

Written Testimony for the Texas Senate Jurisprudence Committee

October 23, 2014

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Interim Charge 4:

Study and make recommendations on the availability and application of deferred adjudication, orders for non-disclosure, and expunctions. Study extending the use of expunction of criminal records history and non-disclosures to certain qualified individuals with low-level, non-violent convictions.

Deferred Adjudication (Code of Criminal Procedure 42.12, Sec. 5)

Deferred adjudication is a special form of judge-ordered community supervision (commonly known as “probation”) that permits a defendant to accept responsibility for a crime without an actual conviction being placed on the record. Only a judge can grant deferred adjudication, not a jury, so the prosecutor and defendant must agree to waive a jury trial.

Who is eligible?

Any defendant charged with a misdemeanor crime other than driving/flying/boating while intoxicated. In addition, any defendant charged with a felony, **except:**

- Driving/flying/boating while intoxicated;
- Intoxication assault;
- Intoxication manslaughter;
- A repeat drug offense enhanced with a drug-free zone finding; and
- A repeat sex offense (indecent with a child, sexual assault or aggravated sexual assault).

Orders of Nondisclosure

An order of nondisclosure is a court order prohibiting public entities such as courts and police departments from disclosing certain criminal records. It also legally frees an individual who is granted an order of nondisclosure from disclosing information about their criminal history (subject to the order of nondisclosure) in response to questions on job applications. The criminal record may be disclosed to other criminal justice agencies for criminal justice or regulatory licensing purposes, as well as several non-criminal justice agencies and entities (e.g. Texas Medical Board, Texas Board of Law Examiners, Texas Education Agency).

Who is eligible?

1. Individual must have been placed on deferred adjudication community supervision for the offense in question.
 - If individual was convicted of an offense, the individual is not entitled to file a petition for an order of nondisclosure.

2. Individual must successfully complete deferred adjudication.
3. Individual must not be seeking an order of nondisclosure for one of the following offenses:
 - Offenses including murder; capital murder; aggravated kidnapping; injury to a child, elderly individual or disabled individual; abandoning or endangering a child; violations of protective order or condition of bond in a family violence, sexual assault or abuse or stalking case; and stalking.
 - Offenses that require registration as a sex offender
 - Offenses involving family violence
4. Individual must wait a period of time following the court’s order of dismissal and discharge before seeking an order of nondisclosure
 - Felony = 5 years
 - Certain Misdemeanors = 2 Years
 - i. Unlawful restraint, sexual offenses, assaultive offenses, offenses against the family, disorderly conduct and weapons offenses
 - ii. Chp 20, 21, 22, 25, 42 and 46 of TX Penal Code
 - All other Misdemeanors = no waiting period
5. Individual must not have been convicted of (or placed on deferred adjudication for) any criminal offenses between deferred adjudication and dismissal and discharge.
 - Fine only offenses under Transportation code do not count.

Who isn’t eligible?

An Individual is ineligible for an order of nondisclosure if they have ever been convicted or placed on deferred adjudication for the following TX Penal Code offenses:

Indecency with a child	Abandoning/endangering a child	Online solicitation of a minor
Aggravated kidnapping with intent to abuse victim sexually	Repeated violations of bond conditions in a family violence case	Continuous sexual abuse of young children
Burglary of a habitation with intent to abuse a victim sexually	Stalking	Injury to a child or elderly
Compelling prostitution	Aggravated sexual assault	Violation of a protective order
Possession/promotion of child pornography	Incest	Any offense involving family violence
Unlawful restraint, kidnapping or aggravating kidnapping of person under 17	Sexual performance by a child	Sexual assault
Capital murder/murder	Indecent exposure	Offenses requiring registration as a sex offender

Court process for Order of Nondisclosure

1. Once individual files a petition for an order of nondisclosure, the court clerk provides notice to the state (prosecutor) of the filing.
2. The State may request a hearing on the petition.
 - a. State has 45 days after receiving notice to request a hearing
3. Judge may issue an order for nondisclosure if:
 - a. Finds individual is entitled and meets all the criteria to file a petition; and
 - b. issuance of an order of nondisclosure is in the best interest of justice.

The Office of Court Administration developed a model petition for an order of nondisclosure that is on the Texas Judicial Branch website located at www.txcourts.gov/rules-forms.

Expunctions

An expunction is a tool that individuals can use to clear their record if they were wrongfully arrested or convicted of a crime.

Eligible for an Expunction

By Acquittal

- An individual must be acquitted by a trial court or Court of Criminal Appeals or pardoned; and
- the individual was not convicted of and is not subject to prosecution for another offense arising out of the same criminal episode

By Charges not being filed/case dismissed/Grand Jury No – Bill

- If individual was arrested and;
 - Individual released
 - No final conviction and none pending
 - No court ordered community supervision for offense **other than a Class C misdemeanor**
- And either:
 - No indictment/information and the required waiting period has passed
 - Class C Misdemeanor = 180 days
 - Class A & B Misdemeanor = 1 year
 - Felonies = 3 years
- Or;
 - Indictment/information dismissed and court finds mistake or fraud
 - Petitioner successfully completed pre-trial diversion
 - Statute of limitations has expired

- Note that individuals who received community supervision for a Class C Misdemeanor are eligible to receive an expunction. (Code of Criminal Procedure 55.01(a)(2)(A))

Expunctions for certain Juvenile offenses

- Fine only and municipal offenses
- Truancy
- Tobacco use by a minor
- Consumption of Alcohol in off-premises location
- Alcohol use by minors

Court Process for Expunctions

Order of Expunction is a civil matter. Individual/petitioner must prove they are entitled to an expunction.

General Provisions

- Hearing held in the trial court if any respondents contest the expunction.
- Respondents must have 30 days-notice for expunction hearing.
- Respondents have right to appeal decision.
- Once expunction order is final, clerk must send copy of expunction order to all respondents named in the petition for expunction.
- Agency that receives an expunction order must destroy all files and records related to the arrest or return the files and records to the court.
- Class B misdemeanor to violate an expunction order (Code of Criminal Procedure 55.04)
 - Exceptions
 - Doesn't apply to non-state agencies such as newspapers
 - Private companies that buy criminal histories face civil penalties for violating expunction orders

Acquittals

- **Trial Court**- Individual acquitted in trial court is entitled to an expunction and trial court must enter order of expunction 30 days after acquittal. (Code of Criminal procedure 55.01(a))
- **Court of Appeals** – period for court of criminal appeals to grant petition for discretionary review must expire before order of expunction granted. (Code of Criminal Procedure 55.01(b)(1)(C))
- **Court or Criminal Appeals** –District court may order an expunction following acquittal by CCA. (Code of Criminal Procedure 55.01(b))