



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 30, 2022

The Honorable Mark A. Gonzalez
Nueces County District Attorney
901 Leopard, Room 206
Corpus Christi, Texas 78401-3681

Opinion No. KP-0402

Re: Whether Code of Criminal Procedure article 55.01(a)(1)(C), which provides for the expunction of all records and files relating to the arrest of a person convicted of unlawfully carrying certain weapons, includes expunction of the conviction itself (RQ-0428-KP)

Dear Mr. Gonzalez:

You ask whether Code of Criminal Procedure article 55.01(a)(1)(C), which provides for the expunction of all records and files relating to the arrest of a person convicted of certain weapons-carry offenses, includes expunction of the conviction itself.¹ Your question stems from the enactment of the Firearm Carry Act of 2021 (the “Act”), which, among other things, decriminalized conduct that previously constituted the offense of unlawfully carrying a weapon under subsection 46.02(a) of the Penal Code. *See* Request Letter at 1; *see also* Act of May 24, 2021, 87th Leg., R.S., ch. 809, §§ 22, 26(8), 2021 Tex. Gen. Laws 1960, 1967, 1972 (“House Bill 1927”).

Background

Article 55.01 governs the expunction of criminal records, which is a statutory privilege defined by the Legislature, not a constitutional or common-law right. *See* TEX. CODE CRIM. PROC. art. 55.01; *Ex parte R.P.G.P.*, 623 S.W.3d 313, 316 (Tex. 2021). An expunction order generally “requires governmental agencies to return, remove, delete, or destroy all records” and files relating to a person’s arrest. *Ex parte E.H.*, 602 S.W.3d 486, 489 (Tex. 2020). The court’s order “generally permits the person to deny the occurrence of the arrest and the existence of the expunction order.” *Id.*

Article 55.01 provides for two basic types of expunctions. *See* TEX. CODE CRIM. PROC. art. 55.01. Subsection (a)(1) applies when a person was tried for an offense and was either acquitted or convicted under the circumstances specified in the subsection. *Id.* art. 55.01(a)(1).

¹*See* Letter and attached Brief from Honorable Mark A. Gonzalez, Nueces Cnty. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 1, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0428KP.pdf> (“Request Letter” & “Brief”).

Subsection (a)(2) applies only to a charge that did not result in a final conviction and is no longer pending. *Id.* art. 55.01(a)(2).

Prior to the Act, subsection (a)(1) provided for expunction only when a trial resulted either in an acquittal or a conviction that the Governor later pardoned. *See State v. T.S.N.*, 547 S.W.3d 617, 623–24 (Tex. 2018). The Act added article 55.01(a)(1)(C) concerning convictions for specified weapons-carry offenses, so that article 55.01(a)(1) now provides:

(a) 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 if:

(1) the person is tried for the offense for which the person was arrested and is:

(A) acquitted by the trial court, except as provided by Subsection (c);

(B) convicted and subsequently:

(i) pardoned for a reason other than that described by Subparagraph (ii); or

(ii) pardoned or otherwise granted relief on the basis of actual innocence with respect to that offense, if the applicable pardon or court order clearly indicates on its face that the pardon or order was granted or rendered on the basis of the person’s actual innocence; or

(C) *convicted of an offense committed before September 1, 2021, under Section 46.02(a), Penal Code, as that section existed before that date . . .*²

TEX. CODE CRIM. PROC. art. 55.01(a)(1) (emphasis added). You wish to know whether a conviction stemming from an arrest for an offense under section 46.02(a) of the Penal Code as it existed before September 1, 2021, is a record or file relating to the arrest and therefore subject to expunction under article 55.01(a)(1)(C) of the Code of Criminal Procedure. Request Letter at 1. To address your question, we consider article 55.01(a)(1)(C) in context as part of the broader statutory plan for expunction in chapter 55. *See 20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008) (“[W]hen interpreting [a specific statute], we must consider its role in the broader statutory scheme.”).

²Although the Act decriminalizes conduct that constituted an offense under subsection 46.02(c) as it read prior to September 1, 2021, subsection 46.02(a) now proscribes different conduct that constitutes the offense of unlawfully carrying weapons. *See* TEX. PENAL CODE § 46.02(a) (“Unlawful Carrying Weapons”).

Article 55.01(a)(1)(C) Proceedings

A person entitled to expunction based on article 55.01(a)(1)(C) may file an ex parte petition for expunction in district or other specified court as appropriate. TEX. CODE CRIM. PROC. art. 55.02, § 2(a), (a-1). The petition must identify pertinent officials, agencies, and entities of the state or a political subdivision and certain private entities. *Id.* art. 55.02, § 2(b)(8). The court must set a hearing on the petition and give reasonable notice of the hearing “to each official or agency or other governmental entity named in the petition.” *Id.* art. 55.02, § 2(c). The petitioner bears the burden of establishing that all statutory conditions have been met. *Tex. Dep’t of Pub. Safety v. J.H.J.*, 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.). But expunction is not absolute, and a court may make certain exceptions in its order, such as allowing the retention of a record needed for other criminal or civil proceedings. *See* TEX. CODE CRIM. PROC. art. 55.02, § 4; *In re State Bar of Tex.*, 440 S.W.3d 621, 626–27 (Tex. 2014); *see also State v. T.S.N.*, 547 S.W.3d at 624 (holding that the expunction statute allows for partial expunctions and redactions where necessary).

When the court’s expunction order is final, the clerk of the court shall send a certified copy “to the Crime Records Service of the Department of Public Safety and to each official or agency or other governmental entity of this state or of any political subdivision of this state named in the order.” TEX. CODE CRIM. PROC. art. 55.02, § 3(c). Upon receipt of the order “each official or agency or other governmental entity named in the order” is generally required to “return all records and files that are subject to the expunction order to the court” or, “if removal is impracticable, obliterate all portions of the record or file that identify the person who is the subject of the order.” *Id.* art. 55.02, § 5(a)(1). The court clerk maintains the files and records in an area not open to inspection and, consistent with the terms of the expunction order, may ultimately destroy the files and records. *Id.* art. 55.02, § 5(c), (d); *In re State Bar of Tex.*, 440 S.W.3d at 624 (observing that the clerk generally destroys the collected files and records unless an exception applies).

Consistent with the terms of a court’s expunction order, “the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited.” TEX. CODE CRIM. PROC. art. 55.03(1). Moreover, the failure to return or obliterate an expunged file or record, or the release, dissemination, or other use of the records or files may constitute a criminal offense. *Id.* art. 55.04.

Records and Files Subject to Expunction

Although article 55.01 provides for expunction of “all records and files relating to the arrest,” chapter 55 does not identify or otherwise explain what records or files may be expunged. *Id.* art. 55.01(a); *see id.* arts. 55.01–.06. But article 55.01(a)(1)(C) reveals a legislative expectation that a conviction may be subject to an expunction order in some circumstances. *Id.* art. 55.01(a)(1)(C). First, courts will “construe a statute’s words according to their plain and common meaning.” *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 501 (Tex. 2015). “Related” commonly means “having relationship: connected by reason of an established or discoverable relation.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1916 (2002). An arrest and conviction for the same offense are connected by reason of their relation, and thus the conviction is one of the “records and files related to the arrest” under the common meaning of that phrase.

Second, a related expunction provision in chapter 55 demonstrates that a judgment of conviction may be a “record relating to the arrest” and subject to expunction. Article 55.02, section 1a addresses the procedure for expunging a conviction pardoned on the basis of actual innocence or completion of certain programs. *See* TEX. CODE CRIM. PROC. art. 55.02, § 1a. Article 55.02, section 1a(c)(1) requires documents pertaining to a defendant transferred by a county to the Department under article 42.09, section 8(a) to be returned to the court for expunction proceedings. *Id.* art. 55.02, § 1a(c)(1). The list of documents in article 42.09, section 8(a) includes “a copy of the judgment entered pursuant to Article 42.01.” *Id.* art. 42.09, § 8(a)(1). Article 42.01 defines a judgment as “the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant.” *Id.* art. 42.01, § 1. Thus, in this context, the Legislature understood a conviction to be one of the “records and files relating to the arrest” that is subject to expunction under article 55.01(a)(1)(B).

Finally, expunction under article 55.01(a)(1) applies to both a person whose conviction was pardoned based on actual innocence under subsection (B) and a person who was convicted of a weapons-carry offense under subsection (C). *See id.* art. 55.01(a)(1)(B)–(C). The Court of Criminal Appeals has recognized that expunction for a pardon may include the conviction. *See Vandyke v. State*, 538 S.W.3d 561, 578 (Tex. Crim. App. 2017) (stating that “an individual may ultimately remove a pardoned *conviction* from his or her criminal records through an expunction” (emphasis added)). Article 55.01 does not provide a textual basis to conclude that a judgment of conviction is subject to expunction under subsection (a)(1)(B) but not in subsection (a)(1)(C). Thus, House Bill 1927 reflects a legislative intent that a conviction under article 55.01(a)(1)(B) be subject to a court’s expunction order in particular circumstances.

You note that House Bill 1927 generally provides for prospective application of changes and a savings provision preserving prior law. *See* Brief at 3–4; House Bill 1927, § 28; *see also* TEX. GOV’T CODE § 311.031 (Code Construction Act provision stating the general rule of prospectivity). You suggest that in light of House Bill 1927’s savings provision, article 55.01(a)(1)(C) should be construed as allowing expunction of all records and files relating to an arrest except for the conviction of the offense under the prior version of section 46.02(a). *See* Brief at 4.

House Bill 1927 section 28 provides:

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.

House Bill 1927, § 28. Section 28’s savings provision states the general rule preserving the prior law for offenses committed prior to the Act’s effective date. *Id.* But article 55.01(a)(1)(C) specifically authorizes expunction of records and files pertaining to offenses occurring before the Act’s effective date—for a person “convicted of an offense committed before September 1, 2021, under Section 46.02(a), Penal Code, as that section existed before that date.” TEX. CODE CRIM.

PROC. art. 55.01(a)(1)(C). When a general provision conflicts with a specific provision, the specific provision prevails as an exception to the general provision. *See Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019). Thus, a court would likely conclude that, to the extent of conflict, Code of Criminal Procedure article 55.01(a)(1)(C)'s provision for expunction prevails over the general savings provision in House Bill 1927, section 28.³

As discussed above, an expunction petition under article 55.01(a)(1)(C) requires a hearing after giving reasonable notice to the officials, agencies, or other governmental entities named in the petition. *See* TEX. CODE CRIM. PROC. art. 55.02, § 2(a), (b)(8), (c). The officials, agencies, or entities may present reasons and evidence at the hearing why the petition should be denied, or a particular record or file should be retained. *See Ex parte Guajardo*, 70 S.W.3d 202, 205–06 (Tex. App.—San Antonio 2001, no pet.). It is for the court after a hearing to determine if the petitioner is entitled to expunction in whole or in part, whether a particular record or file may be retained, and any conditions of the retention. *See* TEX. CODE CRIM. PROC. art. 55.02, §§ 2–5. But on particular facts, a court could conclude that an order of expunction under article 55.01(a)(1)(C) may include the judgment of conviction itself.

³You do not ask and we do not address the application of the general savings provisions in the Code Construction Act and in section 28 of House Bill 1927 to other portions of the Act other than expunction under article 55.01(a)(1)(C). *See* Request Letter at 1.

S U M M A R Y

The Firearm Carry Act passed by the Eighty-seventh Legislature decriminalized specified offenses and amended article 55.01 of the Code of Criminal Procedure concerning expunction of certain records. Article 55.01(a)(1)(C) provides for the expunction of all records and files relating to the arrest of a person convicted of an offense committed before September 1, 2021, under section 46.02(a) of the Penal Code as it existed before that date. A court could conclude that an order of expunction under article 55.01(a)(1)(C) may include the judgment of conviction for such an offense.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

WILLIAM A. HILL
Assistant Attorney General, Opinion Committee