

STATE OF SOUTH CAROLINA)

IN THE SOUTH CAROLINA

COURT OF APPEALS

CASE #2023-000048

Kenneth Dippel)

Appellant)

vs.)

APPELLANT'S CROSS REPLY

RESPONDENTS' RESPONSE

APPELLANT'S SUPPLEMENTAL

RECEIVED

State of South Carolina,)

15th Circuit Solicitor's Office)

& SLED,)

Respondents)

AUG 11 2023

SC Court of Appeals

On August 4, 2023, the SLED's Attorney, Adam Whitsett, filed a responsive letter to the Appellant, Kenneth D. Dippel's supplemental addressed to The Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals. The response does not follow Rule 267(c), SCACR.¹ The Respondents' reply is in letter form, single-spaced. Rule 267(g), SCACR requires the Clerk of Court to ensure compliance with Rule 267, SCACR, before

¹ Rule 267 (c), SCACR states explicitly, "***All papers or documents filed with the appellate court shall be typewritten or machine duplicated. Type size shall be standard 12-point or larger and double spaced on white bond paper of not less than twenty pound weight, 8 1/2 inches by 11 inches. With the exception of exhibits as provided in Rule 210(f), no photographic reduction of the Record on Appeal, brief or other paper is acceptable which reduces the size of the alphabet below that of pica type. Paper shall be of good quality, opaque and unglazed. Duplication through use of chemically treated paper, commonly referred to as "wet image or process copy", does not comply with this rule. Copy may be typed or reproduced on both sides if type or reproduction does not show through; provided, however, if the Record on Appeal or Appendix exceeds 100 pages, copy must be typed or reproduced on both sides of the paper. All copies must be clean, neat and clearly legible.***"

accepting any filing papers. **The appellant respectfully moves the Court to strike the Respondents' response.** The Appellant, Kenneth, also respectfully requests the Court to accept this cross reply in response to the defective filing. This response is essential to rebut the Respondents' misleading the Court into giving a proper interpretation S.C. Code § 22-5-910 (A) (2022), first-time conviction expungement statute in conjunction with S.C. Code § 22-5-910 (E) (2022) and SC Code § 17-22-910(B) (2022).

Respondents, in their defective reply, tried to muddy the waters to support their mistaken interpretation by relying upon *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 419 (2009). The crux of *Gay* was whether Mr. Gay was eligible as a youthful offender to have his expungement application considered.² The South Carolina Supreme Court's interpretation of the youthful offender expungement statute in *Gay* is immaterial to Mr. Dippel's case. First, the Court should take note of the fact that our State Supreme Court held that Mr. Gay was eligible to have his expungement application considered

² S.C. Code Ann. § 22-5-920(B) permits a defendant who was convicted as a youthful offender to apply for an expungement, stating, in part: *"Following a first offense conviction as a youthful offender for which a defendant is sentenced pursuant to the provisions of Chapter 19 of Title 24, Youthful Offender Act, the defendant, who has not been convicted of any offense, including an out-of-state offense, while serving the youthful offender sentence, including probation and parole, and for a period of five years from the date of completion of the defendant's sentence, including probation and parole, may apply, or cause someone acting on the defendant's behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction."*

because at the time of his guilty plea in 1990 to assault and battery of a high and aggravated nature (ABHAN) he was twenty-two years old. S.C. Code Ann. § 24-19-10 defines "youthful offender" as follows:

d) "Youthful offender" means an offender who is:

(ii) **seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor.**

Our State Supreme Court, based on the preceding, held that the plain meaning of the youthful offender expungement statute was clear and unambiguous. Therefore, our State Supreme Court held that under the statute's literal terms, Mr. Gay was a youthful offender. *Gay v. Ariail*, 381 S.C. 341 (S.C. 2009). Second, the Court should take exception to the following Respondents allege in their final reply:

"Further, the materials presented in this filing appear to erroneously argue that Appellant has a right to an expungement based on his prior plea deal. This argument is directly contrary to the applicable jurisprudence in South Carolina. Specifically, South Carolina courts have long acknowledged that expungement is a privilege and not a right, such that the Appellant had no entitlement to an expungement based on his plea bargain."

This is not what our State Supreme Court held in *Gay*. The Supreme Court held in *Gay*; The clear import of S.C. Code Ann. § 24-19-50 is that a person who meets the definition of "youthful offender" is "convicted" **regardless of the manner of sentencing and is eligible to apply for**

expungement if the requirements of § 22-5-920(b) are met. *Gay v. Ariail*, 381 S.C. 341, 345 (S.C. 2009).

This is not synonymous in Mr. Dippel's case. Unlike Mr. Gay's case **there is no plain unambiguous language or interpretation** supporting Respondents claim expungement eligibility under the first time conviction statute, S.C. Code § 22-5-910 (A) (2022) is solely dependent upon the **possibility of an expungement applicant receiving the maximum penalty also known as a sentencing in a penal statute which in this case is misdemeanor resisting arrest**, The Court should take exception to the fact Respondents' in their responsive briefing repeatedly asserted this and then at the same time asserted it is based solely upon the conviction:

*"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 want to eat their cake and have their ice cream by wanting to have it both ways for argument. The Court should not allow them to have it both ways. The added points of authority cited by Mr. Dippel are right about expungement eligibility for a first-time conviction. Expungement eligibility for a first-time conviction in Mr. Dippel's case must be based upon the guilty plea

where a plea bargain was brokered by the State's prosecution resulting in a conviction, the negotiated penalty in the actual sentencing order, terms of the plea bargain leading to the guilty plea resulting in a conviction, whether the applicant has complied with their part of the plea bargain, and whether an applicant satisfies all the criteria in S.C. Code § 22-5-910. S.C. Code § 22-5-910 (A) (2022), the first time conviction expungement statute when properly interpreted together with S.C. Code § 22-5-910 (E) (2022) and SC Code § 17-22-910(B) (2022) fully supports the preceding assertion made by Mr. Dippel.

Mr. Dippel has never asserted he automatically has a right to have his first-time guilty plea conviction for misdemeanor arrest defacto expunged as Respondents have claimed. Mr. Dippel has repeatedly asserted because he meets all the criteria in S.C. Code § 22-5-910 he is eligible to have his expungement application considered by a summary court judge or circuit court judge. There was a guilty plea conviction obtained by a plea bargain which consisted of a negotiated sentencing, a penalty of 1 day in jail credit time serve and to pay a \$128.75 fine (see the checked block "negotiated sentence" - R. at 97 and Mr. Dippel's criminal history record - R. at 137). Mr. Dippel has fully followed the plea bargain and has not had any other convictions in over three years.

The Respondents have intentionally misled the Court by putting forth the assertion that the Solicitor's office and SLED are the sole judge, sole juror,

and sole executioner when it comes to a determination on expungement eligibility consideration by a summary court judge or circuit court judge. Therefore, they claim Mr. Dippel has no right at all to have his expungement application considered by a summary court or circuit court judge. Respondent's nebulous argument is a fallacy which contradicts the governing statutes. SC Code § 17-22-940 (B) (2022) states:

The solicitor's office shall implement policies and procedures consistent with this section to ensure that the expungement process is properly conducted. This includes, but is not limited to:

- (1) assisting the applicant in completing the expungement order form;
- (2) collecting from the applicant and distributing to the appropriate agencies separate certified checks or money orders for charges prescribed by this article;
- (3) collecting funds from individuals choosing to contribute to the fund to defray the costs of administrative fees for expungements;
- (4) coordinating with the South Carolina Law Enforcement Division (SLED) and, in the case of juvenile expungements, the Department of Juvenile Justice, to confirm that the criminal charge is statutorily appropriate for expungement;
- (5) obtaining and verifying the presence of all necessary signatures;
- (6) filing the completed expungement order with the clerk of court; and
- (7) providing copies of the completed expungement order to all governmental agencies which must receive the order including, but not limited to, the:
 - (a) arresting law enforcement agency;
 - (b) detention facility or jail;
 - (c) solicitor's office;
 - (d) magistrates or municipal court where the arrest warrant originated;
 - (e) magistrates or municipal court that was involved in any way in the criminal process of the charge sought to be expunged;
 - (f) Department of Juvenile Justice; and
 - (g) SLED.

The sole role of SLED in the processing of an expungement application is to verify all criminal charges meet expunge eligibility except cases involving

Section 17-1-40, Section 17-22-150(a), Section 17-22-530(A), Section 17-22-330(A), or Section 44-53-450(b). SC Code § 17-22-940 (E) (2022) states:

“SLED shall verify and document that the criminal charges in all cases, except in cases when charges are sought to be expunged pursuant to Section 17-1-40, Section 17-22-150(a), Section 17-22-530(A), Section 17-22-330(A), or Section 44-53-450(b), are appropriate for expungement before the solicitor or his designee, and then a circuit court judge, or a family court judge in the case of a juvenile, signs the application for expungement. If the expungement is sought pursuant to Section 34-11-90(e), Section 22-5-910, Section 22-5-920, Section 63-19-2050, or Section 56-5-750(f), the conviction for any minor traffic-related offense that is not related in any way to driving under the influence of alcohol or other drugs will not be considered as a bar to expungement”.

SC Code § 17-22-940 (B) (2022) and SC Code § 17-22-940 (E) (2022) does not state the County Solicitor’s Office and SLED make a determination on expungement eligibility and their decision is final and binding on all parties. Respondents have resorted to wishful thinking in relying upon this ad hoc conjecture. The process does not end abruptly based on the Solicitor’s or SLED’s decision. The ultimate fact finder regarding whether a charge may be or can be expunged rests solely with the discretion of the summary court judge, circuit court judge, or in case of a juvenile a family court judge (**see SC Code § 17-22-940 (E) (2022)**).

Furthermore, the Respondents’ assertion in their briefing that Mr. Dippel has no right to appeal their so-called binding and final decision and has no due process right to receive a copy of an expungement order is not following the governing statutes. SC Code § 17-22-940 (I) (2022) states:

“Nothing in this article precludes an applicant from retaining counsel to apply to the solicitor's office on his behalf or precludes retained counsel from initiating an action in circuit court seeking a judicial determination of eligibility when the solicitor, in his discretion, does not consent to the expungement.” SC Code § 17-22-940 (I) (2022), see also R. 107.

The Solicitor must always supply a copy of the expungement order to the applicant or his retained counsel. *“The solicitor or his designee also must provide a copy of the completed expungement order to the applicant or his retained counsel.”* SC Code § 17-22-940 (C) (2022).

Respondents have never supplied a written copy of an expungement order signed by a judge saying Mr. Dippel's resisting arrest is not eligible to have his misdemeanor arrest expunged because he possibly could have received a sentence up to a year in confinement. Respondents have been dishonest and disingenuous with this Court in claiming Mr. Dippel's first time conviction is not eligible for expungement because he possibly could have received a sentence of more than 30 days or up to a year in jail (**R 108 – R. 111**).

The attachment sent to Heather Bell by SLED's Kristen Mixon, which was on March 15, 2022, email sent by Heather Bell to Mr. Dippel (**R. 108 – R. 111**) is especially important for the Court to take note to following facts: **(1)** The so-called order was not signed by a summary or circuit court judge. **(2)** SLED did not verify whether the misdemeanor resisting arrest charge was eligible for expungement. This so-called order has a check mark beside “NO.”

(3) SLED's Kristen Mixon initialized and dated the "*no verification*" December 29, 2021, which was before SLED updated Mr. Dippel's criminal history record reflecting final disposition (R. 101 – R. 104). (4) It would be virtually impossible for the Solicitor or SLED on December 29, 2021, to deny expungement eligibility for Mr. Dippel misdemeanor resisting arrest because it was only until March 8, 2022, when SLED entered final disposition noting Mr. Dippel plead guilty to misdemeanor resisting arrest receiving a penalty 1 day suspended for time served and pay a 128.75 fine on December 7, 2018 (R. 136 – R. 137).

Prior to that time Mr. Dippel's SLED Criminal History Report only noted just the original charge "*felony assault on a police officer while resisting arrest.*" (R. 134 – R. 135). Respondent SLED Attorney Adam Whitsett does not mention this fact to this Honorable Court and for good reasons. Attorney Whitsett knows this defeats their nebulous argument that Mr. Dippel's misdemeanor resisting arrest is not eligible for expungement because the charge carried a possible penalty of more than 30 days. The only plausible dumb founded non-common-sense explanation is Horry County Solicitor Employee Heather Bell and Kristen Mixon apparently are soothsayers or time travelers.

In summary, this Court should order for Respondents to supply a common-sense written rational explanation on how they were able to decide on

Mr. Dippel's expungement eligibility for misdemeanor resisting arrest on December 29, 2021 when it wasn't until March 8, 2022 when SLED entered the final disposition pleading guilty to misdemeanor resisting arrest receiving a penalty 1 day in jail suspended credit for time served and a \$128.75 fine (see **R. 136 and R. 137 and compare to R. 134 – R. 135**), **and see also fax documentation sent to Dana Dickey at SLED dated January 19, 2022 (R. 101 – R. 104)** which was after the December 29, 2021 so called denial by SLED (**R. at 110 – R. 111**). The bottom line is there is no rational explanation for any such denial on Mr. Dippel's eligibility to have his expungement application considered by a Summary Court Judge for misdemeanor resisting arrest whereby he received a penalty 1 day in jail suspended credit time served and pay a \$128.75 fine.

Further ignorance by the Respondents is the fact they denied Mr. Dippel first time conviction expungement eligibility consideration by a Summary Court Judge simply because they have an ax to grind with Mr. Dippel. The evidence of record proves this (see **R. at 160, R. at 161, and R. at 162**). The email from Heather Bell states: *"I'm super upset by this news. It was Kenneth Dippel that run you off, wasn't it? Lol"* (**R. 161**). The email from Kristen Mixon states: *"HAHAHA I almost forgot that name!"* (**R. at 162**). Apparently, Respondents think everything is funny and is a joke concerning Mr. Dippel's

case. Lastly, the so order destruction of records there was no Solicitor signature dated and there was no Solicitor opposition **(R. 111)**.

Based on consideration of the preceding, the Appellant respectfully moves the Court to strike Respondent's single-spaced letter addressed to the Court and re-iterates to the Court to vacate and reverse the lower court erroneous ruling typed up by Mr. Whitsett himself **(R. 169)**.

Respectfully submitted,

Kenneth Dippel
Kenneth Dippel,
4931 Forest Drive
Loris, SC 29569
Phone: 843-877-5535

August 10, 2023
(Date)

PROOF OF SERVICE

I, **Kenneth D. Dippel**, certify I properly served a copy of the Appellant's Cross Reply to Respondent's letter dated August 4, 2023 to the Clerk of Court Motion by providing to the parties below a copy by US First Class Priority Mail with Return Receipt:

Jimmy Richardson, Horry County Solicitor
Horry County Solicitor's Office
1301 2nd Ave
Conway, SC 29526

RECEIVED

AUG 11 2023

SC Court of Appeals

The Honorable Alan Wilson,
South Carolina Attorney General
Attention: William M. Blicht, Jr
P.O. Box 11549
Columbia, S.C. 29211

Adam L. Whitsett, General Counsel
SLED
PO Box 21398
Columbia, SC 29210

Kenneth Dippel

Signature

August 10, 2023

Date

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