

# Indiana's New Expungement Law the Product of "Many, Many Compromises"



## COLLATERAL CONSEQUENCES RESOURCE CENTER

December 15, 2014

In May of 2013, Indiana Governor Mike Pence signed into law what is possibly the most comprehensive and forward-looking restoration of rights statute ever enacted in this country. Under the *new law*, courts are empowered to "expunge" most criminal records, after waiting periods keyed to the seriousness of the offense. The effect of an expungement order varies to some extent according to the nature of the crime, but its core concept is to restore rights and eliminate discrimination based on criminal record in the workplace and elsewhere. This new law has already resulted in relief for hundreds of individuals, due in large part to the proactive approach of the state courts in facilitating *pro se* representation.

We recently had a chance to talk to the person primarily responsible for shepherding this law through the Indiana legislature, and his experience should be instructive to reform advocates in other states. Jud McMillin, a conservative former prosecutor who chairs the House Committee on Courts and Criminal Code, might once have been regarded as a rather unusual champion of this unique and progressive legislation. But in an age of bipartisan support for criminal justice reform, apparently anything can happen.

Rep. McMillin told us how he was able to persuade his colleagues in the legislature by careful groundwork, and overcome opposition from prosecutors and courts by making what he described as "many, many compromises." One of the most important of those compromises was limiting use of criminal records rather than limiting public access to them, at least in the case of more serious offenses.

Before letting Rep. McMillin describe in his own words how he secured passage of this relief scheme, here is a brief description of the law's most salient features. (A more detailed description can be found in the Restoration of Rights Project.<sup>1</sup>)

- All criminal records (except convictions involving serious violence, public corruption, and sexual offenses) are eligible for expungement from the court of conviction, after waiting periods ranging from one year (for non-conviction records) to ten years (for the most serious eligible felonies).
- After the court has issued an expungement order, records not resulting in conviction and records of

misdemeanors and minor felonies are automatically sealed. After a record is sealed, even a prosecutor may not access it without a court order.

- Expunged records of more serious convictions "remain public," although they must be "clearly and visibly marked or identified as being expunged." However, all expungement orders similarly limit the use to which a criminal record can be put, as described below.
- Expungement may be granted by the court without a hearing unless the prosecutor objects. Those filing for expungement of a conviction must pay the filing fees required for filing a civil action (\$141), and this requirement may not be waived. Defendants are not permitted to waive the right to seek expungement as part of a plea agreement.
- A petitioner may seek to expunge more than one conviction at the same time, but may be granted expungement only once in his or her lifetime. If the first petition fails, there is a three-year waiting period before a person may reapply, and the only convictions expungeable are those in the original petition.
- It is unlawful discrimination for any person to refuse to employ or license a person because of a conviction or arrest record that has been expunged or sealed, and a person may not be questioned about a previous criminal record except in terms that exclude expunged convictions or arrests.
- Expunged convictions are not admissible as evidence of negligence in a civil action against a person who relied on the expungement order, and they may not be reported by credit reporting companies. The Attorney General may enforce the provisions relating to credit reporting companies through injunction and fines, and a private individual injured by a violation of these sections may recover damages, court costs and attorney fees.
- The Indiana courts have published a detailed explanation of the law and sample petitions for expungement that are tailored to the particular categories of eligible cases, to enable a person to seeking expungement without hiring a lawyer.

\*\*\*\*\*

*Federal Sentencing Reporter*, Vol. 30, Nos. 4-5, pp. 261-263, ISSN 1053-9867, electronic ISSN 1533-8363.  
© 2014 Collateral Consequences Resource Center. Please direct requests for permission to photocopy or reproduce article content to the Collateral Consequences Resource Center:  
<http://ccresourcecenter.org/>. DOI: <https://doi.org/10.1525/fsr.2018.30.4-5.261>.

Here is our interview with Rep. McMillin:

**How did you get interested in the subject of criminal records?**

As a former prosecutor, and now someone who does some criminal defense work while serving in the legislature, I think I have seen the justice system from several sides. Also, as a fiscal conservative it just makes practical sense to me that when somebody has served their court-imposed sentence there has to be a pathway back into society for them. Without this, we can't expect them to become productive members of society. The Indiana Constitution requires our criminal justice system to be based upon the principles of reformation and not vindication. I firmly believe that our expungement law moves substantially in that direction.

**How did you build support for the concept of expungement among your colleagues in the legislature?**

This was a process that played out over several years. We proceeded in incremental steps, building on existing law and gaining supporters from various constituencies. We started by expanding an existing provision of the Indiana code that allowed courts to reduce a minor felony to a misdemeanor upon completion of the sentence, to allow people to come back after a waiting period to get the felony reduced, as long as they had no further charges. I thought if I could just start the conversation with a simple bill that did not involve more serious offenses I would be able to get people to see how detrimental having a felony conviction can be for someone who wants to get back into the work force. I took a practical approach, and was able to persuade some of my fiscally conservative colleagues that there can be economic benefits through the reduction of recidivism. After getting that initial language enacted I came back the next session to work on full expungement, and found that there was support on both sides of the aisle as many people were able to see the benefits.

There were those who had general objections to the legislation, some for ideological reasons, some for practical reasons, but we were able to overcome all of them with solid logic when it came to debating this issue. We were even able to win over some of the prosecutors, enough that the opposition of the holdouts didn't derail the legislation's chances. One of the most effective supporters was the Indianapolis Chamber of Commerce, which helped me convince people that expungement could be beneficial to business owners and economy as a whole.

Obviously there were a lot of compromises we had to make, and it's not hard to see what some of them were, like the lifetime limit to one expungement, the prohibition on seeking expungement of offenses committed after a petition has been denied, and the filing fee that is hefty for many. Certain violent and sexual offenses had to be excluded from coverage or it would have torpedoed the effort before we got it off the ground.

It was sometimes difficult to give up some things just to get the bill passed, while still ending up with a law that actually made a difference. We were able to resist several offers to compromise that would have simply gutted the bill. We had to keep our eye on the core purposes of the legislation, which are to restore rights and give people a fair chance in the workplace and elsewhere.

We will see how the law works. If some of the compromises we made need to be revisited, we can do that. In fact, in the 2014 session we made quite a number of reasonably minor adjustments in the law, notably to permit more government entities including licensing agencies access to sealed records.

**How were you able to defuse opposition from the prosecutors?**

Because I anticipated the prosecutors would be the main opponents, I reached out to them early in the process, and worked with the ones who were willing to consider the concept. Here again I took a practical view, asking if they really wanted people they had prosecuted to return to the system, or whether they wanted them to succeed. I had to persuade them that expunging a record did not reflect badly on the prosecution or create problems for law enforcement. While their ideas were substantially different than mine, I felt it was important to incorporate many of them, and so we were able to reach a middle ground. That is how we came to have a multi-tiered system, with limits on sealing for more serious offenses, a role for prosecutors in the expungement process, the possibility of unsealing in the event of a new crime, and a lifetime limit of one expungement.

This is not to say that prosecutors across Indiana ended up supporting expungement. In fact many of them remain its most ardent opponents. However, asking for their input early and making them a part of the process instead of a constant and united opponent was instrumental in getting the job done.

**What about other sources of opposition or support?**

Many judges objected and some of the clerks were opposed to the additional work that the legislation would make for them. The credit reporting companies were also not happy but they did not mount any substantial resistance. As noted, the business community was surprisingly supportive. Many employers liked the protections afforded them in the bill — including not being held responsible for information there were not permitted to have.

Governor Pence was a supporter from the beginning. Early in his term he adopted a slogan that "Indiana should be the worst place to commit a crime, but the best place to get a second chance." This slogan fit perfectly into the concept of this legislation.

**How has the law been working in its first year?**

Once the law was passed, the courts took a proactive role in carrying out their new responsibilities. They took it upon

themselves to develop a variety of forms for different kinds of cases, and publish them on a website so that people could apply for expungement without the need to hire a lawyer. Legal services organizations have been spreading the word around the state, and are helping to clarify what appears to have been some initial confusion because of the law's complexity. There have been a few kinks, and as I said we have already passed several bills to make slight adjustments mostly of a procedural nature. I anticipate that there will be more a few more tweaks this year. Thankfully the concept has been received wonderfully by the public so making the changes at this point is relatively easy and meets little resistance.

**Why is the relief called “expungement” if many records remain open to the public?**

I get this question frequently, and yes I agree it is a bit confusing to use a term that ordinarily implies some limits on access. The original concept was that an expungement order would seal all records except for law enforcement purposes. But that was not an approach that I could sell, in or out of the legislature, especially for more serious offenses. As the bill ended up with tiered approaches, there really was not a single term that fit the whole—and as we studied what other states do, I am not even sure the term “expungement” has a single meaning. Also, even if a record is actually destroyed, it may be impossible to ever remove all evidence of it.

In the end, I was convinced that “expungement” was the best term to use to ensure that people who need relief would take advantage of it. There's no doubt that most people believe that you only get a second chance if your record is clear in a literal sense. But even where a record is sealed, our law does not permit people to deny that they were arrested or convicted; rather, they cannot be asked about a record that has been expunged. In this way we were able to reconcile keeping the record open with the core concept of restoring rights. By limiting the use of a record we hope to clear away the cloud that these individuals have been living under.

**What advice do you have for legislators in other states and for advocates who want to try to develop a comprehensive scheme like Indiana's?**

To begin with, to pass a bill like this you have to have someone in a leadership role who really understands the inside and out of the criminal justice system, and who is willing to live and breathe this concept through the entire

legislative process and see it all the way through to completion.

You have to start the conversation very early, and learn patience. It takes a long time to convince people who may only have a passing interest (or no real interest at all) in something like this, and no personal experience with the justice system, to understand why it is a good idea and why they should take the perceived risk of supporting this concept. In the political world it is very easy for those who oppose this concept to get their hooks into legislators early by telling them that this is “soft on crime” and that it will damage them politically to support it. In order to combat this I think it is necessary for the legislator who is carrying the bill to spend one-on-one time sitting down with other legislators. While advocates are important and certainly should be recruited, I find that nothing is as persuasive as the legislators themselves discussing the concept. The other really important thing is to secure the support of the business community.

You should also find examples of individuals who have been battling for years if not decades to be successful in society while carrying the weight of a criminal record. Their anecdotal testimony can be extremely powerful.

I also recommend reaching out to those you anticipate will oppose the bill and asking them to help with the bill. If they are not on the inside helping they will be on the outside opposing. Even if the “help” they are giving is not always consistent with the concept you are trying to advance, you are still much better off having those people working with you on developing language than trying to kill any language that you come up with.

It is helpful to defuse opposition if you couch the conversation in terms of the social and economic benefit to society rather than always talking about the benefit to the individuals who might seek expungement. It is very important to make people see that while our human compassion should want to give people a second chance, our duty is to be fiscally responsible to our constituents, and that for numerous reasons (recidivism, costs of incarceration, costs of providing welfare, public safety, etc.) this concept is the right one for all of our constituents.

In the end, you really do have to be willing to compromise, recognizing that if you get the key concepts enacted you can always come back later and change the details.

**Note**

<sup>1</sup> <http://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/>.