

## INDIANA'S SECOND CHANCE LAW-How Expungement Works in Indiana

By Andrew Fogle\*

A certain percentage of offenders in the criminal justice system (approximately 5% to 10%) who, because of the significant risk they present to public safety belong in the Correctional System once they are convicted.

The incarceration of the remaining 90% to 95% of offenders, while an option, is not a very successful option in breaking the cycle of criminal activity. To achieve the goal of breaking the cycle of criminal activity the more effective options are the development of alternatives to incarceration through the creation of alternative sentences, the creation of programs that can address the criminogenic problems that contribute to criminal behavior and; the development of effective programs that can assist offenders in returning to their community and becoming a productive member of the community.

When ex-offenders return to their community after having paid their debt to society, they are often discriminated against because of prior convictions and arrests. This discrimination occurs in nearly every aspect of the ex-offender's life. It is found in limited employment opportunities including job interviews, hiring, promotions and advancements. It is found in housing opportunities including the ability to qualify for more secure and affordable housing and the ability to obtain mortgages and loans. It is found in the inability to obtain certain licenses needed to advance careers. It is found when parents are unable to volunteer at their children's school events because of their past convictions.

The Indiana Expungement Statute (IC 35-38-9 et. seq.), that became law on July 1, 2013, was designed to address the barrier of discrimination based on past convictions and arrests.

The Marion County, Indianapolis, Indiana Prosecutor is of the opinion that the Expungement Statute (often referred to as the "Second Chance Law") is a good first step in significantly limiting the negative effect past convictions and arrests have on an ex-offender and can be a factor in providing the ex-offender a second chance to better their lives and permits them to feel more accepted in their community.

---

\* Andrew Fogle is the Supervisor of the Corrections Division of the Marion County Indiana (Indianapolis) Prosecutor's office. He is also the assigned Deputy Prosecutor who reviews and responds to all expungement petitions filed in Marion County. He teaches the Trial Practice course at the Indiana University McKinney School of Law in Indianapolis.

## **Expungement in Indiana**

The Expungement Statute defines expungements as a civil remedy and not a right guaranteed in the criminal justice system. It defines the numerous requirements that must be met to qualify for expungement relief and provides protection from discrimination once expungement relief is granted.

The Expungement Statute states in IC 35-38-9-2 (a); IC 35-38-9-3 (a); IC 35-38-9-4 (a) and IC 35-38-9-5 (a) that the statute only applies criminal arrests and convictions. Infractions, being civil in nature, cannot be expunged under the statute.

IC 35-38-9-1 permits Juvenile arrests that do not lead to True Findings to be expunged. However Juvenile True Findings are specifically omitted from the sections of the statute that pertain to convictions and therefore cannot be expunged under the Expungement Statute. The expungement of Juvenile True Findings can be obtained under IC 31-39-8.

### **Categories of Expungement Relief:**

Expungement in Indiana consists of five (5) separate categories of expungement relief. Each category has specific definitions and requirements as to the type of conviction that qualify for expungement relief. Those categories are:

- Arrests that do not lead to a conviction. IC 35-38-9-1 (referred to as Section 1 expungements).
- Misdemeanor Convictions and D Felony/F6 Convictions sentenced as an Alternative Misdemeanor. IC 35-38-9-2 (referred to as Section 2 expungements).
- D felony/F6 Convictions, (except for D felony Battery). IC 35-38-9-3 (referred to as Section 3 expungements).
- Most other felony convictions greater than Class D felonies/ F6 (and D felony/F6 Battery) IC 35-38-9-4 (referred to as Section 4 expungements).
- Serious Bodily Injury (Class C felonies/F5 and above) and any felony offense committed by an elected public official during the official's term in office or while a candidate for public office IC 35-38-9-5 (referred to as Section 5 expungements).

### **The Expungement Process**

1. Expungement relief for arrests that do not lead to a conviction (Section 1) can be filed whenever the entire case is dismissed or where there is a finding of Not Guilty on all counts or when the entire conviction was vacated on appeal.

- a. Filing must be within the statutory time frame of one (1) year after arrest or the certification of the appellate decision unless that time frame is waived by the prosecutor.
  - b. There is no limit to the number of Section 1 petitions that can be filed.
  - c. Section 1 petitions can be filed even if there has been a previous filing for the expungement of convictions.
  - d. There is no filing fee for filing Section 1 petitions.
2. Expungement relief for Convictions
    - a. These petitions can only be filed once in a person's lifetime in the County where the convictions occurred.
    - b. A person has one (1) year after the first petition for expungement relief for a conviction is filed in the first County to file for expungement in other Counties.
    - c. Any convictions incurred after obtaining a court order of expungement relief can never be expunged.
    - d. A conviction that occurred prior to the filing of the expungement and omitted from the petition, can be amended into the petition if the failure to list that conviction was not, the fault of the Petitioner and is in the best interest of justice (IC 35-38-9-9 (k)).
    - e. A filing fee for a civil filing is required although a Court can waive the filing fee.
  3. Expungement relief must be granted for Section 1, Section 2 and Section 3 petitions if all statutory requirements are met. The position of the Prosecutor or of any victim cannot be considered by the Court.
  4. Expungement relief is a discretionary decision by the Court for Section 4 and Section 5 petitions. The position of the Prosecutor or of any victim can be considered by the Court.

### **Eligibility for Expungement Relief**

Section 1: All Criminal and Juvenile arrests that do not lead to a conviction or a true finding are eligible for expungement relief under Section 1.

Section 2: Any Misdemeanor convictions or D felony (L6) convictions sentenced as misdemeanor convictions are eligible for expungement relief under IC 35-38-9-2.

Section 3: Most D felony/F6 are eligible for expungement under IC 35-38-9-3 except:

- Convictions under IC 35-42-1 (Homicide); IC 35-42-3.5 (Human Trafficking); and/or IC 35-42-4 (sex crimes)

- D felony (L6) that resulted in bodily injury to another person
- Convictions for perjury under IC 11-8-8-5
- Convictions for official misconduct under IC 34-44-1-1

Section 4: Most convictions that are C felonies (L5) or higher felonies and a D felony (F6) that resulted in bodily injury to another person are eligible for expungement relief under IC 35-38-9-4 except:

- Convictions under IC 35-42-1 (Homicide); IC 35-42-3.5 (Human Trafficking); and/or IC 35-42-4 (sex crimes)
- Convictions for perjury under IC 11-8-8-5
- Convictions for official misconduct under IC 35-44-1-1
- Any conviction that occurred while the Petitioner was an elected official serving the official's term or a candidate for public office when convicted.
- Any C (L5) felony conviction for battery with serious bodily injury.

Section 5: This section only applies to:

- A criminal conviction for a C felony /F4 or higher for serious bodily injury
- Any criminal conviction committed by an elected official while serving the elected official's term or while a candidate for public office are eligible for relief.
- No convictions under IC 35-42-1 (Homicide); IC 35-42-3.5 (Human Trafficking); and/or IC 35-42-4 (sex crimes); Perjury under IC 11-8-8-5; and or Official misconduct under IC 35-44-1-1 can be expunged.
- The Petitioner must have the written consent and approval of the County Prosecutor to file under this section.

No Person can get any type of expungement relief if:

- The person has not been convicted of two (2) or more felony offenses that involved the unlawful use of a deadly weapon and were not committed in the same episode of criminal conduct.
- The person is a sex or violent offender as defined in IC 11-8-8

### **Interpretation of the Expungement Statute**

Although the Expungement Statute has been in effect for over four (4) years, there are a limited number of appellate cases which have interpreted the intent of the Expungement Statute.

the Indiana Supreme Court in the case of *Craig Alvey v. State of Indiana* (20A04-1310-MI-533) (May 28, 2014) makes clear that the Expungement Statute must be read and defined based on its apparent and obvious meaning. The Court further stated that if the language appears to be ambiguous or uncertain, the Court would look to the language and to the subject matter of the act and the objective to be accomplished.

The Indiana Court of Appeals in *Lonnie L. Burton v. State of Indiana* (10A01-1606-XP-1327) (February 3, 2017), stated that “when a statute’s language allows only one meaning; we accept what it says without enlarging or restricting its plain and obvious meaning.”

*Burton v. State, supra*, also held that a person convicted of a sex crime under IC 35-42-4 is not eligible for any expungement relief. It did not address if persons convicted under IC 35-42-1 (Homicide) or IC 35-42-3.5 (Human Trafficking) were also ineligible for any expungement relief.

### **Time Frame for Petition for Expungement Relief**

Each category of expungement has a specific time frame which must be met before a petition for expungement relief may be filed.

- Section 1: A person is eligible to file for expungement relief one (1) year after the date of arrest once all charges have either been dismissed; there has been a finding of not guilty on all charges at trial or if the entire conviction was overturned on appeal.
- Section 2: A person is eligible to file for expungement relief five (5) years after the date of conviction and cannot have had any convictions which occurred for five (5) years before the date of filing unless the Prosecutor consents to a shorter time frame.
- Section 3: A person is eligible to file for expungement relief eight (8) years after the date of conviction and cannot have had any convictions which occurred eight (8) years before the date of filing unless the Prosecutor consents to a shorter time frame.
- Section 4: A person is eligible to file for expungement relief convictions eight (8) years after the date of conviction or three (3) years after the completion of the sentence (whichever is longer) and cannot have had any convictions which occurred eight (8) years before the time of filing unless the Prosecutor consents to a shorter time frame.

- Section 5: A person must receive permission from the Prosecutor in the County where the expungement petition must be filed before the Petitioner can file a petition under Section 5. Ten (10) years must have elapsed since the time of the conviction or three (3) years after the completion of the sentence (whichever is longer) and cannot have any convictions which occurred ten (10) years at before the time of filing. The Marion County Prosecutor will not consent to shorter time frame.

The County Prosecutor has the sole discretion to give a Petitioner consent to file for expungement relief earlier than provided by statute. The process to request consent will vary from County Prosecutor to County Prosecutor.

In Marion County, Indiana all requests for consent are reviewed by a five (5) member Expungement Committee of experienced Deputy Prosecutors and require the following information to be presented before the request will be evaluated:

- The cause number(s) and date(s) of all convictions in Indiana.
- Proof that ALL court ordered fines, costs, fees and/or restitution obligations have been paid in FULL for each conviction.
- Proof of compliance with all of the requirements in IC 35-38-9-8 (b) which lists the information required to file a petition.
- Statement from the Person explaining why consent should be considered.

### **Status of an Expunged Conviction**

Expunged convictions under Section 2 and Section 3:

- Those expunged convictions are sealed and removed from the public record, IC 35-38-9-6.
- The Prosecutor, Defense Attorney and Probation department can, with the consent of the Court, asked that the expunged conviction be unsealed if needed if needed to carry out their respective legal duties.
- If the expunged conviction is used as evidence by the Prosecutor and a conviction is obtained, the Prosecutor may petition for that conviction to lose expungement protection.

Expunged Convictions under Section 4 and Section 5:

- The Court records and the records of law enforcement pertaining to the expunged conviction remain public records.
- The Court records must be clearly and visibly marked or identified as being expunged.

### **Protections for the Petitioner when a Conviction is deemed Expunged**

The description of how expungement relief will affect the Petitioner are found in IC 35-38-9-10.

- IC 35-38-9-10 (b) makes it unlawful to discriminate against a person based on an expunged conviction or arrest. This includes:
  - Refusal to employ
  - Refusal of admission
  - Refusal to grant or renew a license, permit or certificate necessary to engage in any activity, occupation or profession,
  - Any other form of discrimination.
  
- IC 35-38-9-10 (c) defines that the Petitioner's Civil Rights shall be restored including the right to vote, hold public office, to be considered a proper person under IC 35-47-1- 7 (2), and to serve as a juror.
  
- IC 35-38-9-10(d) requires that Any application for employment, license or other right or privilege a person may be questioned about a previous criminal record only in terms that exclude expunged convictions or arrests. Statutory suggested language: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?"
  
- IC 35-38-9-10 (f) states that any person who engages in "unlawful discrimination" described above commit a class C infraction. violators may be held in contempt by any court of general jurisdiction and the Petitioner is entitled to injunctive relief.
  
- IC 35-38-9-10 (h) states that an expunged conviction is not admissible as evidence in an action for negligent hiring, admission or licensure against a person or entity who relied upon the expungement order.
  
- IC 35-38-9-10 (g) does permit the admission of an expunged conviction in a judicial or an administrative hearing alleging negligence or fault to demonstrate good faith in hiring, licensing, certifying, admission to a school or program and/or transacting business or engaging in an activity with the person who has the expunged conviction.

IC 35-38-9-11 will not permit the waiver of an offender's right to expungement as part of a plea agreement. A purported waiver of the right to expungement is invalid and unenforceable as against public policy.

### **The Marion County (Indianapolis) Indiana Experience.**

The Expungement Division in the Marion County (Indianapolis) Indiana Prosecutor's office consists of one (1) Deputy Prosecutor and 1.5 paralegals.

- Since the implementation of the Expungement Statute on July 1, 2013, Marion County has received over 9,000 Expungement Petitions. Each petition will average 3 to 4 cases per petition and it is estimated that the Expungement Division of the Marion County Prosecutor's office has reviewed over 30,000 individual convictions and dismissals.
- In 2017, the Expungement Division received around 2,300 petitions. The law requires that a Prosecutor respond within 30 days of receipt of the petition or it will waive the right to object for cause. This deadline is rarely missed.
- In Marion County most requests for expungement relief are for Section 1, Section 2 and Section 3 arrests and convictions where a court has no discretion and must grant the petition.
- Petitions for expungement relief under for Section 4 are discretionary with the court and the victim and the prosecutor can object to expungement relief for cause. The Marion County Prosecutor has objected to less than twenty (20) convictions filed for Section 4 expungement relief. The objections for cause have all been based on objections by victims. Most of the requests for section 4 expungement relief are granted.
- The Marion County Prosecutor will review all request to file for expungement relief earlier than permitted by statute. A five (5) Deputy Prosecutor Expungement Committee reviews every request Each year the Expungement Division receives around 250 requests. Most requests are granted.
- In Marion County, on a case by case basis, the Prosecutor's office may allow a plea agreement to contain consent to file for expungement earlier than permitted by statute.

The Expungement Statute has been shown to be an effective tool in Marion County, Indiana in helping ex-offenders overcome one of the last barriers to reentry Although the Expungement Statute is still a work in progress, its effects on both the ex-offenders and on the community appear to be quite promising.