

The Red Ink State:

Necessary Revisions to Restore the Intent of Georgia's First Offender Act

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Introduction

Georgians believe in second chances. In 1968, the Georgia legislature codified that belief and passed the First Offender Act (the Act). The Act gives judges the discretion to sentence certain individuals who stand accused of a crime but have never been convicted of a felony, as First Offenders. The individual must earn a second chance by accepting responsibility for his or her actions and successfully completing their sentence. When the sentence is complete and the individual has demonstrated that they are committed to becoming a productive citizen, the record of the charge is sealed from their official criminal history and they are exonerated of all charges.

The legislature's intent is for individuals who have no previous convictions and who are rehabilitated to move forward without the barrier of criminal history. A criminal record greatly hinders opportunities for employment and housing, and creates barriers in many other areas of life. In addition to the benefits for the individual, all Georgians benefit because crime and recidivism are reduced by the First Offender Act. When a person can maintain employment and stability, that person is much less likely to reoffend. To ensure public safety, all records of a First Offender arrest and sentence remain available to law enforcement agencies.

The First Offender Act is not a free ride, and it is not without risk. The judge sentences the individual to a period of probation and/or confinement and may impose additional requirements such as fines and restitution. If the individual is convicted of another crime while under a First Offender sentence or does not successfully complete probation, the sentencing judge may revoke First Offender status and impose the maximum allowable sentence for the offense. Certain violent and sexual crimes are not eligible for First Offender consideration.

For many years, thousands of individuals successfully used the opportunity the Act provides to turn their lives around and became productive citizens. However, in recent years, the Act's ability to provide a meaningful second chance has diminished. Due to the expansion of the Internet and the private background check industry, records of successfully completed First Offender cases, which the legislature

intended to be private, are routinely used to deny employment and other opportunities. While the offense does not appear on an individual's official criminal history, private background companies continue to report the offense, giving potential employers and landlords access to the information. Although the Act specifically forbids employment discrimination based on successfully completed First Offender cases, the law does not provide a remedy for individuals who are denied employment.

There are a few simple changes that the state legislature should make to the First Offender Act to ensure it is made available to eligible individuals and can effectively reduce crime and increase public safety in Georgia by conferring the benefits it promises. This brief discusses how the Act works, the history of the Act, how it compares to similar laws around the southeast, and how the Act should be improved to effect the intent of the legislature to offer a real and meaningful second chance to rehabilitated Georgians.

The Purpose of the First Offender Act

The purpose of Georgia's First Offender Act is to give individuals who are accused of a crime, but have no prior felony convictions, a chance to move forward without the stigma associated with a criminal record and conviction.¹ O.C.G.A. § 42-8-60 et seq. provide that an individual entering a plea of guilty or nolo contendere, who has yet to be adjudicated guilty and has not been previously convicted of a felony, may be discharged and exonerated of all charges upon successful completion of a sentence of either confinement, probation, or both.² This is referred to as "deferred adjudication" because, although the individual enters a plea, the conviction is never entered if he or she successfully completes the sentence.

Discharge and exoneration are accompanied by benefits not conferred to individuals subject to other sentencing statutes. First offenders are not adjudicated guilty, therefore they are not considered to have a criminal conviction and may not have any civil rights or liberties curtailed such as the right to vote and own a firearm.³ And most importantly, to help individuals move forward with their lives, the Act explicitly prohibits employment discrimination on the basis of a discharged First Offender case.⁴

To further the goal of preventing discrimination based on a discharged First Offender case, the record of the arrest and sentence are sealed from the individual's official criminal history maintained by the Georgia Crime Information Center (GCIC).⁵ ⁶ This means that most potential employers who obtain a criminal history report from GCIC will not see any record of the discharged first offender case. The ultimate goal is to allow individuals who have successfully completed their First Offender cases to move on with their life, get a job, find stable housing, and be productive, tax-paying citizens.

¹ *Davis v. State*, 269 Ga. 276 (1998).

² O.C.G.A. § 42-8-60.

³ O.C.G.A. § 42-8-62.

⁴ O.C.G.A. § 42-8-63.

⁵ *Id.*

⁶ The Georgia Crime Information Center is the state repository of criminal justice information and is a division of the Georgia Bureau of Investigation (GBI). It is primarily used for law enforcement purposes, but potential employers, housing providers, licensing agencies and other entities can access the information with an individual's consent. Without an individual's consent only felony convictions can be accessed.

The broader purpose of the First Offender Act is to increase public safety by reducing crime and recidivism while saving money. In recent years it has become increasingly difficult for individuals with a criminal history to obtain employment. Over 90% of employers now conduct a criminal background check on some or all applicants.⁷ Many studies have shown that the presence of any criminal history greatly reduces the likelihood that an applicant will receive a callback for a job interview. One study found that the chance of getting a callback fell by almost 50% if the applicant had a criminal history, and that the effect was significantly more pronounced for African American men than white men.⁸

While it is difficult for an individual with a criminal history to get a job, research has consistently shown that steady employment is the best prevention for recidivism.⁹ In Georgia, the need to identify low-risk offenders and allow them to move on with their life and obtain employment is particularly acute. Georgia spends over \$1.1 billion dollars annually on corrections, including over \$17,000 a year to house just one prisoner.¹⁰ The First Offender Act helps address these issues by allowing rehabilitated individuals to apply for a job on equal footing with other applicants.

To balance public policy goals of encouraging employment and ensuring public safety there are limitations on the privacy of First Offender records. Records remain available to potential employers, housing providers and licensing agencies until the individual proves they are rehabilitated. Law enforcement retains access to information about pending and completed First Offender cases, even after successful discharge. This means that the police and prosecutors always see First Offender charges and sentences.

In addition amendments to the Act limit the prohibition on employment discrimination for offenders that pled guilty to an offense involving vulnerable populations.¹¹ Such employment includes working at a school, day care, nursing home or other care facility, or working with the mentally disabled or elderly.¹² To ensure compliance with these provisions, GCIC will forward copies of records sealed under the First Offender Act to relevant employers.

The risks of sentencing an individual as a First Offender are minimal – individuals have to successfully complete probation before the record is sealed from their official criminal history and it remains

⁷ See Society for Human Resources Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010), at 3.

⁸ See Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *The Annals of the American Academy*, 195, 199 (2009).

⁹ See American Correctional Assoc., 135th Congress of Corrections, *Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study* (August 8, 2005).

¹⁰ See Robert Z. Welsh, *Tough on Crime and the Budget: The Difficult Balancing Act of Public Safety and Skyrocketing Prison Costs*, Georgia Budget and Policy Institute (January 2008).

¹¹ O.C.G.A. § 42-8-63.1.

¹² *Id.*

available even after completion for employment with vulnerable populations and law enforcement – and the potential benefits are great, both to the individual and the state.

Who is Sentenced as a First Offender?

An individual qualifies for First Offender treatment if they were arrested and formally charged with a misdemeanor or felony offense, they have never been convicted of a felony (in any state), they have never been sentenced as a First Offender, and the pending charge is eligible. Ineligible charges include: Driving Under the Influence (DUI); serious crimes committed against a law enforcement officer engaged in his duties; serious violent felonies; serious sexual offenses; and charges related to child pornography or computer pornography.

First Offender is not automatic for eligible individuals. The individual or his or her attorney must ask to be sentenced under the First Offender Act before a sentence is imposed. If asked a judge is not obligated to sentence an individual as a First Offender even if they meet the criteria. The judge has the discretion to consider the circumstances surrounding the offense, as well as the individual's background and likelihood of reoffending. While the decision is ultimately up to the sentencing judge, in practice the prosecuting attorney may oppose First Offender treatment in any given case, which may have an impact of the decision of the judge whether or not to grant it.

The discretion of the courts to enter a first offender sentence is constrained by timing. A first offender sentence can only be entered before adjudication of guilt and does not have to be considered without a request to do so by the defense.¹³ If the defense fails to request first offender, the court does not have to consider it.¹⁴ A first offender sentence can be given after a jury verdict or a guilty plea, but first offender treatment cannot be offered once a sentence has been imposed.¹⁵ After a trial court has adjudicated the case and entered a final judgment of guilty, the trial court cannot then “unwind” the clock” and retroactively apply first offender status by modifying the original sentence.¹⁶

The court has interpreted the first offender statutes as giving trial courts broad discretion regarding when to offer first offender status and when to withhold it. This broad discretion, however, is limited in several ways. First, the court's discretion is limited because it must genuinely consider whether to confer first offender status. Second, the court's discretion is limited in the type of charges it may grant first offender. Third, as indicated above the court is limited procedurally as to the time in which it may grant first offender status.

Judges have broad discretion regarding when to grant first offender status upon initial sentencing.¹⁷ If a defendant pleads guilty or receives a verdict of guilty, the trial court *may* withhold an adjudication of

¹³ *Griffin v. State*, 244 Ga. App. 447 (2000).

¹⁴ *Id.*

¹⁵ *Burchette v. State*, 274 Ga. App. 873, 874 (2005).

¹⁶ *State v. Neal*, 306 Ga. App. 40 (2010).

¹⁷ See *McCullough v. State*, 317 Ga. App. 853 (2012); *Graydon v. State*, 313 Ga. App. 580 (2012).

guilt and place the defendant on probation, sentence the defendant to confinement, or both.¹⁸ Importantly, this is a permissive authority, the court is not commanded to grant first offender to all defendants that qualify, and the court may refuse to do so by adjudicating a defendant guilty and proceeding according to the law.¹⁹ But, First offender status is only available on one occasion, which means that even when the disposition of multiple charging documents are read at one time, first offender status may only be entered for one charging document.²⁰

The one limitation on this discretion is first offender status must be considered by the court when requested. This means that refusal to impose a first offender sentence will be upheld unless the trial court incorrectly assumed the first offender law was unavailable, or the trial court rejected first offender outright due to a mechanically applied universal rule.²¹ Since the burden of evidence is on the defendant to demonstrate error, a refusal by the trial court to consider first offender status must be demonstrated unambiguously.²² Meaning, the trial court may have a general tendency to not grant first offender status under particular circumstances.²³

How First Offender Works

If an individual meets the criteria, their offense is eligible and the judge agrees to sentence them as a First Offender then the court will note on the sentencing sheet (also referred to as the final disposition) that the defendant has been sentenced pursuant to the First Offender Act. The judge will sentence the individual to a term of probation and/or confinement and may impose other requirements such as counseling, fines, or restitution. Upon sentencing the individual accepts responsibility and enters a plea of guilty to the offense, but Georgia's First Offender Act is a deferred adjudication statute. Although the defendant admits guilt, no conviction is entered unless the sentencing court revokes First Offender status, generally because the person has violated the terms of their probation or has been convicted of another crime.

If an individual violates probation or is convicted of an additional crime while on first offender probation, the original court may enter an adjudication of guilt and proceed according to the law. Individuals who violate the terms of their first offender probation may be sentenced to any term of confinement or probation authorized by the governing statute, which may be longer than the original sentence.

¹⁸ *Mohammad v. State*, 226 Ga.App. 387, 387 (1997).

¹⁹ *Id.*

²⁰ *Higdon v. State*, 291 Ga. 821, 824 (2012).

²¹ *Graydon*, 313 Ga. App. at 582; *see Wilcox v. States*, 257 Ga. App. 519 (2002) (holding that even though the trial court stated it did not have an inflexible rule, a rigid sentencing policy of not offering first offender status for all armed robbery cases was a violation of discretion); *Cook v. State*, 256 Ga. App. 353 (2002) (holding that the statement "you have lost your chance for first offender" when defendant was found guilty by jury was a mechanical rule in violation of the statute); *Camaron v. State*, 246 Ga. App. 80 (2000) (holding that the trial court must clearly state an inflexible rule to demonstrate a failure to consider first offender status).

²² *Powell v. State*, 271 Ga. App. 550, 500 (2002); *See also, Tew v. State*, 320 Ga. App. 127, 127 (2013).

²³ *McCullough*, 317 Ga. App. 853 (finding that a trial court's assertion that first offender status would not be imposed for individuals found guilty by a jury did not violate the statute when the statement was ambiguous and did not clearly indicate a mechanical rule against first offender for jury verdicts of guilty).

Once the trial court has decided to grant first offender status, it also has broad discretion of when to revoke the status for a probation violation or additional criminal convictions. To revoke first offender status the court must enter an adjudication of guilt on the original charge, which means that a first offender violating probation does not automatically have first offender status revoked.²⁴ In *Ailara v. State*, an individual serving a first offender term of probation twice violated his probation, but the court found that he was still entitled to discharge at completion of his first offender sentence.²⁵ Notably, one probation violation resulted in the trial court suspending Ailara's first offender status for eighteen months and sending Ailara to confinement for that period.²⁶ The court found that the first offender statute gives the trial court broad discretion to consider the totality of the circumstances of the probation violation when determining whether to revoke first offender status.²⁷ The trial court did not enter an adjudication of guilt so first offender status was not revoked, and despite the probation violation, Ailara was entitled to be discharged upon completion of the sentence.²⁸ The fact that Ailara violated his probation did not automatically revoke his first offender status without an adjudication of guilt entered.

However, when the trial court does decide to use its discretion and revoke a defendant's first offender status, the trial court again has broad discretion to impose an alternative sentence. This discretion includes imposing a harsher term than the initial first offender sentence, but a harsher sentence is limited in two important ways. The trial court may only impose a sentence allowed by the law, and if the first offender was not made aware that violating his probation would result in a harsher penalty, then he or she cannot be sentenced to that harsher penalty. For example, if an individual is offered first offender status for a drug offense and commits a second drug offense while on probation, the court may not then revoke the first offender status and impose a sentence out of line with statutorily permissible sentencing for first time drug offenders.²⁹ In *Mays v. State*, the trial court was outside its discretionary authority both because it sentenced the offender to a term not authorized by law, and it failed to inform Mays that he could be sentenced to a sentence of that length.³⁰

When first offender status is revoked, the trial court is constrained by both the statutory maximum for the original sentence and the maximum sentence the trial court informed the offender he or she could face upon violation of first offender status.³¹ However, the court may enter a sentence harsher than the sentence the first offender originally received under O.C.G.A. 42-8-60.³²

²⁴ See *Ailara v. State*, 311 Ga. App. 862 (2011).

²⁵ *Id.*

²⁶ *Id.* at 863.

²⁷ *Id.*

²⁸ *Id.* at 864.

²⁹ *Mays v. State*, 262 Ga. 90, 91 (1992).

³⁰ *Id.* At 92-3.

³¹ See *Griffin v. State*, 163 Ga. App. 871 (1982).

³² *Tallant v. State*, 187 Ga. App. 138 (1988).

For the duration of the defendant's sentence, the arrest and sentence will appear on their official Georgia criminal history report, and be available to potential employers, housing providers and others, as well as a national FBI background check.³³ The court considers first offender status to be a probationary period used to determine whether the offender may be rehabilitated; first offender status is a chance for an individual who committed a bad act to demonstrate he or she is "worthy" of the benefits conferred.³⁴

If the defendant does successfully complete their probation and any additional requirements ordered by the judge then their case will be discharged and exonerated of all charges.³⁵ Although the exoneration is automatic upon successful completion of the sentence, in practice, certain steps must occur for the individual's official record to be sealed and the discharge entered. Generally, upon successful termination of probation the probation officer drafts an Order of Discharge, indicating that probation is complete, and sends it to the judge. The judge then signs the order of Discharge which is filed with the Clerk of Court and becomes a part of the official record of the case. Second, first offender court records officially memorialize exoneration and discharge by having the following placed in their court file:

Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties, except for registration requirements under the state sexual offender registry and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1; and the defendant shall not be considered to have a criminal conviction.³⁶

Notice of discharge is forwarded to the Georgia Crime Information Center (GCIC) by the Clerk of Court, which pursuant to its regulations, subsequently seals the relevant arrest disposed of under first offender statutes.³⁷ Sealed GCIC arrest cycles will not show up as part of background checks, but the records are available to GCIC queries used for criminal investigatory purposes.³⁸

And finally, first offender records are not eligible to be expunged despite the court being sympathetic to the need to do so.³⁹ The need to keep accurate records of criminal activity, prevent individuals from securing first offender status multiple times, and the effective administration of the criminal justice system runs contrary to the personal interest first offenders have in expungement.⁴⁰

As noted above certain employers that serve vulnerable populations maintain access to relevant First Offender charges even if there is a successful discharge.⁴¹ Such employment includes working at a

³³ O.C.G.A. § 42-8-65.

³⁴ *State v. Wiley*, 233 Ga. 316, 371 (1974).

³⁵ O.C.G.A. § 42-8-62(a).

³⁶ O.C.G.A. § 42-8-62.

³⁷ O.C.G.A. § 42-8-62; Ga. Comp. R. & Regs. 140-2-.04(1)(b), (2)(a)(3).

³⁸ O.C.G.A. § 42-8-65.

³⁹ *State v. C.S.B.*, 250 Ga. 261, 262-63 (1982).

⁴⁰ *Id.* at 263.

⁴¹ O.C.G.A. § 42-8-63.1.

school, day care, nursing home or other care facility, or working with the mentally disabled or elderly.⁴² To ensure compliance with these provisions, GCIC will forward copies of records sealed under the first offender act to relevant employers. Certain licensing agencies may access records of discharges First Offender cases as well.

Historical Development

Since the Georgia legislature originally passed the First Offender Act in 1968, it has revisited and refined the legislation numerous times, reaffirming the commitment to providing a meaningful second chance to deserving individuals while protecting public safety. The purpose and content remain substantively similar to what they were forty-five years ago.

The original 1968 version contained provisions regarding deferment of regular proceedings, reinstatement of sentence upon violation of probation or conviction of another crime, and availment on only one occasion.⁴³ The original version also stated that discharge completely exonerated the defendant and shall not affect a person's civil rights.⁴⁴ This version of § 42-8-60 remained unchanged until 1978 when sections were updated to reflect the creation of the Georgia Crime Information Center (GCIC).⁴⁵ The amendment stated that a record of discharge would be sent to the GCIC without a defendant's request, a discharge is not a conviction, and a discharge may not be used to disqualify a person in any application for employment.⁴⁶ Moreover, a discharged record could now solely be released to certain individuals within the law enforcement community upon certification of a pending criminal charge.⁴⁷

The third amendment to Georgia's first offender law occurred in 1982 and rewrote 42-8-60 completely, added clarifying grammar, and generally made the statute easier to understand. 1982 Ga. Laws 1807. Importantly, the 1982 amendment specifically allowed for first offenders to be sentenced to a term of confinement, whereas the 1968 version was silent as to first offender terms of confinement and only.

O.C.G.A. 42-8-60 was next amended in 1985, and the 1982 amendment regarding the release of criminal records for law enforcement purposes was modified to prevent those law enforcement agencies from disclosing the content of first offender records except for the fact that said person had exercised the right to first offender treatment and had been discharged.⁴⁸ The 1985 amendment stated that GCIC records of first offenders would be modified to show conviction for those individuals adjudicated guilty for probation violation or another conviction, and GCIC would now be allowed to disseminate information related to first offenders when individuals were afforded first offender status on multiple

⁴² *Id.*, See also, H.B. 78, 2013 Reg. Sess. (Ga. 2013) (enacted).

⁴³ 1968 Ga. Laws 324, 325.

⁴⁴ *Id.*

⁴⁵ 1978 Ga. Laws 1621.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 1985 Ga. Laws 380.

occasions.⁴⁹ Further clarifying treatment of first offender records, this amendment explicitly stated that during the term of first offender confinement, first offender records would be treated like all others. Finally, whereas the previous versions of the law stated that first offender status may be revoked upon a conviction for another felony, the 1985 amendment struck this provision and replaced it with one stating first offender status may be revoked upon a conviction for another felony “during the period of probation.”⁵⁰

O.C.G.A. 42-8-60 was again amended in 1986.⁵¹ This amendment now allowed the court to enter an adjudication of guilt upon discovering that a defendant was not eligible for first offender status, and the amendment required the court to review a defendant’s GCIC record prior to sentencing.⁵² A 2006 amendment added further exception to when defendants qualify for first offender status.⁵³ This amendment specifically prevents first offender status from being afforded to those pleading guilty to serious violent felonies, sexual offenses, sexual exploitation of minors, electronically furnishing obscene materials to minors, and computer pornography and child exploitation.⁵⁴ Adding to the list of exemptions, a 2012 amendment states that certain offenses committed against law enforcement officers engaged in official duties do not qualify for first offender consideration. These offenses include aggravated assault, aggravated battery, and obstruction resulting in serious physical harm.⁵⁵

Employment liability

A problem with implementing Georgia’s First Offender statute effectively is the lack of a way to enforce the prohibition on employment discrimination. Although the law specifically prohibits employment discrimination based on a discharged First Offender case, the victim of such discrimination has no recourse. In *Mattox v. Yellow Freight Systems, Inc.*, the court addressed the question of whether cognizable private claims of action exist pursuant the first offender law.⁵⁶ Relevantly, O.C.G.A. § 42-8-63 states that a criminal case discharged under the first offender statutes cannot be used to deny a person employment. Mattox attempted to sue his employer under this statute when Mattox was fired upon his employer learning that Mattox had been charged with a crime nine years earlier.⁵⁷ The court held that Mattox did not state a cause of action because the statute neither provides for a civil nor criminal remedy.⁵⁸ The Mattox decision relied heavily on a Supreme Court of Georgia case, *Reilly v. Alcan Aluminum Corp.*, which held that a statute expressly prohibiting employment discrimination on the basis of age did not sustain private causes of action.⁵⁹ In *Reilly*, looking to the intent of the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 1986 Ga. Laws 218.

⁵² *Id.*

⁵³ 2006 Ga. Laws Act 571 section 26.

⁵⁴ *Id.*

⁵⁵ S.B. 231 (2012).

⁵⁶ *Mattox v. Yellow Freight Systems, Inc.*, 243 Ga. App. 894 (2000).

⁵⁷ *Mattox*, 243 Ga. App. at 894.

⁵⁸ *Id.*

⁵⁹ *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 280 (2000).

legislature, the court held that if the legislature does not specifically provide for a civil remedy, then it is inappropriate to conclude that the legislature intended for the statute to sustain civil causes of action.⁶⁰ Relying on this interpretation, the court of appeals found that Mattox could not recover on any set of facts provable under his complaint.⁶¹

However, criminal records do have relevance in Georgia tort law in reference to employer liability for negligent hiring and retention. Employers may be tortiously liable for the bad acts of their employees if they allow an unfit person to be in a situation which puts third-parties at unreasonable risk, and the employer either knew or should have known of that risk.⁶² Criminal background checks can be used as a shield against liability by demonstrating reasonable hiring practices because conducting a background check that does not return evidence of an employee's propensity for bad acts can be used to demonstrate that an employer neither knew nor should have known of that propensity.⁶³ In fact, evidence of a criminal background check revealing no negative information may result in summary judgment for the employer against negligent hiring claims.⁶⁴ Obtaining a criminal background check ultimately goes to show that an employer used ordinary care in its hiring practice.⁶⁵ However, failing to obtain a criminal background check does not demonstrate negligent hiring practices; the determination is made on a case-by-case basis considering the type of employment.⁶⁶

The State of the Southeast: State First Offender Laws, Diversion Programs, and the Benefit of Privacy

I. Introduction

As noted above, Georgia's First Offender Act is a deferred adjudication law, because although the defendant pleads guilty a conviction is not entered unless the defendant fails to successfully complete probation – the conviction is deferred to give the defendant a second chance to lead a crime-free life. Pre-trial diversion programs are another tool many courts utilize to divert individuals from the criminal justice system. Participation in a diversion program is generally approved and administered by prosecutors, not judges. An individual does not have to plead guilty to participate in a diversion program and if the program is successfully completed the case is usually dismissed rather than discharged. In practice, a prosecutor may offer diversion to an individual who had not been in serious trouble before rather than pursuing the case against them. The individual may have to complete a probation-like program, take certain classes, and pay fees. These programs are used to move cases through the criminal justice system and resolve them without going to trial. Some may argue that defendants are often sent into diversion programs when there is insufficient evidence to bring the case to trial.

⁶⁰ *Reilly*, 272 Ga. at 280.

⁶¹ *Mattox*, 243 Ga. App. at 895.

⁶² *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993).

⁶³ *Kelley v. Baker Protective Servs.*, 198 Ga. App. 378, 379 (1991).

⁶⁴ *Id.*

⁶⁵ *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 865 (2004).

⁶⁶ *Id.* at 864 n.4.

Georgia statutorily authorizes prosecuting attorneys to administer diversion programs in each judicial district for the purpose of providing alternatives to normal criminal proceedings.⁶⁷ The administering district attorney may use his or her discretion in deciding who may enter the program, but entry must be based on written guidelines that consider the nature of the crime, past criminal record, and victim responses.⁶⁸ Offenders may not qualify for the program if the mandatory minimum sentence associated with their charged offense cannot be suspended, deferred, or probated, and qualifying individuals may be charged a fee of less than \$1,000.⁶⁹ By way of example, Fulton County, Georgia, offers a pretrial intervention program for non-violent offenders.⁷⁰ The program is at the discretion of the prosecuting attorney, must be completed in three months, results in dismissal of charges, and costs \$500.⁷¹

This section looks at both First Offender laws and Pre-trial diversion laws around the southeast as alternative tools available to minimize the collateral consequences associated with a criminal conviction and the mark of a criminal record.

II. Louisiana

Louisiana's first offender law applies to non-capitol felony charges and contains two separate sentencing provisions for first offenders. First, it allows the court to suspend the execution of a sentence upon adjudication of guilt, and, second, it allows the court to defer the imposition of a sentence upon conviction.⁷² For both suspended and deferred charges, a court may place the offender on probation when it is in the best interest of the public and defendant.⁷³ At the conclusion of probation resulting from a deferred sentence only, the offender may motion the court to set aside the conviction and dismiss prosecution.⁷⁴ The court may do so if it finds that the offender's probation has been satisfactory.⁷⁵ The dismissal of first offender charges is treated as an acquittal for all purposes, except it is considered a first offense for the purpose of possible multiple offender charges.⁷⁶ Offenders receiving suspended sentences are not eligible to have their felony prosecution dismissed.⁷⁷

Louisiana provides that after an individual's first or second conviction of specified felonies, the court may suspend the sentence and place an individual on probation for one to five years.⁷⁸ Louisiana courts may also suspend the sentence following an offender's third conviction of certain felonies when it is in

⁶⁷ O.C.G.A. § 15-18-80.

⁶⁸ *Id.* at (b), (d).

⁶⁹ *Id.*

⁷⁰ *Pre-Trial Intervention and Diversion*, Carl H. Freeman. available at <http://www.claytoncountyga.gov/courts/solicitor-general/initiatives/pre-trial-intervention-diversion.aspx>.

⁷¹ *Id.*

⁷² La. Code Crim. Proc. Ann. Art. 893 A, E(1)(a).

⁷³ *Id.* at A, E(1)(a).

⁷⁴ *Id.* at E(2).

⁷⁵ *Id.*

⁷⁶ *Id.* at E(2).

⁷⁷ *State v. Hodge*, 880 So. 2d 983, 984 (La. App. 2d Cir. 2004).

⁷⁸ La. Code Crim. Proc. Ann. Art. 893(A).

the best interest of the public, the prosecuting attorney consents, and the court orders the offender to enter drug treatment, DWI treatment, or reside for one year in a house operated pursuant to Department of Correction's guidelines.⁷⁹

Louisiana's expungement law allows any person who has been arrested for a felony violation to petition the court to expunge record of the arrest upon meeting certain conditions.⁸⁰ The conditions include when the prosecutor declined to prosecute or the felony charges were disposed of by acquittal or dismissal, and when the arrest is not probative of any prior act for any subsequent proceeding.⁸¹ The court has interpreted this statute in relation to Louisiana's first offender law as being applicable for deferred sentences but not suspended sentences.⁸² Since deferred sentences alone are entitled to dismissal according to the first offender law, they alone are eligible for expungement.⁸³ Expungement applies to all law enforcement agencies, but does not limit their authority to consider expunged records for multiple offender provisions or licensing.⁸⁴ Courts ordering expungement are explicitly prevented from ordering the destruction of any record of arrest and prosecution of any felony conviction.⁸⁵ Expungement entitles an offender to removal of the relevant record from public access.⁸⁶ Expunged records are considered confidential, and individuals are not required to reveal expunged arrests or convictions, but they remain available for criminal justice and licensing purposes.⁸⁷

Louisiana's expungement law provides specifically for felony convictions dismissed pursuant to its first offender law, and states that upon expungement all "rights which were lost or suspended" because of the conviction will be restored.⁸⁸ Meaning, such offenders will be considered as not having been arrested or convicted except where the first offender law specifically provides otherwise.⁸⁹ The expungement law also provides for the expungement of dismissed misdemeanor charges, misdemeanor charges adjudicated over five years prior to petition, and felony non-violent drug convictions.⁹⁰ If a person is determined to be eligible for expungement after a hearing, the court shall order expungement. When an expungement is granted for a misdemeanor or dismissed felony charge, the court orders all agencies possessing record of arrest to destroy photographs, fingerprints, and any other information relating to the record.⁹¹ Violation of statutory expungement provisions may result in imprisonment and a fine of up to \$250.⁹² For a felony conviction, the court may order expungement if certain criteria are

⁷⁹ *Id.* at B; La. Rev. Stat. Ann. 40:2852.

⁸⁰ La. Rev. Stat. Ann. 44:9(B)(1).

⁸¹ *Id.* at (B)(1)(a) to (b).

⁸² *Hodge*, 880 So. 2d at 984.

⁸³ *Id.*

⁸⁴ La. Rev. Stat. Ann. 44:9(B)(2).

⁸⁵ *Id.* at (E)(1)(a).

⁸⁶ *Id.* at (G).

⁸⁷ *Id.* at G, I.

⁸⁸ *Id.* at (E)(1)(b).

⁸⁹ *Id.*

⁹⁰ *Id.* at A(1), A(5)(a).

⁹¹ La. Rev. Stat. Ann. 44:9A(2).

⁹² *Id.* at D.

met and after nineteen years has passed since the completion of sentence, but the court may not order the destruction of records.⁹³

III. Arkansas

Arkansas has a statutorily created first offender law but does not require any state court to initiate first offender procedures, and individuals do not have a positive right to first offender consideration.⁹⁴ Arkansas's first offender law states that when an offender pleads guilty or nolo contendere to an offense the judge may defer further proceedings without making a finding of guilt and place the offender on probation for not less than one year.⁹⁵ Offenders who have previously committed a felony and no person pleading guilty to a serious violent felony or sexual offense are eligible for first offender deferment.⁹⁶ If an offender violates the terms of his or her first offender probation, the court may then enter an adjudication of guilt and proceed according to the law.⁹⁷ However, upon successful completion of first offender probation the offender will be discharged without guilt, and the record will be expunged where appropriate.⁹⁸ Court interpretation of Arkansas' First Offender Act holds individuals receiving a bench or jury trial are not eligible to be sentenced under the first offender act because first offender consideration requires a plea of guilty or nolo contendere.⁹⁹

Unlike Georgia, during the period of first offender probation, the offender is not considered to have a felony conviction except for certain limited purposes.¹⁰⁰ These purposes are the application of firearm laws, habitual offender status, determinations of criminal histories and scores, sentencing, and impeachment.¹⁰¹ Additionally, offenders who have successfully been discharged under Arkansas' first offender laws will not be considered to have a felony record except for determinations of habitual offender status, determination of criminal histories and scores, sentencing, and impeachment.¹⁰² Any person statutorily charged with keeping first offender records is subject to both conviction and a \$500 fine for release of the records.¹⁰³

During Arkansas' 2013 regular session, both the Senate and House passed The Comprehensive Criminal Record Sealing Act Of 2013 (CRSA); it is now waiting to be signed by the governor.¹⁰⁴ The intent of the act is to clarify confusing terminology and expungement procedures within Arkansas code provisions dealing with the treatment of criminal records.¹⁰⁵ To be codified at Arkansas State. Ann 16-90-1401 et

⁹³ *Id.* at E(c).

⁹⁴ Arkansas State Ann. § 16-93-303(a)(3).

⁹⁵ Arkansas State Ann. § 16-93-303 (2012 & Supp.).

⁹⁶ *Id.* at (a)(1)(A)(i), (a)(2).

⁹⁷ *Id.* at (a)(3).

⁹⁸ *Id.* at (b).

⁹⁹ *State v. Webb*, 373 Ark. 65, 70 (2008).

¹⁰⁰ Arkansas State Ann 16-93-303(c).

¹⁰¹ *Id.* at (c)(1) to (6).

¹⁰² *Id.* at (d)(1) to (5).

¹⁰³ Arkansas State Ann § 16-93-302.

¹⁰⁴ H.R. 1638, 89th Legs, Reg. Sess (Ar. 2013).

¹⁰⁵ *Id.* at 10, Ln. 17-23.

seq., the law explicitly replaces and supersedes all other Arkansas code provisions dealing with sealing or expunging criminal records, unless the Act specifically provides otherwise.¹⁰⁶ Relevantly, the Act defines “conviction” to *not* include pleas of guilty and nolo contendere when the court does not enter a final judgment of guilt, and the act specifically states that a court ordered probation period under the first offender act is not considered a conviction.¹⁰⁷

With respect to deferred and suspended sentences of first offenders, the Act states that an individual whose case was dismissed or acquitted may petition the court to seal the record.¹⁰⁸ If the court grants the petition, relevant documents must be sequestered in a separate holding area and held confidential.¹⁰⁹ Likewise, the prosecuting attorney must remove all relevant documents from public access and sequester them in a separate holding area to be held confidential.¹¹⁰ The relevant arresting agency must also remove all documents and evidence relating to the sealed arrest as well as sequester all documents the agency is required to keep pursuant to the Act.¹¹¹ An offender whose record has been sealed has all rights and privileges restored, the offense may not affect an offenders civil rights or liberties, and the offender may state that the underlying offense never occurred.¹¹² However, criminal records are inherently public and individuals do not have a right to privacy regarding criminal records.¹¹³

IV. Virginia

The Commonwealth of Virginia has a statutorily created first offender law, a sentencing diversion program, and various other statutorily created paths to sentence deferment. According to Virginia’s first offender law, the court may defer an adjudication of guilt for any person pleading guilty or nolo contendere to any misdemeanor offense against property, and the court may place the offender on probation subject to terms and conditions.¹¹⁴ To be eligible for first offender status, the offender cannot have been previously convicted of a felony.¹¹⁵ If an offender violates the terms of his or her probation, the court may enter an adjudication of guilt and proceed according to the law.¹¹⁶ However, if an offender successfully completes the probationary period, the court shall discharge and dismiss the proceedings.¹¹⁷ Dismissal shall be done without an adjudication of guilt, and the offender will not be considered to have a conviction for all purposes other than applying the first offender act to future proceedings.¹¹⁸

¹⁰⁶ *Id.* at pg. 10, ln. 26-31.

¹⁰⁷ *Id.* at 11, ln. 29 – 12, ln. 33.

¹⁰⁸ *Id.* at 25.

¹⁰⁹ *Id.* at 19.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 23.

¹¹³ *Eagle v. Morgan*, 88 F.3d 620, 625-26 (8th Cir. Ark. 1996).

¹¹⁴ VA Code Ann. § 19.2-303.2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Once an individual has been discharged under the first offender law, he or she may then apply for expungement.¹¹⁹ However, since the first offender law requires a plea of guilty or nolo contendere, and Virginia expungement law only applies to “innocent” persons, first offenders are generally not eligible for expungement.¹²⁰ Expungement applies to charges “otherwise dismissed,” but the intent of the law does not reach charges dismissed under first offender law.¹²¹ First offender status inherently indicates that the trial court found evidence sufficient to find the defendant guilty.¹²² Expungement is not appropriate when the defendant has entered a plea of guilty or its equivalent, and/or the trial court has made a finding sufficient to establish guilt.¹²³ For qualifying individuals, expungement makes it illegal for an individual to view the record or disseminate the information within; doing so is a misdemeanor.¹²⁴ Employers may not require individuals to disclose the details of expunged records on employment applications, nor do individuals have to disclose expunged arrests.¹²⁵

Virginia’s pretrial diversion program allows a court to suspend the imposition of a sentence for any person convicted of a misdemeanor or felony and place him or her on probation.¹²⁶ The only limitation of a trial court suspending a sentence is that the terms of the suspension must be reasonable.¹²⁷ The court must consider the nature of the offense, the background of the offender, and all surrounding circumstances in determining whether suspension is reasonable.¹²⁸

V. Tennessee

Tennessee’s judicial diversion (First Offender) program allows certain qualifying offenders to be placed on probation and have their judicial proceedings deferred.¹²⁹ A qualifying offender is an offender who pleads guilty and has not been previously convicted of a felony, spent time in prison for a Class A misdemeanor, and is not seeking deferral for a sexual offense, DWI, Class A or B felony, or abuse of an impaired adult.¹³⁰ If an offender violates the terms of probation, the court may adjudicate him or her guilty and proceed according to the law.¹³¹ However, if an individual successfully fulfills the terms of probation, the court discharges the offender and dismisses the charges.¹³² Discharge and dismissal is without an adjudication of guilt, and records of dismissed charges are retained by the court only for the purpose of determining future qualification for diversion.¹³³

¹¹⁹ See VA Code Ann. § 19.2-392.2.

¹²⁰ *Gregg v. Com.*, 227 Va. 504, 507 (1984) (citing VA Code Ann. § 19.2-392.2).

¹²¹ *Brown v. Com.* 278 Va. 92, 99 (2009).

¹²² *Id.* at 101-02 (citing *Com. v. Dotson*, 276 Va. 278, 280 (2008)).

¹²³ *Id.* at 102.

¹²⁴ VA Code Ann. § 19.2-392.3(A), (C).

¹²⁵ VA Code Ann. § 19.2-392.4.

¹²⁶ VA Code Ann. § 19.2-303.

¹²⁷ *Hartless v. Com.* 29 Va.App. 172, 175 (1999).

¹²⁸ *Nuckoles v. Com.* 12 Va.App. 1083, 1085 (1991) (citing *Loving v. Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966)).

¹²⁹ Tenn. Code Ann. § 40-35-313.

¹³⁰ Tenn. Code Ann. § 40-35-313(B)(i)(a) to (ii)(k).

¹³¹ *Id.* at (a)(2).

¹³² *Id.*

¹³³ *Id.*

When an offender is discharged he or she may petition the court to expunge records related to the charges. Expungement does not remove the private records of the court, but it does remove information relating to the persons arrest, indictment or information, and trial from official records.¹³⁴ An individual may also petition to expunge public records if the person has not committed another offense, the sentence was completed over five years ago, and all terms of the sentence were fulfilled.¹³⁵ Release of information contained within an expunged record is deemed a misdemeanor.¹³⁶ Individuals seeking expunction in Tennessee are assessed a fee of three hundred fifty dollars.¹³⁷ A portion of that money goes to the public defenders expunction fund, the district attorneys expunction fund, and the state general fund.¹³⁸ The district attorney expunction fund is used to defer the cost of expunction, while the public defender expunction fund is used to defray the costs of educational classes the public defender holds for the community regarding expunction.¹³⁹

Tennessee courts have, despite a general deference to trial courts, historically imposed stringent procedural standards when trial courts deny diversion to those who qualify.¹⁴⁰ The trial court must consider seven specific factors when considering diversion, and if the trial court chooses to deny diversion, the court must state a specific reason for doing so.¹⁴¹ A trial court record that fails to reflect a consideration of all seven factors has been grounds reversal.¹⁴² But, pursuant to recent Tennessee Supreme Court decisions, a trial court's denial of diversion will be upheld if any substantive evidence is found for its decision because trial court sentencing decisions are presumptively reasonable.¹⁴³

Tennessee also has a pretrial diversion program which allows certain qualified individuals to have their prosecution suspended for up to two years in exchange for meeting certain conditions.¹⁴⁴ The major difference between the judicial diversion program and pretrial diversion is that a determination of guilt is prerequisite to judicial diversion, and judicial diversion is initiated by the court rather than the prosecuting attorney.¹⁴⁵ Judicial and pretrial diversion both focus on the same six factors to determine when diversion is appropriate. The factors are: (1) likelihood of correction, (2) circumstances of offense, (3) past criminal acts, (4) social history, (5) physical and mental health, and (6) deterrence value.¹⁴⁶

¹³⁴ Tenn. Code Ann. § 40-32-101; Tenn. Code Ann. § 40-35-313(3)(b).

¹³⁵ *Id.*

¹³⁶ Tenn. Code Ann. § 40-35-313(c)(1).

¹³⁷ Tenn. Code Ann. § 40-32-101(d)(2)(A).

¹³⁸ *Id.* at (g).

¹³⁹ *Id.*

¹⁴⁰ *State v. King*, 2013 WL 793588 *6 (Tenn. Crim. App. 2013).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (citing *State v. Bice*, 380 S.W.3d 682, 707 (Tenn. 2012)).

¹⁴⁴ Tenn. Code. Ann. § 40-15-105.

¹⁴⁵ *State v. Robinson*, 328 S.W.3d 513, 518 (Tenn. Ct. App. 2010).

¹⁴⁶ *Id.*

Tennessee's expungement law provides for the expungement of charges dismissed pursuant to its diversion programs.¹⁴⁷ Specifically, Tennessee's expungement law states that any person with a felony charge, upon petition to the court, shall have the record of that charged expunged if the charge was dismissed.¹⁴⁸ Moreover, the expungement statute specifically provides for individuals seeking expungement after successful completion of both pretrial diversion programs by stating that such individuals shall be charged with a clerk's fee for destroying the records.¹⁴⁹ The expungement statute also explicitly provides for the expungement of charges dismissed pursuant to judicial diversion in its statement of intent.¹⁵⁰ However, Charges dismissed through diversion programs will not be expunged if the charges were for a sexual offense.¹⁵¹ Tennessee's pretrial diversion statute also explicitly provides for expungement.¹⁵² Relevantly, it states that upon dismissal of charges pursuant to the diversion statute, an individual may apply for expungement or records other than nonpublic court records and other confidential records maintained for law enforcement purposes.¹⁵³

Tennessee's expungement statute applies to all public information available regarding a criminal record.¹⁵⁴ Public information does not include arrest histories, investigative reports, intelligence information, and law enforcement reports held confidential and not generally available to the public.¹⁵⁵ Improper release of confidential expunged information is a class A misdemeanor.¹⁵⁶

v. Alabama

The state of Alabama does not formally have a first offender statute; however, Title 45 of The Official Code of Alabama does authorize local district attorneys to establish pretrial diversion programs.¹⁵⁷ The diversion program is under the direct supervision and authority of the applicable district attorney.¹⁵⁸ Not every county in Alabama participates; notably, Jefferson County, the most populous county in Alabama, does not have a pretrial diversion program.¹⁵⁹

By way of example, Autauga County, Alabama, has a pretrial diversion program.¹⁶⁰ The program allows all individuals charged with eligible offenses to apply to the district attorney for pretrial diversion.¹⁶¹ Autauga county explicitly lists the following six charges as being eligible: traffic offenses; property offenses, offenses not causing serious injury; offenses where the victim was not under fourteen, a law

¹⁴⁷ Tenn. Code. Ann. § 40-32-101(a)(6).

¹⁴⁸ Tenn. Code. Ann. § 40-32-101.

¹⁴⁹ *Id.* at (B).

¹⁵⁰ *Id.* at a(6).

¹⁵¹ *Id.* at (D).

¹⁵² Tenn. Code. Ann. § 40-15-105(b)(2)(e).

¹⁵³ Tenn. Code. Ann. § 40-35-313(3)(b) (referencing Tenn. Code. Ann. § 40-32-101).

¹⁵⁴ Tenn. Code. Ann. § 40-32-101(a)(1)(A).

¹⁵⁵ Tenn. Code. Ann. § 40-32-101b(1).

¹⁵⁶ *Id.*

¹⁵⁷ Ala. Code § 45-1-82.01(a) (1975).

¹⁵⁸ *Id.*

¹⁵⁹ *See* Ala. Code § 45-1-10 et seq (1975).

¹⁶⁰ Ala. Code § 45-1-82.02 (1975).

¹⁶¹ *Id.*

officer, or school official, a misdemeanor, and “a violation classified under this code.”¹⁶² The statutes also provides that the following are all ineligible for pretrial diversion: trafficking drugs, abuse of children or elderly, sex offenses, Class A felonies, and any offense involving serious injury or death.¹⁶³ Any person the district attorney deems to be a threat to safety is also not eligible.¹⁶⁴

Autuaga County lists circumstances in which pretrial diversion is appropriate, but the district attorney may waive these standards if “justice or special circumstances dictate.”¹⁶⁵ Pretrial diversion will be appropriate when the offender is eighteen or older, justice will be served through the program, the needs of the state can be met through the program, the offender is not likely to be charged again, or the offender will likely respond to rehabilitative treatment.¹⁶⁶ The district attorney records relating to pretrial diversion admission and subsequent communications are considered privileged and are not admissible in future proceedings.¹⁶⁷ Individuals must apply to the pretrial diversion program within twenty-one days of being issued a citation.¹⁶⁸

Alabama law only allows pretrial diversion criminal records to be purged if they are inaccurate, misleading, or incomplete.¹⁶⁹ The Supreme Court of Alabama has construed the word “purged” to be something less than expungement and limits it to allowing false information to be removed from a criminal record, misstated information to be modified in a criminal record, and incomplete records to be supplemented.¹⁷⁰ Alabama has no law or mechanism by which a court may legitimately expunge a record such that it is sealed or treated as if it never existed.¹⁷¹ In the case of Autuaga County, this would suggest that an individual who successfully completes pretrial diversion would continue to have his or her arrest and court records available to the public.

vi. Florida

The state of Florida does not have a formal statutory first offender law; however, it does have a pretrial diversion program. Florida’s pretrial diversion program is considered to be a contract between the court and the defendant.¹⁷² In exchange for agreeing to fulfill the terms of deferred prosecution agreement, the court dismisses the charges against the defendant upon successful completion.¹⁷³ In order to qualify for the program, the defendant may not have been convicted of more than one nonviolent misdemeanor, and their current charge must be either a misdemeanor or a felony in the third degree.¹⁷⁴

¹⁶² *Id.* at (b)(1) to (6).

¹⁶³ *Id.* at (c)(1) to (6).

¹⁶⁴ *Id.* at (d).

¹⁶⁵ Ala.Code § 45-1-82.03 (1975).

¹⁶⁶ *Id.*

¹⁶⁷ Ala. Code § 45-1-82.05 (1975).

¹⁶⁸ Ala. Code § 45-1-82.06 (1975).

¹⁶⁹ Ala. Code § 41-9-646 (1975).

¹⁷⁰ *State v. Blane*, 985 So.2d 384, 387 (Ala. 2007).

¹⁷¹ *Id.*

¹⁷² *Walker v. Lamberti*, 29 So.3d 1172, 1173 (Fla. 4th Dir. App. 2010).

¹⁷³ *Id.*

¹⁷⁴ Fla. Stat. Ann. § 948.08(2).

The defendant must also obtain the written consent of the administrator of the program, the judge, the prosecuting attorney, and the victim.¹⁷⁵

An individual participating in a pretrial intervention program initially has his or her criminal charges continued without disposition for ninety days.¹⁷⁶ If the defendant participates in the program to the satisfaction of the administrator and state attorney, then the disposition will again be withheld for ninety days.¹⁷⁷ However, if the defendant is found to be in noncompliance with his or her program obligations, criminal proceedings resume.¹⁷⁸ At the end of the intervention period the administrator may recommend (1) the defendant's criminal charges resume, (2) the offender needs further supervision, or (3) the criminal charges be dismissed without prejudice.¹⁷⁹ The prosecuting attorney then decides which of the three options are most appropriate for the offender.¹⁸⁰

Florida has both an expungement statute and a statute governing the sealing of criminal records.¹⁸¹ Florida's expungement statute only applies to individuals who have not previously been adjudicated guilty or previously obtained expungement or sealing of their criminal record.¹⁸² Expungement is only available for cases in which the individual was either not charged, or if a charging document was issued, the charges were dismissed by the state attorney or court.¹⁸³ The effect of expungement is that any agency having custody of an individual's criminal history must retain the record but keep it confidential and not release it except upon court order.¹⁸⁴ Individuals may deny the existence of expunged records except when attempting to secure specific types of employment in the field of criminal justice and education.¹⁸⁵ Florida's statute regarding court ordered criminal record sealing is substantially similar to the expungement law.¹⁸⁶ Charges dismissed under Florida's pretrial diversion program have been held to qualify for both expungement and state-ordered sealing.¹⁸⁷

vii. Mississippi

Mississippi has a statutorily created pre-trial intervention program. The program allows district attorneys, with county court approval, to set up a pretrial intervention program for each judicial district.¹⁸⁸ The program is supervised and controlled directly by the district attorney, and offenders wishing to be considered must submit an application.¹⁸⁹ To qualify, an offender must have not

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at (3).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at (4).

¹⁷⁹ *Id.* at (5)(a) to (c).

¹⁸⁰ *Id.* at (5)(c).

¹⁸¹ Fla. Stat. Ann § 943.0585.

¹⁸² *Id.* at (1)(b).

¹⁸³ *Id.* at (2)(a)(2).

¹⁸⁴ *Id.* at (4).

¹⁸⁵ *Id.* at (4)(a).

¹⁸⁶ *State v. Silvia*, 691 So.2d 529, 531 (Fla 3d Dist. Ct. App. 1997).

¹⁸⁷ *See generally Id.*

¹⁸⁸ Miss. Code Ann. § 99-15-105.

¹⁸⁹ *Id.*

previously been accepted into an intervention program or be charged with a violent crime.¹⁹⁰ An offender must also be over eighteen, pose no threat to the community, be unlikely to commit further offenses, and have no significant prior criminal acts.¹⁹¹

The pre-trial intervention program is an agreement between the defendant and the district attorney.¹⁹² The program must not exceed three years and must state the period of time for which the district attorney may dismiss or pursue the charges.¹⁹³ Successful completion of the program results in a noncriminal disposition being entered by the court.¹⁹⁴ Upon petition, the court shall grant expungement for all arrests if the charges were dropped, dismissed, or no disposition was entered.¹⁹⁵ An order of expungement does not prevent an employer from inquiring about expunged records, as the effect of expungement is only to restore the offender to the legal status he or she occupied prior to the charges.¹⁹⁶ However, no individual receiving expungement shall be penalized for refusing to acknowledge the arrest, indictment, or conviction of expunged records, except for in subsequent criminal proceedings.¹⁹⁷

Mississippi also has a release after successful completion of conditions (first offender) law, which states that a court may withhold acceptance of a guilty plea for all felony and misdemeanor charges other than fraud by a public official or crimes against the person.¹⁹⁸ Such an individual will be sentenced pending the successful completion of certain conditions.¹⁹⁹ However, no individual previously convicted of a felony or previously qualifying for the first offender law is eligible.²⁰⁰ The court may impose conditions which constitute (1) reasonable restitution, (2) less than 960 community service hours, (3) a fine, (4) participation in a treatment program, and (5) remaining in the program for up to five years.²⁰¹ Successful completion of the court conditions results in dismissal of the case and expungement.²⁰²

viii. Kentucky

Kentucky has a statutorily created pretrial diversion program which mandates each judicial circuit to plan and operate a pretrial diversion program.²⁰³ The pretrial diversion program applies to individuals charged with a class D felony that have not been charged with a felony for the previous ten years.²⁰⁴ Offenders are only eligible for pretrial diversion once every five years, and individuals charged with

¹⁹⁰ Miss. Code Ann. § 99-15-107.

¹⁹¹ Miss. Code Ann. § 99-15-109.

¹⁹² Miss. Code Ann. § 99-15-117.

¹⁹³ *Id.*

¹⁹⁴ Miss. Code Ann. § 99-15-123(1).

¹⁹⁵ Miss. Code Ann. § 99-15-123.

¹⁹⁶ Miss. Code Ann. § 99-19-71(3).

¹⁹⁷ *Id.*

¹⁹⁸ Miss. Code Ann § 99-15-26.

¹⁹⁹ *Id.* at (1)(a).

²⁰⁰ *Id.* at (d).

²⁰¹ *Id.* at (2)(a).

²⁰² *Id.* at (4), (5).

²⁰³ Ky. Rev. Stat. Ann. § 533.250(1).

²⁰⁴ *Id.* at (1)(a).

sexual offense are not eligible.²⁰⁵ Offenders wishing to be considered must apply to the Commonwealth's attorney, who will make a recommendation to the court based on that application.²⁰⁶

An offender who does not complete pretrial intervention or is not progressing satisfactorily may have the diversion agreement voided, and the prosecutor may proceed according to the law with respect to that person's guilty plea.²⁰⁷ However, if an offender successfully completes the pretrial diversion agreement, the charges against the offender are to be dismissed and they will not constitute a conviction.²⁰⁸ For purposes of employment, the offender cannot be required to reveal the disposition of the pretrial diversion program to an employer or licensing authority unless otherwise required by law.²⁰⁹

Kentucky's pretrial diversion law does not automatically seal or expunge records or otherwise provide a mechanism of petition for defendants. However, Kentucky does have an expungement law, and the courts have held that charges successfully dismissed through pretrial diversion constitute charges dismissed with prejudice and are eligible for expungement.²¹⁰ Relevantly, Kentucky's pretrial diversion statute states that charges "shall be dismissed with prejudice" upon completion of the pretrial diversion agreement.²¹¹ And Kentucky's expungement law states that the "court shall order all law enforcement and other public agencies holding records of the offense to expunge the records" when the charges were dismissed with prejudice.²¹² At least one Kentucky court has interpreted the relation between these statutes as commanding the court to grant all expungement petitions coming from individuals who successfully completed pretrial diversion.²¹³ If Kentucky decides to make this binding precedent, it will functionally attach expungement to pretrial diversion for any offender choosing to petition the court.

ix. North Carolina

North Carolina statutorily provides deferred prosecution for offenders charged with a Class H or I felony or a misdemeanor.²¹⁴ Deferred prosecution allows an offender to be placed on probation pursuant to an agreement between the defendant and prosecution.²¹⁵ The agreement withholds prosecution for a period to allow the defendant to demonstrate good behavior.²¹⁶ To be eligible for deferred prosecution, the offender cannot have been previously convicted of a felony or misdemeanor involving moral turpitude or have been placed on probation.²¹⁷ Additionally, each victim must be notified of the agreement so that they may be heard, and the defendant must be unlikely to commit additional

²⁰⁵ *Id.* at (1)(c), (d).

²⁰⁶ *Id.* at (6).

²⁰⁷ Ky. Rev. Stat. Ann. § 533.256.

²⁰⁸ Ky. Rev. Stat. Ann. § 533.258.

²⁰⁹ Ky. Rev. Stat. Ann. § 533.258.

²¹⁰ *Huber v. Com.*, 2011 WL 744536 at *2 (Ky. Ct. App. 2012) (unpublished) (citing Kentucky's expungement law KRS § 431.076).

²¹¹ RCr 8.04(4).

²¹² Ky. Rev. Stat. Ann. § 510.300.

²¹³ *Kennedy v. Com.*, 2007 WL 2687398 at *3 (2012) (unpublished).

²¹⁴ N.C. Gen. Stat. Ann. § 15A-1341.

²¹⁵ *Id.* at (a1)(1).

²¹⁶ *Id.*

²¹⁷ *Id.* at (a1)(1), (2).

crimes.²¹⁸ North Carolina courts consider the pretrial diversion program to be a matter of grace rather than right, and the courts allow probation revocation on a standard lower than beyond a reasonable doubt.²¹⁹

An individual charged with a felony or misdemeanor may petition for expungement in North Carolina if the charges were dismissed or a finding of either not guilty or not responsible is entered.²²⁰ Upon a hearing, the court shall enter an order for expungement if it is found that the individual has not previously received expungement or been convicted of a felony offense.²²¹ The purpose of expungement is to remove reference to arrests or trials from the public record so the individual does not have to acknowledge the charges, and background checks will not disclose the charges.²²² Once a record is expunged, the person may not be subject to any penalty for refusing to acknowledge the associated charges.²²³ An employer may not require an applicant to reveal information regarding an expunged arrest, charge, or conviction.²²⁴ An applicant is not required to reveal information of dismissed arrests and charges which have been expunged and cannot be denied employment for refusal to do so.²²⁵ Employers that violate this provision will first be warned and then subject to a \$500 fine for subsequent violations, but the law explicitly states that no private cause of action is meant to be created by the statute.²²⁶

x. South Carolina

South Carolina has a statutorily mandated pretrial intervention program that vests discretion in each county's circuit solicitor to administer the program.²²⁷ Each pretrial intervention program is directly under the circuit solicitor's supervision and control, and the solicitor retains all discretionary powers.²²⁸ To aid solicitors with setting up and administering pretrial intervention programs, the general assembly created a Pretrial Intervention Coordinator.²²⁹

The South Carolina code lists seven factors for when pretrial intervention is appropriate. Pretrial intervention is appropriate if: (1) just will be served, (2) the needs of the offender and state will be met, (3) the offender is unlikely to commit another offense, (4) the offender is likely to respond to treatment, (5) the offender has no significant history of criminal activity, (6) the offender poses no threat to the community, and (7) the offender has not previously used pretrial intervention.²³⁰ However, individuals

²¹⁸ *Id.* at (2), (5).

²¹⁹ *State v. Darrow*, 83 N.C.App. 647, 648 (1986).

²²⁰ N.C. Gen. Stat. Ann. § 15A-146.

²²¹ *Id.*

²²² *State v. Jacobs*, 128 N.C.App. 559, 568 (1998).

²²³ *Id.*

²²⁴ N.C. Gen. Stat. Ann. § 15A-153(c).

²²⁵ *Id.*

²²⁶ *Id.* at (f).

²²⁷ S.C. Code Ann. § 17-22-30 (1976).

²²⁸ *Id.* at (A).

²²⁹ S.C. Code Ann. § 17-22-40 (1976).

²³⁰ S.C. Code Ann. § 17-22-60 (1976).

charged with blackmail, DUI, minor traffic offenses, violent crimes, and minor first and wildlife offenses are not eligible for pretrial intervention.

Offenders who successfully complete the terms of their pretrial intervention program will have a noncriminal disposition of the charge entered by the solicitor in their records.²³¹ After a noncriminal disposition is entered, the offender may petition the court to have all records relating to the arrest destroyed.²³² No evidence of the records may be retained by any state entity except the solicitor must retain records for two years.²³³ The solicitor must also forward record to the South Carolina Law Enforcement Division for future determinations of whether the offender has enrolled in pretrial intervention program.²³⁴ However, the statute explicitly states that identification information regarding PTIs may not be released to the public for any reason, and no person can be guilty of false statements for refusing to disclose arrests disposed of through pretrial intervention.²³⁵ The purpose is to restore the offender to the legal status he occupied before the arrest.²³⁶

xi. West Virginia

West Virginia does not have a first offender law; however it does have a pretrial diversion program. This program allows a prosecutor to enter into an agreement with an offender if it is determined that doing so is in the best interest of the public.²³⁷ Pretrial diversion agreements cannot exceed twenty-four months and may include conditions of probation pursuant to West Virginia's probation laws.²³⁸ Successful completion of the terms of the agreement will result in the charges against the offender not being prosecuted unless the agreement specifically provides for a guilty plea of a related offense.²³⁹

West Virginia's expungement law for individuals found not guilty of the bad acts they were charged with allows such individuals to file a civil petition to expunge their records. Expunged records are deemed to never have occurred, and any state agency must respond to inquiries regarding the records by stating that no record exists.²⁴⁰ Individuals are prevented from being required to report their expunged records to potential employers or on credit applications.²⁴¹ Individuals receiving pretrial diversion are not eligible for expungement if they were charged with domestic violence.²⁴²

²³¹ S.C. Code Ann. § 17-22-150 (1976).

²³² *Id.*

²³³ S.C. Code Ann. § 17-22-130 (1976).

²³⁴ S.C. Code Ann. § 17-22-130 (1976).

²³⁵ S.C. Code Ann. § 17-22-150 (1976).

²³⁶ *Id.*

²³⁷ W. Va. Code, § 61-11-22.

²³⁸ *Id.*

²³⁹ W. Va. Code, § 61-11-22(c).

²⁴⁰ W. Va. Code, § 61-11-25.

²⁴¹ *Id.* at (e).

²⁴² W. Va. Code, § 61-11-22(e).

A Solution of Red Ink

Deferred adjudication refers to a collection of statutorily created programs designed to ameliorate the effects of criminal charges. Legislatures in the southeast utilize two basic types of programs, but they are substantially similar. Both first offender laws and pretrial diversion programs provide individuals without significant criminal histories the opportunity to avoid conviction of non-violent crimes by submitting to a term of probation. Upon successful completion of the probation term, offenders have their charges dropped, dismissed, discharged, or receive a noncriminal disposition. However, since the purpose of deferred adjudication is to offer a second chance to individuals not likely to commit additional crimes, an adjudication of guilt will be entered for any individual who violates probation or is convicted of another crime. These individuals will often find that while deferred adjudication offers benefits not otherwise conferred, such programs are a gamble because judges and prosecuting attorneys many times impose harsh sentences on those not able to complete the program. Though, for those successfully completing deferred adjudication programs, the prospect of staying out of prison is only one benefit they will receive.

In the southeast, five states have statutorily created first offender laws. These states are Georgia, Louisiana, Arkansas, Tennessee, and Virginia. The remaining seven states have various forms of pretrial diversion programs which function similarly to first offender laws. These states are Alabama, Florida, Mississippi, Kentucky, North and South Carolina, and West Virginia. The main difference between the two approaches is that first offender laws require an offender to enter a plea of guilty to accrue the benefits offered, while pretrial diversion programs operate to continue court proceedings prior to the entry of pleas. Pretrial diversion programs are generally considered an agreement between the prosecuting attorney and the defendant, while first offender laws are more appropriately considered a court action which holds a pending sentence in abeyance. For both approaches, successful completion of the agreement or program will result in dismissal of the charges, while unsatisfactory performance or a failure to fulfill the terms agreed to will result in normal court proceedings and any sentence allowable by law.

Every southeast state has provisions to ameliorate the effect of criminal charges adjudicated under first offender laws and pretrial diversion programs. Known as “collateral consequences,” individuals with a criminal history face discriminatory treatment in all facets of society—both state imposed and state condoned. Imposed sanctions are the byproducts of felony convictions and include the inability to own firearms, serve on juries, and vote. These collateral consequences are easily addressed by the legislature because they were created by the legislature. However, a more insidious soft discrimination occurs within society when individuals with a criminal record attempt to find employment, secure housing, and otherwise navigate through society. Every southeast state has record restrictions provisions in their respective deferred adjudication legislation addressing the effects of soft discrimination, which demonstrates that legislatures have been cognizant of the problem of civil disabilities for decades.

With the exception of Alabama, every southeastern state offers relief via first offender and/or pretrial diversion programs by (1) allowing successful completion of the program to result in dismissal, a noncriminal disposition, or non-conviction, and (2) offering relief from collateral consequences through record restriction. Individuals successfully completing deferral programs in the southeast generally qualify for expungement with few exceptions, and courts are generally required to order expungement for qualifying individuals. Florida and West Virginia are the only southeastern states that do not have expungement provisions built into their deferred adjudication statutes and merely provide permissive authority for courts to expunge records. Georgia and Alabama are the only states where individuals completing diversion programs do not at least qualify for expungement. Meaning, individuals residing in every other state in the southeast will receive record restriction for deferred adjudication charges after completing their probation and petitioning the court.

Record restriction in the southeast has generally been defined by legislatures as restoring individuals to their legal status prior to being charged. With the exception of Mississippi, Alabama, Georgia, and Virginia restoration for diversion programs includes removing all records associated with the arresting offense from the public domain. However, records of the charges are retained by various government agencies for criminal justice purposes. These retained records are either considered confidential or sequestered. Arkansas, Louisiana, Virginia, and North Carolina all impose a fine against officials who improperly release expunged criminal records. Every state except Tennessee, Mississippi, Alabama, and South Carolina further protect restricted records by either officially making it unlawful for employers to inquire about applicants expunged records or explicitly protecting individuals by allowing them to withhold acknowledgement of expunged records. Georgia is the only state with a first offender law that automatically augments the record, but Arkansas, Tennessee, Florida, Mississippi, and South Carolina provide within their respective deferred adjudication statutes that successful completion of the program qualifies an offender for expungement.

Although Georgia is among the few states in the southeast that has a first offender program, it is substantially similar to most southeastern states in court treatment upon successful completion. Like most southeastern states, Georgia offers first offenders the chance for conviction to be avoided and civil liberties to be restored, but Georgia offers first offender a discharge rather than a dismissal. Moreover, Georgia is one of only a few states in the southeast where completion of the deferred adjudication program does not result in eligibility for expungement. Georgia significantly lags behind the southeast in this regard, as most states require a court to grant expungement to anyone who qualifies. Georgia, on the other hand, simply indicates on court records that the individual successfully completed the first offender program.

Georgia's first offender law is unique in the southeast because it recognizes the humanitarian goals of deferred adjudication and offers first offender benefits, but the benefits conferred are nominal. Georgia's first offender law occupies an impotent middle ground. The law offers record restriction, but allows court records to remain public. The law modifies court records, but merely states in red ink that the offender was discharged. The law states that employers cannot discriminate on the basis of first offender charges, but does not prevent employers from inquiring about first offender records or

imposing penalties on those who do not acknowledge them. Georgia law discharges and exonerates first offenders, but does not dismiss the charges. The law restricts official criminal histories at GCIC, but does nothing to restrict histories on commercial checks. The law offers probation to first time offenders, but only if they unambiguously ask for it. Ultimately, the red ink solution Georgia has found for first offenders follows the form of other deferred adjudication statutes in the southeast, but falls significantly short of its purpose.

In order for Georgia's first offender law to fulfill its purpose, significant and substantive changes are required. First, in line with most of the southeast, Georgia should supplement the red ink solution by restricting court records and holding them confidential. Second, to combat the development of the commercial background check industry, Georgia should restrict first offender records at GCIC during the term of probation and revoke restriction only upon court ordered adjudication of guilt. Third, Georgia should allow individuals who were not made aware of the possibility of first offender remedies to retroactively apply for the program. Fourth, to ameliorate the effects of soft discrimination, Georgia should make its prohibition against employment discrimination functional by preventing employers from asking about restricted first offender records and imposing a penalty on those who do.

First, Georgia's first offender legislation already recognizes that a criminal record is detrimental to first offender and takes steps to ameliorate the effects. However, the steps have been outpaced by technological advancements and the development and proliferation of commercial background check companies. While restricting records at GCIC after the period of probation struck a balance between the public's interest in knowing about the crimes in their community and the humanitarian purpose of allowing one time offenders to participate in society, the balance no longer exists. Restricted GCIC records which were once available on GCIC will almost always be available from private companies after restriction. Since most employers and landlords use private background check companies, the restriction after probation is functionally moot. A more appropriate balance is to restrict the records on GCIC during the period of probation, but allow the records to be available at the court house. The public will still be able to access the information, but the negative effects of commercial enterprises dealing in criminal histories will be less likely to obtain the information and keep it public contrary to the will of the legislature.

Relatedly, successful completion of probation should result in restriction at the courthouse level. Currently, Georgia not only marks court records with exoneration, but has deemed the matter important enough to require it in red ink. This is an artifact of historical treatment of expungement and criminal records. Historically, expungement meant destruction of courthouse records, which is contrary to the purpose of the first offender laws as destruction of the record would allow an individual to potentially participate in the program multiple times. However, recent national developments and changes in Georgia's law now provide for expungement solutions involving confidentiality and sequestration. The mechanisms of record restriction now exist in Georgia, and applying them to first offender records more fully realizes the purpose of the law. The red ink solution was designed when the only option was record destruction, but that is no longer the case.

The purpose of record restriction and first offender laws generally is to prevent individuals who make a one-time mistake from being disenfranchised from the community. Disenfranchisement for such individuals takes the form of difficulty in obtaining employment and renting housing—both indicia have high correlations to recidivism. The purpose of record restriction is to ameliorate these effects, but often they do not do so fully. Georgia’s first offender law was passed in recognition of this as it has a provision explicitly prohibiting employment discrimination, but since it does not provide a civil remedy, the courts cannot enforce it. This provision is functionally null. Amending this provision to include a civil remedy for violations and amending it to state that employers may not inquire about first offender restricted records would ensure that purpose. These measures have already been enacted by other southeastern states.

Georgia’s first offender laws are only available to individuals who request first offender treatment prior to an adjudication of guilt. Yet, the very nature of first offender laws suggests that such individuals will be unfamiliar with the criminal justice system, thus unlikely to be aware of the law. This puts the responsibility to request first offender status squarely on the offender’s attorney. Such attorneys may or may not be familiar with the law themselves or may fail to request treatment through a unilateral decision or any of a myriad of reasons. This creates a burden for their clients, results in harsher penalties, and completely undermines the community sustaining purpose of the law. It is recommended that the first offender law be amended to allow individuals who were not afforded a first offender treatment request to do so retroactively. Substantively this provision does no change how the first offender law works or the benefits it confers, but is a remedy to a procedural anomaly serving no clear purpose. Retroactivity will even out the problems associated with having inexperienced or incompetent lawyers, and widen the net of first offender treatment without changing the standard for eligibility.

Georgia’s first offender law contains provisions which nominally reflect every substantive first offender benefit southeastern states have to offer. However, the law is out-of-date or has been proven ineffective in almost every one of these substantive benefits. Because of its ineffectivity, the law does not fulfill the purpose or reach the goals the legislature had in mind when the law was passed. Looking to other southeastern states, however, Georgia can take a few minor steps to remedy the problem and allow the first offender law to function as it was meant to.

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