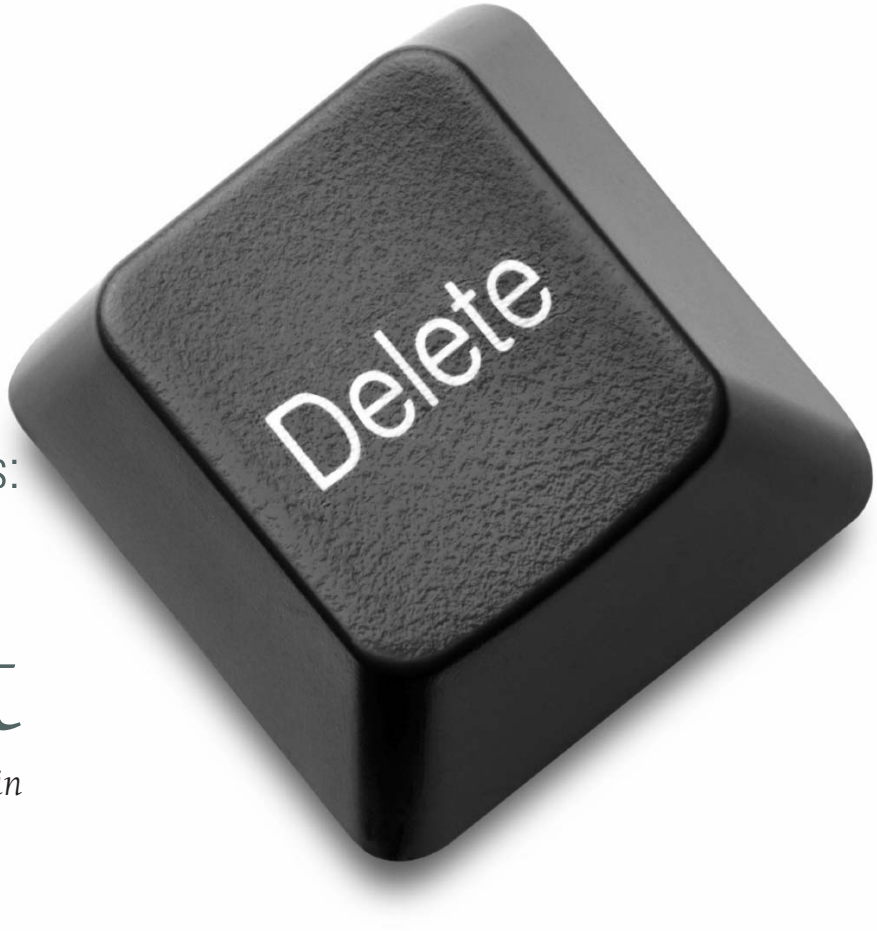

Expungement of Arrest Records:

Erasing the Past

By David Louis Raybin

The impact of the expungement of arrest records may be an issue in civil as well as criminal cases. If the witness's record is expunged, is there any way to still use the criminal act in a deposition for example? What documents are subject to expungement? Sometimes the record can be easily expunged. On other occasions — such as where there is a conviction — expungement may be impossible, unless the conviction itself is vacated. This article addresses the sleight of hand that

evaporates the record of one's confrontation with the constable.

A "criminal record" has horrible consequences when applying for a job, school or professional license. It is amazing how much importance we attach to some ancient sin. In 1853, Gov. Andrew Johnson opposed the practice of teaching inmates stone masonry, which enabled "the criminals to engrave names upon the tombs of the departed." He requested that convicted felons be excluded from those persons having charge of the cemeteries: "if it is degrading to be associated with a felon while we are living, it must be more so to be associated with them after we are dead."

Since the terrorists' attack on our nation, a heightened sense of security has prompted more and deeper background checks disclosing long-forgotten charges that may cost a person his or her job. Thus the insistence for expungements has grown to the point where in Davidson County there is now a full-time expungement clerk in the courthouse.

Although there is some disagreement with the derivation of the term,[1] "expungement" is defined as the "[p]rocess by which record of criminal

conviction is destroyed or sealed after expiration of time."[2] Tennessee's first expungement statute was enacted in 1973 probably to eradicate the drug arrest record of baby boomers.

As written today, the expungement statute,[3] provides that all "public records of a person who has been charged with a misdemeanor or a felony shall ... be removed and destroyed" if (1) the charge has been dismissed, (2) a no true bill was returned by a grand jury, (3) a verdict of not guilty was returned, whether by the judge following a bench trial or by a jury, (4) the person was arrested and released without being charged, (5) upon the expiration of certain bonds, or (6) if the district attorney entered a nolle prosequi. Although civil in nature, a request for an order of protection which was successfully defended and denied by the court following a hearing may also be expunged.[4]

As in most things in the law, there are exceptions. The expungement statute does not require the destruction of "appellate court records or appellate court opinions." I suggest that if you have an appellate case where expungement is at issue that you request the court use a pseudonym or other "John Doe" or else your successful appeal will be pointless. In *State v. Adler*, the defendant was successful in convincing our Tennessee Supreme Court that his case should be expunged. Unfortunately for him, the name, Alan L. Adler, will remain forever in the reported decisions for the entire world to see: a Pyrrhic victory if there ever was one.

Another exception exists that prevents "partial expungement." Suppose there is a multi-count indictment and the defendant is convicted of one count but the remaining charges are dismissed. These remaining charges are eligible for expungement. *State v. Adler*[6] squarely held that a partial expungement of a multi-count indictment was certainly permissible. However, the criminal court clerks rebelled at the notion of a partial destruction of a file and thus the legislature enacted an amendment to the expungement law: "A person shall not be entitled to the expunction of such person's records in a particular case if the person is convicted of any offense or charge, including a lesser included offense or charge."[7] This statute should not be applied retroactively since it would constitute an unconstitutional *ex post facto* law. Thus, multi-count indictments that had partial dismissals for charges that occurred prior to May 22, 2003 (the effective date of the new law) are eligible for expungement.

Although the court and other governmental agencies must destroy documents subject to expungement, certain nonpublic records may be retained:

"... if you have an appellate case where expungement is at issue ... request the court use a pseudonym or other 'John Doe' or else your successful appeal will be pointless."

"Public records," for the purpose of expunction only, does not include arrest histories, investigative reports, intelligence information of law enforcement agencies, or files of district attorneys general that are maintained as confidential records for law enforcement purposes and are not open for inspection by members of the public and shall also not include records of the department of children's services or department of human services that are confidential under state or federal law and that are required to be maintained by state or federal law for audit or other purposes.

The DCS or DHS records mentioned in this statute are regulated by other state and federal laws. Certain other records may be maintained by the police and district attorney only "for law enforcement purposes." This makes sense since law enforcement would be crippled if arrest histories, which often contain fingerprints, were required to be shredded. Notice however, "the law enforcement purposes" exception to destruction is, by its terms, "for the purpose of expunction only" and thus has no impact on the legal effect of an order of expungement which will be addressed later.[8]

While expungement requires that official court records be destroyed, "a non-public record thereof is [to be] retained by the court solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this subsection (a)." By its terms, this exception is "solely for the purpose" of being certain a person only receives Tennessee diversion once. This makes sense and is a narrow and explicit exception.

Expungement is also available for persons who participate in pretrial diversion programs pursuant to *Tenn. Code Ann.* §§ 40-15-102 — 107. Pretrial diversion involves continuing the case for up to two years while the defendant undergoes a probation-like program.[9] If successful, the charges are now subject to dismissal and expungement.

There is seldom a problem with expungement of charges subject to pretrial diversion since these charges never mature into any sort of plea or conviction. The trouble comes about with post-trial, judicial diversion that is utilized far more frequently by prosecutors. Here there is a "quasi-plea" and a "semi-disposition," which is confused with nonexpugnable permanent convictions.

Tenn. Code Ann. § 40-35-313 provides, in pertinent part, as follows:

(a)(1)(A) The court may defer further proceedings against a qualified defendant and place the defendant on probation upon such reasonable

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conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant. The deferral shall be for a period of time not less than the period of the maximum sentence for the misdemeanor with which the person is charged, or not more than the period of the maximum sentence of the felony with which the person is charged. ...

(B)(I) As used in this subsection (a), "qualified defendant" means a defendant who:

(a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought …

(2) ... If, during the period of probation, the person does not violate any of the conditions of the probation, then upon expiration of the period, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this subsection (a) is without court adjudication of guilt, but a nonpublic record thereof is retained by the court solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this subsection (a), or for the limited purposes provided in subsections (b) and (c). The discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose, …

* * *

(b) Upon the dismissal of the person and discharge of the proceedings against the person under subsection (a), the person may apply to the court for an order to expunge from all official records, other than the non-public records to be retained by the court under subsection (a) and the public records that are defined in § 40-32-101(b), all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section; …

If the court determines, after hearing, that the person was dismissed and the proceedings against the person discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information. No person as to whom the order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failures to recite or acknowledge the arrest, or indictment or information, or trial in response to any inquiry made of the person for any purpose ….

Expungement involves forgiveness and not forgetfulness.

Under this statute a person may be placed on a probation-like period of supervision which — if successful — also permits expungement. It is available where the defendant is found guilty, or pleads guilty or nolo contendere to most misdemeanor and many felony offenses. Initial disposition under the diversion statute is not a conviction. A "finding of guilt" alone is not conviction.[10] A conditional guilty plea or nolo contendere plea under *Tenn. Code Ann.* § 40-35-313 is not in any sense a conviction or final adjudication of guilt. Under settled Tennessee law, there is no

guilty plea until the judge unconditionally accepts the plea.[11]

So that there is no doubt about the matter, the preferred method of assuring the possibility of post-trial diversion is to explicitly make it part of the agreed disposition or — if it is to be litigated at a later time — make it part of the written plea agreement as addressed in the recent case of *State v. Sallee*.[12]

The danger in obtaining diversion is that some lawyers believe that even after a "full blown" guilty plea, sentence, judgment and conviction, they can "run their client back to court" so as to obtain the treasured diversion. Not so. You either obtain post-trial diversion at the time of the plea or entry of the verdict or are absolutely certain it is reserved until the later sentencing hearing where the judge will decide the issue. There is no "amending" the case at a later time,[13] short of vacating the plea itself,[14] which is often necessary where the lawyer never advised the client of judicial diversion either through oversight or ignorance.

Expungement cannot follow a conviction. A trial judge does not have the power to pardon. Only the governor may exercise that extraordinary function and even then a pardon does not permit an expungement, absent separate executive exoneration: "While a full pardon restores one's civil rights and remits all punishment associated with the conviction, it does not obliterate the fact of the commission of the crime and the conviction thereof, nor does it wash out the moral stain, for the purposes of entitlement to expungement of criminal records; in other words, it involves forgiveness and not forgetfulness."[15]

What allows for a judicial dismissal (and later expungement) under post-trial diversion is that there has never been an adjudication of guilt — and therefore no conviction — following the conditional guilty plea pursuant to the judicial diversion statute. *Tenn. Code Ann.* § 40-35-313(a) provides that: "The court may defer further proceedings against a qualified defendant and place the defendant on probation upon such reasonable conditions as it may require *without entering a judgment of guilty* and with the consent of the qualified defendant."

While the person is on diversion the judge still has never entered judgment because there is no "adjudication." If the person successfully completes diversion, the person's case is dismissed and expunged when the period of supervision has ended. *Tenn. Code Ann.* § 40-35-313 (a)(2) provides that "if, during the period of probation, the person does not violate any of the conditions of the probation, then upon expiration of the period, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this subsection (a) *is without court adjudication of guilt.*" Two important things occur by virtue of this subsection: The successfully diverted person's case is dismissed, and there never was any adjudication of guilt.

"The effect of the order [of expungement] is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information."

If, on the other hand, the person violates the terms of diversion, then the judge orders a termination, and the person is subject to revocation of probation and might go to jail or prison. Mechanically, the termination of unsuccessful diversion triggers an "adjudication of guilt" which triggers a judgment which, together with the sentence, becomes a "conviction" which is then permanent: the person now has a "felony or misdemeanor record."

Tenn. Code Ann. § 40-35-313 (a)(2) provides that "upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided." Once the adjudication of guilt occurs and sentence is imposed, there is a judgment. At that point the person is "convicted" in every sense of the word. This is so because of the "adjudication." See Rule 32 (e), *Tenn. R. Crim. P,* which provides in part that the content of a "judgment of conviction shall include: (A) the plea; (B) the verdict or findings; and, (C) the adjudication and sentence." As noted, this judgment of conviction is now permanent.

A judgment of conviction is not subject to expungement under any circumstances short of executive exoneration by the governor or vacating the conviction by some sort of collateral attack. This is why — to permit expungement and avoid a life-staining permanent record — there has never been an adjudication and there has never been a conviction where the person enters a guilty plea or is found guilty in a contested jury or bench trial under *Tenn. Code Ann.* § 40-35-313.

Apart from avoiding a permanent "record" by permitting the case to be "diverted" and then eventually dismissed, *Tenn. Code Ann.* § 40-35-313 also contains the mechanics of expungement so that even the arrest is blotted out: *Tenn. Code Ann.* § 40-35-313(b) provides that after the successful completion of diversion, the "person may apply to the court for an order to expunge from all official records … all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section."

The process of expungement is enforced by two provisions. First the person is restored to the status they enjoyed before the arrest as a matter of law, and secondly, the person may truthfully deny they have even been arrested. *Tenn. Code Ann.* § 40-35-313(b) provides that: "The effect of the

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order [of expungement] is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information. No person as to whom the order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failures to recite or acknowledge the arrest, or indictment or information, or trial in response to any inquiry made of the person for any purpose."[16] The legislature has created only two exceptions to the collateral use of an expunged guilty plea that are both contained in the provisions of the diversion statute: a rare plaintiff-in-a-civil suit based on the same criminal conduct and certain terrorism cases.

Judicial diversion has existed since 1973 when it was first enacted only for misdemeanor offenses: again, probably to benefit the baby boomers engaged in experimentation with drugs. Judicial diversion is a "legislative largess" which permits a defendant, after being found guilty or pleading guilty, to complete a diversion program and receive expungement of records and dismissal of the charges.[17]

"The purpose of judicial diversion is to avoid placing the stigma and collateral consequences of a criminal conviction on the defendant, in addition to providing the defendant a means to be restored fully and to useful and productive citizenship."[18] What makes judicial diversion "work" is the ability to expunge one's record of arrest and the plea or finding of guilt.

Lest one think that expungement removes all sins, note that it does not impact the activity that precipitated the arrest. Diversion and expungement rewind the clock to the time before the guilty plea hearing in front of the judge, before the fingerprinting, and indeed, before the arrest itself, but it stops there:

> The state argues that the defendant's 1996 conviction for a prohibited weapons charge supports the application of [a sentencing] factor even though the defendant received diversion for this conviction. The defendant contends that factor (1) does not apply when a defendant has received diversion for an offense and the offense has been dismissed. The record does not reveal whether the 1996 conviction was expunged from the defendant's record at the end of the diversionary period. Even if the conviction has been expunged, expunction "returns the person to the position 'occupied before such arrest or indictment or information' not to "the position occupied prior to committing the offense." *State v. Schindler,* 986 S.W.2d 209, 211 (Tenn.1999) (quoting *Tenn. Code Ann.* § 40-35-313(b)). Our supreme court has held that the trial court may consider evidence of criminal acts resulting in diversion and eventual expunction as prior bad acts, which may form the basis for denying judicial diversion for the present crime. *Id.* It has also held that "the criminal acts underlying an expunged conviction may properly be considered to determine whether a defendant is a suitable candidate for alternative sentencing." *State v. Lane, 3 S.W.3d 456, 462* (Tenn.1999). Under this same reasoning, the criminal acts for which the defendant received diversion can be considered as prior criminal behavior under enhancement factor.[19]

Expungement does not prohibit questioning a witness about prior bad acts even if those acts later were the subject of a dismissed charge.[20] Expungement does not prohibit an employer from considering an employee's probation status in determining whether to discharge the employee.[21] Nor does the expungement statute apply to a school board's decision to terminate a teacher's employment.[22]

The tougher question is what advice to give the client when the bar or college application specifically asks about

expunged or diverted charges. Given the prevalence of private data bases that retain this information, it is foolish to deny that which may be readily ascertained. Moreover, falsehood on the application is always grounds to terminate the license or other benefit. It is difficult to reconcile this advice with the statute except to say that these inquiries may be to determine the underlying sin, which certainly can be a factor in discretionary college admissions or moral fitness to sit for the bar exam.

The expungement statute contains two additional recent provisions that are of interest. First one may expunge all "public records of a person who has been charged and convicted with a misdemeanor or felony while protesting or challenging a state law or municipal ordinance whose purpose was to maintain or enforce racial segregation or racial discrimination." This provision requires that the conviction occurred prior to 1971, and it is limited to protesting racial segregation (it is known as the Rosa Parks Act). Note that this expunges the record but is not a pardon since only the governor — not the legislature — may exercise that function. The expungement statute also prohibits the destruction of records for those charged with certain sexual offenses even though they have completed pre-trial or post-trial diversion.

Even where an attorney has done everything possible to secure the expungement, the client may find that the criminal record still exists in the public domain. This is so because private firms "sweep" the arrest records and seldom update their own files even when there is a later judicial expungement.[23] This ever-increasing problem may be a topic for future federal legislation so that an expunged record is truly removed, thus eliminating the disabling effect of some ancient brush with the law.

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Notes

1. Opinion of the Attorney General, No. 06-003, Jan. 5, 2006:

It has been called to the attention of this Office that there is no such word as "expungement" in the English language. See Letter dated Oct. 17, 2005, from Donald F. Paine, Esq., to Hon. Paul G. Summers ("There is no such English word … The verb is 'expunge.' The noun is 'expunction.'"). We note, however, that at least one authority disagrees. According to *Black's Law Dictionary* 621 (8th ed. 2004), the word "expungement" is preferred in this context. First, under the listing for the verb "expunge," the noun form "expungement" precedes "expunction," which generally connotes preference. Second, *Black*'s has a separate listing for "expungement of record" and, after the appropriate definition, states, "Also termed expunction of record; erasure of record." Third, *Black*'s definition of the phrase "expunction of record" merely states, "See expungement of record."

2. *Black's Law Dictionary* 522 (5th ed. 1979).

3. *Tenn. Code Ann.* § 40-32-101.

4. *Id.*

5. *State v. Adler,* 92 S.W.3d 397 (Tenn. 2002).

6. *Id.* ("We are mindful that if this Court were to hold otherwise, it would be possible for a prosecutor to permanently harm a defendant by significantly overcharging him or her, a valid concern given the pursuit of leverage in the plea bargaining process. We think that it would run counter to the legislature's intent if the expungement statute, designed to prevent

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citizens from being unfairly stigmatized, could be so easily trumped by an overzealous or vindictive prosecutor.")

7. Opinion of the Attorney General, No. 06-003, Jan. 5, 2006: "This Office agrees that the plain language of *Tenn. Code Ann.* § 40-32-101(a)(1) now prohibits the expungement of any charges or counts in a multi-count indictment where the defendant has been convicted of any charge in the case."

8. It should not be lost to one's attention that the statute provides for no regulation of these police records to ensure their accuracy. *See, State v Buck,* 670 S. W.2d 600 (Tenn. 1984) (computer printouts from National Crime Information Center were not admissible as a substitute for certified copies of court convictions or for any other purpose, since information in such reports is pure hearsay of a dubious decree of accuracy, which is prepared for purposes other than court use and contains information that is likely to be prejudicial under all circumstances and is not the best evidence of matters that can be proven by reliable, documentary evidence).

9. *State v. Baxter,* 868 S.W.2d 679 (Tenn. Crim. App., 1993) ("Pretrial diversion, or a suspended prosecution, is truly extraordinary relief for a defendant. … When a defendant is granted pretrial diversion, the consequences of a public prosecution, trial, and conviction are avoided. If the defendant successfully completes the program, the charges are dismissed. Essentially, this is pretrial probation. It is extraordinary relief, and prosecutors must scrutinize each applicant carefully. Such relief is designed to encourage the defendant's rehabilitation. It is to insure that the defendant will not be the subject of criminal charges in the future.").

10. The meaning of the terms "guilty plea" and "conviction" vary according to the context of the statute. See the excellent and much extended analysis in *State v. Vasser,* 870 S.W.2d 543 (Tenn. Crim App. 1993).

11. See the extensive discussion in *State v. Todd,* 654 S.W.2d 379 (Tenn. 1983) which held that until the judge accepts the plea and a final judgment is entered, a court is free to reject the plea and plea agreement and thus there is no conviction.

12. *State v. Sallee*, 2007 WL 189377 (Tenn. Crim. App.):

> One caveat enunciated by our Supreme Court ... is that "the trial court may entertain the issue of judicial diversion .... when such an option is reflected in the 11(e)(1)(C) plea agreement." *State v. Soller*, 181 S.W.3d 645, 650 (Tenn. 2005). In the case sub judice, the negotiated plea agreement, with the consent of the State and the trial court, specifically provides that "[t]he parties agree that [the] question of sentence of probation pursuant to *Tenn. Code Ann.* § 40-35-313 will be determined by the Court at a subsequent hearing. The court shall reserve acceptance of this plea agreement until the issue of judicial diversion is determined by the court." The State argues that the trial court's reservation of acceptance of the plea agreement, by its terms, disqualifies Defendant as a candidate for judicial diversion, relying on the statutory definition of a "qualified defendant" as a defendant who "[i]s found guilty or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought." *Tenn. Code Ann.* § 40- 35-313(a)(1)(B)(i). We respectfully disagree with the State's somewhat circular interpretation of the definition. The statute specifically grants the trial court authority to "defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant." *Id.* § 40-35-313(a)(1)(A). Indeed, the trial court's acceptance of a defendant's plea of guilty and the entry of a judgment precludes the trial court from imposing judicial diversion. *Soller*, 181 S.W.3d 645, 650 (Tenn. 2005). The inclusion of the option of judicial diversion in Defendant's negotiated plea agreement and the trial court's deferral of entering judgment until after an adjudication of Defendant's suitability for judicial diversion mirrors the procedure favorably contemplated in *Soller*.

13. *State v. Soller,* 181 S.W.3d 645, 650 (Tenn. 2005) ("We conclude that when a trial court accepts a plea agreement pursuant to Tennessee Rule of Criminal Procedure 11(e)(1)(C), such agreement represents the full and complete agreement between the parties and cannot be altered by the trial court to include judicial diversion. Thus, the trial court may entertain the issue of judicial diversion only when the court rejects the agreement or when such an option is reflected in the 11(e)(1)(C) plea agreement. Additionally, once a judgment of guilty has been entered, the trial court is precluded from granting judicial diversion.").

14. Opinion of the Attorney General, No. No. 06-008, Jan. 10, 2006 ("However, this does not mean that a defendant aggrieved by his or her lack of knowledge or advice concerning pretrial diversion and judicial diversion is without a remedy. As the Supreme Court noted in *Turco* and *Soller*, trial courts have authority to vacate judgments pursuant to Rule 33 of the Rules of Criminal Procedure and the defendant may move to withdraw his guilty plea pursuant to Rule 32(f) of the Rules of Criminal Procedure. Turco, 108 S.W.3d at 248; *Soller*, slip op. at 5 n.5; see Tenn. R. Crim. P. 32(f) and 33. Aggrieved defendants may raise a claim that they were denied the opportunity to seek diversion through those remedies. A successful defendant will be restored to his pre-judgment status and diversion may then become available.").

15. *State v. Blanchard*, 100 S.W.3d 226 (Tenn. Crim. App. 2002).

16. *Miller v. Tennessee Board of Nursing,* 2007 WL 2827526 (Tenn.App.2007)("Persons whose records have been expunged may properly decline to reveal or acknowledge the existence of a former charge.").

17. *State v. Robinson,* 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004).

18. *State v. Johnson*, 980 S.W.2d 410, 413 (Tenn. Crim. App. 1998).

19. *State v. Kelley*, 34 S.W.3d 471 (Tenn. Crim. App. 2000).

20. *State v. Dishman,* 915 S.W.2d 458 (Tenn. Crim. App. 1995).

21. *Whitmore v. Civil Service Merit Bd. of Shelby County,* 673 S.W.2d 535 (Tenn. App.1984).

22. *Canipe v. Memphis City Schools Bd. of Educ.,* 27 S.W.3d 919 (Tenn. App. 2000).

23. "Expunged Criminal Records Live to Tell Tales," *The New York Times*, Oct. 17, 2006 ("But enormous commercial databases are fast undoing the societal bargain of expungement, one that used to give people who had committed minor crimes a clean slate and a fresh start.").