EXPUNCTIONS
AND
NONDISCLOSURES OF DEFERRED ADJUDICATION
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I. EXPUNCTIONS

A. ELIGIBILITY

1. RIGHT TO EXPUNCTION

Article 55.01(a) of the Texas Code of Criminal Procedure states in relation to misdemeanors that "A person who has been placed under a custodial or noncustodial (emphasis added) arrest for commission of a felony or a misdemeanor is entitled to have all records and files relating to the arrest expunged if:

(1) the person is tried for the offense for which the person was arrested and is:

(A) acquitted by the trial court, except as provided by subsection (c)of this section; or

(B) convicted and subsequently pardoned; or

(2) each of the following conditions exist:

(A) an indictment or information charging him with commission of a felony has not been presented against the person for an offense arising out of the transaction for which the person was arrested, or if an indictment or information charging the person with commission of a felony was presented, the indictment or information has been dismissed or quashed, and:

(i) the limitations period expired before th date on which a petition for expunction was filed under Article 55.02 or

(ii) the court finds that the indictment or information was dismissed or quashed because the person completed a pretrial intervention program authorized under Section 76.011, Government Code, or because the presentment had been 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 or because it was void;

(B) he has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court ordered community supervision under Article 42.12, Code of Criminal Procedure for any offense other than a Class C misdemeanor; and

(C) he has not been convicted of a felony in the five years preceding the date of the arrest."

2. BEAM AND ITS AFTERMATH

Prior to 2001, Article 55.01 C.C.P. required indicted cases to meet the extra burden of proving that the indictment was dismissed because the presentment had been 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 or because it was void. In September, 2001 Article 55.01 was amended to add the provision that if a case was indicted and

dismissed or a motion to quash granted and the statute of limitations has expired, then the person can apply for an expunction, without having to show the more difficult standard.

Unfortunately, the amendment was poorly written. The problem of poor draftsmanship was exacerbated by the Supreme Court when it ruled in *State v. Beam*, 226 S.W.3d 392 (Tex. 2007), that 55.01(a)(2)(A)(I) requires the expiration of limitations for both felonies and misdemeanors before expunction may be sought. 55.01(a)(2)(A) sets out a main paragraph with two conditions (either that 1 an indictment or information was not presented, or 2) that it was dismissed or quashed) one of which must be satisfied. The problems with the drafting result from what follows as subparagraphs (I) and (ii) which contained the condition that the limitations period expire prior to filing the petition or that the charge have been dismissed for certain specified reasons such as absence of probable cause. The language of the statute was ambiguous as to whether the subparagraph requirements apply to both conditions set out in the main paragraph or just to the latter. The most reasonable legislative intent was that these two subparagraphs apply only to cases where the charge was dismissed or quashed, and not to situations in which no indictment or information was ever presented . The legislative intent for the amendment was to make it easier for indicted cases to be expunged. It was not the intent to place a waiting period on cases where no indictment or information was ever presented.

Beam has produced a major anomaly as illustrated in *In re. S.S.A,* 2010 WL 703229 (Tex. App.–El Paso, 2010, no pet.) where the Court of Appeals in El Paso reversed the district court after it granted an expunction in a case where the petitioner was originally charged with an offense with no limitations period expiration even though the district attorney's office had declined to prosecute the case and did not indict the case. The Court held that no expunction would be possible in this situation because the petitioner could not comply with 55.01(a)(2)(A)(I) since the limitations period did not expire and could not comply with 55.01(a)(2)(A)(ii) there was no indictment of information to be dismissed. The effect of this analysis is to preclude expunction of unindicted expunctions that have no statute of limitations, even if the case was not indicted due to a lack of probable cause or some other mistake.

In *T.C.R. v. Bell County*, 2009 WL 3319922 (Tex. App. – Austin, 2009, no pet.), the Third Court of Appeals held that under art. 55.01, a person charged with a felony offense is eligible for expunction, subject to other requirements, where the charging instrument has been dismissed or quashed and the limitations period for the offense has expired. The Court held that a person seeking expunction of a felony case that has been indicted and subsequently dismissed is only required to prove compliance with either 55.01(a)(2)(A)(I) or 55.01(a)(2)(A)(ii), and not both as the state urged.

House Bill 3481 of the 81st Texas Legislature was passed by the house and would corrected the anomaly created by *Beam* by authorizing the expunction of criminal records, including law enforcement case files, 180 days after an arrest if no formal misdemeanor or felony charges had been filed. The law was vetoed by Governor Perry. In his veto, he wrote:

"Expunction statutes should not be used as a means of discovery or as a means to force a prosecutor to rush to file formal charges prematurely. Allowing a person to know the identities of witnesses or the nature of their evidence unnecessarily endangers both law enforcement and

citizen witnesses prior to an indictment for murder, organized crime, sexual assaults and other serious offenses. House Bill No. 3481 precipitates an untenable injustice to victims and a hazard to public safety."

3. INDICTED CASES IN WHICH EXPUNCTIONS HAVE NOT BEEN GRANTED FOR FAILURE TO PROVE INDICTED BY MISTAKE, ETC.

The following list of cases are all decided before the law changed (except for the last case, *In Re Means*). Each case was decided under the old version of the statute that required indicted cases to meet the extra burden of proving the presentment was made by mistake, false information, or proving a lack of probable cause at the time of the dismissal to believe the person committed the offense or proving that the indictment was void.

Dismissed for insufficient evidence: *Herron v. State*, 821 S.W.2d 329 (Tex.App.-Dallas, 1991). *Harris County District Attorney's Office v. Pennington*, 882 S.W.2d 529 (Tex. App.-Houston 1st Dist., 1994).

A dismissal: *Metzger v. Houston Police Dept*., 846 S.W.2d 383 (Tex.App.-Houston [14th Dist.], 1992).

A dismissal because of the prosecuting witness's request: Smith v. Millsap, 702 S.W.2d 741 (Tex.App.-San Antonio, 1985).

Motion to suppress granted: *Ex parte Kilberg*, 802 S.W.2d 17 (Tex.App.-El Paso, 1990), *Harris County District Attorney's Office v. MGG*, 866 S.W.2d 796 (Tex.App. Houston-[14th Dist.], 1993).

Directed Verdict (under previous law): *Wilkomirski v. Texas Criminal Information Center*, 845 S.W.2d 424 (Tex.App.-Houston [1st Dist.] 1992).

Not guilty: See prior case.

A dismissal for insufficient evidence has been held to not qualify for an expunction because it does not meet the statutory requirement of "dismissed because the presentment had been 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 or because it was void". Thus, a dismissal of a felony indictment in and of itself is not expungable. A case where the indictment was dismissed because the child witness was found incompetent to testify was not granted an expunction and the Court of Appeals affirmed. See: *Metzger v. Houston Police Department, supra*. In addition, the petitioner was not allowed to introduce evidence to support his contention that the case was dismissed due to "mistake, false information other similar reason indicating absence of probable case at the time of the dismissal". The court only reviewed the reason given on the dismissal document and the testimony of the Assistant District Attorney handling the case. The suppression of evidence that results in a dismissal is not expungable because the petitioner can not meet the burden on showing that the dismissal was due to a lack of probable cause or false information or mistake.

Specifically, the Courts have held that when evidence is excluded on procedural grounds, it is not the same as showing that the factual underpinnings to the indictment were incorrect. *See In the matter of Wilson*, 932 S.W.2d 263 (Tex. App.-El Paso, 1996).

Wilson, supra, involved the expunction of two different convictions. The first was a heroin conviction that on appeal the Court of Criminal Appeals held the indictment was void and dismissed the case. The Court held that the petitioner met all the statutory elements and the expunction was mandatory under 55.01(a). The second conviction was appealed and the confession was ruled inadmissible. On remand to the trial court the district attorney dismissed the case for insufficient evidence. The trial court granted the expunction for this case also and the Court of Appeals reversed, holding that the petitioner failed to prove the elements for the mandatory expunction under 55.01(a) and he did not fall within the discretionary expunction of 55.01(b).

In re Means, 2009 WL 1530815 (Tex.App.-Texarkana, 2009, no pet.) In affirming the trial court's denial of petitioner's request for expunction, the appellate court held that a statement by the district attorney on the dismissal that "[v]ictim cannot remember the indecency part of the Indictment." did not meet 55.02(a)(2)(A)(ii)'s requirement that the dismissal be made "because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal.

4. FELONY CASES IN WHICH AN EXPUNCTION HAS BEEN GRANTED

A no bill is expungable. Note, again, there is a provision that if the statute of limitations has not run, the District Attorney and the police can keep their records. *Ex parte Aiken*, 766 S.W.2d 580 (Tex.App.-Dallas, 1989).

A motion to quash based on a mistake in the presentment of the indictment, *Harris County District Attorney's Office v. Burns*, 825 S.W.2d 198 (Tex.App.-Houston [14th Dist.] 1992). The trial court found that the indictment was based on the mistaken belief that the false statements which were the basis of the perjury charge, were made during an official proceeding. The Court of Appeals affirmed the expunction. In *Harris County District Attorney's Office v. R.R.R.*, 928 S.W.2d 260 (Tex. App-Houston, 1996) a motion to quash was granted because the previous grand jury had no billed the defendant once he testified in front of the grand jury and presented evidence of the complainant's mental defects. The District Attorney presented the case to another grand jury without letting the defendant appear and present his exculpatory evidence. The Motion to Quash was granted on this ground and then the trial court granted an expunction. The appellate court held that the case had terminated even though it was by motion to quash rather than a dismissal. The Court held "In a case such as this, where actions indicate the defendant was wrongly arrested it would thwart legislative intent and purpose to not expunge". This amounts to "similar reason" which indicated that there was an absence of probable cause. The D.A. appealed and the appellate court affirmed, citing the facts that the first grand jury refused to indict and after the judge granted the motion to quash the D.A. stated they would not present the case to a third grand jury. This was proof that probable cause was lacking.

Dismissal after a showing that the value of the property in the criminal mischief case did not meet the felony level. *Cyrus v. State*, 601 S.W.2d 776 (Tex.App.-Dallas, 1980). The trial court denied the expunction, but the Court of Appeals reversed holding that the defendant must have been indicted by mistake since the evidence was clear that the amount of damage did not meet the felony value.

Entrapment as a matter of law has been held to meet the statutory elements. In *Harris County District Attorney's Office v. Small*, 920 S.W.2d 740 (Tex.App.-Houston, 1996) affirmed the trial court's action of granting the expunction when the petitioner showed that the case was dismissed due to the actions of the police in entrapping him. The court held that there was a lack of probable cause that the defendant voluntarily possessed the cocaine.

The petitioner is entitled to show that the indictment was presented in error rather than it was dismissed due to insufficient evidence. The court is entitled to hear more evidence than just the assistant district attorney's explanation for dismissal. *Thomas v. State*, 916 S.W.2d 540 (Tex.App.-Waco, 1995). In Thomas, the court refused to allow the petitioner to put on evidence. The Court of Appeals reversed holding that Thomas had a right to show that the indictment was presented and dismissed because of "false allegations" made by the complainant, p.5. To the contrary is *Perryman v. State*, 920 S.W.2d 413 (Tex. App.-Dallas, 1996), in which the trial court denied the petition and the appellate court affirmed holding that the statement in the motion to dismiss, that there were two ways to measure the length of the barrel of the shotgun was dispositive of the case. The expert testimony at the expunction hearing, that in fact there was only one way to measure the gun "begs the questions" and did not overcome the District Attorney's statement in the motion to dismiss.

Harris County District Attorney's Office v. Hopson, 880 S.W.2d 1 (Tex. App.-Houston 1st, 1994) involved a dismissal that occurred because the complaining witness could not identify the defendant at trial. It was an indicted felony. At the expunction hearing the D.A. testified that there was probable cause to believe the defendant committed the crime, but admitted that no witnesses testified to the grand jury at the presentment of the case. The D.A. further admitted that there was no medical or scientific evidence indicating the defendant had committed the crime. The District Attorney's office appealed the trial court's order granting the expunction and argued that the appellate should be bound by the prosecutor's statement concerning probable cause to believe the defendant committed the crime. The Court of Appeals held that they would look beyond the reason stated in the motion to dismiss. They found that there was nothing in the record about what the grand jury was told. The appellate court went on to say that if the grand jury had been told that the complainant could identify the defendant, then this was not true and the indictment was based on false information. Since there were no witnesses presented to the grand jury and there was no medical or scientific evidence, the indictment must have been based on the complainant's ability to identify the defendant, which was not true. The expunction order was affirmed.

Ex parte Stiles, 958 S.W.2d 414 (Tex. Ct. App.-Waco, 1997) involved the dismissal of an indicted case after the D.A. discovered exculpatory information. The D.A. testified that after the dismissal, he presented the case with the new evidence to two different grand juries, and both

refused to indict the petitioner. The expunction was granted and affirmed on appeal. The court of appeals held that the refusal to indict by the two subsequent grand juries proved a lack of probable cause to believe the defendant committed the crime at the time of the dismissal.

In re E.R.W., 281 S.W.3d 572 (Tex.App.-El Paso, 2008, no pet.) The Court of Appeals in El Paso affirmed the trial court's granting an expunction. It held that testimony by the District Attorney at the expunction hearing that "after reviewing all the evidence, probable cause no longer existed to support the capital murder charge" was sufficient to meet the requirement of 55.02(a)(2)(A)(ii) that the dismissal be made "because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal."

5 POTENTIAL FUTURE PROSECUTION EXCEPTION

55.02 Section 4(a) provides that if the state establishes that the petitioner is still subject to conviction and that there is reasonable cause to believe that the state may proceed against him for the offense, the court may provide in its order the law enforcement agency and the prosecuting attorney responsible for investigating the offense may retain any records and files that are necessary to the investigation.

Article 55.01 (c) reads: A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court or the court of criminal appeals, if the offense for which the person was acquitted arose out of a criminal episode, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

Article 55.02 Section 4(a) allows the law enforcement agency and prosecuting attorney to retain their records if it is established that the person is still subject to prosecution because the statute of limitation has not run and there is reasonable cause to believe that the state may proceed against the person.

6. INELIGIBILITY

a. PERSONS WITH FELONY CONVICTIONS 5 YEARS PRIOR TO ARREST

If a case is dismissed the petitioner has an additional element to prove, which is that he has not been convicted of a felony within the five years preceding the date of the arrest. Convicted felons who are unlawfully and illegally arrested and subsequently have the charges dismissed, can not obtain an expunction on cases that occurred within five years of their conviction. This section does not apply to acquittals, or pardons. There has been a recent set of cases where D.P.S. has filed an answer and appealed the order granting the expunction because the petitioner failed to prove at the hearing that the he had not been convicted of a felony within the five year period. *See State v. Herron*, 53 S.W.3d 843 (Tex.App.-Fort Worth, 2001). The court held that a verified petition that is judicially noticed is not evidence to prove the statutory requirements. This seems to apply only when a general denial answer is filed that demands strict proof of the elements that meet the expunction statute.

The date of conviction for a probation case, is the date upon which the person was placed on probation, not the date the probation was revoked. 92 S.W.3d 642, *Heine v. Texas Dept. of Public Safety*, (Tex.App.-Austin, 2002). In that case the trial court's refusal to consider the expunction because of the prison sentence within the 5 years preceding the filing of the petition, was reversed.

b. DEFERRED ADJUDICATION IS NOT EXPUNGABLE(EXCEPT FOR CLASS C DEFERRED ADJUDICATIONS AND DEFERRED DISPOSITIONS)

Any type of probation, even though completed, is not expungable. See: *Texas Dept. of Public Safety v. Failla, supra*. and *Moore v. Dallas County District Attorney's Office*, 670 S.W.2d 727 (Tex.App. 5 Dist., 1984). A felony completed deferred adjudication is not expungable. If the trial court grants the expunction, D.P.S. or any agency has 6 months to file a writ of error to get the judgment set aside. See D.P.S. v. Butler, 941 S.W.2d 318 (Tex. App.-Corpus Christi, 1997).

What if the higher charge is dismissed and the defendant is found guilty of a lower charge? One court has held that the higher charge of prostitution could be expunged when the defendant was convicted of a Class "C" DOC. *In re M.H.S.*, 614 S.W.2d 890 (Tex.App.-Eastland, 1981). However, in a case where a felony tampering with records charge was dismissed because the defendant pled guilty to a misdemeanor tampering with records charge, the court held the defendant could not expunge the dismissed case. *State v. Knight*, 813 S.W.2d 210 (Tex.App.-Houston [14th Dist.] 1991). In *Harris County District Attorney's Office v. D.W.B.*, 860 S.W.2d 719 (Tex. App.-Houston 1st, 1993) the defendant completed 180 days of deferred adjudication on a misdemeanor case. He subsequently filed a writ of Habeas Corpus alleging there was no jury waiver on file. The writ was granted and the judgment set aside. The District Attorney then dismissed the case. The trial court's decision to grant the expunction was affirmed on appeal. Since the writ was granted, it restored the case to its original position prior to trial and therefore there was never any valid probation.

BE AWARE: *D.P.S. v. Aytonk*, 5 S.W.3d 787(Tex. App.-San Antonio, 1999), reversed the trial court's order granting an expunction of a Class B theft when the defendant had pled nolo contendere to the charge of theft, Class C, in the same court. The trial court entered a conviction. The appellate court relied upon the Article 55.01 (B)and the charge, if any, has not resulted in a final conviction, and is no longer pending and there was no court ordered community supervision under Article 42.12. The court found that the record shows that Aytonk's plea resulted in a final conviction, rendering him ineligible for expunction. *Rodriquez v. State*, 224 S.W.3d 783 (Tex. App.-Eastland, 2007) holds that a conviction for issuance of a bad check precludes expunction of the higher charge of theft by check that was dismissed. *See also D.P.S. v. Lopez*, 2007 WL 193357 Aggravated assault not subject to expunction if received deferred adjudication on misdemeanor assault.

In 2003, Article 55.01 (a)(2)(B) was amended to state that if the person was released and the charge, if any, is no longer pending and there was no court ordered community supervision for any offense other than a Class C misdemeanor. This is effective 9-1-2003. Therefore, a successfully concluded deferred adjudication probation to a class C misdemeanor can be

expunged. It should also be noted that deferred dispositions of Class C's pursuant to Article 45.051 can be expunged under Article 55.01 (a)(2)(B).

Successfully concluded deferred dispositions of Class C misdemeanors can be expunged pursuant to 45.051 CCP. See also Chapter VI infra for further details.

7. EXPUNCTIONS OF CHARGES THAT RESULTED IN A CONVICTION FOR A LESSER INCLUDED OFFENSE OR A NEWLY FILED DIFFERENT CHARGE

55.01 (a)(2)(B) precludes expunction if "the charge (emphasis added)... has not resulted in a final conviction." The questions arises whether this exclusion prohibits expunction of a refiled different charge, such as when a DWI charge is dismissed pursuant to a plea bargain in which the petition has been sentenced to a charge of Obstructing a Highway. I believe the correct answer is "No", based on the language of the statute (see the language underscored for emphasis), though case law is ambiguous.

Texas Dept. of Public Safety v. Aytonk, 5 S.W.3d 787, Tex.App.-San Antonio,1999. Arrest records pertaining to Class B theft could not be expunged because defendant was convicted of a lesser included offense (Class C theft). This is a different situation from the typical DWI reduction to obstructing which is not a lesser included offense.

Rodriguez v. State, 224 S.W.3d 783, Tex.App.-Eastland,2007. Court held D could not expunge Theft By Check charge because was convicted of Issuance of a Bad Check. Issuance of a bad check is not a lesser included offense of 31.03 Theft. 32.41(g). The opinion states that D was trying to expunge a theft charge. Implicitly, this case holds that conviction of another offense, even one that is not a lesser included offense, precludes expunction of offense on which defendant was arrested. However, the opinion states that the State "waived" the TBC charge, not that it dismissed it. Therefore, it appears that the prosecution was based on a multiple charge complaint. Perhaps this case can be distinguished from one in which one complaint was dismissed and the defendant was convicted for an offense alleged in an entirely different complaint such as the typical situation in which a DWI is dismissed and the defendant is convicted in a newly, separately filed obstructing complaint. One can also argue that this decision was incorrect because it relied on *Aytonk* and incorrectly read *Aytonk* (see my argument above on the correct reading of Aytonk.).

Texas Dept. of Public Safety v. Borhani, Not Reported in S.W.3d, 2008 WL 4482676 (Tex.App.-Austin, 2008) Appears to be an adverse case that is controlling. "Because a final conviction is a bar to later expunging records of the arrest and conviction and this includes convictions for charges reduced to Class C misdemeanors except as provided in the statute, *Rodriguez v. State*, 224 S.W.3d 783, 785 (Tex.App.-Eastland 2007, no pet.), Borhani is not entitled to expunction if he has a final conviction." However, this case clearly involves a lesser included offense situation (Class B theft reduced to Class C) and can be distinguished on that basis when trying to expunge a DWI that was dismissed and refiled as obstructing.

Ex parte E.E.H., 869 S.W.2d 496 (Tex.App.-Hous. [1 Dist.],1993.) "The Court of Appeals, Hedges, J., held that arrestee was entitled to expunction of records respecting charged offenses of felony possession of controlled substance, respecting which grand jury had rendered no bill, and misdemeanor driving while intoxicated, which state had moved to dismiss, despite fact that arrestee could not obtain expunction for misdemeanor possession of marihuana charge,

arising from same arrest, for which she had received conditional discharge." Excellent dicta urging liberal construction of statutory language.

8. ACQUITTALS AND FINDINGS OF NOT GUILTY

In, September 1, 1993, Article 55 was amended to allow an acquittal by the trial court or by the Court of Criminal Appeals or a subsequent pardon to be expunged. The statute specifically states that it applies retroactively. This is similar to when the expunction law was first enacted, it applied to cases that had been dismissed even before the statute was enacted. It is a remedial statute and some cases have held that it should be liberally construed. In Current v. State, 877 S.W.2d 833 (Tex.App.-Waco, 1994) the Waco Court had to determine what "acquittal by the Court of Criminal Appeals" meant. In Current, supra, the defendant was convicted by a jury of burglary. The Court of Appeals reversed and remanded to the trial court with instructions to enter a judgment of acquittal. The Court held it would lead to absurd results to hold only those acquitted by the Court of Criminal Appeals can be granted an expunction. The Court expanded Article 55.01 to include acquittal by the Court of Appeals.

However, the Houston 1st Court of Appeals disagreed with the reasoning in Current and held to the contrary in Harris County District Attorney's Office v. Jimenez, 886 S.W.2d 521 (Tex.App.-Houston 1st, 1994). Jimenez was acquitted on appeal by the Court of Appeals and the trial court granted an expunction. The Houston Court reversed saying the statute was clear that only an acquittal by the Court of Criminal Appeals was subject to expunction.

If a finding of not guilty is entered by the court, the jury, or on appeal, the defendant is entitled to an expunction. If the charges are never filed, the arrest records can be expunged after the statute of limitations has expired. Pending cases, in which an information has been filed, can not be expunged. See also, State v. Bhat, 127 S.W.3d 435 (Tex. App. -Dallas, 2004).

a. PROCEDURE FOR ACQUITTALS ON OR AFTER 9-1-2003

Any request for an expunction of an acquittal that occurs on or after 9-1-2003 is subject to H.B.171. This eliminates the county courts and lower courts from ordering an expunction when an acquittal occurs in that court. It states that the district court in the county in which the trial court is located shall enter an order of expunction if the person was found "not guilty". If the defendant was not represented by counsel, the attorney for the state shall prepare the order. No petition is required.

The defendant must provide the necessary information, including a copy of the judgment of acquittal. The state is entitled to notice and a hearing. The defendant is required to prepare the Order with all the necessary identifiers and information required by D.P.S. The Clerk is then required to send copies of the order by certified mail to each official agency designated. *Bargas v. State*, 164 S.W.3d 763 (Tex. App.-Corpus Christi, 2005) held that the expunction was available even though Bargas did not file it within 30 days of the acquittal.

Article 55.02 Sec. 4 (a) provides in part: " In the case of a person who is the subject of an expunction order on the basis of an acquittal, the court may provide in the expunction order that the law enforcement agency and the prosecuting attorney retain records and files if:

(1) the records and files are necessary to conduct a subsequent investigation and prosecution of a person other than the person who is the subject of the expunction order; or

(2) the state establishes that the records and files are necessary for use in:

(A) another criminal case, including a prosecution, motion to adjudicate or revoke community supervision, parole revocation hearing, mandatory supervision revocation hearing, punishment hearing, or bond hearing; or

(B) a civil case, including a civil suit or suit for possession of or access to a child."

9. VETERANS COURT AND PRETRIAL INTERVENTION PROGRAMS

Texas Code of Criminal Procedure article 55.02(a)(2)(A)(ii) was amended by SB 1980 and HB 4833 to permit expunction of criminal records following a dismissal based upon the completion of a pretrial intervention program authorized under Tex. Govt. Code Section 76.011. Although the change was introduced as part of creation of veterans' court diversion programs, it applies to any dismissal filed upon completion of a pretrial intervention program supervised by a local probation department. It may not apply to cases dismissed upon completion of other forms of pretrial diversion, deferred prosecution, etc unless those dismissals independently meet the terms of 55.02(a)(2)(A)(ii).

§ 76.011. PRETRIAL SERVICES. (a) The department may operate programs for the supervision and rehabilitation of persons in pretrial intervention programs. Programs may include testing for controlled substances. A person in a pretrial intervention program may be supervised for a period not to exceed two years. (b) The department may use money deposited in the special fund of the county treasury for the department under Article 103.004(b), Code of Criminal Procedure, only for the same purposes for which state aid may be used under this chapter.

10. CASES DISMISSED PURSUANT TO 12.45 TPC

Section 12.45 of the Penal Code allows a court to take into consideration at sentencing another criminal case. This results in a termination of the case and the case itself does not result in court ordered probation. Is a misdemeanor or unindicted felony case that is dismissed under Section 12.45 subject to expunction? On the face of the statute it appears to be, however, many cases have held that a case dismissed under Section 12.45 can be used for impeachment purposes and that it is admissible at sentencing as a part of the criminal record. See *Whalon v. State*, 725 S.W.2d 181 (Tex. Crim. App. 1986) and *Perea v. State*, 870 S.W.2d 314 (Tex.App.-Tyler, 1994).

The exact issue was appealed by the Travis County Attorney. In *Travis County Attorney v. J.S.H. and C.E.G.K.*, 37 S.W.3d 163,(Tex. App.-Austin, 2001), the Third Court of Appeals held that the petition did meet the statutory requirements because the charge had not resulted in an final conviction. The Court held that an adjudication of guilt must precede a final conviction. "Therefore, the admitted unadjudicated offenses considered by the trial courts in assessing appellants' punishments for adjudicated offenses in the proceedings conducted pursuant to section 12.45 of the Penal Code may be expunged." At p. 167. A dissent was filed so the issue may end up at the Supreme Court of Texas.

Courts have held that Section 55.01(a) is mandatory and that if all the statutory elements

are met, the District Judge must grant the expunction. By contrast, 55.01(b) says that the district court may grant an expunction for one who is convicted, then acquitted on appeal.

11. DRIVING RECORDS

Can one expunge the driver's license records on the breath test refusal or failure? Effective January 1, 1995, the statute specifically states that the court can not expunge a suspension or a revocation of a driver's license unless there is an "acquittal". Acquittal is not the same thing as a dismissal. *See* Texas Dept. of Public Safety v. Scott, 2003 WL 22103208 (Tex.App.-Eastland, 2003), *see also*Texas Transportation Code Section 524.015.

B. PROCEDURE

1. VENUE

Pursuant to 55.02 Code of Criminal Procedure sections one and two, a person eligible for an expunction under 55.01(b) of the Code of Criminal Procedure may file the petition for expunction in in a district court in the county in which the petitioner was arrested or in a district court in the county where the offense was alleged to have occurred. If a person is eligible for expunction after being acquitted after trial, the person may file for expunction in either the trial court if the trial was in a district court or a district court in the county where the trial was held if the trial was done in a county court.

2. TIMING ISSUES - EFFECT OF STATUTE OF LIMITATIONS

When the case has resulted in an aquittal, the accused need not wait for the statute of limitations to run. *See* Article 55.02(1) Otherwise, generally the accused must wait for the limitations period to run prior to filing the petition. *See* Article 55.01(a)(2)(A)(I), *see also, Beam supra,* 226 S.W.3d 392 (Tex. 2007).

Is there a statute of limitations during which one must apply for an expunction? Because the statute should be liberally construed there is a good argument against applying any statute of limitation period to the expunction statute. *State v. Arellano*, 801 S.W.2d 128 (Tex.App.-San Antonio, 1990). Since it is a remedial statute, it should not be bound by any statute of limitations. However, some agencies have argued that the general residual statute of limitations should apply as it would apply to any civil suit. Article 16.051 of the Civil Practices and Remedies Code provides that where there is no expressed limitation period, the action must be brought within four years. One case has held that the statute of limitations does not apply to the expunction statute. "Accordingly, we hold that section 16.051 of the civil practice and remedies code does not act as a bar to the statutory remedy of expunction."92 S.W.3d 642, *Heine v. Texas Dept. of Public Safety*, (Tex.App.-Austin, 2002).

3. PETITIONS

A verified petition must be filed with all the necessary information, including social security number, birth date, and driver's license number. Such information is set out in Article 55.02(b) of the Code of Criminal Procedure. The exact date of the arrest and date of the alleged offense charged must be very specific. Failure to be correct can result in the Department of Public Safety sending a letter stating they have no records to return, when, in fact, they are keeping the records that were incorrectly identified. The petition and the order must contain the arrest date or else, D.P.S. can appeal the order granting the expunction and have the case reversed. *See Texas Dept. of Public Safety v. Moore,* 51 S.W.3d 355 (Tex.App.-Tyler, 2001).

Example: In Austin, in order to obtain a dismissal in a theft by check case, one must complete a county sponsored education course. In applying for an expunction, be sure and include the records kept at the counseling center.

Up until September 1, 1999, the petition had to be filed in the county in which the arrest occurred. The statute was amended to allow the filing in the county of arrest or the county in which the prosecution occurred. D.P.S. is taking the position that this only applies to arrests after September 1, 1999. Be careful to know where the arrest occurred and where the case was filed. *See: Autumn Hills, supra.*

4. HEARINGS

After the petition is filed, the hearing can not be set for a period of thirty days. This time can not be waived even if the county attorney were to agree. The Department of Public Safety can object and halt the expunction. *See: Texas Dept. of Public Safety v. Riley*, 773 S.W.2d 756 (Tex.App.-San Antonio, 1989). In addition, the Department of Public Safety can fail to file an answer, fail to appear at the hearing and still appeal the judgment. They can file a motion for new trial, appeal, or file a writ of error. Any appeal goes to the Court of Appeals and then to the Supreme Court. It does not go to the Court of Criminal Appeals.

Under the new provisions for an expunction in the trial court that granted an acquittal, there is no 30 day waiting period. Article 55.02 sec. (1) states that at the request of the defendant and after notice to the state and a hearing, the trial court presiding over the case in which the defendant was acquitted shall enter an order of expunction. This must be done within 30 days. An amendment now requires that the court granting an expunction, be a District Court. This was meant to eliminate the need for a petition and the corresponding court costs.

Rangel v. Travis County Attorney, 2009 WL 2341919 (Tex. App. -Austin, 2009, no pet.) The Court of Appeals in Austin held that the district court did not abuse its discretion when it denied defendant's petition for the expunction of records for an escape offense without first allowing him to present evidence at court. The appellate court held that it was not a violation of the prisoner’s due process rights for the trial judge to look at the physical file and records alone to make the determination that the petitioner was not eligible for an expunction.

a. ROUTINE

In the vast majority of cases, there are no objections or answer filed. The case then becomes similar to an uncontested divorce. Evidence should be presented and the order signed. Without the proper showing, any agency can appeal the finding, even if they did not file an objection to the expunction. *Texas Dept. of Public Safety v. Wiggins*, 688 S.W.2d 227

(Tex.App.-El Paso, 1985). Article 55 requires that each agency must be notified of the hearing. Failure to notify the agency of a reset date, or of the original hearing will result in the order being set aside on appeal. *D.P.S. v. Riley*, 773 S.W.2d 756 (Tex. App.-San Antonio, 1989).

b. CONTESTED

If an objection is filed, a full blown hearing needs to be held. Petitioner has the burden of showing compliance with the statute. If any agency appeals the order all the records from all the different agencies can be kept. If that one agency wins, all the records are kept. The court reverses the entire case even if other agencies did not object or appeal.

It is important to present evidence at either type of hearing. Since the agency can come in at a later date and contest the ruling, there needs to be evidence that supports the petition. *Wiggins*, supra.

5. AGREEMENT WITH THE PROSECUTOR

An agreement with the District Attorney to not contest an expunction is not binding on the Department of Public Safety. All the statutory requirements must still be met and D.P.S. can and does file writs of error to set aside orders even when they defaulted at the actual hearing. In *D.P.S. v. Katopodis*, 886 S.W.2d 455 (Tex. App. -Houston-1st, 1994) the D.A. agreed to the expunction and on the dismissal of the indicted case, noting the defendant completed pre-trial diversion. There was no evidence that the dismissal was for a lack of probable cause and the appellate court held that D.P.S. was not bound by the agreement and reversed the expunction for all agencies. *See also Ex Parte Gus Andrews*, 955 S.W.2d 178 (Tex. App.-Waco, 1997), where the D.A. agreed to an expunction in exchange for a plea of guilty. The judge granted the expunction and D.P.S. appealed. The Court of Appeals held that the agreement did not meet the statutory requirements and the expunction was reversed. BE AWARE: THERE ARE NO PARTIAL EXPUNCTIONS.

6. ORDERS

It must be specific as to the date of the arrest, offense and agencies. Under the new section dealing with acquittals, the order must include a copy of the judgment of acquittal and the D.P.S. tracking number along with all the identifiers of the defendant listed in Article 55.02. If the defendant wants a copy of the order, be sure and include a sentence stating that the clerk is ordered to provide the defendant and/or his attorney a copy. It is important to obtain a certified copy because it is impossible to obtain a copy later without a court order. The defendant should check each agency in about thirty days to be sure the records have been removed or returned. Many agencies put a low priority on compliance. It is important to check. *DPS v. Cooper,* 2007 WL 805548 (Tex. App., 2007) reversed an order for expunction that failed to include the address, key identifiers and the TRN number as required by 55.02 section 3(b). Remand to trial court to enter proper order.

7. APPEAL

D.P.S. can appeal an order granting an expunction even if they did not file an answer, appear at the hearing or file a motion for new trial. They can appeal by way of an writ of error. *D.P.S. v. Peck*, 954 S.W.2d 108 (Tex. App. - Austin, 1997) and *D.P.S v. Butler*, 941 S.W.2d 318 (Tex. App.-Corpus Christi, 1997).

If an expunction is improperly granted and it is reversed on appeal, it is reversed to all parties. *Ex parte Elliot,* 815 S.W.2d 251 (Tex. 1991). New case holding the same, 68 S.W.3d 179, *Texas Dept. of Public Safety v. Woods*, (Tex.App.-Hous. [1st Dist.] 2002) .

C. EFFECT OF EXPUNCTION

1. WHAT RECORDS ARE EXPUNGABLE?

All records relating to the arrest. However, corporations are not entitled to have their records of criminal cases expunged. See*: State v. Autumn Hills Center, Inc*., 705 S.W.2d 181 (Tex.App.-Houston [14th Dist.] 1985). Even records kept by the Texas Department of Human Resources which relate to the arrest are expungable. In *S.P. v. Dallas County Child Welfare Unit, Inc*., 577 S.W.2d 385 (Tex.App.-Eastland, 1979), the district court refused to expunge the welfare department's records relating to the petitioner's arrest for injury to a child, even though he had been no billed by the grand jury. On appeal, the Court of Civil Appeals held that Chapter 55.01 of the Code of Criminal Procedure provides for expunction of "all records and files relating to the arrest". Thus, they ordered the Child Welfare Unit to expunge any reference in their records which were based upon the police records and files relating to the arrest.

Can an expunction be granted even though another charge out of the same arrest is not expungable? In *Ex parte E.E.H.*, 869 S.W.2d 496 (Tex.App. Houston-1st 1993), the court held the statute permits expunction of less than all charges arising from a single arrest. One can obtain an expunction on a dismissed case even though another charge out of the same arrest is not expungable. In this particular case, the defendant received probation on a misdemeanor marijuana charge. Out of the same arrest a possession of controlled substance was no billed and a D.W.I. was dismissed. The Houston court held that the POCS and the DWI could be expunged, even though they were out of the same arrest for which the person received probation on another charge. The court relied on *State v. Knight*, 813 S.W.2d 210 (Tex. App.-Houston [14th Dist.] 1991) which held that one misdemeanor charge could be expunged even though it was dismissed because the defendant agreed to plead guilty to another misdemeanor charge. The Houston 1st Court of Appeals also quotes from *State v. Arellano*, 801 S.W.2d 128 (Tex. App.-San Antonio, 1990) which held that the expunction statute is remedial and should be broadly interpreted in order to give a fresh start to individuals who had been wrongly charged. "We perceive no public policy reason to limit the right of expunction to an "all or nothing" proposition." *Ex parte E.E.H.* at p. 499.

Texas Educ. Agency v. T.F.G., 295 S.W.3d 398 (Tex.App.-Beaumont, 2009, no pet.) The Beaumont Court of Appeals addressed the issue of what documents the Texas Education Agency would be required to destroy for a teacher acquitted of the charge of indecency. It held that, as matter of apparent first impression, only documents and records pertaining to acquittee's

criminal investigation, arrest, and prosecution were subject to expunction.

2. CAN DENY ARREST (UNDER TEXAS LAW, NOT IMMIGRATION LAW, OTHER STATES)

Under 55.03(2) Code of Criminal Procedure, except when questioned under oath in a criminal proceeding, the person arrested may deny the occurrence of the arrest and the existence of the expunction order.

3. QUESTIONING OF DEFENDANT BY JUDGE OR PROSECUTOR

Under 55.03(3) Code of Criminal Procedure, the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

II. NONDISCLOSURE ORDERS

A. ELIGIBILITY

1. GENERALLY FOR SUCCESSFULLY COMPLETED DEFERRED ADJUDICATION PROBATIONS

Pursuant to Tex. Gov't Code Section 411.081(d), and subject to exceptions, if a person is placed on deferred adjudication community supervision under Section 5, Article 42.12, Code of Criminal Procedure and subsequently receives a discharge and dismissal under Section 5(c), Article 42.12, and satisfies the requirements of Subsection (e), the person may petition the court that placed the defendant on deferred adjudication for an order of nondisclosure.

2. EXCLUDED OFFENSES AND INELIGIBLE PERSONS

Tex Gov't Code Section 411.081(e)(1-4) limits the offenses and people eligible for an order of non-disclosure. A person is not entitled to an Order of Nondisclosure if they have been previously convicted or placed on deferred adjudication for any of the following:

1. Any offense requiring registration as a sex offender.
2. Murder, Capital Murder, Injury to a child, elderly or disabled; endangering a child, violation of a protective order, stalking or aggravated kidnaping or
3. Any other offense involving family violence.

Because it was not clear if this applied to a 1st deferred adjudication for family violence, in 2007 the legislature clarified that a person is ineligible under these categories, if the person was placed on the deferred adjudication for or has been previously convicted of any of these offenses.

3. WAITING PERIODS

Tex. Gov't Code Sections 411.081(d)(1-3) set out the waiting periods required before filing a motion for nondisclosure. In 2005 the legislature lowered the waiting period to two years from the discharge and dismissal. The most common offenses listed are indecent exposure, public lewdness, disorderly conduct, obstructing a highway, false report, interference with emergency telephone call, harassment, cruelty to animals, unlawfully carrying a weapon, and making a firearm accessible to a child.

On a felony offense there was originally a 10 year waiting period from the date of discharge that in 2005 the legislature lowered to 5 years from the date of discharge.

4. MAY NOT BE CONVICTED OR RECEIVED DEFERRED ADJUDICATION PROBATION DURING WAITING PERIOD

During the applicable period, the person must not have been convicted of or placed on

deferred adjudication for any offense, other than a fine only Transportation Code violation pursuant to Tex. Gov't Code Section 411.081(e).

B. PROCEDURE

1. VENUE

A motion for nondisclosure is properly filed under Tex. Gov't Code Section 411.081(d) in the court that placed a defendant on community supervision.

2. PETITION

A petition must be filed showing why a person meets the requirements for an order of nondisclosure and notice must be provided to the state under Tex. Gov't Code Section 411.081(d)

3. HEARING

After a petition is filed, the court shall hold a hearing on the petition under Tex. Gov't Code Section 411.081(d)

4. DISCRETION OF COURT AS CONTRASTED WITH EXPUNCTIONS

The court is not required to issue an order of non-disclosure and may only do so if it is in the interest of justice under Tex. Gov't Code Section 411.081(d)

C. EFFECT

1. CAN DENY ON JOB APPLICATIONS

Under Tex. Gov't Code Section 411.081(g-2), a person whose criminal history record information has been sealed under this section is not required in any application for employment, information, or licensing to state that the person has been the subject of any criminal proceeding related to the information that is the subject of an order issued under this section.

2. LAW ENFORCEMENT AGENCIES, PROSECUTORS AND COURTS CAN FIND AND USE

Tex. Gov't Code Sections 411.081(h-i) list the agencies to which a criminal justice agency disclose the sealed information.

III. JUVENILE RECORDS

A. APPLICABILITY OF 55.01 CCP

"An arrest is a threshold requirement under the expunction statute. FN2 The taking into custody of a juvenile suspect is not, however, considered to be an "arrest" except for purposes of determining the validity of that "arrest." FN3 A juvenile is not effectively "arrested" until the juvenile court certifies him as an adult and enters a proper transfer order to district court.FN4 "The transfer of custody is an arrest." FN5 Thus, for purposes of the expunction statute, Appellant's arrest occurred not when he was taken into custody in Tarrant County by Arlington police, but rather, when the juvenile court in Dallas County certified him to stand trial as an adult and transferred the cases to Tarrant County district court." -- *Quertermous v. State*, 52 S.W.3d 862 (Tex.App.-Fort Worth, 2001.)

Texas Family Code Section 52.01(b) states:

> (b) The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

B. FAMILY CODE REMEDIES

Article 58.003 of the Family Code provides for sealing juvenile records under certain circumstances. If there was no adjudication, sealing can occur immediately. If there is an adjudication, there is a two year waiting period, with proof of no intervening conviction of a criminal case. In felony cases, the person must turn 21 years of age, not have had the case transferred to criminal court, the records must not have been used as evidence in the punishment phase of a criminal case and the person must not have been convicted of a felony after becoming 17.

In addition, 58.003 provides that sealed records can be eventually destroyed if:

1. The records do not relate to a violation of the penal law of a felony or a misdemeanor punishable by jail,
2. Five years have elapsed since the person's 16th birthday and
3. The person has not been convicted of felony.

Article 58.003 (b) sets out the cases that can never be sealed, specifically the records of a determinate sentence that violated a penal law listed in Section 53.045 or engaging in habitual felony conduct.

IV. MISUSE OF IDENTIFICATION

Article 55.01(d) specifically allows the expunction of information contained in records if the information identifying the person was falsely given by another person arrested. Article 55.02 Sec. (2)(a) was amended to make it easier for a person to remove false information about themselves from someone else's records. The procedure is intended to allow an unrepresented person to apply for the expunction of the records with the attorney representing the state. The applicant must file a verified application stating that they did not give the person arrested consent to falsely identify himself or herself as the applicant. If the state's attorney verifies that the information was falsely given without permission, then they are to forward a copy of the application to the district court and request the court to enter an order directing expunction based on the entitlement under Article 55.01(d).

55.02(e) now provides that the director of DPS may file a petition on behalf of someone the victim of identity theft.

V. ENFORCEMENT AND COMPLIANCE ISSUES

A. CRIMINAL OFFENSE FOR VIOLATING ORDER

Article 55.04 provides that:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

B. FILE DESTRUCTION AND OBTAINING EXPUNGED FILES

In 2003, Article 55.02 Section 5 (d) was amended and apply to all expunctions except acquittals and expunctions for the fraudulent misuse of identifiers. It orders the clerk to destroy all the records maintained not earlier than the 60th day after the date the order of expunction is issued or later than the first anniversary of that date unless the records or files were released under Subsection (b).

(d-1)Not later than the 30th day before the date on which the clerk destroys files or other records under Subsection (d), the clerk shall provide notice by mail, electronic mail, or facsimile transmission to the attorney representing the state in the expunction proceeding. If the attorney representing the state in the expunction proceeding objects to the destruction not later than the 20th day after receiving notice under this subsection, the clerk may not destroy the files or other records until the first anniversary of the date of the order of expunction is issued or the first business day after that date. This act took effect on June 30, 2003. See HB 2725

Under 55.02 Code of Criminal Procedure Section 5(a),on receipt of the order, each official or agency or other governmental entity named in the expunction order shall:

(1) return all records and files that are subject to the expunction order to the court or, if removal is impracticable, 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; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

Under 55.02 Sec 5 (b) the court "may" order return of the files to petitioner. Requesting this will facilitate the process of verifying compliance with the expunction. If the court refuses to do this, subsection (c) requires the court clerk to open the records for Petitioner's inspection. Subsection (d) requires clerk to destroy files between 60 days and 1 year after the order is granted. Compliance review should be conducted during this time and before the records are destroyed.

C. PRIVATE ENTITY COMPLIANCE

In 2007, the legislature passed HB 1303 which created Texas Government Code Section 411.0851. This statute allows a person to sue private entities that disseminate criminal history information in violation of a legally granted expunction or non-disclosure order. The full text is below:

> § 411.0851. Duty of Private Entity to Update Criminal History Record Information; Civil Liability
> (a) A private entity that compiles and disseminates for compensation criminal history record information shall destroy and may not disseminate any information in the possession of the entity with respect to which the entity has received notice that:
> (1) an order of expunction has been issued under Article 55.02, Code of Criminal Procedure; or
> (2) an order of nondisclosure has been issued under Section 411.081(d) or (f-1).
> (b) Unless the entity is regulated by the federal Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.) or the Gramm-Leach-Bliley Act (15 U.S.C. Sections 6801 to 6809), a private entity described by Subsection (a) that purchases criminal history record information from the department or from another governmental agency or entity in this state:
> (1) may disseminate that information only if, within the 90-day period preceding the date of dissemination, the entity:
> (A) originally obtains that information; or
> (B) receives that information as updated record information to its database; and
> (2) shall notify the department if the entity sells any compilation of the information to another similar entity.
> (c) A private entity that disseminates information in violation of this section is liable for any damages that are sustained as a result of the violation by the person who is the subject of that information. A person who prevails in an action brought under this section is also entitled to recover court costs and reasonable attorney's fees.

Subsection (a) sets out the general requirement that a private entity not disclose criminal history that has been sealed or expunged once it is notified that the record has been sealed or expunged.

Subsection (b) sets out requirements that the private entity not disclose information that is not current within a 90 day period and that the entity notify DPS if it sells any compilation of the information. However, Section (b) has a built in exception to its two requirements: any entity that is regulated by two federal statutes. The first federal statute is 15 U.S.C. Section 1681 and seq. This section applies to consumer reporting agencies which are defined by 15 U.S.C.A. § 1681a(f) as:

> "The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the

purpose of preparing or furnishing consumer reports."

"The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title."

15 U.S.C.A. § 1681a(d):

This is a potentially very large exception, but it is not clear if the information provided by companies like publicdata.com would be considered to be "consumer reports" and, thus, to be "consumer reporting agencies" exempt from this statute.

Subsection (c) sets out a cause of action for violation of Section 411.0851. Subsection (c) applies to violations of the requirements of either subsections (a) or subsection (b). Even if subsection (b) has a large built in exception, there is still likely potential for suing entities for violations of subsection (a). If a private entity is notified that a record has been expunged or sealed and then fails to destroy the record, they are liable for damages.

VI. STATUTES THAT PROVIDE FOR EXPUNCTION OUTSIDE OF CHAPTER 55 CCP

A. OTHER STATUTES THAT PROVIDE FOR EXPUNCTION

Article 45.051 of the Code of Criminal Procedure, provides for deferred disposition in class "C" offenses. This section applies to the Justice and Corporation courts. This includes traffic and non-traffic offenses. This statute provides upon completion of the deferred disposition, the complaint is dismissed and may be expunged under Article 55.01 of this code. Even offenses that include the operation of a motor vehicle can be deferred and upon successful completion are subject to expunction under Article 55.01. See 45.0511 C.C.P.

An expunction was denied for an officer charged with a Class "C" misdemeanor on which he was acquitted, on the basis that the petitioner had never been "arrested" and therefore he was not entitled to an expunction. 65 S.W.3d 774, Carson v. State, (Tex.App.-Fort Worth, 2001). The Court of Appeals reversed the trial courts refusal to grant the expunction, finding that the petitioner's actual submission to an assertion of authority by appearing at the time and place indicated on the citation to dispute the charges against him was an "arrest".

Article 45.053 concerning deferred disposition for chemically dependent persons also provides for expunction under Article 55.01.

Article 45.055 provides for expunctions of conviction and records in failure to attend school cases.

B. ALCOHOL RELATED OFFENSES

In the Alcohol Beverage Code there is a little noticed provision for expunctions of even convicted cases. Article 106.12 states that the person convicted of not more than one violation under this code, upon attaining the age of 21 years, may apply to the court in which he was convicted to have the conviction expunged. The application must contain the applicant's sworn statement that he was not convicted of any violation other than the one he seeks to expunge. If the court finds the application to be true, the court shall order the records, including the sentence, expunged. The applicant is then released from all disabilities resulting from the conviction, and the conviction may not be shown or made known for any purpose.

This is the only statute that allows expunctions of convictions. This is particularly important now that the new Driving with a Detectable Amount of Alcohol by a Minor, is included in this code and covered by this provision. It is section 106.041. Section 106.02 covers purchases of alcohol by a minor, 106.04 prohibits consumption by a minor, 106.05 is possession of alcohol by a minor, and 106.07 is misrepresentation of age by a minor. All of these are expungable even if a conviction occurs.