ALAN WILSON
ATTORNEY GENERAL

May 28, 2019

The Hon. Ashley Trantham
South Carolina House of Representatives
522-A Blatt Building
Columbia, SC 29201

Dear Rep. Trantham:

We received your request seeking an opinion on whether South Carolina job applicants whose criminal records have been expunged must disclose an arrest, charge, or conviction on a job application. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> I am writing to ask for your legal opinion on whether South Carolina job applicants whose criminal records have been expunged must answer truthfully questions on job applications that ask about whether the applicant has ever been arrested, charged or convicted.
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> Does the law consider the crime never to have happened if the criminal record has been expunged? Can the applicant now answer "no" when asked if he or she has been convicted of a crime? Or must they answer, "yes, and explain that the records were expunged?"

Law/Analysis:

The potential legal consequences for failing to disclose an expunged offense will depend in part on the specific statute which authorized the expungement. Generally an expungement removes the records of an arrest or conviction from public view, but does not "un-ring the bell" such that the arrest or conviction effectively never occurred. In certain expungement statutes, however, the General Assembly has expressly undertaken to restore an offender to the status they had before the arrest and protect them from criminal prosecution for denying or failing to acknowledge the arrest and proceedings. We note that this statement of the law is given in the abstract, and any particular expunged offense must be considered on the particular facts and circumstances of that case.

Our Office is not aware of any general statute which provides an affirmative right to deny the existence of any expunged arrests or convictions. Accordingly, any such right would have to be found in the text of the expungement statute in question. As you likely are already aware, several statutes provide that a criminal record may be expunged under certain circumstances, as described in Section 17-22-910(A) of the South Carolina Code:

> (1) Section 34-11-90(e), first offense misdemeanor fraudulent check;
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> (2) Section 44-53-450(b), conditional discharge;
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> (3) Section 22-5-910, first offense conviction in magistrates court;
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> (4) Section 22-5-920, youthful offender act;
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> (5) Section 22-5-930, first offense simple possession or possession with intent to distribute drug convictions;
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> (6) Section 56-5-750(F), first offense failure to stop when signaled by a law enforcement vehicle;
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> (7) Section 17-22-150(a), pretrial intervention;
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> (8) Section 17-1-40, criminal records destruction, except as provided in Section 17-22-950;
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> (9) Section 63-19-2050, juvenile expungements;
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> (10) Section 17-22-530(A), alcohol education program;
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> (11) Section 17-22-330(A), traffic education program;
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> (12) Section 17-22-1010, Youth Challenge Academy and Jobs Challenge Program; and
>
> (13) any other statutory authorization.

S.C. Code Ann. § 17-22-910(A) (Supp. 2019). These statutes are too lengthy to quote all of them individually in full in this opinion. However, our careful review of the current text of these Code sections reveals that they can be categorized in one of two ways: those which provide for expungement without referencing legal status and disclosure of the offense; and those where the General Assembly further undertook to restore the person to the status as if the crime were never

committed and to protect an individual who does not disclose or acknowledge the arrest. We discuss each of these categories in turn.

First, as an example of a statute which simply provides for expungement without addressing legal status, Section 22-5-910 governs expungement of criminal records in certain misdemeanor cases. S.C. Code Ann. § 22-5-910 (Supp. 2019). That statute is lengthy but we set it out in full here because it contains several provisions which are typical of many of our State's expungement statutes:

> (A) Following a conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, the defendant after three years from the date of the conviction, including a conviction in magistrates or general sessions court, 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 and any associated bench warrant. However, this section does not apply to an offense involving the operation of a motor vehicle.
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> (B) Following a conviction for domestic violence in the third degree pursuant to Section 16-25-20(D), or Section 16-25-20(B)(1) as it existed before June 4, 2015, the defendant after five years from the date of the conviction, including a conviction in magistrates or general sessions court, 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 and any associated bench warrant.
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> (C) If the defendant has had no other conviction, including out-of-state convictions, during the three-year period as provided in subsection (A), or during the five-year period as provided in subsection (B), the circuit court may issue an order expunging the records including any associated bench warrant.
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> (D) After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of the expungement to ensure that no person takes advantage of the rights of this section more than once. This nonpublic record is not subject to release pursuant to 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 to know this information in order to prevent the rights afforded by this section from being taken advantage of more than once.

> (E) As used in this section, "conviction" includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail. For the purpose of this section, any number of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.
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> (F) No person may have the person's record expunged under this section if the person has pending criminal charges of any kind unless the charges have been pending for more than five years; however, this five-year time period is tolled for any time the defendant has been under a bench warrant for failure to appear. No person may have the person's records expunged under this section more than once. A person may have the person's record expunged even though the conviction occurred before the effective date of this section.

Id. We note specifically that the Legislature did not reference the legal status of the person arrested and disclosure of the arrest in any way in this text. *See id.*

By contrast, in certain other sections of the Code the General Assembly undertook to provide for the expungement of certain offenses and further provide also that the expungement would legally restore the person to the status as if the crime were never committed. For example, Section 17-22-150 governs expungement of criminal records following pretrial intervention programs, and Subsection 17-22-150(a) reads in relevant part:

> The effect of the [expungement] order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest. No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose.

S.C. Code Ann. § 17-22-150(a) (2014). Identical or substantively similar language appears in Sections 17-22-1010 (Youth Challenge Academy completion), 44-53-450 (conditional discharge, controlled substance), and 63-19-2050 (juvenile records).

In summary, the General Assembly has set out numerous statutes which provide for the expungement of certain offenses, but only a few of these statutes contain provisions which expressly seek to restore the legal status quo before the offense was committed. *See discussion,*

supra. We believe that a court would find this distinction significant. As our Office has opined previously,

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Hodges v. Rainey*, 341 S.C.79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory interpretation are subservient to the one that 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. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). Concerning expungements generally, our Office has opined previously:

> The expungement of a record is not a remedy frequently granted. *U.S. v. Friesen*, 853 F.2d 816 (10th Cir. 1988). Where the right to expungement is not specifically granted by the relevant statute, no expunction may occur. *State v. Salmon*, 279 S.C. 344, 306 S.E.2d 620 (1983). Only where the statutory conditions are met, may expungement be granted. *State v. Millsap*, 702 S.W.2d 741 (Tex. 1985). Expungement of a criminal record is a privilege, not a right and the requirements of the expungement statute must be strictly adhered to. *State v. Thomas*, 64 Ohio App.2d 141, 411 N.E.2d 845 (1979).

Op. S.C. Att'y Gen., 1996 WL 82897 (January 22, 1996).

In this case, the General Assembly elected to insert what might be called a "restoration clause" into the language of certain expungement statutes but not into others. *Cf.* S.C. Code Ann. §§ 22-5-910 (Supp. 2019) & 17-22-150(a) (2014). The plainest interpretation of that distinction is that the General Assembly intended for expungements under certain statutes to include collateral consequences which are unavailable under others.

Conclusion:

Accordingly, our answer to your question as presented is that the potential legal consequences for failing to disclose an expunged offense will depend in part on the specific statute which authorized the expungement. The General Assembly plainly intended that an expungement would remove the records of an arrest or conviction from public view. *See, e.g.,* S.C. Code Ann. § 22-5-910 (Supp. 2019). However, this removal generally does not "un-ring the bell" such that the arrest or conviction effectively never occurred, unless the General Assembly

expressly undertakes to do so. Without such an undertaking, our Office is not aware of any legal basis for denying the history of the matter.

In certain statutes, however, the General Assembly has undertaken "to restore the person, in the contemplation of the law, to the status he occupied before the arrest." *See, e.g.*, S.C. Code Ann. § 17-22-150(a) (2014). In such cases, an individual who does not disclose or acknowledge the arrest law is protected from criminal prosecution under South Carolina law for doing so. *Id.*

Additionally we note that our opinion here has discussed legal consequences of the expungement of public government records. As a practical matter, evidence of an expunged arrest may still "be accessible through some other search of newspaper files generally such as can be accomplished by an [internet] search" of nongovernmental records and reports. *Op. S.C. Att'y Gen.*, 2007 WL 4284646 (September 27, 2007). Accordingly, even in those cases where the Legislature undertakes "to restore the person, in the contemplation of the law, to the status he occupied before the arrest," voluntary disclosure may still be the most prudent approach.

Finally, this opinion has focused exclusively on South Carolina state law, and should not be construed as any opinion on any question of federal law.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General