

A Guide to Expunctions & Nondisclosures



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Expunctions vs. Nondisclosures



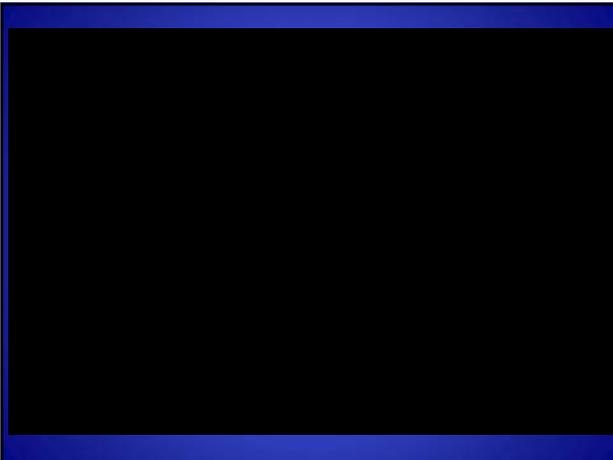
- Expunctions:
 - Intended to allow wrongly arrested person to clear their records
 - Require **total destruction** of all files and records after arrest where Petitioner acquitted or case dismissed



Expunctions vs. Nondisclosures



- Nondisclosures:
 - Intended as a “second chance after deferred or some convictions
 - Require **sealing** of files, but they can still be used or shared under some circumstances



Expunctions



Filed in District Court or
JP/municipal court

Two types of expunction

Standard expunction

- Petitioner is arrested
- No conviction
 - Charges never filed
 - Case dismissed
 - Acquittal
 - Pre-trial diversion

Identity theft expunction

- Another person is arrested and gives petitioner's name
- "Misuse of identity"
- Treated separate from other types of expunction



Notification

- When an order is signed, the District Clerk will send a notice to all respondents.
 - Opportunity to appeal
- When the order is final (30 days or after appeal), the District Clerk will send a certified copy of the order.
 - Compliance does not begin until order is received

Appeal



Appeal

- Direct appeal
 - Civil in nature
 - Must file notice of appeal within 30 days of order being signed
 - Order **not** final until time to file appeal passed or appeal resolved
- Writ of error
 - May be filed within 180 days
 - Does not affect finality of order

Appeal

- Any agency listed as a respondent can appeal
 - Each agency considered individually – DA doesn't represent every other agency
- If win on appeal, expunction overturned as to **all** parties, not just appealing party

Who complies with an expunction order?



Who complies?

- Only agencies listed on order have to comply with the expunction.

BUT

- CCP Art. 55.04 – Any person who “acquires knowledge of an arrest” while working for a state agency and “knows of an order expunging the records” commits an offense by releasing or using the records

The Three Ds

There are three methods of complying with an expunction order:

- Deliver
- Delete
- Destroy

DELIVER



Return all records subject to expunction to District Clerk

- Include certification that these are all the records subject to the expunction order



Actual Innocence

- Delivery is the **ONLY OPTION** for “actual innocence” expunctions
- Order must say specifically that it was granted due to actual innocence.
- Records must be delivered to District Clerk and are held until the statute of limitations has passed for any wrongful conviction claims.
- New Veteran’s Court expunctions added to list

DELETE



If removal is “impracticable,” then:

- “Obliterate all portions of the record or file that identify the person who is the subject of the order” and
- “Notify the court of its action”

DESTROY



Instead of deleting just the references to the petitioner’s identifying information, the agencies may destroy the entire file.

- When “impracticable” to return to clerk
- Certify to the District Clerk
- Useful if all your records are electronic

Why Destroy?

- Petitioner may receive a copy of any files returned to the District Clerk, except for acquittals & ID theft
 - Delete or destroy anything that cannot be legally turned over or should not be released publicly
 - Privileged/work product
 - Criminal history print-outs
 - CPS records
 - Child pornography or forensic interviews

Which records are included?



- “All records and files relating to the arrest”
- Be sure to find all indexes, databases, etc.
- May keep invoices, receipts, etc if identifying information is redacted

Which records are NOT included?

- Records generated before the arrest
- Independent investigation records (ie, employment records, CPS)
- Personal recollections
 - BUT only if not relying on records subject to expunction
- Records not belonging to governmental agencies

Time Limits



- No time limit in statute for agencies to comply
- District Clerk may destroy records after 60 days from order's signing (immediately for acquittal)
- If DA objects to earlier destruction, District Clerk may not destroy records until one year after order's signing
- Special rules for actual innocence & Veteran's Court

Effect of expunction

- After expunction order is final:
 - "Release, maintenance, dissemination, or use" of expunged files is prohibited **for any reason**
 - Class B misdemeanor 
 - Person may deny occurrence of the arrest and existence of expunction order (except under oath in criminal case)

Exceptions

- Some exceptions can be granted to expunction orders
 - Mandatory for waiting period expunctions
 - Optional for prosecuting other offenses or another person
- If granted, **only** police and prosecutor keep their files. All others expunge as normal.

What if we get sued?

- No exception in expunction statute to keep files to defend against potential civil suit
- But
 - If a defendant files a civil suit, he necessarily makes contents of expunction file a matter subject to discovery
 - If defendant will not consent to release of expunction file, civil action should be dismissed

W.V. v. State, 669 S.W.2d 376 (Tex. App.—Dallas 1984)

Identity Theft / Misused Identity



Identity Theft / Misused Identity

- Authorized where arrested person gives another's identifying information or arrested solely due to clerical error
- Petition and order filed by DA's office

Identity Theft / Misused Identity

- Petitioner's identifying information **only** is redacted from file
 - May replace with arrested person's information if known
- No records returned to clerk
- No certification required

Nondisclosures



Filed in court that handled criminal case

Basic Requirements

- No other convictions/deferred from time sentence pronounced through waiting period
- Never convicted/deferred for:
 - Any offense requiring sex offender registration
 - PC 19.02, 19.03, 20.04, 20A.02, 20A.03, 22.04, 22.041, 25.07, 25.072, 42.072
 - Any offense involving family violence

AND

Must fit into one of eight categories

1. "Automatic" nondisclosure
2. Deferred adjudication
3. Misdemeanor community supervision
4. Misdemeanor jailtime
5. DWI probation
6. DWI jailtime
7. Veterans Court
8. Human trafficking victims



Petitioning

- Automatic nondisclosures
 - No petition, just provide information and \$28 fee
 - No formal hearing required
- All others
 - Must file petition, pay \$28 fee plus other civil fees
 - Hearing only if State requests within 45 days **OR** cannot determine eligibility from face of petition



Notification

- Court clerk sends copy of order to DPS within 15 days
 - Clerk seals own records "as soon as possible" after sending notice to DPS
- Within 10 days of notice from clerk, DPS
 - Seals own records
 - Sends order to agencies with records



Notification

- State agencies
 - Seal records within 30 days of getting notice from DPS
 - No certification required
- Private agencies
 - Destroy records as soon as receive notice from DPS

Appeal



Appeal

- Direct appeal
 - Only if amount in controversy >\$250
 - Rarely allowed
- Mandamus
 - Judge must have clearly abused discretion
 - No other right to appeal

Which records are included?



- “Criminal history record information”
- Identifiable descriptions and information about a person

Which records are NOT included?

- Fingerprints and other identification information that does **not** indicate involvement in criminal justice system
- Posters, etc for identifying or apprehending fugitives
- Public judicial, administrative, or legislative proceedings, and clemency announcements
- Court records & published judicial or administrative opinions

Effect of nondisclosure



- Must seal records within 30 days of notice from DPS
- Agencies may not release information except to:
 - Petitioner
 - Other criminal justice agencies, for criminal justice purposes
 - List of exempt agencies
- Petitioner may **not** waive nondisclosure

Exempted agencies

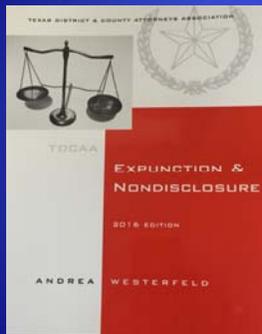
- Educational agencies
 - School districts, Board for Educator Certification, TEA
- Regulatory & licensing agencies
 - Board of Law Examiners, Private Security Board, Board of Nursing, Dept of Insurance
- Health services
 - Medical Board, Dept of State Health Services, hospitals

See complete list at Gov't Code 411.081(f)

Petitioner's Rights

- Petitioner may deny occurrence of arrest and prosecution
 - Unless information being used against him in subsequent criminal proceeding
- Petitioner is **not** required to disclose on any application for employment or licensing

Thank you!



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Book available at
tdcaa.com

Updated edition coming Winter 2017/18!
