

## **Expunging Criminal Records in Tennessee: More Rhetoric than Reality?**

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The concept of expunging criminal charges is not new to Tennessee; but its scope and prominence in the public sphere is. For several decades, Tennessee has had an expungement statute on the books, predominately focused on expunging non-conviction records. It wasn't until 2012 that the law expanded to permit the expunction of only *one* low-level, non-violent misdemeanor and felony conviction – essentially creating a first-offender expungement statute. Over the past five years, though, the statute has been amended repeatedly offering greater relief. One change allowed for partial expungements of dismissals in cases where some charges were dismissed, but others resulted in non-expungable convictions; while another amendment excluded “moving or nonmoving traffic offenses” for the purpose of the one-time expungement rule. As the legislature tinkered with the expungement statute, making it incrementally stronger, it also added a complementing statute that established a Certificate of Employability as an additional form of relief for those not eligible for expunging their convictions. A Certificate of Employability shields employers from negligence-in-hiring lawsuits if they hire a certificate-holder with a criminal record. Then most recently, in 2017, the Tennessee legislature expanded the adult expungement statute to include expunging up to two convictions provided that they are either two eligible misdemeanor convictions or one eligible misdemeanor and one eligible felony; while significantly lowering the filing fee for eligible convictions.

Paralleling the legislature's focus on expungement as a reentry tool, expungement has also become a major access to justice agenda item for the Tennessee Supreme Court's Access to Justice Commission, state and local bar associations, criminal court judges, law students, and legal aid organizations. The goal is explicit: to offer free legal assistance to those with eligible convictions. The result is tangible: thousands of expungement petitions have been filed, and eligible criminal charges ultimately expunged.

This notable reentry focus by the state legislature, legal organizations, and the courts has brought the term “expungement” into the mainstream and offered great hope to many seeking a second chance after a conviction. But a closer look at the Tennessee expungement statute and its implementation statewide reveals a statute that may be more rhetoric than reality for those who need it the most.

This outline first quickly summarizes the Tennessee expungement statute by highlighting its strongest features, and then turns to the very practical problems created by a complicated statute that is administered differently throughout the state.

## ***Expunging Records in Tennessee***

The essential elements of Tennessee's expungement statute T.C.A. 40-32-101:

What does expungement mean: All public records are "removed and destroyed" if the expunged charge was the result of a dismissal, a no true bill, or a successful completion of diversion. If the expunged records were the result of an eligible conviction, the clerk of the court is required to keep the records confidential and not release them to the public. Expunction means "the conviction of the expunged offense never occurred and the person shall not suffer any adverse effects or direct disabilities."

What is actually expunged:

Tennessee requires the expunction of all public records. It defines public records in the negative by listing what is "not" a public record. For example, law enforcement arrest records and district attorney files are not considered public records.

What can be expunged:

- Automatic expungement for dismissed charges at no cost to the petitioner.
- Non-discretionary expungement for eligible charges (i.e. certain sex offenses are excluded) that were dismissed based on a successful completion of diversion once the expungement fee of \$475 is paid in full.
- Discretionary one-time expungement for up to two eligible state convictions (two eligible misdemeanors or one eligible felony and an eligible misdemeanor) after a five-year waiting period and the expungement fee of \$280 is paid in full.
- Moving and nonmoving traffic convictions do not count against the maximum number of eligible convictions.

What is the process:

- For dismissals and diversions: a single-page, form petition created by the Administrative Office of the Courts is required and to be filed with the clerk's office. Once signed by the judge, the petition becomes the order sent to applicable agencies to command the expunction of public records.
- For convictions: A more extensive form petition created by the District Attorney's conference is required to present the required factors considered for expunging a conviction. The prosecutor's office can consent or file an independent recommendation with evidence. But the court ultimately decides by considering all of the evidence presented and "weighing the interests of the petitioner against the best interests of justice and public safety."

What is the legal effect of an expungement: An expungement "has the legal effect of restoring the petitioner... to the same status occupied before the arrest, indictment, information, trial, or conviction." No collateral consequences can be "imposed or continued." The petitioner also cannot be guilty of perjury for denying the charge or conviction in response to a question for "any purpose."

***Is the Tennessee Statute more rhetoric than reality?***

The expungement statute may appear to offer more relief than it actually does given the limited number of eligible convictions, the narrow definition of public records, one of the highest expungement fees in the country, and its often-confusing structure that can require careful and conflict-free legal advice.

**A. Administrative Obstacles**

The primary administrative obstacles for pro se applicants is filling on the expungement petitions for dismissals, diversions, and convictions. Each offers its own challenges, but the most basic one for dismissals and diversions is that it requests technical information that can be incorrect or incomplete on a person's criminal history. All of the fields on the form ask for technical information about the arrest and charging instruments and are required by the Tennessee Bureau of Investigation to help identify the correct records for expungement, but even a law student can be stumped without extremely explicit instructions and a complete criminal history printout. Compounding the problem, pro se applicants do not usually have access to their criminal history or have a step-by-step guide to filling out the expungement petition. Any error made in filling out the petition is cause for denying the petition.

**B. Costly Hurdles**

There are visible and invisible cost hurdles that present the most significant obstacles for indigent expungement petitioners. The very visible cost hurdle is written into the statute itself. In 2012, when expungement was extended to no-violent convictions, the state legislators supporting the bill believed that expungement petitions would be a significant revenue generator given the filing fees. As a result of this hope, jurisdictions were charging as much as \$450 to expunge a single conviction and \$475 to expunge a diversion. Of the total amount, \$100 dollars was a permitted local clerk fee. Although part of the 2017 amendment acknowledged this problem, and reduced the conviction expungement fee, it was only reduced to \$280 which is still prohibitively expensive for a low-income petitioner. And even prosecutors commented on the peculiarity of making it prohibitively more expensive to expunge diversions than convictions.

The invisible and in many cases most significant cost hurdle results from unpaid court costs attached to expungeable charges or convictions. Under the statute, court costs must be paid before a person can expunge any charge, even dismissed charges. Too often defendants agree to a dismissal of their charges "on payment of court costs." For example, a dismissed simple possession charge, one of the least expensive misdemeanor cases can result in court costs that exceed \$500. These costs have to be paid before the dismissed charge can be expunged. The same is true for eligible convictions which far exceed \$500. Unless indigent petitioners have legal help with a cost waiver motion, which has no guarantee of being granted, these charges will remain on their records until the costs are paid.

### C. Counseling Conflict

There are two legal representation issues. First, the statute requires the District Attorney to assist pro se petitioners in filing their expungement petitions. Reasonably, for dismissed charges that may not raise much of a problem. They are automatic and free. But for convictions it could. According to a 2014 Tennessee Attorney General Opinion, that requirement does not create a conflict. But it is hard to imagine that every prosecutor who is responsible for charging and convicting defendants can or should be committed to helping those same defendants destroy the eligible convictions from their records especially if the statute is vague. The Tennessee statute has several conflicting sections about what convictions can be expunged and what consists of partial expungements. For example, in 2015, language was added to exclude moving and nonmoving traffic offenses from the definition of eligible offenses. There has been significant disagreement between defense attorneys and prosecutors about what those moving and nonmoving offenses are. If a prosecutor is offering legal advice to a pro se defendant, the prosecutor may offer legal counsel that is too limited.

### D. Access to Justice Issues

As attorneys throughout the state join the growing momentum to help people expunge their records, the most common form of legal help is through an increasing number of weekend bar association or legal aid “expungement clinics.” The results of these clinics on paper are often overwhelmingly successful. Hundreds of expungement petitions are filed. Yet, the bulk of the work done at these clinics focus almost singularly on removing dismissals from a person’s criminal history. If dismissals were automatically removed by a clerk or computerized system, it would allow these free legal clinics to redirect their pro bono energy. The statute’s authority to expunge eligible dismissed charges would also be distributed more fairly, and not just to those for petitioners who are savvy enough or lucky enough to attend an expungement clinic.

Although expunging hundreds of dismissals is no small task, often there are more complicated legal issues relating to the eligibility of convictions (especially more than one). The pro bono attorneys often do not address conviction eligibility, court cost waiver issues, or unaffordable expungement fees. There is also the potential that pro bono attorneys who are not well-versed in the complexities of the expungement statute may give incomplete or incorrect legal advice. A one-stop-shop free legal services model offers only a partial solution and may actually mask how inaccessible the statute is for a person who cannot afford to hire a lawyer.

### E. Statewide Inequities in Legal Assistance

Two of the largest cities in Tennessee reflect the potential for how counties can successfully implement effective free legal help for people seeking to expunge their records. In Nashville, the clerk’s office developed an individualized, online form to request help with expungement. If a person has eligible charges, the clerk fills out and submits a petition. Independently, a Nashville general sessions court judge hosts a community court on several Saturdays throughout the year to assist petitioners in determining their eligibility for expungement, waive court costs, and sign orders on-sight. A judge in Memphis and one in Knoxville have replicated this weekend, community court model with hundreds of individuals lining up to attend. Also in Knoxville, the District Attorney’s office collaborated with the Clerk’s Office to set up an ‘expungement

screening' twice a week where an assistant DA and University of Tennessee clinic student attorneys, trained in expungement law, counsel pro se petitioners and assist them in filling out their petitions. The Administrative Office of the Courts has also set up an expungement clinic-in-a-box tool kit to help pro bono attorneys run effective clinics throughout the state.

These examples present ways that the courts, DAs, clerks, and local attorneys are developing best practices to help pro se petitioners understand how the expungement statute can help them and file those petitions. However, much of that work is occurring in Tennessee's biggest cities creating a disparity in assistance for people living in less populous and rural countries where resources are more limited.

### ***A Path to Reform***

Tennessee has the potential to be a national leader in expungement law. To resolve some of the tensions presented by the obstacles above, Tennessee's statute needs to become more accessible to indigent, pro se applicants. Other states have accomplished this by:

- A. Focusing expungement only on convictions, and removing dismissed charges automatically without the filing of a petition, and regardless of court costs.
- B. Removing judicial discretion for expunging eligible convictions, and either simplifying the petition or making it automatic after a specified waiting period.
- C. Expanding expungement of convictions based on desistance, not the number of convictions by creating longer waiting periods for more serious offenses.
- D. Destroying all expunged records.
- E. Removing expungement fee barriers for indigent petitioners.
- F. Creating a computerized system that can do the vast majority of record expungement work needed to truly give people a second chance.