STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

August 31, 2016

Opinion No. 16-36

Partial Expungements

Question 1

Under Tenn. Code Ann. § 40-32-101(j), should criminal court clerks process petitions for partial expunction of criminal records and destroy all public records relating to the petitioner's arrest, indictment, charging instrument, or disposition for any charges other than the offense for which the person was convicted?

Opinion 1

Upon order granting a petition for partial expunction, criminal court clerks must destroy public records that relate solely to offenses for which a petitioner was not convicted. When records relate to several charges, some resulting in convictions and others resulting in dismissals or acquittals, the records must be redacted. A criminal court may find that redaction is infeasible due to the intertwined nature of the charges, but the record must contain sufficient evidence to justify the finding.

Question 2

Does the second sentence of Tenn. Code Ann. § 40-32-101(j) limit the type of records that should be expunged, such that only public records in the relevant databases are expunged?

Opinion 2

No.

ANALYSIS

Public Chapter 89, 2015 Tenn. Pub. Acts ch. 89, § 2, added the following subsection (j) to Tenn. Code Ann. § 40-32-101 effective July 1, 2015:

> (j) A person who is ineligible for expunction of the person's records pursuant to subdivision (a)(1)(E) shall be entitled to partial expunction of any public records relating to the person's arrest, indictment, charging instrument, or disposition for any charges other than the offense for which the person was convicted. The public records shall be expunged from the relevant databases of the national crime information center system and similar state databases, and the person shall be entered into the Tennessee bureau of investigation's expunged criminal offender

> and pretrial diversion database with regard to the offenses expunged pursuant to this subsection (j). Nothing in this subsection (j) shall require court clerks to expunge records relating to an offense for which the person was convicted.

Tennessee Code Annotated § 40-32-101(a), to which subsection (j) refers, generally calls for the destruction of records when an accused is acquitted or charges are dismissed. *See* Tenn. Code Ann. § 40-32-101(a)(A), (F). Subdivision (a)(1)(E) carves out the following exception:

> (E) Except as provided in subsection (j), a person is not entitled to the expunction of such person's records if:
>
> > (i) The person is charged with an offense, is not convicted of the charged offense, but is convicted of an offense relating to the same criminal conduct or episode as the charged offense, including a lesser included offense; provided, however, any moving or nonmoving traffic offense shall not be considered an offense as used in this subdivision (a)(1)(E); or
> >
> > (ii) The person is charged with multiple offenses or multiple counts in a single indictment and is convicted of:
> >
> > > (a) One (1) or more of the charged offenses or counts in the indictment; or
> > >
> > > (b) An offense relating to the same criminal conduct or episode as one (1) of the offenses charged in the indictment, including a lesser included offense.

Id. § 40-32-101(a)(1)(E).

In construing this statute, the primary objective is to ascertain and give effect to the legislature's intent without unduly restricting or expanding the statute's coverage beyond its intended scope. *Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000). The process begins by focusing on the statute's words, presuming that each word has its own meaning and purpose. If the language is clear and unambiguous, the task is at an end. *Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012). When faced with ambiguous language, however, we may refer to the broader statutory scheme, the legislative history, and other sources, including the established canons of statutory construction. *State v. Marshall*, 319 S.W.3d 558, 561 (Tenn. 2010); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

The term "partial expunction" as used in the new subsection (j) is not defined by the Code. In the absence of a statutory definition, the phrase's constituent words are given their ordinary meaning. *See, e.g., Brookside Mills, Inc. v. Atkins*, 322 S.W.2d 217, 218 (Tenn. 1959). Black's Law Dictionary defines "expunge" as "[t]o remove from a record, list, or book; to erase or destroy." Expunge, *Black's Law Dictionary* (10th ed. 2014). Subsection (j) points to subsection (a), which contemplates that expunged records "be removed and destroyed," as does Tenn. Code Ann. § 40-32-102. Tenn. Code Ann. § 40-32-101(a)(A), (F); *see id.* § 40-32-102 (providing that

officials "shall remove and destroy the records within a period of sixty (60) days from the date of filing a petition authorized by § 40-32-101"). In view of this language, this Office has consistently opined that expungement of records requires "actual destruction." Tenn. Op. Att'y Gen. No. 01-040 (Mar. 19, 2001) (citing Tenn. Op. Att'y Gen. No. 00-058 (Mar. 31, 2000)).[1]

The ordinary meaning of "partial" is "[n]ot complete; of, relating to, or involving only a part rather than the whole." Partial, *Black's Law Dictionary* (10th ed. 2014). Subsection (j) differentiates between records "relating to an offense for which the person was convicted" and those relating to "any charges other than the offense for which the person was convicted." Tenn. Code Ann. § 40-32-101(j). This suggests that a "partial expunction" refers to expungement of some part of a record according to its content. We note that the Tennessee Supreme Court has used the term "partial expungement" to mean expungement of records for charges dismissed from a multi-count indictment—a construction of which the General Assembly presumably was aware. *State v. L.W.*, 350 S.W.3d 911, 916 (Tenn. 2011); *see Davis v. State*, 313 S.W.3d 751, 762 (Tenn. 2010) (noting presumption that the legislature is fully aware of judicial constructions of prior enactments). Accordingly, the most natural reading of the term "partial expunction" is the destruction of records relating to a petitioner's arrest, indictment, charging instrument, or disposition for any charges other than the offense for which he was convicted.

The chief objection that might be lodged to this construction is that it largely un-works subdivision (a)(1)(E) of the expungement statute. *See, e.g., State v. Brookman*, No. M2014-00745-CCA-R3-CD, 2015 WL 3929646, at *2 n.1 (Tenn. Crim. App. June 26, 2015) (noting that expungement of records relating to dismissed charges on multi-count indictment was not available under the 2012 version of the expunction statute), *no perm. app. filed*. Before the 2012 amendments to the statute,[2] a defendant could obtain expungement of records relating to dismissed charges on a multi-count indictment. *L.W.*, 350 S.W.3d at 918 (holding that that "a conviction for one count in a multi-count indictment or presentment does not preclude expungement of the records relating to a separate count when the criteria of section 40-32-101 have been satisfied"). And, before the 2003 amendments,[3] a defendant who was convicted of a lesser-included offense of the offense sought in the indictment was entitled to have the record expunged of any greater charges for which the jury found the defendant not guilty. *State v. Adler*, 92 S.W.3d 397, 403 (Tenn. 2002). Consequently, the legislature could have achieved much of the effect of the current subsection (j) simply by repealing subdivision (a)(1)(E), a result that is not lightly to be assumed. *Cf. Elliott v. Cobb*, 320 S.W.3d 246, 251 (Tenn. 2010) (countering implied repealer argument with

[1] *See also* Tenn. Op. Att'y Gen. No. 00-058 (Mar. 31, 2000) (citing Tenn. Op. Att'y Gen. No. 79-539 for the proposition that "the mandate to 'remove and destroy' public records subject to an expungement order means 'destruction or obliteration'"); Tenn. Op. Att'y Gen. No. 79-539 (Dec. 21, 1979) (opining that "the legislature means more than seal and maintain when the term 'expunge' is used").

[2] Before 2012, subdivision (a)(1)(E) provided: "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." *L.W.*, 350 S.W.3d at 917 (quoting Tenn. Code Ann. § 40-32-101(a)(1) (Supp. 2010)).

[3] Before 2003,the expungement statute provided only: "All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed . . . or a verdict of not guilty returned by the jury . . . shall . . . be removed and destroyed without cost to such person. . . ." *L.W.*, 350 S.W.3d at 916 (quoting Tenn. Code Ann. § 40–32–101(a)(1) (Supp. 2002)).

the observation that "[i]f the legislature had intended to repeal section 20-9-304 in medical malpractice cases, it easily could have done so, as it did with section 20-9-302").

These provisions might be harmonized, as the opinion request suggests, by reading the second sentence of subsection (j) to limit the class of records that are to be expunged. *See Bible & Godwin Const. Co. v. Faener Corp.*, 504 S.W.2d 370, 371 (Tenn. 1974) ("Where different sections are apparently in conflict we must harmonize them, if practicable, and lean in favor of a construction which will render every word operative."). That is, a "partial expunction" of records would occur according both to their content and to the medium in which they are embodied (electronic versus paper). The use of the definite article at the beginning of the second sentence of the subsection lends some support to this construction.

In our view, however, there is little need to resort to the canon of statutory construction calling for the harmonization of provisions which stand in apparent conflict. Not only do subsection (j) and subdivision (a)(1)(E) refer to one another, but the latter provision was reenacted (with emendations relating to traffic offenses) as part of Public Chapter 89. *See* 2015 Tenn. Pub. Acts ch. 89, § 1 (codified at Tenn. Code Ann. § 40-32-101(a)(1)(E).) Subdivision (a)(1)(E) prohibits expunction in cases in which a defendant is partly successful on the charges against him; subdivision (j) qualifies the prohibition by providing for partial expunction. These provisions do not conflict merely because the legislature could have accomplished the same result by a different avenue in light of earlier judicial pronouncements.

Two additional considerations bolster the construction that we have advanced here. First, subsection (j) calls for partial expunction of "any" public records, and the term "public record" as used in the expungement statute refers to "all records maintained by a public official." Tenn. Op. Att'y Gen. No. 05-150 (Sept. 30, 2005). The use of the qualifier "any" signals that the legislature did not intend that the scope of a partial expunction be defined by the rather narrow class of records mentioned in the succeeding sentence. Second, an expunction limited to the removal of information from databases would be at least partially ineffective. Though a petitioner might benefit from the absence of readily accessible electronic information from which criminal histories are often derived, inspection of court files still would reveal that the petitioner had been charged with offenses for which he had not been convicted. The purpose of the expungement statute is to restore persons to the status they occupied before criminal proceedings began, and to "prevent citizens from being unfairly stigmatized." *Adler*, 92 S.W.3d at 403; *State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988). Given that the statute is frequently construed in light of these remedial goals, *see, e.g., L.W.*, 350 S.W.3d at 916, we conclude that a reviewing court is unlikely to hold that partial expunction is limited to deletion of information from databases.

Cases under subdivision (a)(1)(E) often will involve documents that relate both to conviction offenses and to dismissed/acquitted charges. Precedent indicates that such documents should be redacted. *Brookman*, 2015 WL 3929646, at *5. The Court of Criminal Appeals has said:

> Obviously, some records that relate to several charges, some resulting in convictions and others resulting in acquittals, may be of such a character that it is impractical to redact the part dealing with the dismissed charges. However, the

> mandatory nature of the expunction statute means that any exception to it must be for cause shown. . . . [I]t is incumbent upon the opponent of expunction to insure that the record justifies less than full redaction of relevant records.

Id. (quoting *Eslick v. State*, 942 S.W.2d 559, 560 (Tenn. Crim. App. 1996)); *see also L.W.*, 350 S.W.3d at 918 (leaving open the question of petitioner's entitlement to partial expungement due to the "intertwined" nature of the charges). As this passage reflects, a criminal court may find that something less than full redaction is warranted due to the intertwined nature of the charges in a particular case; the record must, however, "contain sufficient evidence to show that such a finding is justified." *Eslick*, 942 S.W.2d at 560.

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