**S T A T E O F T E N N E S S E E**
OFFICE OF THE
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Opinion No. 06-003

Effect of Public Chapter No. 175 of the Acts of 2003 on the Expungement of Records in Multi-Count Criminal Indictments

## QUESTION

Where a defendant is convicted of at least one count in a multi-count indictment, does Tenn. Code Ann. § 40-32-101(a)(1), as amended by Public Chapter No. 175 of the Acts of 2003, preclude the expungement[1] of records relating to all counts in that indictment?

## OPINION

Yes. The plain language of section 40-32-101(a)(1), as amended by Public Chapter No. 175, prohibits the expungement of records of charges "in such case" where a defendant has been convicted of "any offense or charge."

## ANALYSIS

Tenn. Code Ann. § 40-32-101(a)(1), as amended by Public Chapter No. 175 of the Acts of 2003, reads in pertinent part as follows:

> All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury . . . shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person; . . . provided however, when a defendant in a case has been convicted of any offense or charge, including a lesser included offense or charge, the defendant shall not be entitled to expungement of the records or charges in such case pursuant to this part.

[1]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 October 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."

According to the fiscal note prepared for the Senate and House bills that became Public Chapter No. 175, the General Assembly enacted the amendment in response to the Supreme Court decision in *State v. Adler*, 92 S.W.3d 397 (Tenn. 2002). In *Adler*, the Court held that a defendant convicted of a lesser included offense was entitled to the expungement of public records relating to the greater offense for which he was originally charged. *Adler*, 92 S.W.3d at 403. The statute as amended now clearly prohibits a defendant convicted of a lesser included offense from having such records expunged. In a 2004 opinion, this Office concluded that the amendment "clarifi[es] under Tenn. Code Ann. § 40-32-101(a)(1) that the records in any criminal case are not expungeable if the defendant is convicted of any offense under the indictment, be it the indicted offense or a lesser included offense." Op. Tenn. Att'y Gen. 04-024 (Feb. 12, 2004). It is the opinion of this Office that the plain language of section 40-32-101(a)(1) also prohibits the expungement of records related to *all* charges in an indictment, where a defendant has been convicted of at least one count under the indictment.

The amendment clearly states that "when a defendant in a case has been convicted of any offense or charge . . . the defendant shall not be entitled to expungement of the records or charges in such case pursuant to this part." Where a statute lacks "contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from [its] words." *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000). In interpreting such a statute, "courts must presume that the legislature says in a statute what it means and means in a statute what it says there. Accordingly, courts must construe a statute as it is written." *Id.* (citations omitted).

In 2004, the Court of Criminal Appeals denied a petition for writ of certiorari filed by a defendant whose request for expungement had been denied by the Davidson County Criminal Court under section 40-32-101(a)(1). The court ruled that "[t]he amendment to Tenn. Code Ann. 40-32-101(a)(1) limits expungement. The statute now provides that if a defendant is convicted of *any* offense or charge in a case, he is not entitled to expungement of the records or charges in such case." *Crawley v. State*, No. M2004-00253-CCA-R3-CO, order at 2 (Tenn. Crim. App. Aug. 3, 2004) (emphasis in original). 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.

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