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By Opinion Committee at 1:13 pm, Sep 01, 2021

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RQ-0428-KP

FILE# ML-49004-21

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September 1, 2021

Office of the Attorney General
Attention Opinion Committee
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Pursuant to Texas Government Code Section 402.042, I hereby request a Texas Attorney General's Opinion concerning the following question:

Whether a recent amendment to Tex. Code Crim. Proc. art. 55.01(a)(1)(C) providing for the expunction of "all records and files relating to the arrest" of a person who has been "convicted of" unlawful carrying of a handgun under Tex. Penal Code 46.02(a) for an offense committed before September 1, 2021, requires the expunction of the conviction itself and all court records related to that conviction?

Respectfully submitted,

/s/ *Mark A. Gonzalez*

Mark A. Gonzalez

BRIEF IN SUPPORT OF REQUEST

The operative provisions of the expunction statute provide that a person “who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have *all records and files relating to the arrest* expunged.” Tex. Code Crim. Proc. art. 55.01(a) (emphasis added). Until now, it does not appear that the expunction statute has ever allowed a person with a presently valid conviction to expunge the records of arrest preceding that conviction. The question naturally arises - what about the record of conviction itself?

The expunction statute prohibits the “release, maintenance, dissemination, or use of the expunged records and files for any purpose,” and allows the person who was arrested to deny the occurrence of the arrest, though it says nothing about denying the existence of a conviction. *See* Tex. Code Crim. Pro. Ann. art. 55.03. The expunction statute further makes it a Class B misdemeanor for a state agency or employee to release, disseminate, use, or fail to return records and files that have been expunged. *See* Tex. Code Crim. Pro. Ann. art. 55.04.

The Supreme Court of Texas long ago recognized the general legislative intent of the expunction statute “to permit the expunction of records of wrongful arrests.” *Harris County Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991). But, the Court has also said that “statute's purpose is not to

eradicate all evidence of wrongful conduct.” *In re State Bar of Tex.*, 440 S.W.3d 621, 626 (Tex. 2014). The expunction statute simply protects wrongfully accused persons “from inquiries about their arrests.” *State Bar of Tex.*, 440 S.W.3d at 624.

Noting that the Code of Criminal Procedure does not define “relating to the arrest,” the Houston Fourteenth Court of Appeals construed the phrase to exclude “investigative files and records that existed prior to, and independent of, the ultimate arrest.” *Ex parte S.C.*, 305 S.W.3d 258, 263 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Similarly, the Houston First Court of Appeals concluded that files relating merely to the conduct underlying the arrest are not subject to expunction, explaining that “the statute's plain text limits the scope of expunction to ‘the arrest.’” *Tex. Educ. Agency v. H.C.V.*, 575 S.W.3d 30, 35 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The Court further noted that “the statute does not provide that the person arrested may deny the occurrence of the conduct or any investigation of the conduct that led to the arrest.” *Id.* at 36.

Accordingly, to the extent that a conviction for unlawful carrying of a weapon (“UCW”) is a matter independent of the arrest, the District Attorney would argue that records of that conviction fall outside the files required to be expunged.

Moreover, to hold that all prior UCW convictions are subject to expunction would be tantamount to invalidating such convictions, which would be a drastic measure inconsistent with other parts of the statute in question.

The Legislature could have added a provision specifically voiding prior convictions, but it did not do that in this case. To the extent that House Bill 1927 decriminalized the carrying of a handgun by an unlicensed person and renders conduct that was otherwise subject to Penal Code 46.02 lawful, it amounts to a legislative repeal and would otherwise fall within the provisions of the Government Code that the repeal of a statute does not affect “any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal.” Tex. Gov't Code § 311.031(a)(3); *see Vandyke v. State*, 538 S.W.3d 561, 579 n.93 (Tex. Crim. App. 2017) (discussing the concept of legislative repeal and citing Section 311.031(a)(3)).

Moreover, the Savings clause for House Bill 1927 (which includes not only the expunction provision in question but also the provisions generally decriminalizing the underlying conduct that would otherwise amount to a UCW offense) provides as follows:

SECTION 28. The changes in law made by this Act apply only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

87th Leg., R.S. Ch. 809 (H.B. 1927) (2021).

Accordingly, the statute would be internally inconsistent if it intended, by its expunction provision, to invalidate all prior UCW convictions, yet by its savings clause to continue the prior law as valid and enforceable for prior offenses. On the other hand, it would be absurd to interpret the statute to allow such prior UCW convictions to stand, while at the same time requiring that all record of such convictions to be expunged.

The District Attorney would argue that the only logical reading of the statute that harmonizes all of its provisions would be to allow prior convictions to stand, together with the record thereof, but to expunge only the arrest records leading up to such convictions.