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House Committee on Criminal Jurisprudence

Charge #2: Study the effectiveness of deferred adjudication and orders for non-disclosure in spite of the many exceptions to the statute. Study extending the use of expunction of criminal records history and non-disclosures to certain qualified individuals with low-level, non-violent convictions. Examine the statutorily allowed but underused non-disclosure and expunction of criminal records, and the use of deferred adjudication.

Dear Members of the Committee,

My name is Sarah Pahl. I am a Policy Attorney for Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on effective strategies to address orders for nondisclosure and expunction.¹

NONDISCLOSURE AND EXPUNCTION

There are indisputable barriers to success for people with criminal records. Depending on the crime, a person convicted of an offense in Texas will have difficulty, or be absolutely barred from, obtaining employment or a place to live, receiving a license for a particular occupation, obtaining certain types of educational assistance, or receiving federal or state benefits for basic human needs. Recognizing this, Texas has created a system by which criminal records can be sealed from the public through an order of nondisclosure, or destroyed through an order of expunction.²

The opportunity to petition for an order of nondisclosure provides an incentive for individuals to remain law-abiding by requiring that no additional crimes be committed after the offense at hand, while expunctions benefit those who were found never to have committed a crime (or were granted deferred adjudication for Class C misdemeanors). Despite the fact that policies regulating orders of nondisclosure and expunction take many steps in the right direction, these forms of relief do not extend far enough to offer a genuine second chance to those trying to live as responsible and safe residents of Texas.

KEY FINDINGS

- **The eligibility criteria to petition for an order of nondisclosure are strict and not available to everyone.**
 - » In order to be eligible for an order of nondisclosure, an individual must have been placed on and successfully complete deferred adjudication community supervision, resulting in the dismissal and discharge of the case.³
 - » An individual must also wait a designated amount of time after the charge is dismissed—five years for felonies and two years for certain misdemeanors.⁴
 - » Only some types of offenses are eligible for nondisclosure; certain violent and sex-related offenses are ineligible.⁵
 - » Even if the offense for which the petition is filed is eligible for nondisclosure, an individual can still be disqualified by their criminal history—any record of certain violent or sex-related offenses makes

the present offense ineligible—or a conviction or placement on deferred adjudication during the waiting time (does not include traffic tickets).⁶

- » Finally, if an individual meets all these criteria and files a petition with a fee of approximately \$280, the judge must issue an order of nondisclosure only upon a finding that issuance of the order is in the best interest of justice.⁷

- **Few orders of nondisclosure are issued compared to the number of eligible offenses.**

- » According to the Office of Court Administration’s Court Activity Reporting and Directory System, a total of 170,587 cases were dismissed in district criminal courts over a four-year period (September 2010 through August 2014). Over 18 percent, or 30,924 of these, were for drug possession alone.⁸ Another 3,366 dismissals were for misdemeanors.⁹ Most of these drug possession and misdemeanor cases, after the proper waiting periods, likely are or will be eligible for petitions of nondisclosure.
- » The Texas Department of Public Safety reported in May 2014 that it had only received a total of 8,842 orders of nondisclosure over a two-year period (2012 and 2013).¹⁰

- **Even when issued, orders of nondisclosure and expunction are not always effective in limiting access to criminal records, potentially resulting in the ongoing dissemination of restricted or inaccurate information.**

- » While the Texas Department of Public Safety (DPS) is statutorily mandated to certify to the court that issued the order of nondisclosure or expunction that the relevant records in its possession have been destroyed, sealed, or returned to the court, the statute does not require DPS to certify to the court that it has notified all the private commercial businesses it sold the records to of the order of nondisclosure or expunction. This means that, although DPS is accountable to the courts to comply with orders of nondisclosure and expunction, DPS is not held accountable to notify all the private entities it sells records to that an order of nondisclosure or expunction has been issued.
- » Similarly, private entities are not held accountable by any compliance mechanism to remove information subject to an order of nondisclosure or expunction. Please note, however, that DPS indicates on its website that it “provides a file that contains the Nondisclosure records that are no longer public” and that “customers have 30 business days from the posting of the file to remove any records.”¹¹

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **Reform the qualifications and procedures related to orders of nondisclosure, which limit access to, but do not completely expunge, criminal records.**

- » **Expand the eligibility criteria for nonviolent offenses and reduce waiting times before being permitted to petition for orders of nondisclosure.** In order to be eligible to petition for an order of nondisclosure, an individual must have successfully completed deferred adjudication and waited a designated period of time, during which he or she may not commit any additional crimes. However, individuals who receive convictions, rather than deferred adjudication, may not petition for nondisclosure, thus reducing their incentive to remain law-abiding after they complete a term of probation. The eligibility criteria to petition for orders of nondisclosure should be expanded to include convictions for nonviolent offenses, and the waiting times required prior to petitioning should be reduced in order to provide real relief for people attempting to make a new start.

- » **Prohibit the forfeiture of the right to nondisclosure in plea agreements.** In certain counties across Texas, district attorneys demand that defendants waive their right to nondisclosure in return for a plea bargain. These agreements exploit the vulnerable position of individuals charged with a crime and should be strictly prohibited.
- » **Prohibit third parties from asking individuals to request records that are subject to an order of nondisclosure.** Orders of nondisclosure are intended to provide a way for individuals to make a new start without a criminal history hindering their attempts to secure employment and housing. Some employers and landlords, however, require applicants to request their own criminal record so that the employer or landlord can have access to records under orders of nondisclosure. This practice circumvents the spirit of the law and should be strictly prohibited.
- **Allow judges to automatically expunge records for cases that do not result in conviction and for those who successfully complete specialty court programs.** Judges should be authorized to provide automatic expunctions of arrest records for cases that do not result in a conviction, which will provide swift relief for those who have been found not guilty of an offense or for whom charges are not pursued. Additionally, judges should have the power to provide automatic expunctions for individuals who successfully complete specialty court programs.

Note: Recommendations to address the problems posed by the ongoing dissemination of restricted or inaccurate information are included in testimony on Charge 3 on the sale and dissemination of criminal records.

Citations

¹ National Institute of Justice and the American Bar Association, “National Inventory of the Collateral Consequences of Conviction,” (2012), accessed on October 1, 2014, available at <http://www.abacollateralconsequences.org/>.

² [Tex. Gov’t Code, § 411.081](#); [Tex. Crim. Pro. Code, Ch. 55](#).

³ [Tex. Gov’t Code, § 411.081\(d\)](#).

⁴ *Ibid*, at § [411.081\(d\)\(2\)](#), [\(3\)](#). The two-year waiting period applies to misdemeanors under Chapter 20, 21, 22, 25, 42, or 46 of the Penal Code (offenses related to kidnapping and unlawful restraint, sexual offenses, assaultive offenses, offenses against the family, disorderly conduct and related offenses, and weapons). All other misdemeanors are not subject to a waiting time (see § 411.081(d)(1)).

⁵ *Ibid*, at § [411.081\(e\)](#). Ineligible offenses include an offense requiring registration as a sex offender under Chapter 62, Code of Criminal Procedure; an offense under Section 20.04, Penal Code (aggravated kidnapping); an offense under Section 19.02, 19.03, 22.04, 22.041, 25.07, 25.072, or 42.072, Penal Code (murder; capital murder; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; violation of certain court orders or conditions of bond in a family violence case; repeated violation of certain court orders or conditions of bond in a family violence case; stalking); and any other offense involving family violence, as defined by Section 71.004, Family Code.

⁶ *Ibid*.

⁷ *Ibid*, at § [411.081\(d\)](#).

⁸ Data was obtained from the Office of Court Administration Court Activity Reporting and Directory System using the Ad-Hoc Search feature on October 1, 2014. Public court activity data may be found at <http://card.txcourts.gov/Secure/login.aspx?ReturnURL=default.aspx>.

⁹ *Ibid*.

¹⁰ Texas Department of Public Safety (DPS), Letter to the Lieutenant Governor and Speaker of the House dated May 30, 2014, reporting the number of petitions and orders for nondisclosure received by the Department in 2012 and 2013. The Department received 4,414 orders of nondisclosure in 2012 and received 4,428 orders in 2013.

¹¹ Texas Department of Public Safety, “Conviction Database Customers,” accessed on October 3, 2014, available at <https://records.txdps.state.tx.us/DpsWebsite/CriminalHistory/Purchases.aspx>.

Guide to the Differences between Nondisclosure and Expunction in Texas

Nondisclosure

An individual may petition for an order of nondisclosure (OND) to

- prohibit public entities such as courts and police departments from disclosing certain criminal records; and
- be freed from disclosing criminal history information on job applications.

An OND only applies to a particular criminal offense—it does not apply to all offenses on one's criminal record.

Effect of Nondisclosure

- Private entities and individuals cannot access the criminal record and criminal background companies must remove the information from their records.
- A wide range of government agencies, commissions, and licensing boards are eligible to receive records that are subject to orders of nondisclosure.

Eligibility to Petition for an Order of Nondisclosure

- Must have been placed on deferred adjudication community supervision
- Must have successfully completed deferred adjudication and had case dismissed and discharged
- Offense must be eligible for nondisclosure (violent and sex offenses are not eligible)
- Must not have any disqualifying criminal history (individuals with any record of violent or sex offenses are ineligible)
- Must wait a certain period of time after charge is dismissed (5 years for felonies; 2 years for certain misdemeanors)
- Must not have been convicted or placed on deferred adjudication for any criminal offenses during the waiting period (does not include traffic tickets)

Cost: civil petition fee (≈\$280) + \$28 fee

Government Code, § 411.081

Expunction

An individual may petition for an expunction to

- have all records destroyed related to a certain criminal charge; and
- be freed from disclosing criminal history information to any person or entity.

An expunction applies to all arrest and court records related to a particular criminal offense.

Effect of an Expunction

- All records are destroyed; no secret record is kept by any agency.
- Criminal background companies must remove the information from their records.

Types of Expunctions

- Acquittals, pardons, actual innocence
- Dismissals and no-bills—not granted if community supervision performed, except for Class C misdemeanors
- Discretionary expunctions—at discretion of the prosecutor and agreed upon by the judge
- Identity theft

Eligibility for an Expunction

- Must have been arrested (custodial or noncustodial arrest)
- Arrest must have been for a misdemeanor or felony
- Juvenile records not eligible
- May be subject to a waiting period

Cost: civil petition fee (≈\$280) + additional fees (\$5-15) for each criminal justice agency served with notice

Code of Criminal Procedure, Chapter 55