is the date of the filing petition, not the date of the conviction, which governs what version of the expungement statute applies"). Whether a similar rule would be applied in this instance has not been addressed by our Courts, but we consider it a point worth raising.

II. DUI Arrest Occurring in 1978

Our interpretation of the criminal history regarding the 1978 charges of DUI and petit larceny is that the Defendant was tried in his absence and convicted, *i.e.* "court disp- multiple charge one disposition; tried in absence." While we are unclear why "multiple charge, one disposition" was entered as the disposition code, there is no indication that the DUI charge was dismissed, discharged, nol prossed, or the Defendant found not guilty to render application of S.C. Code Ann. § 17-1-40 (1973).

Under the current application of our expungement statutes, with the exception of a conviction for failure to stop for a blue light when signaled by a law enforcement officer, convictions involving the operation of a motor vehicle cannot be expunged. See S.C. Code Ann. § 22-5-910(A)(1) (Supp. 2014). As the legislature has expressly exempted traffic convictions from consideration for expungement, it follows that convictions for Driving Under the Influence are not eligible for expungement under the current law. Id.; see also S.C. Judicial Dep't, Frequently Asked Questions (FAQs) about Expungements and Pardons in South Carolina Courts, 4 (2011) ("The only type of traffic offense that can be expunged is a first offense conviction for failure to stop when signaled by a law enforcement vehicle. Other types of traffic offenses, including convictions for driving under the influence, are not eligible for expungement").

Because the defendant was tried in 1978, we acknowledge that the initial enactment of S.C Code Ann. § 22-5-910 took effect on June 1, 1992. See 1992 Act. No. 395, 1992 S.C. Acts 2191. While, as discussed above, statutes, as a general rule, are not retroactively applied, the Legislature's clear expression of its intent that S.C. Code Ann. § 22-5-910 apply retroactively in a 1997 amendment has led to our prior conclusion that § 22-5-910 should be applied as such. See Op. S.C. Att'y Gen., 1998 WL 746921 (Sept. 15, 1998) ("In response to this ambiguity in this regard, it is evident that the Legislature decided to clarify that this expungement statute allowed expungement for those convicted prior to the statute's effective date"). For the sake of argument we note that even if § 22-5-910 was not given retroactive application, it appears the law applicable to expungement in 1978 would render the same conclusion that the defendant's DUI conviction is not expungable as the law at that time only permitted expungement for charges discharged, dismissed, or on which the defendant was found not guilty. See Op. S.C. Att'y Gen., 1978 WL 35244 (Nov. 28, 1978) (referencing S.C. Code Ann. § 17-1-40 (1976) as the only statute in South Carolina dealing with expungement of criminal records).[10] Accordingly, under our interpretation that the 1978 DUI charge did not result in a dismissal, was not nolle prossed, and the Defendant was not acquitted, it is our belief that a court would find the Defendant's 1978 DUI charge is not eligible for expungement.

Conclusion

From the foregoing analysis, it is our opinion that a court would reach the following conclusions.

[10] Our November 28, 1978 opinion quotes S.C. Code § 17-1-40 as follows: "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." Op. S.C. Att'y Gen., 1978 WL 35244 (Nov. 28, 1978).

I. DUI Arrests Occurring in April and September of 2005

a. Based on the South Carolina Supreme Court's holding in Gentry, which was applied at the magistrate's level in Bayly, the concepts of subject matter jurisdiction and the sufficiency of a notice document are distinct, and while subject matter cannot be waived, a challenge to an indictment, arrest warrant, or uniform traffic ticket can.

b. The Defendant's convictions for speeding and reckless driving would not be considered void. Despite the Defendant not being noticed of the charges by way of arrest warrant or uniform traffic ticket, the magistrate's court had subject matter jurisdiction over the charges and any challenge to the sufficiency of the notice documents would have since been waived.

c. Because the DUI charges and the lesser offenses of speeding and reckless driving – although improperly – were charged under the same case numbers, they would be considered dismissed as a result of upholding the convictions for speeding and reckless driving pursuant to Gentry.

d. Under the current posture of S.C. Code Ann. § 17-1-40 and § 17-22-950 relating to expungement of charges that have been dismissed, nolle prossed, or where the defendant was found not guilty in summary court, the plain language of S.C. Code Ann. § 17-1-40(E)(1) (Supp. 2014) indicates it does not apply to Title 56 offenses. It follows that non-conviction DUI charges are not eligible for expungement pursuant to § 17-1-40. However, because the Legislature identified that the amendment now contained in § 17-1-40(E)(1) and § 17-22-950 took effect upon approval by the Governor, retroactive application is not warranted.

e. The Defendant would have the right to expungement of both DUI charges occurring in 2005 *pursuant to law in effect at the time the charges were dismissed* – S.C. Code Ann. § 17-1-40 (1973) – because there was no express identification that Title 56 offenses that had been dismissed, nolle prossed, or that resulted in an acquittal could not be expunged.

II. DUI Arrest Occurring in 1978

a. It appears the Defendant's 1978 DUI charge was not dismissed, nolle prossed, and did not result in an acquittal.

b. Because only a DUI charge that was dismissed, nolle prossed, or where the defendant was acquitted would warrant expungement for this charge, it is not eligible for expungement.

While we were unable to obtain any additional information from the magistrate's court where these charges appear to have been heard, the court has indicated your agency can request additional information on each charge by way of a formal disposition letter. As this may resolve the uncertainly of the final disposition of each charge, we strongly encourage you do so. There are numerous variables regarding the expungement of the Defendant's DUI charges, and each relies on correct application of the other. As this is the case, we stress that only a court of law can definitively address these issues. What is contained herein is only an opinion of how a court may rule, and as such, this opinion should not be treated as conclusive.

Very truly yours,

Anne Marie Crosswell

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