Indiana Law Journal

Volume 90
Issue 5 *The Supplement*

Article 2

2015

Are Indiana's Newly Expunged Convictions Still Available for Impeachment?

Graham Polando
Saint Joseph (Indiana) Probate Court, grahampolando@gmail.com

Are Indiana's Newly Expunged Convictions Still Available for Impeachment?

GRAHAM POLANDO*

During trial, a litigant can, of course, impeach a witness with certain criminal convictions.[1] However, Indiana Evidence Rule 609(c), like its federal counterpart, prohibits parties from introducing such evidence when "the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated . . . ."[2] Indiana, however, has no procedure for annulment or certificates of rehabilitation—and, until recently, had nothing resembling one.

To some fanfare,[3] the General Assembly has recently enacted an expungement provision.[4] As courts begin to grant these expungements, it is only a matter of time before their recipients will begin to testify.

Despite its intent, the expungement legislation fails to completely erase the past: litigants seeking to attack the witness's credibility may legitimately unearth an expunged conviction. For example, they could personally know of the conviction, as would frequently occur in a domestic relations case. Or they could easily obtain the information online from services as innocuous as a local newspaper's police blotter.[5] Litigants with this knowledge will undoubtedly attempt to use it.

Trial courts must decide, soon, whether Rule 609 prohibits such use—in other words, whether the new expungement provision is an "equivalent procedure based on a finding that the person has been rehabilitated." This essay contends that it is not—that courts should allow evidence of expunged convictions for impeachment purposes, but should likewise allow a witness's proponent to introduce evidence of the expungement. To see why, we first turn to what the expungement statute requires.

---

* Magistrate, Saint Joseph (Indiana) Probate Court. Lecturer in Sociology and Social Work, Manchester University (Indiana).

[1] *See* IND. R. EVID. 609(a).

[2] *Compare* FED. R. EVID. 609, *with* IND. R. EVID. 609.

[3] *See, e.g.*, Vic Ryckaert, *New Law Gives Rehabilitated Offenders a Second Chance*, INDIANAPOLIS STAR, Aug. 29, 2013, http://www.indystar.com/article/20130828/NEWS02/308280087/.

[4] These provisions' exact parameters are, to understate matters, a moving target. As discussed in *infra* notes 7–9, the General Assembly tinkered with the expungement provisions after just one year. 2014 Ind. Legis. Serv., P.L. 181-2014 (effective July 1, 2014). The Court of Appeals summarized the effects of this legislation in footnote two of its opinion in *Taylor v. State*. 7 N.E.3d 362 (Ind. Ct. App. April 24, 2014). Even those changes may not last: on January 8, 2014, Senator Randall Head introduced Senate Bill 164, which, pending in committee as of this writing in June 2014, would enact further substantive changes, the most significant of which for these purposes is discussed at *infra* note 9.

[5] *See* Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. LAW & CRIMINOLOGY 253, 253–55 (2012); Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS 123, 123–24 (2010).

Indiana Code 35-38-9 details the new expungement procedures.[6]

To secure an expungement, the convicted person must, by a preponderance of the evidence, establish four elements:[7]

(1) the passage of time between the conviction and the expungement petition. This time period varies directly with the seriousness of the offense, from five years for a misdemeanor to ten years for a serious felony.

(2) that there are no charges pending against the convicted person. Given the difficulty in proving a negative (especially in light of the statute's geographical indefiniteness), the prosecuting attorney presumably could rebut this contention if necessary.

(3) that the convicted person has "paid all fines, fees, and court costs, and satisfied any restitution obligation placed on the person as part of the sentence."[8]

(4) that the convicted person has not been convicted of a crime during the time period applicable to the level of offense (again, ranging from five years for a misdemeanor to ten years for a "serious felony"). While this presents the same "proving a negative" problem from the second requirement, the petitioner's testimony will presumably be more persuasive here. A person likely has considerably more knowledge about convictions, which require his presence, than charges, which do not.

Finally, the serious felony convictions carry an additional, fifth requirement: the prosecuting attorney must consent in writing to the expungement.

For misdemeanors and minor Class D felony convictions, the court, once it finds that the petitioner has indeed established the five conditions, *must* grant the expungement.[9] This lack of discretion weighs against labeling such procedures rehabilitative; the court must grant the expungement even to a manifestly unrehabilitated offender. For example, in his petition or at hearing, he could deny

---

[6] Though the terms are often used interchangeably, the recently revised statute correctly uses *expungement* when dealing with a conviction, and *sealing* when dealing with an arrest or charge with a different result.

[7] Ind. P.L. 181-2014 changed the standard from the 2013 statute's "clear and convincing" standard to the "preponderance" standard. The legislature also removed an additional element present in the 2013 statute: that "the person does not have an existing or pending driver's license suspension." 2014 Ind. Legis. Serv., P.L. 181-2014.

[8] The 2013 statute required the person to have successfully completed his or her sentence, but did not define "successfully," which had led to litigation in very similar contexts. *See* Pittman v. State, 9 N.E.3d 179, 184–85 (Ind. Ct. App. 2014) (holding that a petitioner seeking to "restrict access to" [rather than expunge] his criminal record did not "satisfy any other obligations imposed . . . as a part of the sentence" when he "flagrantly violated the terms of [his] probation" by committing a new offense). Ind. P.L. 181-2014 removed the requirement that the petitioner complete his or her sentence at all, much less that he or she do so "successfully." *See also* Taylor v. State, 7 N.E.3d 362 (Ind. Ct. App. April 24, 2014).

[9] *Id.* at 365 ("had the legislature intended the expungement of conviction records . . . to be discretionary, it would have used the word 'may' instead of the word 'shall.'"). Senate Bill 164, which is pending as of this writing, would remove that mandatory requirement "if the crime resulted in injury or loss of property to another person." S.B. 116, 118th Gen. Assemb, Reg. Sess. (Ind. 2014).

his guilt, disclaim the law's legitimacy, or proudly say that the victim had it coming.

Even for serious felonies, the court may grant the expungement, though the statute does not specify how the court should exercise the apparent grant of discretion. Presumably, the court will look to undisputed indicators of potential rehabilitation, such as remorse or positive community service. But even here, the court may legitimately exercise its discretion in favor of an unrehabilitated offender, as nothing limits the court's discretion to rehabilitative factors: the court may believe that the conviction's prejudicial effect (especially for sex offenses) outweighs its informational value to the public, or that the offense's subsequent downward reclassification does as well.

Even if a court concerned itself solely with rehabilitation in reviewing potential expungements, it is not entirely clear what the term means. In *The Shawshank Redemption,* Morgan Freeman's character Red famously refers to rehabilitation as a "made up . . . politician's word."[10] Indeed, though an oft-encountered term in the criminal law, it appears nowhere else in the Rules of Evidence. In *K.M. v. State*, the Indiana Court of Appeals deliberately declined to define the term: "'beyond rehabilitation' has not been defined in our case law. We believe that the reason for the lack of a definition is that the determination of whether a juvenile is beyond rehabilitation is fact sensitive and can vary widely from individual to individual and circumstance to circumstance."[11] This seems obvious—rehabilitation (whatever it means) must depend on the nature and circumstances of the committed offense.

If rehabilitation depends on specific facts, the Indiana expungement provisions do anything but acknowledge facts. Courts lack the discretion to deny expungements for any non-serious felony, and even serious felonies require only a period of non-offending (and, in one case, prosecutorial consent). The General Assembly clearly intended the expungement procedures to provide a streamlined process to decide relatively objective questions—and rehabilitation is far from objective.

Indeed, even if, as seems plausible, the General Assembly wished to encourage or recognize the general rehabilitation of a particular class of non-recidivists, Rule 609(c) directs the Court to focus on the individual, as the U.S. Court of Appeals for the Ninth Circuit emphasized in interpreting the Indiana Rule's federal twin:

> "Rehabilitatory motive alone, however, is insufficient to trigger Rule 609(c). The Rule requires 'a *finding* of the rehabilitation of the *person convicted*.' Thus, courts have consistently upheld introduction of prior convictions under Rule 609 where the convictions were later expunged, even where the statute authorizing expungement was motivated by rehabilitation."[12]

If the Indiana Rule requires an individual focus, then, perhaps our courts should exclude impeachment evidence when the expungement provision allowed for such

---

[10] THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

[11] 804 N.E.2d 305, 309 (Ind. Ct. App. 2004).

[12] United States v. Wood, 943 F.2d 1048, 1055 (9th Cir. 1991) (emphasis in original).

a particularized determination—that is, when the Court had discretion to grant or deny the petition.

This test has been adopted by the Fifth Circuit. In *Smith v. Tidewater Marine Towing*, the Fifth Circuit affirmed the trial court's admission of an impeachment conviction despite the fact that it had been the subject of Louisiana's *first-offender pardon* provision.[13] The court distinguished such convictions from those in which the trial court had discretion to grant or deny the petition, apparently reasoning that such discretion would necessarily include a rehabilitation assessment. Because the first-offender pardon was automatic, no court *could* have denied it even to a clearly unrehabilitated offender. Applying that Fifth Circuit test to Indiana's expungement law would mean that expungements of misdemeanors and minor Class D felonies are not based on rehabilitation (because the court *shall* grant them), but serious felonies are (because the court *may* do so).

As might be obvious, this standard relying only on whether the expunging court had discretion leads to bizarre results when applied to Indiana's provisions. The test would allow a party to impeach a witness with a *less* severe conviction, but could not do so with a *more* serious one. Moreover, while the assumption that courts will use their discretion to assess rehabilitation is reasonable, it is far from necessary.

If the rule requires a rehabilitation determination and the statute only occasionally provides one, perhaps trial courts could conduct their own assessment. In *United States v. Thorne*, the Eighth Circuit approved just such a procedure.[14] Though the testifying witness there had three prior felony convictions (none of which had been the subject of any sort of procedure), the court affirmed the trial court's finding of rehabilitation. The trial court apparently conducted a summary rehabilitation hearing and declared the witness rehabilitated. *Thorne*, then, provides a potential alternate test: the court faced with the evidentiary issue may provide the party seeking to prohibit the impeachment with the opportunity to present evidence of rehabilitation and, presumably, the party seeking to introduce it a chance to show evidence of non-rehabilitation.

Thorne, however, has been rightly criticized as an expansive reading of Rule 609(c).[15] While its ad hoc rehabilitation tribunal may have been a procedure, it was far from equivalent to the more formal pardon or certificate programs the Rule contemplates. The hearing lacked any standard or burden of proof for determining rehabilitation—indeed, the Court of Appeals expressly disapproved the very reason the trial court gave for making its finding (a desire to preserve the witness's ability to testify in the future). Courts might indeed be reluctant to recess their own proceedings to conduct an entirely separate inquiry into the Defendant's

---

[13] 927 F.2d 838 (5th Cir. 1991). Louisiana's Constitution granted all "first offenders" a pardon "automatically upon completion of [their] sentence." *Id.* at 840, citing LA. CONST. art. 4, § 5(E)(1).

[14] 547 F.2d 56 (8th Cir. 1976). For an excellent discussion of this and other federal cases, as well as state analogues to Federal Rule of Evidence 609, see Andrew Hacker, Comment, *The Use of Expunged Records to Impeach Credibility in Arizona*, 42 ARIZ. ST. L.J. 467 (2010).

[15] *See* Zinman v. Black & Decker, 983 F.2d 431, 435 (2d Cir. 1993).

character—presumably with attendant provisions for discovery, evidence, and argument.

Most importantly, individualized rehabilitation determinations frustrate the expungement statute's purpose. Given the fact-sensitive nature of rehabilitation, the court would likely have to receive evidence on the crime's circumstances and the convicted witness's attempts to remedy them—the very evidence the General Assembly intended to forever bury.

Given that the expungement provision's square peg fits uneasily into Rule 609's round hole, courts might be tempted to bypass the Rule's ambiguous "equivalent procedure . . . based on rehabilitation" language in favor of the familiar balancing Rule 403 requires. Though relevant, the court could exclude expunged impeaching convictions on the ground that they would unfairly prejudice either the testifying witness or the party calling the witness. This approach has some support in the case law: the passage of time is a key component of the expungement provision, and it seems clear that "the probative value of a prior conviction on the issue of credibility tends to decrease with the passage of time."[16]

But the Rule already addresses such concerns (albeit somewhat bluntly) by presumptively excluding convictions after ten years. The expungement statute should not (indeed, constitutionally cannot) subvert the Rules of Evidence by prescribing a shorter time period for all but the most serious felonies. More importantly, one can easily imagine scenarios in which the impeachment value of the conviction *is* highly probative despite its expungement.

To take an extreme but perfectly plausible example, imagine a police officer who knowingly offers perjured testimony in a grand jury proceeding investigating that officer's use of deadly force. The prosecutor uncovers the officer's deception, charges him with perjury, and, pursuant to a plea agreement, allows him to plead to the lesser (misdemeanor) offense of false informing.[17] The officer openly expresses a lack of contrition. Nevertheless, after five years, he applies for expungement, which the reviewing court has no discretion to deny. Soon after, he yet again faces a grand jury investigation into yet another use of deadly force. That prior dishonesty, while highly prejudicial, is also indubitably relevant.

The General Assembly has, however, prohibited "any person" from "discriminating against any person because of a conviction . . . expunged or sealed under this chapter,"[18] and commanded that "a person whose record is expunged shall be treated as if the person had never been convicted of the offense."[19] If the General Assembly has determined that the prejudice to the convicted person outweighs its general probative value to the public, that determination would seem to apply specifically in court.

However, the extraordinarily broad command that beneficiaries of the expungement statute "shall be treated as if the person had never been convicted of

---

[16] U.S. v. Shapiro, 656 F.2d 479, 481 (7th Cir. 1977).

[17] The expungement statute specifically prohibits courts from expunging perjury convictions. *See* IND. CODE § 35-38-9-3(b)(4). However, it allows expungement for any misdemeanor. *See* IND. CODE § 35-38-9-2 (expungement for misdemeanors); IND. CODE § 35-44.1-2-3(d) (defining misdemeanor false informing).

[18] IND. CODE § 35-38-9-10(a)(6).

[19] IND. CODE § 35-38-9-10(d).

the offense" raises serious concerns about overbreadth. Read literally, it would prohibit a young woman from leaving her boyfriend on learning that he had a criminal past, or a prosecutor from complying with the Rules of Professional Conduct by disclosing his own witness's prior expunged theft conviction.[20] More significantly for our purposes, it imposes obvious restrictions on any litigant's (especially a criminal defendant's) right to present his or her case. Imagine a court denying a defendant during the penalty phase of a capital trial the opportunity to introduce a prosecution witness's prior perjury conviction.

It seems, then, that so long as the conviction is otherwise admissible under Rule 609, trial courts should allow impeachment with expunged convictions. We are left with one final role for the expungement statute: following impeachment, could the court admit evidence of the expungement so the calling party could (ironically enough) rehabilitate the witness—if not in character then in credibility?

Generally, the circumstances surrounding an impeaching conviction are inadmissible for the reason mentioned above: while courts can easily adjudicate a conviction's existence, they understandably wish to avoid a "trial within a trial" on that conviction's minutiae. But if a court can readily determine a conviction's existence, certainly it can just as easily adjudicate whether it has been expunged. We then come to the question of the expungement's relevance.

An expungement does not necessarily reflect positively on its recipient. But, for the necessarily limited issue of credibility, the mere fact of expungement seems at least *as* probative as the mere fact of conviction. If we are looking only for readily determinable facts bearing on credibility, an expungement would seem as valuable as a conviction. The weight to be given to each should be for the finder of fact to decide, as it already is for the conviction.

In short, Rule 609 recognizes that criminal convictions bear on credibility, but that subsequent rehabilitation matters as well. Indiana's expungement provisions are agnostic about rehabilitation, and therefore should not bar evidence of the underlying conviction—but the expungement may, in itself, have probative value. Courts should therefore admit evidence of expunged convictions, but should likewise admit evidence of the expungement itself.

---

[20] Even if the prosecutor knows the Rules of Evidence exclude the conviction, the ABA Standing Committee on Ethics & Professional Responsibility has interpreted Model Rule of Professional Conduct 3.8 to require the prosecutor to disclose *any* impeaching material so the defendant and his counsel can assess its potential evidentiary value. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009). *See also* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VANDERBILT L. REV. 1429, 1452–54 (2011).