

# “ExpungeLaw SquareFacts”

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Tennessee Alliance of Legal Services  
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James B. (Jim) Hawkins  
Attorney at Law  
126 East Main Street, Suite A  
Mailing Address: P. O. Box 57  
Gallatin, Tennessee 37066-0057  
jimhawkinsattorney@gmail.com

## OVERVIEW:

Thousands of Tennesseans have encountered barriers to employment, housing, and educational opportunities as a result of criminal convictions. The relatively recent passage and implementation of Tennessee's revised expungement statute – which took effect on July 1, 2012 – has created a new tool to help eligible clients overcome the rather hefty stigma of criminal records – in exchange for a rather hefty fee to the court clerk, in most cases.

This workshop is designed to provide attorneys, paralegals, and intake staff with the knowledge and tools to deal with determining eligibility, identifying and completing the necessary forms, and helping eligible clients to obtain expungement of their criminal histories, without having to go to great lengths (such as 'a pineapple under the sea').

Note: Any similarities between the artistic intellectual property known to the world as SpongeBob SquarePants™, and the title of this session and handout, are purely a matter of mild self-referential satire. SpongeBob SquarePants is one of the most well-recognized and appreciated international subjects – and therefore stands in stark contrast to the new Tennessee expungement law.

For one's cultural awareness, the following YouTube link to Russian Soldiers marching to, and chanting, these lyrics in Russian is but one of many such videos on the Internet. See, <http://www.youtube.com/watch?v=rPiWgFw6IUU>

Are you ready kids "Aye Aye Captain"  
I Can't hear you "AYE AYE CAPTAIN"  
Ohh...  
Who lives in a pineapple under the sea  
"Spongebob squarepants"  
Absorbant and yellow and porous is he  
"Spongebob Squarepants"  
If nautical nonsense be something you wish  
"Spongebob Squarepants"  
Then drop on the deck and flop like a fish  
"Spongebob Squarepants"  
READY  
Spongebob squarepants  
Spongebob squarepants  
Spongebob squarepants

#### Outline:

- I. Introduction
- II. Previously Existing Expungement Laws Still In Effect
- III. The New Expungement
- IV. Attachments

## **I. Introduction**

There is a diverse array of expungement laws that have been in effect in Tennessee for many years. These laws traditionally provided little or no expungement remedy, however, for a person who was convicted of a crime, in the absence of a diversion agreement.

On May 21, 2012, Tennessee Governor Bill Haslam signed Public Chapter No. 1103, “related to the expunction of certain criminal records.”

This new expungement law took effect on July 1, 2012.

A reference copy of Public Chapter 1103 is attached at the end of this handout.

[Note: Although some may say that the verb is “expunge” and the noun is “expunction,” *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004) strongly indicates that the word “expungement” is preferred in this context.]

The new law allows persons convicted of any of a large and certain set of crimes in Tennessee to apply and pay a fee to have that incident expunged from their records, pursuant to TENN. CODE ANN. § 40-32-101(g).

Since a criminal record may have serious adverse consequences for persons who are applying for employment, school, housing, or a professional license, this is an important potential legal remedy for those who are eligible – and who can afford the new fee of \$350.00 plus an additional \$100.00 fee assessed by clerks.

## II. Previously Existing Expungement Laws Still In Effect

### “No-Fee” Expungement Options

Before addressing the “new expungement law” in effect as of July 1, 2012, it should be noted that “**no-fee**” expungement may still be an option in several instances:

#### A. Charge Dismissed

If an individual was charged with a misdemeanor or felony but the charge was dismissed, then she or he is eligible to petition for the expungement of such all criminal records on that matter. There are no clerk’s fees or costs charged to the individual under this condition. See TENN. CODE ANN. § 40-32-101(a)(1).

#### B. “No True Bill” Returned/Verdict of Not Guilty

If a “no true bill” is returned by a grand jury, or a verdict of not guilty is returned by a jury, an individual has the right to petition for the expungement of such records, and all public records of that charge must be removed and destroyed. There are no clerks’ fees or costs charged to the individual under either of these conditions. See TENN. CODE ANN. § 40-32-101(a)(1).

#### C. Judgment Reversed Upon Appeal

An expungement request should be granted if a conviction has by appeal been reversed and the charge dismissed. There are no clerks’ fees or costs charged to the individual under this provision. See TENN. CODE ANN. § 40-32-101(a)(1).

#### D. Nolle Prosequi

If an order of *nolle prosequi* has been entered in the case, an expungement of criminal records should be granted. There are no clerks’ fees or costs charged to the individual under this condition. See TENN. CODE ANN. § 40-32-101(a)(3).

E. Arrested and Released Without Being Charged

A person who has been arrested and released without being charged with a crime is entitled to petition a court for the expungement of such records, and no court costs or fees shall be charged. See TENN. CODE ANN. § 40-32-101(e)(4).

NOTE: There are two other little-known “civil expungements” that exist under Tennessee law:

F. Order of Protection Petition Denied by Court

If a person had a petition for an order of protection brought against him or her, and if such petition was successfully defended and denied by the court following a hearing conducted pursuant to TENN. CODE ANN. § 36-3-605, then that person may petition to the court denying such order for all public records concerning the order of protection to be expunged, removed, and destroyed without court costs or fees to such person. See TENN. CODE ANN. § 40-32-101(a)(5).

G. Divorce Complaint Dismissed

In Tennessee, parties to a divorce proceeding, who have reconciled and dismissed their action, may file a petition requesting expungement of their divorce records:

Parties to any divorce proceeding, who have reconciled and dismissed their cause of action, may thereafter file an agreed sworn petition signed by both parties and notarized, requesting expungement of their divorce records. Upon the filing of such petition, the judge shall issue an order directing the clerk to expunge all records pertaining to such divorce proceedings, once all court costs have been paid. The clerk shall receive a fee of fifty dollars (\$50.00) for performing such clerk’s duties under this section.

TENN. CODE ANN. § 36-4-127.

Section 36-4-127 does not describe any procedure for expungement. In addition, there is no other authority dictating such procedure. Therefore, the Tennessee Attorney General concluded that this statute only demands that the clerk destroy or obliterate the divorce records; there is no one proper procedure to accomplish this end. (Tenn. Atty. Gen. Opinion No. 006-015, January 19, 2006.)

Juvenile Matters:

If, by chance, a minor has experienced a brush with delinquency, certain statutes relating to juveniles provide for expungement and the destruction of fingerprint and photograph records upon request. The standard form that an applicant fills out for the expungement of a criminal offender record (attached to the end of this hand-out) also includes five provisions relating to juvenile records:

1. A child charged with a felony and who is not adjudicated a delinquent child may petition for destruction of fingerprint and photograph records after the subject reaches 18 years of age. See TENN. CODE ANN. § 37-1-155(b)(1)(A).
2. A petition for destruction of fingerprints and photographs may be filed and granted if proceedings against a minor were dismissed after petition was filed or after the case was transferred to the Juvenile Court as provided in TENN. CODE ANN. §§ 37-1-109 and 37-1-155.
3. A petition for destruction of fingerprints and photographs may be filed and granted if a child was adjudicated not to be a delinquent child. See TENN. CODE ANN. § 37-1-155(b).
4. If the child has reached eighteen years of age and there is no record that he or she has committed a criminal offense since reaching sixteen years of age, then the court shall grant a petition for destruction of fingerprint and photograph records, unless such fingerprints were obtained on alleged charges which if committed by an adult would be a felony. See TENN. CODE ANN. § 37-1-155(b).

5. If six months have passed from the date of a liquor law violation for underage consumption or possession (not including transporting or serving alcohol in the course of employment), any person under the age of 21 can petition to have the matter removed from his or her record without a court fee. See TENN. CODE ANN. § 57-3-412(a)(3)(C).

These provisions reflect the public policy that it is important to keep doors open and to eliminate as many barriers as possible for youth, in hopes that they can be successful, productive members of society.

#### Pretrial Diversion

According to TENN. CODE ANN. § 40-32-101(a)(1), if a charge is dismissed in any court as a result of successful completion of a pretrial diversion program defined within TENN. CODE ANN. § 40-15-102 and 40-15-105, an individual is eligible to petition for the expungement of his or her criminal records on that matter.

Under the new law, criminal court clerks are now charging the new fee of \$350.00 plus \$100.00 for the expungement of records of persons who have completed pretrial diversion.

#### Judicial Diversion

A defendant is generally eligible for judicial diversion when she or he is charged with a misdemeanor or felony and has not previously been convicted of a felony or Class A or B misdemeanor (the most serious levels of misdemeanor), per TENN. CODE ANN. § 40-35-313(a)(1)(B)(i).

Tennessee law allows for judicial diversion to be a conditional part of a guilty plea if approved by the prosecutor and the trial court at the time that the guilty plea is entered. Such judicial diversion is sometimes called “posttrial diversion,” but that is a misnomer, as there has, generally, been no trial.

A judicial diversion plea is like a guilty plea, but the guilty plea is stayed and is not formally entered as a conviction. TENN. CODE ANN. § 40-35-313 requires that the defendant must be supervised by probation staff during the term of the diversion.

The defendant must pay probation fees and court costs just like a person who has entered a plea of guilty. If a defendant fails to comply with the conditions of probation or obtains a new arrest or conviction before the end of the probation period, then the Court will conduct a hearing to determine whether to remove the defendant from diversion and then sentence the defendant and enter the conviction on the record.

A judicial diversion plea is recognized as a conditional guilty plea that can be subsequently expunged on the condition that the defendant completes the requirements of his or her probation.

NOTE: Certain offenses are automatically ineligible for diversion, including :

(a) Driving under the influence of an intoxicant as prohibited by § 55-10-401;

(b) Any misdemeanor sexual offense prohibited by title 39, chapter 13, part 5;

(c) Conspiracy, under § 39-12-103, to commit any Class E felony sexual offense prohibited by title 39, chapter 13, part 5;

(d) Criminal attempt, under § 39-12-101, to commit any Class E felony sexual offense prohibited by title 39, chapter 13, part 5;

(e) Solicitation, under § 39-12-102 to commit any Class D or Class E felony sexual offense prohibited by title 39, chapter 13, part 5; or

Eligibility under the judicial diversion law does not guarantee the grant of diversion. The decision of whether to place a defendant on judicial diversion is within the sound discretion of the trial court. See, State v. Harris, 953 S.W.2d 701, 705 (Tenn. Crim. App. 1996).

Under the new law, criminal court clerks are now charging the new fee of \$350.00 plus \$100.00 for the expungement of records of persons who have completed judicial diversion.

NOTE: “Is the new expungement fee \$350.00 or \$450.00?) [Answer: “Yes.”]

There has been a continuing question of whether the “new expungement law” fee is \$350.00 or \$450.00. The Tennessee Public Defenders Conference and some legislators have sought clarification, and the Tennessee Attorney General issued an opinion on September 20, 2012 seeking to clarify this issue (copy attached).

Although the Attorney General’s opinion is that the expungement fee is set by the new Public Chapter 1103 at \$350.00, many trial clerks across Tennessee are generally charging \$350.00 plus a \$100.00 clerk’s fee historically allowed by TENN. CODE ANN. § 8-21-401. This fee issue may be further clarified by future legislation.

### **III. The New Expungement Law**

The new expungement law is codified at Tenn Code Ann. 40-32-101(g). It does not apply to the other expungement options referenced above.

#### **Eligibility**

For a person to be eligible for expungement of his or her Tennessee criminal conviction record:

- A. At the time of filing the application for expungement, that person must have **never been convicted of any other criminal offenses**, including federal offenses and offenses in other states, other than the offense for which an expungement is sought; and
- B. At the time of filing, **at least five (5) years have elapsed** since the completion of the sentence imposed for the criminal conviction; and
- C. The person must have **fulfilled ALL of the requirements of the sentence imposed** for which she or he was convicted, including:
  - Payment of all fines, restitution, court costs, and other assessments; and
  - Completion of any term of imprisonment or probation; and
  - Meeting all conditions of supervised or unsupervised release; and
  - If required by the conditions of the sentence, remaining free from dependency on or abuse of alcohol, or a controlled substance or other prohibited substance for a period of not less than one (1) year.

## Class E Felonies Eligible for Expungement

The new law only allows for expungement of specific offenses. For convictions that occurred after November 1, 1989 there are 38 specific class E felonies which may be expunged.

(Expungment is permitted if the person was convicted of one of the felonies listed below and sentenced to imprisonment of 3 years or less and the offense was committed on or after November 1, 1989):

- 39-11-411 Accessory after the fact;
- 39-13-306 Custodial interference where person not voluntarily returned by defendant;
- 39-13-604(c)(2) Knowing dissemination of illegally recorded cellular communication;
- 39-14-105(2) Theft (\$501-\$999);
- 39-14-114(c) Forgery (up to \$1,000);
- 39-14-115 Criminal simulation (up to \$1,000);
- 39-14-116(c) Hindering secured creditors;
- 39-14-117(b) Fraud in insolvency;
- 39-14-118 Fraudulent use of credit or debit card (\$501-\$999);
- 39-14-121 Worthless checks (\$501-\$999);
- 39-14-130 Destruction of valuable papers (\$501-\$999);
- 39-14-131 Destruction or concealment of will;
- 39-14-133 Fraudulent or false insurance claim (\$501-\$999);
- 39-14-137(b) Fraudulent qualifying for set aside programs (\$501-\$999);
- 39-14-138 Theft of trade secrets (\$501-\$999);
- 39-14-139 Sale of recorded live performances without consent (\$501-\$999);
- 39-14-143 Unauthorized solicitation for police, judicial or safety associations;
- 39-14-147(f) Fraudulent transfer of motor vehicle with value of less than \$20,000;
- 39-14-149 Communication theft (\$501-\$999 (fine only));
- 39-14-153 Home improvement fraud (\$500-\$1,000);
- 39-14-402 Burglary of an auto;
- 39-14-408 Vandalism (\$501-\$999);
- 39-14-411 Utility service interruption or property damage;
- 39-14-505 Aggravated criminal littering (2nd & 3rd offenses involving certain weight or volume);

- 39-14-602 Violation of Tennessee Personal And Commercial Computer Act (\$501-\$999);
- 39-14-603 Unsolicited bulk electronic mail (\$500-\$999);
- 39-16-201 Taking telecommunication device into penal institution;
- 39-16-302 Impersonation of licensed professional;
- 39-16-603 Evading arrest in motor vehicle where no risk to bystanders;
- 39-16-609(e) Failure to appear (felony);
- 39-17-106 Gifts of adulterated candy or food;
- 39-17-417(f) Manufacture, delivery, sale or possession of Schedule V drug (fine not greater than \$5,000);
- 39-17-417(g)(1) Manufacture, delivery, sale or possession of not less than ½ ounce and not more than 10 pounds of Schedule VI drug marijuana (fine not greater than \$1,000);
- 39-17-417(h) Manufacture, delivery, sale or possession of Schedule VII drug (fine not greater than \$1,000);
- 39-17-418(e) Simple possession or casual exchange (3rd offense);
- 39-17-422(c) Selling glue for unlawful purpose;
- 39-17-423(c) Counterfeit controlled substance;
- 39-17-425(b)(1-3) Unlawful drug paraphernalia uses and activities;

All Misdemeanors Can Be Expunged – EXCEPT for Certain Misdemeanors NOT Eligible For Expungement

For this same time period all misdemeanors, with 45 specific exceptions, may be expunged. Some common examples of misdemeanors which may not be expunged include DUI and assault convictions. It is important to note that if a person is charged with DUI but is convicted of a non-DUI offense, such as reckless driving, then that person may be eligible to have that case expunged.

Here are the 45 misdemeanors that CANNOT be expunged:

- 39-13-101(a)(1) & (2) Assault;
- 39-13-102 Aggravated assault of public employee;
- 39-13-111 Domestic assault;
- 39-13-113(g) Violation of protective or restraining order;
- 39-13-113(h) Possession of firearm while order of protection in effect;
- 39-13-511 Public indecency 3rd or subsequent offense;

39-13-511 Indecent exposure (victim under 13 years of age) or by person in penal institution exposing to a guard;

39-13-526(b)(1)(2) Violation of community supervision by sex offender not constituting offense or constituting misdemeanor;

39-13-528 Soliciting minor to engage in Class E sexual offense;

39-13-533 Unlawful sexual contact by authority figure;

39-14-118 Fraudulent use of credit/debit card (up to \$500);

39-14-304 Reckless burning;

39-14-406 Aggravated criminal trespass of a habitation, hospital, or on the campus of any public or private school, or on railroad property;

39-15-201(b)(3) Coercion — abortion;

39-15-210 Third or subsequent violation of “Child Rape Protection Act of 2006”;

39-15-401(a) Child abuse (where child is between ages 7-17);

39-15-401(b) Child neglect and endangerment (where child is between ages 7-13);

39-15-404 Enticing a child to purchase intoxicating liquor — purchasing alcoholic beverage for child;

39-15-404 Allow person ages 18-21 to consume alcohol on person’s premises;

39-15-414 Harboring or hiding a runaway child;

39-17-315 Stalking;

39-17-431 Unlawful dispensing of immediate methamphetamine precursor, sale of meth precursor to person on methamphetamine registry or purchase by someone on registry, possess meth precursor with intent to sell to another for unlawful use, purchase meth precursor for another for unlawful use, purchase meth precursor at different times and places to circumvent limits, and use false ID to purchase meth precursor for purpose of circumventing limits;

39-17-437 Using substance or device to falsify drug test results & selling synthetic urine;

39-17-438 Possession of the hallucinogenic plant Salvia Divinorum or the synthetic cannabinoids;

39-17-452 Sale or possession of synthetic derivatives or analogues of methcathinone;

39-17-902(a) Importing, preparing, distributing, processing, or appearing in obscene material or Class A misdemeanors;

39-17-907 Unlawful exhibition of obscene material;

39-17-911 Sale or loan to minors of harmful materials;

39-17-918 Unlawful massage or exposure of erogenous areas;

39-17-1307(f)(1)(A) Possession of firearm after being convicted of misdemeanor crime of domestic violence;  
39-17-1307(f)(1)(B) Possession of firearm while order of protection is in effect;  
39-17-1307(f)(1)(C) Possession of firearm while prohibited by state or federal law;  
39-17-1312 Failure of adult to report juvenile carrying gun in school;  
39-17-1320(a) Nonparent providing handgun to a juvenile;  
39-17-1352 Failure to surrender handgun carry permit upon suspension;  
39-17-1363 Violent felon owning or possessing vicious dog;  
39-13-101(a)(3) Assault (offensive or provocative physical contact);  
39-13-511(a) Public indecency — first or second offense (punishable by \$500 fine only);  
39-13-511(b)(2) Indecent exposure (victim 13 years old or older);  
39-15-412(b) Disseminating smoking paraphernalia to minor after 3 prior violations;  
39-16-404 Misuse of official information by public servant;  
39-17-317 Disorderly conduct at funerals;  
39-17-715 Possession of or consuming alcoholic beverages on K-12 school premises;  
39-17-914 Display for sale or rental of material harmful to minors;  
55-10-401 Driving under the influence of an intoxicant

### Steps to Complete the Expungement Process

1. A person seeking an expungement of his or her record must obtain and complete a checklist prepared by the district attorney's office **where the conviction occurred**.
2. The person seeking the expungement will be required to obtain all of the documents and records in the checklist and submit them to the district attorney that provided the checklist.
3. Once the district attorney is satisfied that the required information has been submitted, then the district attorney will provide the applicant with a petition to submit to the court clerk **where the conviction occurred**. (Note: The district attorney may determine that the applicant does not qualify for expunction. The applicant may still file the petition with the court. **However**, the district attorney will likely oppose the request.)

4. Upon submission of the petition to the clerk, the applicant will be required to pay all of the required fees, which include a **\$350.00** fee to file the petition and any other fees required by the court clerk. **THESE FEES ARE NOT REFUNDABLE.**
5. Within 60 days of submitting the petition, the district attorney may submit recommendations to the court. The district attorney is required to provide a copy of such recommendations to the applicant. During this 60 day time period, each party may submit evidence to the court in support of the case.
6. If the court **denies** the application, then the applicant may **not** file another application for expungement for at least **two years from the date of the denial.**
7. If the request for expungement is **granted**, the successful applicant will be entitled to a copy of the order of expunction and this copy will be sufficient proof that she or her is no longer under any disability, disqualification or other adverse consequence resulting from the conviction that has been expunged.
8. NOTE: New laws effective on July 1, 2013 allow for a payment plan to be set up to pay the fee, and for expungement of pardoned individuals' records.
9. Also, it is possible for a person to apply for an indigency waiver of the fee, subject to the trial court's determination of waiver eligibility based on financial need.

#### **IV. Attachments**