

# **Practical Procedures for Expunction of Class C Misdemeanors**

Presented by

**Andrew Hawkins**

Hawkins & Walker, PC

Fort Worth, Texas

817-877-3355

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# Preliminary Information

This presentation concerns expunctions on Class C misdemeanors in Texas and does not apply to higher charges. I want to thank my partner, Sommer Walker, for her help with preparing this presentation and my son, Jackson, for helping with the slides.

## Benefits of an Expunction

If a case has been dismissed, the charge and arrest records, if applicable, remain. Such records can appear in a background check or require disclosure on applications.

A final expunction order has two benefits, (1) it allows the petitioner to deny both the charge and the arrest,<sup>1</sup> and (2) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited. TEX. CODE CRIM. PROC. ANN. art. 55.03. Thus, an expunction *should* prevent information about the charge and arrest from appearing in a background check. An expunction also gives the petitioner the ability to deny the charge and arrest, which is useful when completing applications for jobs, housing, volunteer opportunities, etc.

PRACTICE POINT: Despite the deadlines in the statute for compliance, the process may take some time to fully clear. You should let your clients know that the issuance of the order does not mean information will not pull in a background check conducted soon thereafter. Further, governmental agencies and private entities will sometimes fail to remove the information. Finally, the statute only applies to information held by:

- (A) law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
- (B) central federal depositories of criminal records; and

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<sup>1</sup> An exception is if the petitioner is questioned under oath in a criminal proceeding about an arrest for which the records have been expunged. In this case, the petitioner may state only that the matter has been expunged. *Id.* art. 55.03(3)

(C) private entities that compile and disseminate for compensation criminal history record information.

*Id.* art. 55.02. The statute does not apply to private entities that do not purchase records; for example, the store where an alleged theft occurred.

## Filing Procedure

### A. Cases That Can Be Expunged

Not all cases are eligible for an expunction. A charge is eligible for an expunction under one of the following provisions:

- Acquittal by the trial court. *Id.* art. 55.01(a)(1)(A).
- Convicted and subsequently pardoned. *Id.* art. 55.01(a)(1)(B).
- There is no final conviction and the charge is no longer pending. *Id.* art. 55.01(a)(2).
- The case is dismissed after the completion of deferred disposition. *Id.* art. 45.051(e).

PRACTICE POINT: A conviction is not eligible for an expunction; however, the case may be eligible for an order of non-disclosure under Section 411.0735 of the Texas Government Code. TEX. GOV'T. CODE § 411.0735. To qualify for a non-disclosure after a conviction, the defendant could not have been previously convicted of or placed on deferred adjudication community supervision for another offense other than a traffic offense that is punishable by a fine only. *Id.*

### B. When You Can File

When an expunction can be filed depends on how the case was disposed. There is no waiting period after an acquittal or dismissal after completion of deferred disposition. There is a 180 day waiting period if there is no final conviction, the charge is no longer pending and there was no felony charge arising from the same transaction. TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2)(A)(i)(a).

PRACTICE POINT: The State can request permission to keep information under seal if the statute of limitations has not run for a dismissed case or another case part of the same transaction. *Id.* art. 55.02 § 4. The State has the burden to establish that “there is reasonable cause to believe that the state may proceed against the person for the offense(s).” *Id.* If established, the records can be held only by the applicable law enforcement agency and the prosecuting attorney. *Id.* Any additional government agencies or private entities with information related to the charge and arrest still have to destroy their records. *Id.* The petitioner also has the right to deny the arrest and charge unless testifying in a subsequent criminal charge. *Id.*

### C. Filing Costs

The filing fee in a municipal court of record or a justice court is \$100. *Id.* art. 102.006(a-1). Unlike an expunction filed in a district court, there is no extra fee for service of the petition or order. *Cf.* art. 102.006(a) (fees for service of the petition and order on agencies for expunctions filed in district court).

PRACTICE POINT: There is no charge for an expunction following an acquittal if the expunction is filed not later than the 30th day after the date of the acquittal. *Id.* art. 102.006(b). An expunction after an acquittal should be filed in the court with original jurisdiction.

### D. Where You Can File

The petition can be filed in any municipal court of record or justice court in the county where the petitioner is arrested, or the alleged offense occurred. *Id.* art. 55.02 § 2 (a-1). The petition does not have to be filed in the court with original jurisdiction. You cannot file an expunction in a municipal court that is not a court of record.

PRACTICE POINT: Find one court in each county you practice to handle all class C expunctions for that county. For example, we file expunctions for all Tarrant County Class C cases in the same municipal court regardless of the court with original jurisdiction. This consolidates hearings and provides predictable results as we have a standard petition and order that both my office and the court are comfortable with.

## E. What Needs to Be In the Petition

An expunction petition has to be verified and include the following information:

- (1) the petitioner's:
  - (A) full name;
  - (B) sex;
  - (C) race;
  - (D) date of birth;
  - (E) driver's license number;
  - (F) social security number; and
  - (G) address at the time of the arrest;
- (2) the offense charged against the petitioner;
- (3) the date the offense charged against the petitioner was alleged to have been committed;
- (4) the date the petitioner was arrested;
- (5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
- (6) the name of the agency that arrested the petitioner;
- (7) the case number and court of offense; and
- (8) together with the applicable physical or e-mail addresses, a list of all:
  - (A) law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
  - (B) central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction; and
  - (C) private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction.

*Id.* art. 55.02.

PRACTICE POINT: An arrest can be a custodial or non-custodial arrest. The issuance of a citation qualifies as a non-custodial arrest. See *Carson v. State*, 65

S.W.3d 774, 784 (Tex.App.--Fort Worth 2001, no pet.)(finding a person's submission to an assertion of authority by appearing in court to contest charges is a non-custodial arrest).

PRACTICE POINT: We have obtained either an email or fax number for service of the petition and order on most of the governmental agencies and private entities that we list in our petitions. This saves service fees for the courts where we file our petitions. See Art. 55.02, which allows service of the notice of hearing and order granting an expunction by certified mail, return receipt requested; or secure electronic mail, electronic transmission, or facsimile transmission.

## F. The Hearing

The hearing has to be set at least thirty days after the filing of the petition. *Id.* art. 55.02 § 2 (c).

PRACTICE POINT: Unlike a non-disclosure, an expunction is non-discretionary. If the case is eligible to be filed, it should be granted. We have had *very* few objections to our expunction filings; the objections we have had involved multiple charges from the same incident or an alleged criminal episode.

PRACTICE POINT: The statute does not require that governmental agencies and private entities receive thirty days notice of the hearing; rather, the clerk is to give these entities “reasonable notice” of the hearing. *Id.*

## G. What Needs to Be In the Order

An order of expunction has to include the following information:

- (1) the petitioner’s:
  - (A) full name;
  - (B) sex;
  - (C) race;
  - (D) date of birth;
  - (E) driver’s license number;
  - (F) social security number;

- (2) the offense charged against the petitioner;
- (3) the date the petitioner was arrested;
- (4) the case number and court of offense; and
- (5) the tracking incident number (TRN) assigned to the individual incident of arrest under Article 66.251(b)(1) by the Department of Public Safety.

*Id.* art. 55.02.

PRACTICE POINT: An expunction order requires less information than the petition; however, all of the information listed in the petition can also be listed in the order even if it is not required.

PRACTICE POINT: The order has to have a judgment of acquittal attached and incorporated by reference if the expunction is filed after an acquittal.

## Other Issues

### A. Immigration Issues

If the petitioner is in the process of filing or plans to file for legal status in the future, you need to obtain a complete copy of the Court's file prior to filing the expunction application. The immigration attorney may need part or all of the court's file to show the nature of the charge and how it was disposed of. When the expunction is granted, the court will destroy these documents and you will not have an opportunity to obtain the records.

### B. Multiple Charges

#### 1. Plea in Bar

A plea in bar is an admission of an unadjudicated offense under Section 12.45 of the Texas Code of Criminal Procedure. TEX. PENAL CODE ANN. § 12.45. An expunction can not be granted on a charge if prosecution is barred pursuant to an agreement under Section 12.45. *Collin Cty. Dist. Attorney's Office v. Fourrier*, 453 S.W.3d 536, 542 (Tex. App.--Dallas 2014, no pet.) (unadjudicated theft offense resulted in a final conviction for purposes of expunction statute because guilt for the offense was admitted and

considered in determining punishment for evading arrest offense); *see also State v. N.R.J.*, 453 S.W.3d 76, 82 (Tex. App.—Fort Worth 2014, pet. denied) (when pursuant to section 12.45 of penal code, defendant admits guilt of an offense by pleading guilty or nolo contendere to a second offense and requests that the trial court account for that admission in sentencing for the second offense, the admitted, unadjudicated offense is not expungable; "that is, the unadjudicated offense has resulted in a final conviction for purposes of the expunction statute because guilt for the offense was admitted and considered in determining punishment, albeit for another offense").

PRACTICE POINT: In the alternative to a plea in bar, it is advisable to either do deferred disposition on each matter that may be eligible for expunction or have the State, if it is willing, dismiss a case outright before an admission of guilt by the defendant during a sentencing hearing. TEX. PENAL CODE ANN. § 12.45

## 2. One Arrest, One Case is Eligible for Expunction and One is Not

In *Ex Parte R.P.R.G.*, the Texas Supreme Court found "subarticles (a)(2) and (a)(2)(A) of Article 55.01 of the Texas Code of Criminal Procedure are offense-based provisions with regard to misdemeanors but arrest-based with respect to felonies." Under this holding, the expunction statute looks at specific offenses vs arrests if all offenses under an arrest are misdemeanors. This means a misdemeanor charge can be expunged, if it otherwise qualifies, even if another misdemeanor from the same arrest is not eligible for expunction.

PRACTICE POINT: If a police report references a charge or charges that are subject to an expunction order and charge or charges that are not, any reference to a charge subject to the expunction order is to be redacted in the order. *State v. T.S.N.*, 547 S.W.3d 617, 623-24 (Tex. 2018).

## C. Assault Family Violence

Assault Family Violence cases can be expunged.

## D. Safekeeping of the Order

The governmental agencies and private entities along with the court where the expunction is filed will, or should, destroy all information about the charge and the expunction filing, including the expunction order. The petitioner should be advised to keep a copy of the order in a safe place. The copy may be the only evidence of the expunction if the need arises later (for example, the charge appears online in a governmental agency or private entity's records).

PRACTICE POINT: You should also keep a copy of the order, both hard and digital copies, in the unlikely event that the order is needed in the future.

## E. Review for Removal

You should have a procedure to review that the information related to the charge has been removed after the order is granted. We will typically check a couple of months after the expunction order has been granted to ensure that the information has been removed. This includes looking online and calling the court with original jurisdiction.

PRACTICE POINT: Information can appear online in weird places. For example, the City of Arlington removed the information about a charge in its main search online; however, the charge remained in the payment portal. We had to bring this to the court's attention multiple times. We have also seen cases appear on credit reports after the case was reported to collections.

PRACTICE POINT: Article 55.02, Section 5 provides that the "clerk of the court shall destroy all the files or other records ... not earlier than the 60th day after the date the order of expunction is issued or later than the first anniversary." TEX. CODE CRIM. PROC. ANN. art. 55.02 § 5. This provision applies to the clerk of the court where the expunction is filed, not the clerk of the court with original jurisdiction. *Id.* We have had courts with original jurisdiction try to keep the information online following service of an expunction order under this provision, which is wrong.