

CLEARING UP THE JUVENILE CRIMINAL RECORD

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State Bar of Texas
**SPECIAL EDUCATION ISSUES AND THE
JUVENILE JUSTICE SYSTEM IN TEXAS**

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CHAPTER 3

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BIOGRAPHICAL INFORMATION

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CLEARING UP THE JUVENILE CRIMINAL RECORD

I. INTRODUCTION

This paper provides a brief overview of what Texas criminal records can be removed by an individual. My focus is on eligibility; that is, what a person can seal, expunge, or non-disclose from their criminal history.

A. Where to Start

First, determine your client's criminal history. Second, determine whether the client was a juvenile or an adult when the offense occurred.

B. Who is a Juvenile?

In common usage, a juvenile may mean 16 years old and under; 18 years old and under; or 21 years old and under.

However, under Texas law, a juvenile is ten to sixteen years old. An adult is seventeen and older.

Sealing of records governs clearing offenses that occurred as a juvenile.

Expunction and non-disclosure are the two main mechanisms to clear an offense that occurred as an adult.

C. The Effect

Expunction, non-disclosure, and sealing of records legally entitle a person to deny that the arrest occurred. All three remedies hide the record from the public.

D. A Summary of the Three Actions

1. Expunction

Expunction, which is governed by Chapter 55 of the Code of Criminal Procedure, basically applies to cases that are dismissed without punishment; pardoned by the governor; or acquitted by a jury. Expunction also applies to a completed deferred adjudication on a Class C misdemeanor.

Expunction is a right; if the person is eligible, a judge does not have discretion to deny an expunction.

Expunction is the strongest remedy of the three mechanisms and results in a record being erased.

2. Non-Disclosure

Non-disclosure applies to completed deferred adjudications on crimes punishable by jail time. Some misdemeanors can be non-disclosed immediately after completion of community supervision; some misdemeanors require a two year waiting period. Felonies require a five year waiting period.

Some offenses like crimes involving family violence are not eligible for non-disclosure.

A judge has discretion whether to grant or deny a non-disclosure.

Non-disclosure results in a record being hidden from the public. However, the record is not destroyed and several entities designated by the legislature can see a non-disclosed record.

Non-Disclosure is laid out in §411.081 of the Texas Government Code.

3. Sealing of Records

Sealing of records, found in § 58.003 of the Juvenile Justice Code, governs concealing a juvenile record. Sealing of records results in a juvenile record being sealed with the clerk of the court. It is not as strong as expunction but stronger than non-disclosure.

Sealing of records is also available to more offenses and dispositions than expunction and non-disclosure. Thus, while an adult conviction can never be expunged or non-disclosed, many juvenile adjudications can be sealed.

II. EXPUNCTION

Expunction is the strongest remedy and the most limited one. Chapter 55 of the Code of Criminal Procedure governs expunction.

A. Eligibility (Article 55.01)

1. Basically, a person can have an offense expunged in the following instances:

- a. The petitioner was acquitted by the trial court.
- b. His misdemeanor was dismissed without punishment; the statute of limitations of two years has passed; and he does not have a felony conviction five years preceding the arrest.
- c. The petitioner was convicted and then pardoned by the governor.
- d. His felony was dismissed without punishment; the statute of limitations has run or presentment was made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense; and he does not have felony conviction five years preceding the arrest.
- e. He completed deferred adjudication on a class c misdemeanor; the statute of limitations has run; and he does not have a felony conviction five years preceding the arrest.

2. What Cannot be Expunged:

- a. A jail sentence unless pardoned by the governor;
- b. A prison sentence unless pardoned by the governor;
- c. A sentence of a fine unless pardoned by the governor;
- d. A sentence of regular community supervision or deferred adjudication community supervision on any offense punishable by confinement.
- e. A sentence of community supervision that is set-aside and dismissed under Texas Code of Criminal Procedure Art. 42.12 § 20.

3. Felony Eligibility in More Depth

Felony eligibility for an expunction is unsettled. Recently, in *T.C.R. v. Bell County District Attorney's Office*, 2009 Tex. App. LEXIS 6136, the Third Court Appeals offered an opinion favorable to felony expunction petitioners.

In short, the Court found that a person is entitled to expunction if he can satisfy one of the possibilities in § 55.01(a)(2)(A) and either 55.01(a)(2)(A)(i) or 55.01(a)(2)(A)(ii).

This opinion basically says that a dismissed felony can be expunged if either the statute of limitations has run or because presentment was made because of “mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense.”

B. Procedure (Article 55.02)

An expunction is a civil proceeding and filed in district court in the county where the offense occurred. The petition, which contains identifying information of the client and the offense, is served on the public agencies that have records of the arrest. The petition must be verified.

The petition should also include a list of private entities that purchased the record through DPS or the county of the offense.

When the court finds that the petitioner qualifies for expunction, the court will enter an order directing the noticed agencies to destroy their records of the offense.

C. Acquittal—Accelerated Expunction

If the petitioner was acquitted of the offense, he is entitled to an accelerated expunction order. The district court must enter the expunction order within thirty days of the acquittal.

D. Effect (Article 55.03)

All records of the offense will be destroyed. The petitioner is allowed to deny that the arrest ever occurred except when under oath in a criminal proceeding. In that case, the petitioner can say that the matter was expunged.

Caveat—despite the fact that the records have been destroyed, immigration lawyers recommend disclosing an expunged record on naturalization applications.

E. Appeal

When a district court denies an expunction, the petitioner may appeal in the same manner as in a civil case.

III. NON-DISCLOSURE

Non-disclosure applies to completed deferred adjudications on offenses punishable by confinement. Unlike expunction, non-disclosure is not a right. The judge has the right to grant or deny a non-disclosure based on the “best interest of justice” whether or not the petitioner is eligible.

Non-disclosure does not result in the destruction of the records; rather, the records are hidden from the public. Several entities with a public interest designated by the legislature can still see the arrest record.

A. Automatically Disqualified (411.081(d)(e))

1. Must Complete the Community Supervision Term

The petitioner must receive a discharge and dismissal under Art. 42.12 § 5(c) of the Code of Criminal Procedure. If the court revokes the deferred adjudication and finds the defendant guilty, he is not eligible to non-disclose the offense.

2. Another Offense during the Community Supervision Term

A person cannot apply for non-disclosure of an offense if during the period of community supervision, he was convicted or placed on deferred adjudication for another offense (traffic citations punishable by fines do not count).

3. Disqualifying Offenses

A person can never apply for non-disclosure if he has a conviction or was placed on deferred adjudication for:

- a. an offense requiring sex offender registration under Chapter 62, Code of Criminal Procedure;
- b. aggravated kidnapping;
- c. murder or capital murder;
- d. injury to a child, elderly or disabled individual;

- e. abandoning or endangering a child;
- f. violation of a protective order or magistrate's order;
- g. stalking;
- h. any offense involving family violence as defined by Family Code § 71.004.

B. Misdemeanor Eligibility

If the petitioner meets the above requirements, he can apply for non-disclosure for most misdemeanors immediately after finishing the community supervision term.

1. Misdemeanors with a Two Year Waiting Period

Some misdemeanors require that the petitioner wait two years from the date he finishes the community supervision term before applying for non-disclosure. During that two year period, the petitioner cannot be convicted or placed on deferred adjudication for an offense other than a traffic citation punishable by a fine.

The misdemeanors with a two year waiting period are found in Chapters 20, 21, 22, 25, 42 and 46 of the Penal Code.

C. Felony Eligibility

1. Five Year Waiting Period

In addition to meeting the requirements in subsection A above, a petitioner who wants to non-disclose a felony deferred adjudication must wait five years from the date he finishes community supervision. During that five year period, the petitioner cannot be convicted or placed on deferred adjudication for an offense other than a traffic citation punishable by a fine.

D. Best Interest of Justice

The judge has discretion to grant or deny a non-disclosure order; that standard is the "best interest of justice."

E. Effect

1. Can Deny the Arrest

A person granted non-disclosure may "deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding." Texas Government Code § 552.142

2. Record is Hidden from the Public

The District Clerk and DPS will remove their record from their public databases. Consumer reporting agencies cannot release a non-disclosed order.

3. Entities Who Can See a Non-Disclosed Order

Several entities with a public interest can see a non-disclosed order. For example, schools, hospitals, and several licensing boards can see non-disclosed orders. See § 411.081(i).

IV. SEALING OF RECORDS

Sealing of records refers to offenses committed before the person turned seventeen; it is the mechanism to conceal a minor's offense.

When a record is sealed under § 58.003, all of the records are destroyed except the court file which is kept by the court clerk. Any mention of the record in computer or paper indices is removed. Sealing of records is more powerful than non-disclosure but not as strong as expunction.

A. Ineligible

If the juvenile has received a determinate sentence, any juvenile record that the petitioner has can never be sealed.

B. Eligibility of Felony Adjudications (Non-Determinate Sentence)

1. Must be twenty-one years old.
2. The petitioner must never have been certified for any offense.
3. The juvenile record must not have been used in the punishment phase of an adult prosecution.
4. The petitioner cannot have been convicted of a felony since turning seventeen.
5. In this instance, the court has discretion whether to grant or deny the sealing of records.

C. Felony Dismissal, Non-Felony Adjudications

1. Right--The juvenile has a right to seal his felony dismissal, conduct in need of supervision case, or misdemeanor adjudication if:

- a. two years has elapsed since the juvenile exited the system and
- b. in that two year period, the petitioner does not have a felony conviction; a conviction for a misdemeanor involving moral turpitude; has not been found to engage in delinquent conduct or conduct indicating a need for supervision; and does not have a pending criminal proceeding.

2. Discretion—the judge has discretion to seal a dismissed felony or a non-felony adjudication without the two year waiting period if the petitioner since exiting the system does not have a felony conviction; a conviction for a misdemeanor involving moral

turpitude; has not been found to engage in delinquent conduct or conduct indicating a need for supervision; and does not have a pending criminal proceeding.

D. Not Guilty

The judge shall immediately seal a record when the juvenile is found not guilty after a trial.

E. Effect

Agencies that have a record of the arrest must return the records to the juvenile court within 60 days of receiving the order. All index references to the record must be deleted within 60 days of receipt of the order. The petitioner is allowed to deny the arrest, even in a subsequent criminal proceeding.

V. MISCELLANEOUS PROVISIONS

Some specific areas of the law have their own clearing records rules.

A. Drug Court

As set out in § 469.001 of the Texas Health and Safety Code, a participant in drug court has different rules for non-disclosure.

Similarly, §58.003 of the Juvenile Justice Code delineates when a juvenile who participated in a drug program can have their record sealed.

B. Veterans Court

S.B. 1940, passed by the 2009 legislature, creates a Veterans Court. Successful completion of the program allows for a dismissal that can be expunged.

C. Possession of Alcohol by a Minor

Section 106.12 of the Texas Alcohol Beverage Code allows a minor who has a conviction for possession of alcohol by a minor to expunge the arrest if he reaches the age of twenty-one and does not have another conviction for the offense.

D. Class C Offenses by a Juvenile in Municipal or Justice Court

Article 45.0216 of the Code of Criminal Procedure allows for expunction of certain Class C offenses committed by minors and prosecuted in a municipal or JP court.