

STATE OF SOUTH CAROLINA)

)

IN THE SOUTH CAROLINA

)

COURT OF APPEALS

)

CASE #2023-000048

Kenneth Dippel)

)

Appellant)

)

vs.)

)

MOTION TO TAKE LEAVE

TO FILE SUPPLEMENTAL

ADDENDUM TO FINAL

State of South Carolina,)

)

BRIEFING

15th Circuit Solicitor's Office)

)

& SLED,)

)

Respondents)

)

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SC Court of Appeals

Appellant Kenneth D. Dippel respectfully requests to take leave of the Court to file this supplemental submission after the final briefing to provide the Court with added authority. Federal Courts allow parties to tell the Court of relevant and significant sources that become known after the final briefing. *United States v. Rodríguez-Lozada*, 558 F.3d 29, 28 (1st Cir. 2009) (citing to Federal Rule of Appellate Procedure 28(j) supplying a mechanism to tell the Court of pertinent and significant authorities that become known after final brief completion.)

Mr. Dippel's case is the first case ever in the State of South Carolina whereby the Court must provide a correct statutory interpretation regarding S.C. Code § 22-5-910 (A) (2022), first-time conviction expungement statute in conjunction with S.C. Code § 22-5-910 (E) (2022). South Carolina courts have never given proper interpretation on the first-time conviction expunge statute

whereby a conviction resulted from a plea bargain. However, other courts have addressed this question in similar cases where a sentence or non-conviction resulted from a plea bargain.

For example, in Commonwealth v. Trimble, 5 A.3d 518 (Pa. Super. 2013), the Pennsylvania Superior Court held expungement was proper where the Commonwealth failed to meet its burden of justifying why the petitioner was not entitled to expungement of his arrest record related to charges of rape, simple assault and terroristic threats dismissed in connection with a negotiated plea of guilty to a single count of kidnapping; see also Commonwealth v. A.M.R., 887 A. 1266 (Pa. Superior Court 2005) (granting expungement of theft and misapplication of entrusted property that was dropped after defendant agreed to resign from his job); and Commonwealth v. Hanna, 964 A.2d 923 (Pa. Super. 2009) (illustrating that courts are interested in how a conviction was obtained and why the charges were dropped). In People v. Arata, 151 Cal. App. 4th 778 (Cal. Ct. App. 2007), the California Court **discussed whether the promise of expungement was implicitly part of a plea bargain and ultimately concluded that the conviction resulting from a plea bargain could be expunged.** These cases teach us plea bargain convictions depending on the terms of the plea bargain and the actual negotiated sentencing are expungable. Furthermore, SC Code § 17-22-910 (2022) (B) supports this:

*“A person's expungement of an offense contained in this section, or authorized by any other provision of law, **must be based on the crime that the person pled guilty to or was convicted of committing and not on an offense for which the person may have been charged.**” SC Code § 17-22-910(B) (2022).*

Indeed, South Carolina Courts have looked to other State jurisdictions for guidance in the absence of the South Carolina Authority. *Moore v. Moore (In re Moore)*, No. 5887, at *5 (S.C. Ct. App. Jan. 5, 2022) (“We look to other states for guidance to determine whether a contract for the sale of property severs a joint tenancy with a right to survivorship in the State of South Carolina”); *State v. Lopez*, 352 S.C. 373, 380 (S.C. Ct. App. 2002) (“holding in the absence of South Carolina authority on point, we look to other state jurisdictions for guidance.”); and *In re Broome*, 356 S.C. 302, 317 (S.C. 2003) (stating “because there is no South Carolina case on point, this Court looks to cases from other states for guidance.”).

Respondents in this case at bar, said in their final brief that the **conviction** ultimately determines whether an applicant is eligible to have a first-time conviction expunged. Respondents noted in their final brief:

“Further, the Appellant's argument regarding the lack of a specific definition of the word penalty in S.C. Code Ann. § 22-5-910 is unavailing. The South Carolina Legislature drafted S.C. Code Ann. § 22-5-910 to provide that the crime of conviction is the determining factor regarding eligibility. The language involved demonstrates a clear intent. The determination is not based on the circumstances of the individual in question, or the sentence received. Rather, the determination is based solely on the crime of conviction.” Respondent's final brief on page 4.

Respondents ignore why there was a conviction for misdemeanor resisting arrest when it is clear the only reason was a plea bargain brokered by the prosecutor in the Solicitor's office. **R. 97.** A plea bargain is an agreement between the prosecutor, the defense attorney, and his client in a criminal case. A plea bargain usually includes a plea down to a lesser charge (sometimes much lesser) in exchange for a guilty plea. Plea bargains can also have an agreement on the sentence of the case, but this is always subject to approval by the judge. Sentence bargaining involves assurances of lighter sentences in return for a defendant's pleading guilty.

<https://www.britannica.com/topic/plea-bargaining/Benefits-of-plea-bargaining>.

Regardless of the Respondents' interpretation, the State, the Solicitor, SLED, and this Court are now bound by the plea bargain. The undisputed evidence proves the plea bargain resulting in a conviction included a negotiated sentence: **A "penalty" 1 day in jail with credit for time served and a pay a fine of \$128.75**, which was accepted by the Court (see the checked block "negotiated sentence" - R. at 97 and is documented by SLED on Mr. Dippel's criminal record - R. at 137).

Thus, S.C. Code 22-5-910(A) and S.C. 22-5-910(E) must read together in defining what is meant by the word "penalty" in S.C. Code 22-5-910(A). Statutes must be read as a whole, sections that are part of the same general

statutory law must be construed together, and each must be given effect in construing statutory language. T.N.S. Mills, Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 620 (S.C. 1998). S.C. Code § 22-5-910

(A) states:

*“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 sentence 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.*

S.C. Code § 22-5-910(E) states that a **guilty plea is a conviction**:

*“As used in this section, **“conviction” includes a guilty plea**, a plea of nolo contendere, or the forfeiting of bail. For 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.”*

Our United States Supreme Court has held *“that when a plea rests to any significant degree on a promise or agreement of the prosecutor so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.”* Santobello v. New York (1971) 404 U.S. 257, 262 [30 L. Ed. 2d 427, 433, 92 S. Ct. 495].

The Supreme Court in California has recognized that due process requirements apply not only to the taking of the plea but also to the implementation of the bargain. People v. Mancheno (1982) 32 Cal. 3d 855, 860

[187 Cal. Rptr. 441, 654 P. 2d 211] citing Boykin v. Alabama (1969) 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed. 2d 274) (“*due process applies not only to the procedure of accepting the requirements of due process but also to the implementation of the bargain itself*”). It necessarily follows that violation of the deal by an officer of the state raises a constitutional right to some remedy; Santobello, supra, 404 U.S. 257, 266-267, 92 S.Ct. 495, 501, 30 L.Ed.2d 427 (conc. opinion of Douglas, J.); People v. Calloway (1981) 29 Cal.3d 666, 676, 175 Cal.Rptr. 596, 631 P.2d 30 (dissenting opinion the specific performance of omitted term of plea bargain calling for diagnostic study).

Although the plea bargain resulting in Mr. Dippel's conviction did not **explicitly** state expungement is part of the plea bargain, there is an implicit agreement that the misdemeanor resisting arrest would be eligible for expungement based on the negotiated sentencing **(R. 97) which was part of the plea bargain agreement** whereby by Mr. Dippel pleading guilty to the lesser offense misdemeanor resisting arrest he would receive the following “*penalty*”: 1) Serve one day in jail with credit for time served and 2) pay a fine of \$128.75 **(see also R. 137)**. Mr. Dippel completed his end of the bargain by completing his sentence, and he has not had any other convictions in over three years following his first-time plea bargain conviction for misdemeanor resisting arrest. Thus, the first-time conviction misdemeanor resisting arrest is eligible for expungement.

CONCLUSION

The lower court ruling based upon consideration of the preceding granting Respondents' summary judgment dismissal should be vacated and reversed, and the Court should give Mr. Dippel equitable relief.

Respectfully submitted,

Kenneth Dippel
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July 5, 2023

(Date)

CERTIFICATE OF SERVICE

I, **Kenneth D. Dippel**, certify I properly served a copy of the Motion to Take Leave to Supplement Final Briefing by providing to the parties below a copy by US First Class Priority Mail with Return Receipt:

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The Honorable Alan Wilson,
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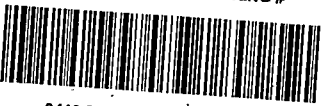
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July 5, 2023
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