

# Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences



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Federal judges have a limited repertoire of responses to people who appear before them for sentencing, even when the offense is relatively minor. If a person is guilty, judgment must be entered and sentence imposed, and a permanent conviction record will result. Short of complete exoneration or a presidential pardon, the convicted person can look forward to a lifetime of disabling collateral consequences. Internet technology and pervasive background checking have made it nearly impossible for someone with a federal conviction to escape their past.

State court judges, on the other hand, often have available creative sentencing alternatives that can avoid or neutralize the effect of a criminal record. One such alternative is deferred adjudication, known in some states as deferred sentencing or “probation before judgment.” Successful participants in deferred adjudication programs see the charges against them dismissed and their arrest record expunged. Deferred adjudication thus offers not only an alternative to incarceration, but also an alternative to the legal barriers and stigma that result from a conviction.

From the defendant’s point of view, deferred adjudication offers the possibility of a clear record at the conclusion of probation. From the prosecutor’s perspective, deferred adjudication promises practical efficiencies that conventional diversion does not. A court that has statutory authority to defer sentencing is not dependent upon the prosecutor’s agreement to give the defendant a second chance.

The U.S. Sentencing Commission recently initiated a study of alternatives to incarceration. It might usefully extend its inquiry to alternatives to conviction. The collateral consequences of conviction are, as a practical matter, as much a part of the sentence as a prison term, even though they generally have no expiration date. Avoiding a conviction record is often the most important part of the penalty phase for a defendant who does not already have one, since the collateral consequences of conviction may linger long after the court-imposed sentence has been satisfied. Indeed, it has been said that, “[g]iven the number of people that have been convicted at one time or another, collateral consequences have become one of the most significant methods of assigning legal status in America.”<sup>1</sup>

Federal courts presently have authority to defer adjudication and expunge the record only in one narrow category of cases.<sup>2</sup> This article proposes that the Sentencing Commission consider recommending expansion of this authority to impose what it terms a *rehabilitative sentence* (see USSG § 4A1.2, cmt. N. 9), to broaden the government’s arsenal of responses to criminal behavior, and to give federal defendants in appropriate cases a chance to start over with a clean slate.

## I. How Deferred Adjudication Works

Deferred adjudication is a close relative of diversion, but because it is leveraged by an upfront guilty plea, it is useful in a wider range of cases. In the typical deferred adjudication scenario, the court accepts the defendant’s guilty plea but withholds judgment, subject to the defendant’s satisfactory completion of a period of probation with conditions. If the defendant successfully completes probation, the court dismisses the charges and vacates the plea, so that the defendant can truthfully say that he or she has never been convicted. This is because, under the law of most jurisdictions, there is no “conviction” until sentence is imposed and judgment entered.<sup>3</sup>

In many jurisdictions, if probation is successfully completed pursuant to a deferred adjudication program, the record is expunged or sealed so that there is no publicly available evidence that the individual was ever charged with a crime.<sup>4</sup> Expungement is a valuable feature of deferred adjudication schemes, since the existence of an arrest record alone can be fatal to an individual’s chances for a job, apartment, or loan. In an age where background checking has become routine, and employers and landlords are increasingly averse to taking risks, a clear record offers obvious advantages.<sup>5</sup> Deferred adjudication thus may offer not only an alternative to conviction, but the additional advantage of allowing a defendant to come away from an adverse encounter with the justice system without any criminal record at all, or at least not one that is accessible to the public. Such an outcome can be considerably more important to a defendant in the long run than avoiding a short period of incarceration or compulsory residential drug treatment, both of which may be part of the conditions of probation imposed by the court pursuant to a deferred adjudication bargain.

*Federal Sentencing Reporter*, Vol. 22, No. 1, pp. 6–16, ISSN 1053-9867 electronic ISSN 1533-8363.

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From the point of view of courts and prosecutors, deferred adjudication is more efficient than simple diversion in many cases, since the upfront guilty plea secures the conviction in the event the defendant fails to comply with the terms of probation, and provides the leverage sometimes necessary to steer a defendant into treatment and permanently out of the justice system.<sup>6</sup> A term of community supervision saves the cost of a prison bed, and a defendant who takes full advantage of the opportunities afforded by deferred adjudication may be less likely to return to the justice system. Deferred adjudication gives a court a greater degree of control over the disposition of a case vis-à-vis the prosecutor, whose decision to divert can be neither compelled nor reviewed.

At the same time, deferred adjudication is not an option to be chosen lightly either by the defendant or by the government. The conditions of probation can be burdensome, and a defendant's failure to comply in a deferred adjudication scenario can lead, with speed and certainty, to a more severe sentence than might otherwise have been expected.<sup>7</sup> While the maximum allowable sentence will not have changed when the defendant returns to the court for sentencing, the court may be less inclined to be lenient toward someone who has shown himself unwilling or unable to take advantage of what the government doubtlessly regards as a generous bargain. Many defendants would prefer a quick resolution of the case with a short jail term to burdensome conditions of probation that may last for some time, and may be hard to comply with. Defense attorneys will therefore not encourage a client to agree to probation terms if they doubt the client's ability to succeed. Deferred adjudication programs are aimed at good risks, and defense attorneys have as much interest in steering high risks away as courts and prosecutors do.<sup>8</sup>

Furthermore, deferred adjudication dispositions may not always avoid undesirable collateral consequences even if the record is expunged<sup>9</sup> and generally may be considered to enhance a sentence in later criminal cases, including under the federal sentencing guidelines.<sup>10</sup> Federal law is not consistent in its treatment of state deferred adjudication programs,<sup>11</sup> notably where non-citizen defendants are concerned.<sup>12</sup>

In addition, the fact that a growing number of agencies that are exempt from statutory restrictions on access to records may render unrealistic the expectations that may follow judicial expungement. It is becoming risky for an individual to rely on a court's order sealing the record as long as the guilty plea remains somewhere on the books, even in those states where the law specifically allows a person to deny its existence.<sup>13</sup>

It follows that competent defense counsel must have a thorough understanding of the collateral consequences that are likely to be important to their clients, including relevant policies on access to and use of criminal records.<sup>14</sup> To the extent collateral consequences affect disposition of the criminal case, prosecutors and courts too should understand

them and be prepared to take them into account.<sup>15</sup> As the then-president of the National District Attorney's Association wrote in 2001, "Judges often consider the collateral consequences of a conviction" and prosecutors also "must consider them if we are to see that justice is done."<sup>16</sup> If an upfront guilty plea is likely to produce the very collateral consequences that all hoped to avoid, a pre-plea diversion model may be preferable to deferred adjudication. Alternatively, the defendant may be permitted to plead to less serious charges that do not produce the undesirable collateral consequences.

In summary, deferred adjudication programs promise both cost savings and public safety benefits. It is the promise of a clear record for the defendant, and the possible reduced risk of recidivism that comes with motivation to succeed under supervision, that in the end make deferred adjudication an attractive part of any jurisdiction's public safety strategy. Of course, deferred adjudication programs work best if coordinated with federal and state policies and practices on access to and use of criminal records.

## II. Overview of Deferred Adjudication Programs in the States

Deferred adjudication schemes are statutorily authorized in over half the states. Their purpose, like post-conviction sealing and expungement and executive pardon, is to provide an opportunity for offenders who demonstrate an ability to comply with the law to avoid the burden and stigma of a criminal record.<sup>17</sup> The American Bar Association, the National District Attorneys Association, and the major national defender organizations have joined to urge jurisdictions to support and fund prosecutors and others seeking to develop "deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record" for any offender deemed appropriate for a community supervision sentence.<sup>18</sup>

In the 1970s, many states adopted deferred adjudication laws that were evidently inspired by the Corrections Articles of the Model Penal Code. Section 301.1 of the MPC authorizes the court to "suspend[] the imposition of sentence" and place a defendant on probation, with "such reasonable conditions . . . as it deems necessary to insure that he will lead a law-abiding life or likely to assist him to do so." § 301.1(1). Some of the conditions authorized by this section include satisfaction of family and work responsibilities, compliance with a course of medical or psychiatric treatment, service of a period of incarceration not exceeding 30 days, and a variety of other familiar conditions of community supervision. § 301.1(2) & (3). Upon successful completion of the period of probation, the court may order that "so long as the defendant is not convicted of another crime, the judgment shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction." § 301.5 (1).

Deferred adjudication programs vary from state to state. In many states, only individuals charged with a relatively minor crime, or who have a relatively minor prior

record, are eligible for deferred adjudication; in others, there are few statutory restrictions on the offenses that are eligible.<sup>19</sup> Certain categories of offenses (generally those involving sex and violence) may not qualify. In some states the court's authority to postpone entry of judgment depends upon a motion by the government, and in others it does not.<sup>20</sup> The required period of probation is usually one to two years, though in some states it may be as many as five years. In most states, an individual only gets one opportunity to take advantage of deferred adjudication, but the episode is generally not considered a predicate offense for purposes of any subsequent criminal proceeding.

In twenty states, expungement or sealing of the entire case record is authorized or required following successful completion of probation where judgment has been deferred.<sup>21</sup> Among these states are Arkansas, Texas, and Vermont, whose programs are described in the Appendix. Another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing of the record.<sup>22</sup> In these states no conviction results, but the guilty plea remains on the individual's record and may be disclosed. (A number of states authorize expungement of convictions, essentially obviating the need for a deferred adjudication option.<sup>23</sup>)

In other states, the approach to avoiding a conviction record is less comprehensive and less clear. New York law does not specifically authorize deferred adjudication, but courts administer these programs under their own rules, vacating the guilty plea upon request of the prosecutor after successful completion of probation. In New York, non-conviction records are automatically sealed unless the prosecutor objects.<sup>24</sup> In Missouri, courts are authorized to suspend imposition of sentence and seal the record upon successful completion of a probation term, but the charges and plea remain on an individual's record for law enforcement and a number of other specified purposes.<sup>25</sup> North and South Carolina permit deferred adjudication only for minor drug offenses, and authorize expungement of records only for offenders whose crimes were committed before they were 21 years of age.

In California, courts may "knock down" a felony conviction to a misdemeanor, and suspend imposition of sentence pending successful completion of a period of probation, thus avoiding conviction and imposition of legal disabilities.<sup>26</sup> Minnesota and North Dakota have similar schemes.<sup>27</sup> However, none of these three states authorize expungement or sealing of the record.

### III. Deferred Adjudication Under Federal Law

Federal courts presently have no general authority to delay or postpone imposing sentence and entering judgment. Indeed, the rules of criminal procedure provide that "[t]he court must impose sentence without unnecessary delay."<sup>28</sup> The one exception to this is the so-called Federal First Offender Act, codified at 18 U.S.C. § 3607,<sup>29</sup> which applies where a person with no prior drug convictions is found

guilty of misdemeanor marijuana possession under 21 U.S.C. § 844. In this limited class of cases, the court may impose a term of probation of no more than one year "without entering a judgment of conviction."

At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

If the guilty party was less than 21 years of age at the time of the offense, the court "shall enter an expungement order upon the application of such person." The effect of an order under this provision is as complete as under most state expungement laws:

The expungement order shall direct that there be expunged from all official records, except the nonpublic [Department of Justice] records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

The Federal First Offender Act is well crafted as far as it goes, and could easily be extended to a broader range of offenses. As it is, it is the only avenue under federal statutory law by which the collateral consequences of conviction may be avoided.<sup>30</sup> Between 1950 and 1984, federal law provided an additional avenue of relief for offenders between the ages of 18 and 26, who could petition to have their convictions "set aside" after successful completion of probation under the Federal Youth Corrections Act (YCA).<sup>31</sup> While the effect of this set-aside was never settled in the courts,<sup>32</sup> the Sentencing Reform Act repealed the YCA, and nothing replaced it.<sup>33</sup> This left a presidential pardon as the only avenue for a federal offender to avoid collateral consequences and the stigma of conviction.<sup>34</sup> Unfortunately, by 1984, for most people, federal pardons had become difficult to obtain. The pardon process in the Justice Department has become increasingly irregular and unreliable with every passing year.

The United States Sentencing Commission has undertaken a study of alternatives to incarceration, and it seems timely and appropriate for the Commission to expand that inquiry to include alternatives to conviction. More specifically, it could consider recommending that federal courts be given statutory authority to suspend imposition of sentence

and defer judgment whenever a probationary sentence would otherwise be appropriate under the Sentencing Guidelines. At present, without the jurisdiction over a case that comes with taking a plea, federal courts do not have the option of diverting defendants out of the justice system for a period of time to see if they can comply with some set of probation-like conditions.<sup>35</sup> State courts of general jurisdiction make good use of their authority to give less serious offenders a chance to avoid a criminal record, and it would seem a useful tool for federal courts as well.

#### IV. Conclusion

Since the 1970s, many state courts have had the authority to deal with offenders who are otherwise appropriate for a probationary sentence by giving them a chance to avoid a conviction record. Deferred adjudication programs that include the possibility of expungement have proven an efficient and effective way of dealing with offenders who are ready to change their behavior. Particularly now that the collateral consequences of conviction have become so numerous and severe, making it harder than ever for people with a criminal record to establish themselves as law-abiding members of the community, it seems appropriate to make full use of this sort of authority. In the federal system, which offers such limited opportunities for relief from collateral consequences, it would be sensible to give offenders, in appropriate cases, a chance to avoid them in the first place to improve the chances of their rehabilitation. Accordingly, the Sentencing Commission should consider proposing to Congress that it expand deferred adjudication as a sentencing option to improve public safety outcomes, while at the same time enhancing the efficiency and fairness of the justice system.

#### Appendix—Three Deferred Adjudication Programs

##### ARKANSAS

Arkansas law provides several ways of avoiding a conviction record, though only one (the First Offender Act of 1975, described below) is a deferred adjudication program. Nevertheless, these several options allow almost any offender who is deemed appropriate for probation or other community supervision to avoid a conviction and prevent the public availability of the criminal record. This is so because, under Arkansas law, a person is not deemed “convicted” unless and until a prison sentence or fine is imposed. Thus, anyone sentenced to probation only may apply to the court for dismissal of the charges and expungement of the record as soon as the conditions of probation are satisfied. Under Arkansas law, anyone who has committed a serious violent offense or who has more than two prior felonies is ineligible for probation. Ark. Code Ann. § 5-4-301. The Arkansas courts’ authority to impose a probationary sentence was expanded considerably in 1993 by the Community Punishment Act, Ark. Code Ann. § 1201, *et seq.*, described in greater detail below. Successful completion of probation under any of these

authorities may result in expungement of the record, and in some cases expungement is mandatory.

- **First Offender Act of 1975** (“Act 346”): First offenders who plead guilty or *nolo contendere* may have adjudication deferred and, upon successful completion of probation, are automatically entitled to have conviction expunged (or sealed). Ark. Code Ann. §§ 16-93-302(a)(1), 16-93-303(a)(1). Persons who go to trial may not obtain the benefits of the Act. See *Baker v. State*, 310 Ark. 485, 837 S.W. 2d 471 (1992). Persons convicted of a sex offense with a victim under the age of 18 are also not eligible for first offender expungement. After the person enters the appropriate plea, the judge then refrains from entering a judgment of guilt and places the person on probation for not less than one year. At the time that the judge places the person on probation, a fine not exceeding \$3,500 can be imposed. Significantly, this Act provides the only exception to the general rule of Arkansas law that the imposition of a fine constitutes a conviction. Any further proceedings are then deferred until the terms and conditions of probation are either violated or fulfilled. If the person violates the terms and conditions, the court may enter an adjudication of guilt and “proceed as otherwise provided.” However, if the person fulfills the terms and conditions of probation, the court must enter an order that dismisses the case, discharges the person, and expunges the criminal record. A person may obtain the benefits of the First Offender Act only once.

**Note:** Since the passage of 1993 Community Punishment Act described above, which does not require a guilty plea and is available to persons with a prior felony conviction, this statute has been used less frequently. However, it is useful for first offenders who plead guilty insofar as it automatically entitles them to expungement upon successful completion of probation.

- **First-time Drug Offenders:** Ark. Code Ann. § 5-64-413, enacted in 1989, provides deferred adjudication leading to expungement for persons who have not been previously convicted of a drug offense. As under the First Offender Act, a person who fulfills the conditions of probation is entitled to have the charges dismissed. A person may obtain the benefits of this provision only once.

**Note:** There are three notable differences between § 5-64-413 and the First Offender Act. First, a person can obtain the benefits of § 5-64-413 even if he or she has been found guilty after a bench or jury trial. Second, under § 5-64-413, merely “pleading guilty” or having “been found guilty” of a previous drug crime is enough to make a person ineligible for the benefits of § 5-64-413, while one must have been previously “convicted” under the First Offender Act. Third, under § 5-64-413, expungement of the criminal record is not automatic, but must be applied for and may be withheld.

- **Probationers (Clean Slate Act):** Under Ark. Code Ann. § 5-4-311(a) and (b), the so-called Clean Slate Act of 1975, probationers for whom a judgment of conviction was not entered, including those who went to trial, are entitled to apply to the sentencing court upon completion of supervision for an order dismissing the charges, and expunging the record. If the person then fully complies with the conditions of suspension or probation, the judge must discharge the person and dismiss any proceedings against him or her, though expungement of the record is discretionary. Expungement is not available if the person was convicted of a sexual offense involving a victim under 18 years of age. Since under Arkansas law a judgment of conviction is not entered in any case unless a prison term or fine is imposed, see Ark. Code § 5-4-301(d), the relief afforded by this statute is potentially available to all persons sentenced to probation only.

**Note:** This Act was passed by the Arkansas General Assembly in 1975 pursuant to a recommendation from the Arkansas Criminal Code Revision Commission and was “designed to fully effectuate the Commission’s view that an offender who successfully completes a period of suspension or probation should have an unblemished record.” See Ark. Criminal Code Annotated, Original Commentary to § 5-4-311.

- **Community Punishment Act of 1993 (“Act 531”):** Ark. Code Ann. § 16-93-1201 *et seq.* This act seeks to ensure[] the efficient use of prison beds, which are becoming scarce resources, through the development and expansion of community correction options that will provide supervision, correction, and services to a primary target group of nonviolent offenders who would otherwise have been eligible for and likely to be sentenced to traditional incarceration. Ark. Code Ann § 1204(a). See also § 16-93-1201(a) for additional legislative findings. The “community correction target group” consists, *inter alia*, of individuals who are “involved in less serious criminal activity or are nonviolent by nature and crime, or both, even though the offender and the offense may be repetitive.” Unlike the First Offender Act of 1975, there is no requirement of a guilty plea under this statute, and relief is available to offenders who are found guilty after trial.

For eligible offenders, the court may “suspend the imposition of sentence,” or place the offender on probation to be supervised by a probation officer assigned to the court, or transfer the offender to the Department of Community Correction (as renamed in 2005) for a period of confinement not to exceed two years. § 16-93-1206(b). All but serious, violent offenses are eligible for suspended imposition of sentence or probation under this provision (a provision limiting relief to offenders under the age of 26 at the time of commission of the crime was deleted in 2005).

Upon successful completion of probation or a commitment to the Department of Community Correction for a target offense, “the court may direct that the record of the offender be expunged of the offense of which the offender was either convicted or placed on probation under the condition that the offender has no more than one (1) previous felony conviction and that the previous felony was other than a conviction [for specified serious violent offenses].” § 16-93-1207(b)(1). Unlike the 1975 Act, offenders are not automatically entitled to expungement under this Act, but must petition the court, which has the option to grant or deny the request.

- **Drug courts:** Drug court judges in Arkansas also defer adjudication under Ark. Code § 16-98-303. Under a 2009 amendment to this statute, drug court judges may dismiss and expunge charges where an offender has successfully completed drug court programming, upon the recommendation of the prosecutor, after considering the individual’s criminal history. See § 16-98-303(g)(1). Certain charges are excepted (burglary, breaking and entering, fourth DUI). A drug court judge may expunge both the current criminal record of a drug court participant and also the criminal record of that participant in another Arkansas court for designated crimes. § 16-98-303(g)(2)(A).
- **Effect of expungement:**
  - Under Ark. Code Ann. § 16-90-901, an individual who has been charged and arrested for any criminal offense where the charges are subsequently nolle prossed or dismissed, or who has been acquitted at trial, is eligible to have all arrest records, petitions, orders, docket sheets, and any other documents relating to the case expunged. “Expunge” is defined to mean that the record “shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter,” but “shall not mean the physical destruction of any records.” § 16-90-901(a).
  - A person whose record is expunged “shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law.” § 16-90-902(a). Upon the entry of the order to seal, the underlying conduct “shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist,” including in response to questions. § 16-90-902(b). The records may be disclosed if the person applies for employment with a criminal justice agency or is subsequently prosecuted for a new crime. § 16-90-903(a)(2)-(4).
  - A conviction that has been expunged may not be used as a predicate offense. See *State v. Ross*, 39 S.W. 3d 789 (Ark. 2001). As to whether expunged

records may be used as evidence of character in subsequent prosecution, *see James Orval Davidson v. State*, 363 Ark. 86, 88–92 (2005)(Hannah, C.J. concurring).

Arkansas's extensive community corrections scheme achieves the following:

- An individual sentenced pursuant to any of one of the statutes described above is diverted from prison, thereby leaving a prison bed open for a person who has a greater need to be incarcerated. While the individual is not controlled by being incarcerated, he or she is subjected to some correctional control through the imposition of the terms and conditions of probation and the resulting supervision.
- Since a judgment of conviction has not been entered against the individual, he or she can truthfully state that he or she has not been convicted of a felony, for example, if asked about a felony conviction on an employment application.
- An individual is assured that if he or she fulfills the terms and conditions of suspension or probation, a discharge and dismissal will ultimately follow. A discharge and dismissal will result in either an automatic expungement of the criminal record (under the 1975 First Offender Act) or the ability to seek expungement of the criminal record (under the Clean Slate Act and other authorities discussed).
- Even if the offender's criminal record is not expunged, the discharge and dismissal to which the offender is entitled ensures that his or her finding of guilt is not disclosed in a background report, in the event that one is requested by a non-law enforcement entity, such as a potential employer.

## TEXAS

For many years, Texas has allowed most misdemeanor and felony offenders to enter a plea of guilty or nolo contendere, have the court find that the evidence substantiates their guilt, but then defer adjudication of guilt and place the defendant on community supervision. See § 5, Article 42.12, Code of Criminal Procedure. Notable exceptions to that right are offenses related to driving while intoxicated and other related intoxication offenses, possession or delivery of certain controlled substances in a school zone, indecency with a child, or aggravated sexual assault. Offenses eligible for deferred adjudication include murder, robbery, aggravated robbery, sexual assault, and aggravated sexual assault, to name a few. Under § 5(c) of Art. 42.12, "a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense," but it may be taken into account in subsequent prosecution, and for various licensing purposes.<sup>36</sup>

Deferred adjudication allows a defendant to be placed on community supervision without being convicted. Conversely, if a motion to proceed to an adjudication of guilt

proves by a preponderance of the evidence that a defendant has violated community supervision, the court can find the defendant guilty and sentence him to the full punishment permitted for the original offense. This can be significant if the case is a first- or second-degree felony. In those cases, the range of punishment can be up to 99 years or life for a first-degree felony or up to 20 years for a second-degree felony.

By contrast, in a "regular probation case", in which the defendant was found guilty and placed on community supervision, the maximum punishment a court can assess is 10 years. So a defendant takes a certain risk by choosing deferred adjudication instead of a guilty plea. The promise of course is that, if he is successful, he will avoid a conviction record.

In almost all felony cases, the defendant may petition the court for a reduction of the term of community supervision or termination of the community supervision. In cases of deferred adjudication, the court can reduce or terminate community supervision at any time. (In cases of "regular probation", termination or reduction cannot occur until one-third of the term or two years, whichever is less, has transpired). The notable exception is any offense requiring registration as a sex offender. In those cases, there is no authority for the court to terminate or reduce the term of supervision.

Persistent problems with deferred adjudication include databases showing that an offender has been convicted, and a belief that the case "disappears" upon termination of community supervision and is no longer part of the offender's criminal history.

Misdemeanor and felony defendants placed on deferred adjudication may be eligible for an order sealing the record of their offense. Under a law passed in 2005, a person placed on deferred adjudication community supervision who subsequently receives a discharge and dismissal may petition the court for an "order of nondisclosure." See § 411.081, Texas Gov. Code. A person may petition the court regardless of whether the person has been previously placed on deferred adjudication community supervision for another offense. A \$28 fee is assessed in addition to any other fee that generally applies to the filing of a civil petition. After notice to the state, and a hearing to determine whether the person is entitled to file the petition and whether issuance of the order is "in the best interest of justice," the court "shall issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication."<sup>37</sup>

For misdemeanor offenses, the date to petition the court for an order of non-disclosure is two years from the date of discharge. For felony offenses, the date to petition the court for an order of non-disclosure is five years from date of discharge. Petitions requesting non-disclosure are becoming more common. In eligible cases, the prosecutor just signs off and delivers the document to the court for signature. Attorneys now advertise this service. Many of

the cases are 10 to 20 years old. It is likely that some of those people are planning to change jobs and do not want the old case to be an issue.

An order of nondisclosure prohibits criminal justice agencies from publicly disclosing the criminal history record information related to an offense, and criminal history record information subject to an order of nondisclosure is excepted from required disclosure under the Public Information Act. A criminal justice agency may disclose criminal history record information that is the subject of the order only to other criminal justice agencies, for criminal justice or regulatory licensing purposes, one of the licensing and employment agencies listed in 411.081(i), including schools, hospitals, various public licensing boards and agencies, or the person who is the subject of the order. If a law enforcement agency receives a request for information subject to a section 411.081(d) nondisclosure order from a person who is not authorized to receive the information, the agency may declare that it has “no record.” Op.Atty.Gen.2004, No. GA-0255. See FAQs at [www.txdps.state.tx.us/administration/crime\\_records/pages/faq.htm](http://www.txdps.state.tx.us/administration/crime_records/pages/faq.htm). Non-disclosure cannot be granted if, during the term of supervision, the defendant was found guilty or placed on community supervision for another criminal offense, other than a ticket-grade offense. Other exceptions include murder, cases involving an affirmative finding of family violence, or cases for which the defendant was required to register as a sex offender.

## VERMONT

Vermont law provides for both deferred adjudication and diversion, and for eventual expungement of the record in both cases.

**Deferred adjudication:** Vermont’s deferred adjudication statute, originally enacted in 1971, authorizes a court to defer sentencing after an adjudication of guilt, and to place an individual on probation for an indefinite period pending satisfaction of conditions. Vt. Stat. Ann. tit. 13, § 7041. Under the law as originally enacted, and until recently, the court’s authority depended upon a prior agreement between the state’s attorney and the defendant. § 7041(a). In 2005, the law was amended to give the court authority to defer adjudication without agreement from the prosecutor, under specified conditions: (1) the defendant must be 28 years old or younger; (2) the crime must not be on a list of serious crimes; (3) the court must order a pre-sentence investigation (unless this requirement is waived by the prosecutor); (4) the victim is permitted to submit a statement; (5) the court reviews the pre-sentence investigation and the victim’s impact statement with the parties; and (6) the court determines that deferring sentence is in the interest of justice. § 7041(b).

In determining whether to order deferred sentencing or imprisonment, the court “shall consider the nature and circumstances of the crime, the history and character

of the defendant, the need for treatment, and the risk to self, others, and the community at large presented by the defendant.” Vt. Stat. Ann. tit. 13 § 7030. No crimes are specifically excluded by statute, though many are excluded as a matter of policy. The court is not required to impose a fixed probationary period or to allow discharge from probation upon completion of specific and clear conditions within the control of the probationer, but rather may impose probation until further order of the court. See *State v. Lloyd*, 169 Vt. 643 (1999). During the period of probation, the defendant must meet certain conditions imposed by the court in order to avoid incarceration, and failure to meet those conditions may result in revocation of probation. See *State v. Bensch*, 168 Vt. 607 (1998). A deferred sentence may include a restitution order, but “[n]onpayment of restitution shall not constitute grounds for imposition of the underlying sentence.” § 7041(e).

Upon successful completion of probation, the charges are dismissed and the record is automatically expunged, “except that the record shall not be expunged until restitution has been paid in full, absent a finding of good cause by the court.” § 7041(d). Between 2001 and 2003, the law provided that the charges could not be dismissed until restitution had been paid, a requirement that evidently quickly proved unworkable. An individual who has successfully completed probation need not wait the usual two year period to have the conviction expunged. See *State v. Putvain*, 179 Vt. 619 (2006).

**First Offender Diversion:** Vermont law also provides for an “adult court diversion project,” which is administered by the Attorney General and “designed to assist adult first-time offenders.” Vt. Stat. Ann. tit. 3, § 164(a). The diversion project shall accept only persons against whom charges have been filed and the court has found probable cause, but are not yet adjudicated. § 164(c)(1). Each state’s attorney, in cooperation with the adult court diversion project, “shall develop clear criteria for deciding what types of offenses and offenders will be eligible for diversion; however, the state’s attorney shall retain final discretion over the referral of each case for diversion.” § 164(c)(4). Program participants may be required to pay a fee of up to \$300, but will not be excluded on the basis of inability to pay. § 164(c)(9).

Two years after successful completion of the diversion program,

the court shall provide notice to all parties of record of the court’s intention to order the sealing of all court files and records, law enforcement records other than entries in the adult court diversion project’s centralized filing system, fingerprints, and photographs applicable to the proceeding. The court shall give the state’s attorney an opportunity for a hearing to contest the sealing of the records. The court shall seal the records if it finds:

(1) two years have elapsed since the successful completion of the adult diversion program by the participant and the dismissal of the case by the state's attorney; and

(2) the participant has not been convicted of a subsequent felony or misdemeanor during the two-year period, and no proceedings are pending seeking such conviction; and

(3) rehabilitation of the participant has been attained to the satisfaction of the court.

§ 164(e). Upon the entry of an order sealing such files and records under this section, the proceedings in the matter under this section "shall be considered never to have occurred . . . and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such participant inquiry in any matter." § 164(g).

## Notes

\* Law Office of Margaret Love. I wish to thank David Eberhard, General Counsel of the Arkansas Department of Community Correction, and Judge John Creuzot, Criminal District Court No. 4, Dallas, Texas, for their assistance in preparing the sections on Arkansas and Texas law, respectively, in the Appendix. John Hendrickson of the U.S. Probation Office (WDMO) and Circuit Judge Richard Callahan (Cole County, MO) offered helpful insights on deferred imposition of sentence under Missouri law.

<sup>1</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS cmt at 9 (ABA 3d ed. 2004). Two types of collateral consequences are defined in Standard 19-1.1(a) collateral sanctions and (b) discretionary disqualifications. As described in the commentary to Standard 19-1.1, a collateral sanction "signifies a direct and immediate change in an offender's legal status that does not depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction." *Id.* cmt. at 15-16.

<sup>2</sup> See 18 U.S.C. § 3607(c) (misdemeanor marijuana possession under 21 U.S.C. § 844), discussed *infra*.

<sup>3</sup> In a few states, like Arkansas, a person is not considered convicted until a prison sentence or fine is imposed. Thus, a sentence to probation only does not constitute a conviction. See Appendix.

<sup>4</sup> The term *expungement* does not have a commonly accepted definition, and is frequently used interchangeably with *sealing*. The effect of a judicial order of expungement varies from state to state. See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 42-49 (Hein 2006) (hereinafter "LOVE STATE RESOURCE GUIDE"), excerpts available at [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=115](http://www.sentencingproject.org/detail/publication.cfm?publication_id=115). A record that has been expunged is rarely destroyed, and is almost always available for law enforcement purposes. In many states, an expunged record may be used as a predicate offense, and some employers and licensing boards also have access to expunged records, even though many state laws specifically authorize an offender to deny having ever been convicted. See *id.* at 113-124 (Table 5, Judicial Expungement, Sealing and Set-Aside.)

<sup>5</sup> See American Bar Association, Commission on Effective Criminal Sanctions, *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies* 26-35 (2008).

<sup>6</sup> See New York City Bar, *The Immigration Consequences of Deferred Adjudication Programs in New York City* 3-4 (June 2007) (hereinafter "New York City Bar Report") available at [www.nycbar.org/pdf/report/Immigration.pdf](http://www.nycbar.org/pdf/report/Immigration.pdf), describing how problem-solving courts and diversion programs in that state came to require an upfront guilty plea:

[P]roblem-solving court planners and diversion program practitioners viewed the upfront guilty plea as a means to ensure compliance with court orders. Prosecutors also favored the upfront guilty plea as a means to provide swift sentencing in the event that defendants failed out of their diversion and treatment programs, thus avoiding the problems associated with delayed prosecutions. However, the upfront plea requirement was not viewed as a mechanism for punishing *successful* participants of diversion and treatment or creating a barrier to their reintegration into society. The idea was that successful participants would still get their plea vacated and their charges dropped and be able to return to their families and communities as law-abiding individuals.

<sup>7</sup> See, e.g. *State v. Rafuse*, 168 Vt. 631 (1998) (Pursuant to special statute governing deferred sentences, trial court was required to impose sentence after finding defendant violated condition of probation outlined in his deferred-sentence agreement, even though general statute governing probation violations allowed for alternative dispositions).

<sup>8</sup> A recent report from the National Association of Criminal Defense Lawyers on problem-solving courts is critical of post-plea diversion schemes for these very reasons. *America's Problem Solving Courts: The Criminal Costs of Treatment and the Case for Reform* at 11 (September 2009) ("Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure."), accessible at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/\\$FILE/problem-solving%20report\\_100709.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solving%20report_100709.pdf). The NACDL report also objects to post-plea deferred adjudication based on what appears to be a misunderstanding of how these schemes actually work in many states to expunge an individual's criminal record:

In post-adjudication courts, the defendant must plead guilty before entering drug court, and even if he or she is successful and completes the program, *the conviction will never go away*. In pre-adjudication courts, the defendant must plead guilty, but then, if he or she successfully completes the program there is a possibility that the plea can be withdrawn and the charge dismissed.

<sup>9</sup> See, e.g., *State v. Brothers*, 59 P.3d 1268 (N.M. Ct. App. 2002), *cert. granted*, 59 P.3d 1262, *cert. quashed*, 73 P.3d 826 (2003) (deferred adjudication scheme does not erase the conviction for purposes of sex offender registration, even though the charges were dismissed).

<sup>10</sup> See USSG § 4A1.2(f): "A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted ... even if a conviction is not formally entered...." The deferred adjudication must "involve[ ] a judicial determination of guilt or an admission of guilt in open court," thus reflecting "a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." § 4A1.2, cmt. N. 9. This is the case even where the record of the plea has been expunged under state law. See USSG § 4A1.2 cmt n. 10 ("A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a



- criminal conviction. Sentences resulting from such convictions are to be counted.”) See, e.g., *U.S. v. Daniels*, \_\_\_ F.3d \_\_\_, 2009 WL 3807628 (5th Cir. 2009).
- <sup>11</sup> Compare 49 CFR § 1570.3 (For purposes of maritime and land transportation employment involving national security considerations, “where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction for purposes of this subchapter”) with 24 C.F.R. § 3400.105(b)(1), 74 Fed. Reg. 66548 (Dec. 15, 2009) (in order to be eligible for licensure as mortgage originator, person must not have “been convicted of, or pled guilty or nolo contendere to, a felony”).
- <sup>12</sup> See 8 U.S.C. § 1101(a)(48)(A) (under the Immigration and Nationality Act, a guilty plea coupled with some court-ordered “restraint on the alien’s liberty” constitutes a conviction that may warrant deportation). A report of the New York City Bar describes the adverse consequences for non-citizens of the trend toward requiring upfront guilty pleas in problem-solving courts and diversion programs in New York, “a trend that Congress had no reason to foresee at the time the definition of ‘conviction’ was codified [in 8 U.S.C. § 1101(a)(48)(A)]:”
- [T]he interaction of the broad definition of “conviction” in immigration law and the application of the upfront plea requirement has resulted in the deportability of individuals who have rehabilitated themselves through successful completion of diversion programs—the *ultimate unintended consequence*.
- New York City Bar Report*, *supra* note 7 at 3–4. The report recommends that prosecutors and courts consider diversion rather than deferred adjudication in cases where there is general agreement about the desirability of avoiding a defendant’s deportation. *Id.* at 6–13.
- <sup>13</sup> See Martin Kaste, Digital Data Make For A Really Permanent Record, National Public Radio, October 29, 2009, <http://www.npr.org/templates/story/story.php?storyId=114276194>. See generally LOVE, STATE RESOURCE GUIDE, *supra* note 5, at 113-124 (Table 5, Judicial Expungement, Sealing and Set-Aside).
- <sup>14</sup> See, e.g., Amicus Curiae American Bar Association, *Brief in Padilla v. Kentucky*, U.S. Sup. Ct. No. 08-651, at 17–25 (immigration status can affect bail decisions, charges and plea bargains, and sentencing).
- <sup>15</sup> For example, in a majority of states, courts are required by statute or court rule to ensure that non-citizen defendants have been informed of the immigration consequences of a guilty plea. See Amici Curiae National Association of Criminal Defense Lawyers, *et al.*, *Brief in Padilla v. Kentucky*, U.S. Sup. Ct. No. 08-651, App. B (citing 28 states, the District of Columbia, and Puerto Rico).
- <sup>16</sup> Robert M.A. Johnson, Message from the President, *Collateral Consequences*, THE PROSECUTOR (May/June 2001).
- <sup>17</sup> State constitutional, statutory, and common law authorities for limiting access to or otherwise mitigating the effects of a conviction record are described in LOVE, STATE RESOURCE GUIDE, *supra* note 5, *passim*.
- <sup>18</sup> ABA 2007 Report with Recommendation #103A (Commission on Effective Criminal Sanctions, co-sponsored by the National District Attorneys Association, National Association of Criminal Defense Attorneys, National Legal Aid and Defenders Association).
- <sup>19</sup> The Arkansas deferred adjudication programs described in the Appendix benefit first offenders or those convicted of offenses targeted by the legislature. The Texas and Vermont programs, also described in the Appendix, exclude few crimes from eligibility.
- <sup>20</sup> See, e.g., Vt. Stat. Ann. tit. 13, § 7041, discussed in the Appendix. Under Vermont’s deferred adjudication law as originally enacted, the court’s authority depended on a prior agreement between the state’s attorney and the defendant. § 7041(a). In 2005, the law was amended to give the court authority to defer adjudication without agreement from the prosecutor, under specified conditions: (1) the defendant must be 28 years old or younger; (2) the crime must not be on a list of serious crimes; (3) the court must order a pre-sentence investigation (unless waived by the prosecutor); (4) the victim is permitted to submit a statement; (5) the court reviews the pre-sentence investigation and the victim’s impact statement with the parties; and (6) the court determines that deferring sentence is in the interest of justice. § 7041(b).
- <sup>21</sup> Expungement or sealing of the record is specifically authorized as part of a deferred adjudication scheme in Arkansas (e.g., Ark. Code Ann. § 16-93-1201; Ark. Code Ann. § 5-4-311); Colorado (Colo. Rev. Stat. § 18-1.3-102); Connecticut (Conn. Gen. Stat. 54-142a); Delaware (Del. Code Ann. tit. 11, § 4378); Florida (Fla. Stat. ch. 948.01(2); Fla. R. Crim P. Rule 3.670); Hawaii (Haw. Rev. Stat. § 853-1(e)); Illinois (720 Ill. Comp. Stat. §§ 570/410, 550/10); Iowa (Iowa Code § 907.3); Louisiana (La. Rev. Stat. Ann. § 44:9(E)(1)(b)); Maryland (Md. Code Ann. [Crim. Proc.] § 6-220(b)(1)); Mississippi (Miss. Code Ann. § 99-15-26); Missouri (Mo. Rev. Stat. § 610.105); Montana (Mont. Code § 46-18-201 through 204); Pennsylvania (Pa. Cons. Stat. § 9122(a); Oklahoma (Okla. Stat. tit.22, § 991c); South Dakota (S.D. Codified Laws § 23A-27-13); Tennessee (Tenn. Code Ann. § 40-35-313); Texas (Tex. Code Crim. Proc. Art. 42.12; Tex. Gov. Code § 411.081); Vermont (Vt. Stat. Ann. Tit. 13, § 7041); and Washington (Wash. Rev. Code §§ 3.66.067, 9.95.240(1) & (2)).
- <sup>22</sup> See Alaska Stat., § 12.55.085 (e), Ga. Code Ann. §§ 42-8-60, 42-8-62, Idaho Code 19-2601(4), Ky Rev. Stat. Ann § 533.250(1)(a), Neb. Rev. Stat. 29-2264(4)(a) & (b), and N.M. Stat. Ann. § 31-20-3.
- <sup>23</sup> Kansas (Kan. Stat. Ann. § 21-4619), Massachusetts (Mass. Gen. Laws ch. 276, § 100A), Nevada (Nev. Rev. Stat. § 179.245), New Hampshire (N.H. Rev. Stat. Ann. § 651:5(l)), Oregon (Or. Rev. Stat. § 137.225) and Utah (Utah Code Ann. § 77-18-11(1)), all have comprehensive schemes that authorize a court to expunge or seal most misdemeanors and many felonies after a waiting period. Washington courts also have broad vacatur authority, Wash. Rev. Code. § 9.94A.030, in addition to a deferred adjudication option. Four states permit expungement for most first offenders: Michigan (Mich. Comp. Laws § 780.621), New Jersey (N.J. Stat. Ann. § 2C:52-2(a), Ohio (Ohio Rev. Code Ann. §§ 2953.31-2953.36), and Rhode Island (R.I. Gen. Laws § 12-1.3-3(b)(1)). In some of these states the range of eligible offenses and required waiting periods have been lengthened in recent years.
- <sup>24</sup> See *New York City Bar Report*, *supra* note 6 at 2–3; N.Y. Crim. Proc. Law. §§ 160.50, 160.55.
- <sup>25</sup> See Mo. Rev. Stat. § 557.011, construed in *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993) (no conviction need be reported). The limited effect of a sealing order is described in § 610.120. The limits on a court’s authority to dismiss the charges and vacate the plea are discussed in an e-mail to the author from the Honorable Richard Callahan, Cole County Circuit Judge, May 18, 2009, in the author’s possession.
- <sup>26</sup> California probationers generally may apply to withdraw a guilty plea after completion of sentence. See Cal. Penal Code §§ 17(b)(1) through (b)(4); Cal. Penal Code § 1203.4(a) (authorizing a court to “set-aside of the verdict of guilty” upon successful completion of probation, thus releasing the individual “from all penalties and disabilities resulting from the offense of which he or she has been convicted.”). In addi-

tion, misdemeanants not sentenced to probation may have the verdict of guilty set aside one year after entry of judgment, if they can show that they have, “since the pronouncement of judgment, lived an honest and upright life and ha[ve] conformed to and obeyed the laws of the land.” § 1203.4a. The anomalous higher standard for misdemeanants not sentenced to probation was noted in *People v. Bradley*, 57 Cal. Rptr 82 (Ct. App. 1967).

<sup>27</sup> The Minnesota “knock down” scheme, Minn. Stat § 609.13, subd. 1, is somewhat less comprehensive than California’s scheme on which it was modeled in *Matter of Woollett*, 540 N.W. 2d 829, 832 n.3 (Minn. 1995) (conviction still disqualifying for peace officer licensing). North Dakota courts also have authority under N.D. Cent. Code §§ 12.1-32-02(4) and 12.1-32-07.1 to defer imposition of sentence and, upon successful completion of probation, to knock down a felony conviction to a misdemeanor, though it is still counted as a felony for purposes of sex offender registration and firearms disabilities.

<sup>28</sup> Fed. R. Crim. Proc. 32(b)(1) (“Time of Sentencing”).

<sup>29</sup> Section 3607 (“Special probation and expungement procedures for drug possessors”), enacted in 1984 by Pub.L. 98-473, Title II, § 212(a)(2), 98 Stat. 2003, provides as follows:

(a) *Pre-judgment probation.*—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) *Record of disposition.*—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) *Expungement of record of disposition.*—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in sub-

section (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

<sup>30</sup> See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (1996 amendment to definition of “conviction” in federal immigration laws did not repeal, in whole or in part, Federal First Offender Act, under which expungement of first-time simple possession drug offense results in protection against deportation). Federal law generally does not provide for expunging or sealing criminal records, and there is no federal administrative relief mechanism like the certificate programs in New York and Illinois. See Margaret Colgate Love & April Frazier, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws*, meetings.abanet.org/webupload/commupload/CR209800/sitesofinterest\_files/AllStatesBriefingSheet10106.pdf. Federal offenders are sometimes eligible to apply for state certificates of relief from disabilities, as in New York and Illinois, but the effect of these certificates is limited to the law of the jurisdiction that issued them. The only complete relief from collateral consequences is through a presidential pardon.

<sup>31</sup> 18 U.S.C. §§ 5005–5056 (1984).

<sup>32</sup> Compare *Doe v. Webster*, 606 F.2d 1226, 1244–45 (D.C. 1979) (record of YCA conviction that has been set aside must be sealed, and the government must respond in the negative to all inquiries about the offense) and *United States v. Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977) (felony conviction that has been set aside cannot constitute a prior conviction for the purposes of the firearms crime for which the defendant was convicted) with *Bear Robe v. Parker*, 270 F.3d 1192, 1195 (8th Cir. 2001) (set-aside conviction may serve as a basis for termination of employment) and *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976) (YCA set-aside provision does not authorize expungement). See generally Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 482 (1981).

<sup>33</sup> Ironically, the companion House bill would have extended the YCA’s set-aside remedy to all federal first offenders, and settled the judicial disagreement about the legal effect of a “set-aside” order, specifically providing that such an order restores all rights and privileges, seals the criminal record for most purposes, and “grants the offender the right to deny the conviction.” H.R. REP. NO. 98-1017, at 138–42, explaining H.R. 6012, the Sentencing Revision Act of 1984, 98th Cong. §§ 4391–4392. The “goal” of the House bill was “to restore the convicted person to the same position as before the conviction.” *Id.* at 142. To deal with the ticklish problem of candor, it provided that an individual granted a set-aside “is not guilty of an offense for failure to admit or acknowledge such conviction.” Sentencing Revision Act of 1984, H.R. 6012, 98th Cong. §§ 4391–4392. See Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1715–16 (2003).

<sup>34</sup> Federal offenders may be eligible for limited relief from state law disabilities in states that offer certificates of rehabilitation. See note 29, *supra*. Most of the states that do not restore the right to vote automatically give federal offenders access to

their restoration procedures for this limited purpose only. See LOVE, STATE RESOURCE GUIDE, *supra* note 5 at 88–89.

- <sup>35</sup> Cf. *United States v. Wyson*, 516 F.3d 666 (8th Cir. 2008) (federal courts have no authority to suspend execution of sentence).
- <sup>36</sup> See *Hurley v. State*, 130 S.W.3d 501 (Tex. App. 5 Dist. 2004) (deferred adjudication order was not a “conviction,” and therefore trial court was not authorized to cumulate deferred adjudication community supervision with prison sentence from conviction in another case); *State v. Juvrud*, 96 S.W.3d 550 (Tex. App. 8 Dist.), *affirmed* 187 S.W.3d 492 (Tex. Crim. App. 2002) (placement on deferred adjudication is “punishment

assessed,” for purposes of defendant’s right to appeal an order deferring adjudication, but such placement does not mean defendant has had “sentence imposed”).

- <sup>37</sup> Article 55.01 of the Texas Code of Criminal Procedure provides for mandatory expunction of all records in a criminal matter where an arrest does not result in a conviction, or where the offense has been subsequently pardoned. However, except for Class C misdemeanants, persons who have been sentenced to deferred adjudication are not eligible for this relief. See Art. § 55.01(2)(B).