Expungement in Indiana: A Radical Experiment and How It Is Working So Far

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I. Background

Marion County Deputy Prosecutor Andrew Fogle says the four years since Indiana enacted a broad "second chance" law have been like "the Wild West." Fogle, who oversees petitions for expungement for his office in Indiana's most populous county, agreed to be interviewed about what may be the Nation's most comprehensive and creative scheme to overcome the adverse effects of a criminal record.[1] We also spoke about the law to several criminal defense attorneys and legal service providers in the State.

Indiana's expungement law, first enacted in 2013 and amended several times since, extends to all but the most serious offenses, although the effect of relief and the process for obtaining it differ considerably depending on the offense involved. Perhaps most important, the term *expungement* doesn't have the same meaning in Indiana as it has in most states, because it doesn't necessarily result in limiting public access to the record.

Fogle recalls that after the law was passed, with nothing but the statutory text as a guide, law enforcement officials and the courts worked diligently to give practical effect to a complex and sometimes ambiguous set of mandates involving every branch of government and potentially transforming the State's criminal justice system.

With the law's challenges came opportunities, both for those with criminal histories and for those charged with administering the scheme. With so many questions about the new law unresolved, prosecutors like Fogle were given significant latitude to shape its operation to align with their own interests. Court personnel and the state police (who maintain the criminal records most directly affected by the law) were also afforded broad leeway to interpret the law at both the state and county levels.

Fogle explained that in the period immediately after then Governor Mike Pence signed the measure into law, its intended beneficiaries and their representatives sometimes found it hard to keep up with new interpretations and procedural details. Although the law's fluidity gave lawyers a chance to advocate for their clients in creative ways, they also had to be aware of how shifting policies and practices might affect the availability of relief, and shape their advocacy accordingly. And, once that relief was obtained, they had to find ways to maximize its effect.

Even now, the relief the law offers is sometimes frustratingly unclear. For non-conviction records, and for most misdemeanors and Class D felonies, expungement is mandatory upon a determination of eligibility and is automatically followed by sealing of the record. More serious felonies are also eligible for expungement, but in these cases relief is discretionary with the court and is not accompanied by any limits on public access to the record (although the record is marked as "expunged").[2] The potentially confusing use of the term *expungement* to describe relief that may or may not involve limiting public access to the record is one of the more unusual features of the Indiana law.[3]

Expungement in Indiana restores civil rights (including firearms rights in all but domestic violence cases), limits employer and licensing board inquiries about criminal history, regulates background checking practices, prohibits licensing and employment "discrimination" based on an expunged conviction or arrest record,[4] and protects employers from liability for negligent hiring based on an employee's criminal record. In all cases, the law states that an expunged conviction shall be treated "as if the person had never been convicted of the offense."

II. Results after Four Years

Four years after the law's passage, the dust has begun to settle and some results can be reported. For one thing, more than six thousand expungements have been granted in Marion County alone since the law took effect, a testament to the law's efficient administration and to the accessibility of relief. More than half of these expungements involved convictions, and the number of denials by Marion County courts is in the low double digits. (Statewide numbers are not available.) The number of expungements under the new law would be much lower if not for the efforts of pro bono lawyers and other advocates who have risen to meet the demand created by the law, and to educate the public about the advantages of expungement. Statewide legal service organizations, like Indiana Legal Services and Neighborhood Christian Legal Clinic, have worked to assist indigent individuals in obtaining relief. Advocacy programs, like the Second Chance Expungement Initiative run by the Volunteer Center in Fort Wayne, have vetted and referred clients to legal service providers who could represent them in court.

The good will of the courts has also been a key consideration. From the beginning, the Indiana Office of Court

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Services has also done its part to introduce consistency and improve access. Its website provides standardized petition forms for all types of expungement, links to relevant laws and court rules, and contact information for pro bono service providers.

Finally, the visionary and energetic approach of the Marion County Prosecutor and his staff has also been a critical factor in the record-breaking number of grants in the new law's first years.

The access-to-justice issues that have made expungement an elusive remedy in many jurisdictions[5] have not been experienced under the new Indiana law, at least in Marion County. But demand for expungement has put a strain on legal service providers. The volume of cases received has compelled the Indianapolis office of Indiana Legal Services to periodically freeze its expungement client intake. The Second Chance Expungement Initiative has been active for less than a year, and it has already worked with over 1,200 individuals seeking relief, most of whom are attracted by the large-scale information sessions put on by its Volunteer Center. According to Jean Joley, the Center's director, demand for expungement has "bordered on overwhelming." She reports that over four hundred people attended the Initiative's first information session in the fall of 2016, and interest has continued to grow ever since. To meet the demand, the Center has recruited a cadre of thirteen lawyers and has trained thirty-five volunteers to support them by making initial eligibility determinations and accessing official criminal history records. Joley reported that 98 percent of eligible individuals are also income-eligible for pro bono representation from one of the three statewide organizations to which the Initiative makes referrals.

Neighborhood Christian Legal Clinic was more creative, setting up an expungement "help desk" inside the Marion County courthouse, in space loaned by the District Attorney's office, to help pro se expungement clients research their own criminal histories and eligibility status. The help desk, staffed primarily by trained students three days a week, assists about three hundred individuals each month.

When it comes to expungement practices in Marion County, the landscape is "calm waters," according to Brian Dunkel, Director of Legal Services for Neighborhood Christian Legal Clinic. The recent introduction of electronic filing in the county courts (a system that has been rolling out statewide) has streamlined the process, particularly in cases involving non-conviction records and misdemeanors, where no hearing is required. In those cases, the time between filing and relief is generally only a couple of months.

III. The Marion County Prosecutor's Proactive Role

That waters are calm in Marion County is largely due to Fogle himself, who was given complete control over expungements in the county by elected Prosecutor Terry Curry. According to Fogle—an experienced attorney who served as a public defender and as legal counsel to the Department of Corrections before becoming a prosecutor—expungement is in everyone's interest. "Our goal is to encourage success and make ex-offenders productive members of society," he says. "When your conviction prevents you from working and you're out of money and feel the world closing in around you, you're going to find other ways of getting it."

To limit what he describes as a "cycle of criminal activity," Fogle has gone to impressive lengths to ensure that those who are eligible for expungement get relief. One of his office's guiding policies is to avoid petitions being denied for minor shortfalls in meeting eligibility requirements. (Although a petition for expungement of a low-level conviction can be amended and refiled without penalty if it is denied on the basis of ineligibility, the cost of refiling—$141 per petition filed in each county of conviction—can be prohibitive for those of limited means.) Rather than formally objecting to a petition from an ineligible petitioner (which the law permits, and which would lead to almost certain denial), Fogle's office makes a policy of supporting court-ordered continuances so that waiting periods and other eligibility requirements, such as payment of restitution, may be satisfied. His office also supports waiver of the filing fee in appropriate cases. Eligibility denials are discouraged through the courthouse "help desk" operated by Neighborhood Christian Legal Clinic, a program actively supported by Fogle and his team.

Fogle also works to make expungement available sooner than statutory eligibility periods provide. The law permits waiver of these limiting eligibility periods with prosecutorial consent, and Fogel has created a formal structure to make that a real possibility for petitioners. With waiting periods ranging from five to ten years, waiver can be a significant aid to reentry. An "expungement panel" of five experienced prosecutors reviews all waiver requests, which must be accompanied by a statement from the petitioner explaining why he or she believes a waiver is justified. After reviewing criminal history and sentence compliance, the panel votes on whether to grant the request. In most instances those requests are granted. In addition, Marion County prosecutors are authorized to write waivers directly into plea agreements in cases they deem appropriate for early expungement, something they do with increasing frequency.

Fogle doesn't ask why someone wants an expungement for a low-level offense. To him, every reason is valid and contributes to reintegration. Petitioners seeking to improve employment opportunities are given equal standing with those looking to chaperone their children's field trips, improve their self-esteem, or even restore their firearms rights. (The U.S. Department of Justice recently acknowledged that Indiana expungement restores federal firearms rights lost because of a felony conviction, and many low-level felonies qualify for mandatory expungement under the state's law.)

Most petitions filed in Marion County are for low-level offenses because waiting periods are shorter and sealing is

available, and many pro bono service providers lack the resources to take on felony cases that require a hearing and presentation of the petitioner's case for relief. That circumstance, along with the provision for permanent unsealing of expunged records upon subsequent conviction, allows prosecutors to take a generally pro-petitioner stance without worrying about public safety or political risk.

But Fogle's office acknowledges that those with more serious felony records need relief too. Even though these cases require hearings, Fogle's policy is to intervene only where the victim (who the law requires be given notice of the petition) requests it. And Fogle specifically excludes nonhuman entities like businesses from his definition of what constitutes a "victim." Fogle is quick to point out that his office does not extend these benefits to serious career criminals, but he is happy to report that cases involving such individuals make up a small minority of his office's expungement caseload.

IV. Mixed Results Elsewhere in the State

But it appears that Marion County may currently be an outlier in Indiana as far as prosecutor approaches to the law are concerned. According to David Joley, a Fort Wayne attorney in private practice who was instrumental in founding the city's Second Chance Expungement Initiative (and who is the son of Jean Joley, director of the Volunteer Center, who founded the Initiative at her son's urging), "expungement is a different animal from county to county." In Allen County, where Joley provides both paid and pro bono expungement representation, waiting period waivers are unheard of and requests for them are opposed by prosecutors as a matter of policy. In other counties, prosecutors may actively seek denial of ineligible petitions without a continuance, or request hearings for low-level offenses even where eligibility is clear. According to Joley, the culture in some prosecutors' offices creates a sense of duty to challenge petitions to the extent permitted by law.

Roderick Bohannon, an attorney with Indiana Legal Services, represents clients in a variety of counties and has also experienced push-back from prosecutors. While prosecutors in some counties will immediately waive their objection in low-level cases where eligibility is clear, others will object to felony expungements as a matter of policy, even in cases involving low-level offenses where expungement is mandatory if eligibility requirements are met. Some prosecutors will not respond to petitions despite having no intent to object, which can add at least a month to the process, since objections are deemed waived only after thirty days without a response.

The courts of each county operate differently as well, sometimes creating a separate set of challenges. Initially, different filing practices in each county meant there was little uniformity in how petitions were processed, which presented special hurdles for individuals seeking to expunge convictions from multiple counties. However, as each county has transitioned to a uniform e-filing system, these problems have become less prevalent. Now, for the most part, attorneys can track the progress of petitions in multiple courts through a unified online system, somewhat easing the inefficiencies caused by the requirement that each separate petition be filed in each convicting court.

As noted, the Indiana Office of Court Services has been supportive, but attitudes from the bench vary widely across the state. In Marion County, where the Prosecutor's Office has gone to great lengths to set an expungement-friendly tone, judges are generally happy to follow the government's lead. But in most other counties, the tone of proceedings reportedly depends on the judge hearing the petition. Some judges will require hearings for low-level offenses even if there is no objection from prosecutors, while others will require that eligibility be shown by specific documentation that may not be readily available, even if it can be established by other means.

In one instructive case, a judge in Jay County denied a petition for expungement of forgery and methamphetamine felony convictions despite the petitioner's eligibility for relief, stating at the hearing that methamphetamine crimes are "a pain" and that "I'm not doing favors for people that are causing these problems in Jay County." In his order, the judge wrote that denial was "based largely on the nature of the convictions, the severity of the offenses, and the relatively short duration since release from probation/parole on the most recent convictions," none of which are criteria identified in the statute. The Indiana Court of Appeals reversed, finding in *Cline v. State* that the evidence of the petitioner's rehabilitation, her age at the time of commission, and her desire to find work in management all weighed in favor of expungement. The Court of Appeals concluded by stating:

> [O]ur Legislature has provided a second chance for individuals who have in the distant past committed drug-related crimes. Although the trial court is granted discretion, this does not extend to disregard of remedial measures enacted by our lawmakers. As previously observed, such statutes should be liberally construed to advance the remedy for which they were enacted.[6]

Several months after its *Cline* decision, the Court of Appeals reversed a trial court's dismissal of a suit seeking to hold the Marion County Sheriff in contempt for refusing to consider for employment as a deputy sheriff an individual whose conviction had been expunged, finding that the Sheriff was not exempt from the law's provisions barring discrimination based on an expunged conviction.[7] But not all trial judges are negative toward expungement petitioners, and those who might be tempted in this direction are being educated by progressive decisions of the Court of Appeals. For example, according to Brian Dunkel of Neighborhood Christian Legal Clinic, some judges will grant relief in felony expungement cases with little or no scrutiny if the prosecutor fails to object.

Roderick Bohannon of Indiana Legal Services believes the most serious problem is the reluctance of some judges

to waive filing fees for indigent petitioners, as permitted but not required by law. In some courtrooms, judges will refuse such waivers as a matter of policy, which Bohannon considers legally impermissible, and insist that arguments in favor of waiver be taken up on appeal. While Bohannon's organization has filed such appeals, the process can add six months to a year to the expungement process, pushing back the availability of relief and draining pro bono resources. Bohannon therefore reluctantly advises clients to do whatever they can to pull the filing fee together, which can be difficult when a criminal record presents a major obstacle to employment.

Despite these problems, nearly all petitions for expungement of low-level offenses are eventually granted, as they must be if an individual meets the statutory eligibility requirements. Grant rates for more serious felonies, for which expungement is discretionary, are unavailable. However, grant rates are expected to increase in the wake of the *Cline* decision.

V. Implementing and Interpreting Expungement Orders

Getting an expungement is only part of the process, though. Since the law took effect, those with records and their attorneys have found that effectuating an expungement order presents its own challenges.

Records of low-level offenses that are expunged are sealed by the court and the State Police, while the statute requires only that records of higher-level offenses be "clearly marked" as having been expunged. (Other agencies must do the same, but their records are often not readily accessible by the public.) Court records have been swiftly sealed/marked since the law took effect, and that process is practically immediate now that e-filing has been implemented. The Indiana State Police, which provides records to employers, landlords, and others, seals/marks in a matter of weeks. (By comparison, in North Carolina the state has a significant backlog, and execution of an expungement order can take up to a year.[8])

But early on, pro bono attorneys like Brian Dunkel and Roderick Bohannon noticed a problem with how the State Police were handling expungement orders. The agency took the position that it was obligated to seal/mark only the conviction record that was the subject of the order, *not* records of dismissed charges from the same criminal case. Dismissed charges may be expunged, but under a different section of the statute, and the State Police was taking the position that expungement of dismissed charges must be sought separately before they could be sealed. The State Police put that policy into practice without regard to the provision of the law stating that "[a] person whose record is expunged shall be treated as if the person had never been convicted of the offense."[9]

To deal with this problem, attorneys now draft their proposed orders to direct the State Police to expunge all records from the same case. The solution gets the desired results, although it requires attorneys to ensure that draft orders identify all relevant conviction and non-conviction records.

Dunkel and Bohannon also reported that they cannot rely on the courts to ensure that all records that may be publicly available are actually sealed/marked after expungement. The courts in some counties take the position that they are not required to send notices to all agencies holding records, even though their expungement order must, by law, be directed to all agencies holding records. In some counties, the court will send notices to some but not all relevant agencies. So Dunkel and Bohannon take it upon themselves to notify relevant agencies of the expungements they secure, following up as necessary when clients report that expunged records are still showing up.

The new law also raises significant questions about how individuals should represent their expunged record. On paper, expungement confers a number of rights. It is illegal for public and private employers and licensing boards to discriminate on the basis of an expunged conviction, and the law requires that inquiries into criminal history be phrased in terms that exclude expunged convictions from the inquiry.[10] But employers have been slow to change their hiring procedures, and the law does not specifically authorize applicants to deny the existence of an expunged conviction if they are asked about it, even where the inquiry is unlawful.[11]

Defense attorneys in the state acknowledge that this creates a real dilemma for expungement clients, and for their lawyers: should clients be advised to deny the expunged conviction, which the employer may later find out about through a commercial criminal background checking company that may not have updated its files to account for the expungement, and risk being viewed as dishonest? This is a special problem where more serious felonies are concerned, because expungement does not seal the record but simply marks it as "expunged."[12] Should they advise their clients to acknowledge and explain the conviction and the significance of the expungement? Attorneys we spoke to said they tend to advise clients to acknowledge that they have been convicted but that their conviction was expunged, and to explain the legal effect of expungement.

Situations like these demonstrate the need for holistic expungement representation like that provided by Indiana Legal Services and Neighborhood Christian Legal Clinic. A call or letter from an attorney to an employer that has unlawfully inquired about an expunged conviction can go a long way, especially since the law provides that unlawful discrimination based on an expunged conviction is punishable as a Class C infraction and may be the basis for contempt-of-court proceedings. And the threat of enforcement is very real.[13]

Notwithstanding these legal and practical issues, the big question is whether expungement is actually making life better for individuals with criminal records while protecting public safety. Unfortunately, outside of some anecdotal evidence, this question has no reliable answer. Prosecutor Fogle says he has seen few individuals with expunged records come back into the system, but he notes that

funding is lacking to conduct the kind of research that would be necessary to assess the link between expungement and recidivism in his county. And the already-strained resources of pro bono providers make it difficult to follow up with clients to see whether they actually got the job, the license, the promotion, or the apartment. Although a few clients will check in to share their success stories, most lose contact after receiving services. But David Joley thinks that might be a good sign: clients who are not receiving the relief they expected are the ones most likely to return for help, whether or not they have paid for it.

The experiment under way in Indiana—which, as of March 2018, includes a new law providing for comprehensive state-wide regulation of how criminal record is considered in the context of occupational and professional licensing[14]—is worth taking a closer look at, to determine exactly what it is accomplishing by way of rehabilitation, reintegration, and restoration of status. Perhaps researchers will seek funding to do just that.

Notes

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1 For a detailed description of the Indiana expungement law and related provisions, including the comprehensive law regulating occupational licenses enacted in 2018, see Indiana profile, Restoration of Rights Project, http://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/.

2 The fact that the law specifies no standards to guide a court's discretion has proved troublesome in a few cases. *See* Cline v. State, 61 N.E.3d 360 (Ind. Ct. App. 2016), discussed below. The Cline decision is reprinted in this issue at pp. 264–265.

3 The unusual choice of terminology by the drafters of the Indiana law is explained in an interview with its principal sponsor in the Indiana House the year following the law's enactment. *See* Margaret Love, *Indiana's New Expungement Law the Product of "Many, Many Compromises,"* Collateral Consequences Resource Center (Dec. 15, 2014), http://ccresourcecenter.org/2014/12/15/indianas-new-expungement-law-product-many-many-compromises/, reprinted in this issue at pp. 261–263.

4 In 2016, the Indiana Court of Appeals held that the law's nondiscrimination provision overrides mandatory disqualifications imposed by law, there a state law barring individuals convicted of felonies from serving as a sheriff's deputy. H.M. v. State, 65 N.E.3d 1054 (2016). However, it is not clear whether in such circumstances the law prohibits consideration of the conduct underlying an expunged arrest or conviction.

5 *See, e.g.*, Joy Radice, *Access-to-Justice Challenges for Expungement in Tennessee,* 30 Fed. Sent. Rep. 277–282 (2018).

6 Cline v. State, *supra* note 2. In November 2017, the Court of Appeals affirmed the denial of expungement for two felony drug-trafficking convictions where the statutory requirements were met and the petitioner had "led a generally successful life" but was subsequently convicted of a DUI misdemeanor. The Court of Appeals stressed the discretionary nature of a trial judge's authority and distinguished the case from *Cline*, noting the petitioner's subsequent clean record and the judge's openly negative attitude. *See* W.R. v. State of Indiana, 17A03-1703-XP-571 (Ind. Ct. App., 2017).

7 *See* H.M. v. State, *supra* note 4.

8 *See* John Rubin, *Relief from a Criminal Conviction in North Carolina: Forgetting, Forgiving, and Forgoing*, 30 Fed. Sent. Rep. 267–272 (2018).

9 Ind. Code § 35-38-9-10(d). See specific provisions of the Indiana expungement law analyzed by the Restoration of Rights Project in this issue at p. 258.

10 Ind. Code § 35-38-9-7.

11 See note 2, *supra*.

12 See note 3, *supra*, for an explanation of how the term *expungement* is used.

13 In one recent case, the Indiana Court of Appeals reversed a trial court's dismissal of a contempt petition filed against the Marion County Sheriff by an individual whose application for employment as a deputy sheriff had been denied on the basis of an expunged conviction, finding that the nondiscrimination law applied to the Sheriff even though he was authorized by law to obtain an applicant's expunged record. *See* H.M. v. State, *supra* note 4.

14 See Collateral Consequences Resource Center, *Indiana enacts progressive new licensing law* (April 3, 2018), reprinted in this issue at p. 266.