

## Expungement as a Tool of Restorative Justice

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**Updated for 2017**

**Author's Note:** Law is organic; it is not an event, it is a process. For the Criminal Identification Act, this continual evolution is good news for the Restorative Justice community, legal professionals and would-be petitioners alike. The bad news is, the upgrades create a slight tendency to make the law just a little more complex. The better news is, this updated edition to the article will explain the most recent amendments and the effects on their basis in law and on the procedure. Thanks to these new changes, more people now have access to the Restorative/Rehabilitative process – and that surely, is the best news of all. To illustrate, here is the most recent amendment to the Act. You will note that it removes a major roadblock to expunging a record!

On January 1, 2017, a sentence was removed from the Expungement Law: “He or she who has never been convicted of a criminal offense; and” (20 ILCS 2630/5.2(b)(1)(A)). This deletion means that, even if you have convictions on your record, the record may still be eligible to be expunged. This is a major advancement in Rehabilitative Justice, as you will see when the discussion moves to the difference between expunging and sealing a criminal history.<sup>1</sup>

However, when (b)(1)(A) was removed, a section was added: (b)(1.5). This paragraph states:

When a petitioner seeks to have a record of arrest expunged under this Section and the offender has been convicted of a criminal offense, the State’s Attorney may object to the expungement on the grounds that the records contain specific relevant information aside from the mere fact of the arrest.

Exactly what impact this will have on the Petitions to Expunge remains unknown, but it is clear that the State’s Attorneys are being given wide latitude to object to expunging any record that contains convictions.

### Introduction

One of the most important components of restoring the rights of citizenship to ex-offenders is the expungement process.<sup>2</sup> A criminal record will affect where the ex-offender lives,

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<sup>1</sup> P.A. 099-0881, eff. Jan. 1, 2017

<sup>2</sup> The Criminal Identification Act, 20 ILCS 2630/5.2 *et seq.* For one thing, it doesn’t identify criminals.

where she can work, and, in some states, whether she can vote or exercise certain other rights. Expungement is the method available to erase this record. Expungement is crucial to the effectiveness of restorative justice. It is unfortunate that in Illinois, this procedure is governed by one of the most complex statutory procedures ever devised by anyone under any circumstance. It is the ultimate example of a camel: a horse designed by a committee, being all at once or by turns, ungainly, awkward, bullheaded and occasionally mean-spirited. It can also be, like a camel - powerful, durable and reliable. Quite simply, it is one of the most difficult processes that a do-it-yourself litigant can attempt. However, this article was developed to explain not only the “How’s” but the “Why’s” of Illinois restorative justice law with the goal of providing enough guidance to make it possible for the *pro se* applicant to proceed with confidence.

The term *expungement*<sup>3</sup> is used generically. There are actually several different ways to “expunge a record.” Because of that, this chapter will be divided into sections, each covering a specific type of expungement.

Let’s begin with why the expungement process is necessary.

Any contact with the criminal justice system creates a record. There will be a record with the law enforcement agency that performed the arrest (or that took down the report at the station, in the event that someone turned themselves in). There may be a record with the Circuit Court. There may be a record with the Illinois State Police and/or the FBI. How much trouble this will cause the person with the record varies, depending on the circumstances. Even a minor criminal record can become a problem with employment, education, finance, travel, family planning or immigration. The important thing to remember is that no matter how minimal the contact, a record is created and it will not go away of its own accord. Proactive steps must be taken, and it is up to the ex-offender or her designated legal representative make the go-away happen. This is done through a Request to Expunge and Impound Criminal Records or a Request to Seal Criminal Records, aka Petition to Expunge or Petition to Seal.

## **Criminal Histories**

To begin the expungement process, an applicant for expungement must secure a copy of her criminal history. This is not a difficult process, but it requires an expenditure of time, shoe leather, gasoline and patience. The expungement process depends on examination of the *entire* record, so the applicant may need to utilize several sources.

If the applicant was arrested by a municipality or local police, the applicant must obtain a copy of her records from the clerk’s office in the local municipality or county where the arrest occurred. In Illinois, the applicant will need to obtain a copy of the court disposition, and, in

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<sup>3</sup> 20 ILCS 2630/5.2(a)(1)(E) (“‘Expunge’ means to physically destroy the records or return them to the petitioner and to obliterate the petitioner’s name from any official index or public record, or both. Nothing in this Act shall require the physical destruction of the circuit court file, but such records relating to arrests or charges, or both, ordered expunged shall be impounded ...”).

Chicago, the applicant will also need to obtain a copy of the RAP Sheet.<sup>4</sup> In addition, Chicago applicants will need to obtain their Court Dispositions. The Clerk of the Circuit Court located at the Daley Center (10<sup>th</sup> floor) or the Criminal Courts Building at 2650 S. California Ave., (5<sup>th</sup> floor). For records created in Suburban Cook, or counties other than Cook, the applicant will need to visit the office of the Clerk of the Circuit Court that has jurisdiction over that district. Many clerks' offices offer records online from their own websites. Others will have records available through a website, [www.judici.com](http://www.judici.com). These records are not official, but if the criminal history is not complex, they will provide a good starting point.

An applicant can also get her criminal history from the Illinois State Police through the Illinois State Police Bureau of Identification. See the ISP website at: <http://www.state.isp.is.us/crimhistory/chri.cfm>.<sup>5</sup> This report will contain CONVICTION information only. The record may also be accessed through the ISP Access and Review Division, see: <http://www.isp.il.us/crimhistory/viewingchricds.cfm>. This report will contain both conviction and non-conviction information. There is no fee charged by the ISP, but there may be one from the facility which performs the fingerprint. This process will take longer (at least 60 days). The applicant may also use a commercial internet record search, but they are expensive and may not be particularly accurate.

### ***Pertinent Information***

Aside from one's name, the most important information on criminal history is the case number. This can usually, but not always, be found toward the top of the document. Often the first 2 or 4 digits represent the year in which the arrest took place. Some records will contain "M" or "CM" embedded in the case number, indicating that this is a misdemeanor record. Some records will contain "CF" or "CR" in the number, indicating that, at least at some point, this was a felony case. We will talk more about the difference between misdemeanors and felonies below. The local clerk can assist in interpreting the information, but the clerk cannot help fill out the forms or give advice as to whether or not a record can be expunged or sealed.<sup>6</sup> For this and other challenges, such as archived records, etc., applicants should take advantage of some of the free legal services<sup>7</sup> available to help ex-offenders during the expungement process.

It may be helpful to keep track of information by using a grid similar to this:

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<sup>4</sup> To obtain the RAP Sheet, go to Chicago P.D. Headquarters at 3510 S. Michigan Ave. with \$16.00 (as of this writing). This is rarely a one-day service, be prepared to have to return for the record.

<sup>5</sup> Fees for this service: \$16.00 for non-fingerprint records and \$20.00 for fingerprint information.

<sup>6</sup> Circuit Court Clerk Regulation Act, 705 ILCS 110/1.

<sup>7</sup> Consider Cabrini Green Legal Aid Clinic or Illinois Legal Aid On-Line, for example.

Case Number	Date of Arrest	Arresting Agency	Disposition	Date Sentence Ended

## Expunging a Record

What does expunging a record mean? In general, expunging a record means eliminating the record, either electronically or physically. It means that one’s criminal history has disappeared. The ex-offender need not fear answering any questions about her background on any application for employment or housing, or lending, or education, or travel, or family planning.<sup>8</sup> She need not reveal any record ordered expunged, and no one can take into consideration the fact that she had a record expunged.<sup>9</sup>

Expungement is a simple but powerful remedy.

### *Expunging Criminal Histories*

Until this year, *any* conviction on the record meant that no part of the record can be expunged, but that still means that all arrests or other brushes with the law that did not result in a conviction can be expunged.

Some examples: The police pick up someone and then let them go. Someone is picked up and the judge releases her because there wasn’t probable cause for the arrest. Someone is picked up, charged, tried, and found not guilty. Someone is picked up, charged, convicted, and the conviction was overturned on appeal. Someone is convicted, but granted a pardon by the governor that specifically says she can expunge that conviction.

There are two other special types of records that can be expunged:

Court Supervision.<sup>10</sup> Court Supervision includes words like “judgment withheld” or “conditional and revocable release”; it is essentially a judicial slap on the wrist. It’s the judge saying, “Don’t get cute or you’ll get burned.” If one successfully completes the period of Court Supervision *and* does not get into trouble within either two or five years thereafter,<sup>11</sup> she can

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<sup>8</sup> 20 ILCS 2630/12.

<sup>9</sup> 775 ILCS 5/2-103.

<sup>10</sup> 730 ILCS 5/5-1-21.

<sup>11</sup> There are only a few misdemeanor crimes where a sentence of Court Supervision will result in a five-year wait before you can expunge the case: domestic battery; criminal sexual abuse; operation of an uninsured motor

expunge the case. If the accused does get into trouble, then the initial case is considered a conviction and the record cannot be expunged. It is worth noting however, that a sentence of Court Supervision, which was not completed satisfactorily can be sealed two years after the completion of the sentence.<sup>12</sup> We will discuss sealing a record in more detail later in this article.

On the other hand, there are some crimes which, even if you're given Court Supervision, you can't expunge:

- Driving under the Influence (DUI).<sup>13</sup> DUIs in Illinois are a one-strike-and-you're-out proposition; get one and deal with it for the rest of your life.
- Sexual Offense where the Victim is a Minor.<sup>14</sup>
- Reckless driving (if you were older than 25 when it happened).<sup>15</sup> For a time, reckless driving had the same status as DUI—the crime was not eligible for expungement. However, recent legislation was introduced to allow Court Supervision for reckless driving to be expunged, if the defendant was under the age of 25 at the time of the arrest, he/she had no convictions on the record for DUI or for another reckless driving offense, and the expungement could happen after the defendant turned 26.

Having gone to all the effort to explain that convictions cannot be expunged, I now need to explain the exceptions which prove the rule:

*An Exception: Eligible Veterans*<sup>16</sup>

A new provision allows honorably discharged veterans to expunge some specific convictions, provided they meet certain criteria: They must have completed at least one tour of duty, and the conviction cannot be for a crime that was violent, gun-related, or sex-related.

There are others way a conviction can be expunged, in addition to the amendment contained in P. A. 099-0881 - the Governor's Pardon, the Exception for Eligible Veterans, or the conviction is overturned on appeal.<sup>17</sup>

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vehicle; operation of a motor vehicle when the registration was suspended for non-insurance; display of false insurance card; and failure of a scrap dealer to keep records.

<sup>12</sup> P.A. 099-0385, Effective August 17, 2015

<sup>13</sup> 20 ILCS 2630/5.2(a)(3)(A).

<sup>14</sup> 20 ILCS 2630/5.2(a)(3)(A)(i).

<sup>15</sup> 20 ILCS 2630/5.2(a)(3)(A)(iii).

<sup>16</sup> 20 ILCS 2630/5.2(e-6). *See also* 730 ILCS 5/5-3-3(11).

## *Probation*

There are certain types of probations, related to first-offense drug cases, where a very special type of probation can be the sentence. These are known as “Qualifying Probations.”<sup>18</sup> They are also known as “Intense Probations”—and with good reason. Some people elect to go to prison rather than accept a Qualifying Probation. The offense may be simple possession of cannabis<sup>19</sup> or a violation of the Illinois Controlled Substance Act,<sup>20</sup> the Methamphetamine Control and Community Protection Act,<sup>21</sup> the Alcohol and Other Drug Use Act,<sup>22</sup> or the Steroid Control Act.<sup>23</sup> If (and it’s a big IF) you can get all the way through the Probation period, and then not get into trouble for five years, *and* if you have no convictions on your record and no cases active, you can petition the court to expunge the record. If you get into trouble any time during or within five years after your probation, the drug offense turns into a conviction and the case is no longer eligible for expungement.

A new law, effective January 1, 2014, provides for a “2nd Chance Probation” for certain offenses.<sup>24</sup> This is similar to the Qualifying Probations and, in fact, includes some of the same eligible crimes, such as possession of a controlled substance and possession of methamphetamine. However, it also includes Class 4 theft—if from a school, place of worship, or government property<sup>25</sup>—as well as criminal damage to property<sup>26</sup> and criminal damage to government supported property.<sup>27</sup> Class 3 felony offenses included under this new law are theft (based on the value of the property<sup>28</sup>) and retail theft.<sup>29</sup> If all of the terms and conditions imposed by this type of probation are fulfilled, the charges are dismissed and the case is eligible to be expunged. The law does not say if there is any waiting period to petition to expunge after the

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<sup>17</sup> Included in this category is a little-known provision introduced into the law that allows 1<sup>st</sup> time Prostitution Convictions to be vacated if the conviction was the result of the defendant’s being a victim of human sex trafficking. (PA-0267) (725 ILCS 5/116-2.1)

<sup>18</sup> 20 ILCS 2630/5.2(a)(1)(J).

<sup>19</sup> 720 ILCS 550/10.

<sup>20</sup> 720 ILCS 570/410.

<sup>21</sup> 720 ILCS 646/70.

<sup>22</sup> 20 ILCS 301/40-10.

<sup>23</sup> Section 10 of the Steroid Control Act, former Ill. Rev. Stat., ch. 56-1/2, par. 2310 (repealed).

<sup>24</sup> 20 ILCS 2630/5.2(b)(7). *See also* 730 ILCS 5/6-3.4.

<sup>25</sup> 720 ILCS 5/16-1.1.

<sup>26</sup> 720 ILCS 5/21-(d)(1)(C).

<sup>27</sup> 720 ILCS 5/21-101(c).

<sup>28</sup> 720 ILCS 5/16-1(4).

<sup>29</sup> 720 ILCS 5/16-(f)(3).

charges under Second Chance Probation have been dismissed, but of course if one gets into trouble thereafter, all opportunity for expungement is lost.

### **Alternative to Expunging Criminal Records**

The recent change in the expungement provision has, on paper at least, no effect on the sealing provisions in the Act. When expungement is not allowed, due either to the type of offense or, presumably, an objection raised by the State’s Attorney to expungement of a record containing a conviction, *sealing* the record may still be the best available remedy. The mechanics are similar, but the effect is a little different. Sealing is not as powerful a remedy as expunging the record. When a record is sealed, words like “obliterate” and “destroy” are not part of the definition. A sealed record means that access to the record is limited only to those entities which, under the law, can access the record. If someone without this access runs a background check and the record has been sealed, the response is “No record found”—the same result that expungement produces—and it carries the same non-discrimination rule that governs expungement. This is only true, however, if the *entire* record can be sealed. This requires an explanation:

Because a conviction involves a finding or plea of guilt, which results in a punishment of some kind, society has a greater interest in maintaining the record to prevent abuses from those who have an established history of lawlessness. Therefore, more restrictions are placed on what can be sealed than on what can be expunged.

Even if an applicant’s entire record cannot be sealed, it can still be worth the hassle of going through the sealing process. Imagine someone with a fairly extensive criminal history—several pages’ worth. If a background check is performed, all of the record appears, sealable or not. But imagine that those crimes which could be sealed are hidden from view, and then a background check is run. An employer choosing between potential employees, one with an extensive record, and one with a shorter record, may be more inclined to hire the person who doesn’t look like a career criminal. Thus, even a partial sealing of the record can be very helpful.

Before we go any further, let’s take a moment to look at crimes that cannot be expunged or sealed, just because they aren’t quite crimes: minor traffic offenses (for instance, moving violations, parking tickets, etc.<sup>30</sup>), conservation offenses (fishing without a license, etc),<sup>31</sup> offenses that are considered to be “petty”<sup>32</sup>—none of these rise to the level of criminal activity. Therefore, they can’t be removed or hidden from the record, but they are also not likely to keep you from getting your dream job.

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<sup>30</sup> 20 ILCS 2630/5.2(a)(1)(G).

<sup>31</sup> Ill. Sup. Ct. R. 527.

<sup>32</sup> 730 ILCS 5/5-1-17.

## Misdemeanors and Felonies

A distinction that is very important is between a misdemeanor and a felony. A *misdemeanor* is an offense where the potential sentence is up to one year (364 days) in the County Jail. A *felony* is an offense where the potential sentence is a year or more in the Department of Corrections. The key word in these definitions is “potential”; it is entirely possible to have a felony conviction on one’s record without ever having seen the inside of a cell. Example: Someone is arrested for burglary, which is a felony. But, it was her first offense, and the judge sentenced her to 36 months on probation. But burglary is a Class 2 felony and the *potential* sentence is three to seven years in the Department of Corrections.

### *Sealing Your Misdemeanor Record*

Misdemeanors are classified as “A,” “B,” and “C,” with “B” and “C” usually being considered “petty offenses.” Most misdemeanor convictions can be sealed three years after the end of the most recent sentence, although there are several exceptions.

There’s a whole chapter of crimes in the Illinois Compiled Statutes under Chapter 11. Chapter 11 laws deal a lot with sex. It is in the best interest of the public that convictions for these crimes not be sealed. These are such offenses as indecent solicitation of a child,<sup>33</sup> sexual misconduct with a person with a disability,<sup>34</sup> sexual relations within a family,<sup>35</sup> and child pornography.<sup>36</sup>

A striking example of how inconsistent this policy can be involves a section that covers additional Chapter 11 sexual offenses, which are, for the most part, *consensual* in nature. Convictions for such crimes as adultery, bigamy, and marrying a bigamist<sup>37</sup> cannot be sealed. Also included on this list is the offense of Fornication, defined as “[k]nowingly [having] sexual intercourse with another not his or her spouse if the behavior is open and notorious.”<sup>38</sup> Fornication convictions cannot be sealed either. Yet Prostitution, another Chapter 11 offense, is treated differently. The definition for Prostitution is as follows: “Any person who knowingly performs, offers or agrees to perform any act of sexual penetration as defined in section 11-0.1 of this Code for anything of value, or any touching or fondling of the sex organs of one person by

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<sup>33</sup> 720 ILCS 5/11-6.

<sup>34</sup> 720 ILCS 5/11-9.5.

<sup>35</sup> 720 ILCS 5/11-11.

<sup>36</sup> 720 ILCS 5/11-20.1.

<sup>37</sup> 720 ILCS 5/11-35; 720 ILCS 5/11-45.

<sup>38</sup> 720 ILCS 5/11-40. Lest you think that people are whooping it up in the streets and frightening the horses, “open and notorious” simply means pains are not being taken to make secret what’s going on behind closed doors.

another person, for anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.”<sup>39</sup> Prostitution convictions *can* be sealed.

In the recent past, all offenses that were considered to be “Crimes of Violence” under Section 2 of the Crime Victims Compensation Act (740 ILCS 45/2) were ineligible for sealing. An amendment to the “Exclusion” section of the Act removes this blanket language and instead indicates specific crimes which cannot be sealed: Criminal Sexual Abuse (5/11-1.50), Violation of an Order of Protection, (5/12.3.4), Battery of an Unborn Child (5/12-3.1), Domestic Battery (5/12-3/2) and Dog Fighting (5/12-48.1).<sup>40</sup>

Issuance of an Order of Protection against you is considered to be *civil* in nature, even if the order was issued in response to a criminal problem (usually some kind of domestic issue). Therefore, it cannot be expunged or sealed.<sup>41</sup>

Just about any other misdemeanor conviction not listed above can be sealed. The only other requirement is that the convicted individual must wait three years after the end of the most recent sentence before their record can be sealed.

### ***Sealing Felony Records***

Sealing a felony conviction, under any of the circumstances discussed in this section, can only be done once. It is a one-time-only provision.

In Illinois, felonies are classed “X,” “1,” “2,” “3,” and “4,” with “X” being the most serious, and “4” being the least serious, just one step above a Class A misdemeanor. Until recently, the only felony convictions that could be sealed were Class 4 felonies for Possession of Cannabis, Possession of a Controlled Substance, and violations of the Steroid Control Act, the Methamphetamine Precursor Control Act, and the Illinois Controlled Substances Act, as well as Class 4 felony prostitution, as mentioned above.<sup>42</sup>

However, beginning in July, 2013, a series of new laws designed to open up the categories of felony convictions which could be sealed came into effect.<sup>43</sup> As of this writing, Class 3 and Class 4 felony convictions can be sealed, if they meet certain requirements; violent, sexual and gun-related crimes cannot be sealed. There must be at least five years since the *end* of the most recent sentence before the sealing process can be commenced, and there can be no contact with the criminal justice system during that period. The process is somewhat different

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<sup>39</sup> 720 ILCS 5/11-14.

<sup>40</sup> P. A. 98-1009 § 5, effective January 1, 2015.

<sup>41</sup> In addition, other civil issues that cannot be expunged or sealed include divorce and bankruptcy.

<sup>42</sup> 20 ILCS 2630/5.2(c)(1)(F)(i).

<sup>43</sup> 20 ILCS 2630/5.2(e-5). *See also* 730 ILCS 5/3-3-2(10).

than a standard sealing petition and will be discussed in the section of this chapter dealing with the Illinois Prisoner Review Board. If the conviction is for an eligible drug case, proof that the offender completed a drug-abuse program must be attached to the petition.

January 1, 2014 brought forth another new law allowing for the sealing of certain Class 3 and Class 4 felony convictions. The law is very specific as to the crimes which can be sealed: among the sealable Class 4 felonies are theft,<sup>44</sup> retail theft,<sup>45</sup> deceptive practice,<sup>46</sup> forgery,<sup>47</sup> and possession of burglary tools.<sup>48</sup> Eligible Class 3 felony convictions include theft,<sup>49</sup> retail theft,<sup>50</sup> deceptive practice,<sup>51</sup> forgery,<sup>52</sup> and possession with intent to manufacture or deliver a controlled substance, or under a recent amendment, possession with intent to manufacture or deliver cannabis.<sup>53</sup> A recent change to this law allows the conviction to become eligible for sealing three years after the termination of the most recent sentence.<sup>54</sup> This sealing provision does not require the submission of any materials to the Illinois Prisoner Review Board. (See the “Mechanics” section of this chapter.)

A powerful new tool for sealing eligible cases, including those resulting in supervision, misdemeanor convictions, 1<sup>st</sup> Offender Probation for drug cases and eligible Class 3 and Class 4 Felony convictions has been implemented courtesy of P. A. 099-0378, effective January 20, 2016. This amendment removes the time restrictions usually applied (three years) before one can petition to seal a criminal history based on the petitioner’s behavior while the sentence is in effect. Simply put, eligible cases<sup>55</sup> can be sealed UPON COMPLETION OF THE SENTENCE if during the sentence, the petitioner has earned:

- High School Diploma
- Associates Degree
- Career Certificate-
- Vocational, Technical Certification

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<sup>44</sup> 720 ILCS 5/16-1(b)(1.1).

<sup>45</sup> 720 ILCS 5/16-25.

<sup>46</sup> 720 ILCS 5/17-1.

<sup>47</sup> 720 ILCS 5/17-3(d)(2).

<sup>48</sup> 720 ILCS 5/19-2.

<sup>49</sup> 720 ILCS 5/16-(b)(4).

<sup>50</sup> 720 ILCS 5/16-25(2).

<sup>51</sup> 720 ILCS 5/17-1.

<sup>52</sup> 720 ILCS 5/17-3(d)(1).

<sup>53</sup> 720 ILCS 570/401.

<sup>54</sup> P.A. 99-0385, Effective 8/17/15

<sup>55</sup> See 20 ILCS 2630/5.2(c)(3)(E); (c)(2)(F), excludes offenses under (a)(3)

- Bachelor's Degree

## **The Illinois Prisoner Review Board**

The Illinois Prisoner Review Board is responsible for hearing the cases of incarcerated persons as to their readiness to be released from prison.<sup>56</sup> The Board also has the power to make recommendations to either the Governor or to a sentencing judge as to whether or not a crime can be expunged or sealed.

### ***Executive Clemency***

A person convicted of a felony that is classed “too high” for sealing (“X,” “1,” or “2”), or of a crime involving violence, sex or guns, must seek clemency (pardon) from the Chief Executive of the State by the Illinois Constitution to clear the offense off their record.<sup>57</sup> This is sometimes called the “Benign Prerogative,” meaning that, even if the Board recommends someone for a pardon, it is the Governor’s sole decision as to whether or not it will be granted. Any crime that resulted in a conviction is eligible for a pardon. To request a pardon, the person must submit a Petition for Executive Clemency. This petition must contain full and accurate information, including letters of recommendation, awards, certificates, and diplomas—anything that can be used to present the convicted person in a good light is certainly helpful. While there is no set waiting period before one can petition for a pardon, as a practical matter, the longer the time between the crime and the petition, the better.

Applicants petitioning the Governor should request both clemency *and* expungement. Receiving a pardon doesn’t automatically grant an expungement.<sup>58</sup>

### ***Expungement of Felony Convictions of Veterans***

Recommendations for veterans who have met the eligibility requirements to have their convictions expunged do not go to the Governor, but rather to the Chief Judge of the county in which the veteran was convicted.<sup>59</sup> If the recommendation of the Board is favorable, the conviction can be expunged by following the steps outlined in the “Mechanics” section of this chapter.

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<sup>56</sup> 730 ILCS 5/3-3-1.

<sup>57</sup> Ill. Const. art. V, § 12.

<sup>58</sup> The Petition for Executive Clemency and other forms of relief provided by the Illinois Prisoner Review Board can be found on the Board’s website: [www2.illinois.gov/prb](http://www2.illinois.gov/prb).

<sup>59</sup> 20 ILCS 2630/5.2(e-6). *See also* 730 ILCS 5/3-2-2(11).

## ***Sealing of Certain Felony Convictions***<sup>60</sup>

The Board's duties also include issuing Certificates of Sealing for Class 3 and 4 felonies. Although it is advisable to request an in-person appearance, this may not be granted unless the Board has specific questions about the petition. After a review, the Board advises the Chief Judge where the crime took place. Any Class 3 or 4 felony is eligible for sealing under this provision, except for the usual prohibition against violent, sexual or gun-related crimes. The forms for application look very similar to the forms for Executive Clemency and ask much the same questions. Again, the Board will hear cases four times per year. If the Board rejects the application, the applicant must wait four more years before reapplying. If the Board grants the application, the offender may move forward with the sealing process explained below.<sup>61</sup>

### **Miscellaneous**

There is a provision within the purview of the Board which allows pardons issued by the Governor to authorize reinstating a petitioner's FOID rights. If you wish to pursue this course of action, your petition must specifically state that this is part of the requested remedy (along with Clemency and Expungement.)

A recent amendment to the Act removes the possibility of an objection to Expungement after Executive Clemency, "Whenever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement, an objection to the petition may not be filed."<sup>62</sup>

### **Alternative Remedies**<sup>63</sup>

#### ***Certificates of Rehabilitation***

There are two partial remedies available to persons who cannot petition to have their cases expunged or sealed (for instance, if the requisite time period from the end of the most recent sentence has not yet passed). It is important to note that the Certificates of Rehabilitation do *not* remove or hide any crime on the criminal history.

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<sup>60</sup> 20 ILCS 2630/5.2(e-5) See also 730 ILCS 5/3-2-2(10).

<sup>61</sup> As of this writing, necessary documents that must be attached to the Certificate for Sealing are: 5 year's W-2 forms, proof of child support, high school diploma, GED, college diploma or transcripts.

<sup>62</sup> 20 ILCS 2630/5.2(d)(5)(A)

<sup>63</sup> Although, for the most part, the alternative remedies described below are available through the various clerks' offices, they are governed under the Adult Probation Division of the Illinois Supreme Court.

### ***Certificate of Good Conduct***

The Certificate of Good Conduct is exactly what it sounds like: a document, signed by a judge, stating that the offender is rehabilitated and is unlikely to reoffend. In practical terms, this certificate removes criminal or civil liability from any employer that chooses to hire an ex-offender should the offender later become involved in any criminal activity which might subject the employer to a civil suit on grounds such as Negligent Hiring.<sup>64</sup> It is like a portable fidelity bond.

Certificates of Good Conduct can be applied for through the Clerk of the Circuit Court in the county where the crime occurred.<sup>65</sup> The process begins with gathering and examining the criminal history. The usual prohibitions are a little less strict than with the other methods. Public Act 099-0381, effective January 20, 2016 has removed a major impediment to receiving Certificates of Rehabilitation. Prior to its implementation, persons with Class “X” felony convictions or “Forcible Felony” convictions were ineligible to receive Certificates of Rehabilitation. Currently, the only records that remain prohibited are those containing convictions for Arson, Aggravated Arson, Kidnapping, Aggravated Kidnapping, Aggravated DUI (including drugs, intoxicating compounds or any combination thereof) and Aggravated Domestic Battery<sup>66</sup> Certificates of Good Conduct are available even if there is more than one felony conviction on the record.

There is a waiting period before an offender can apply for a Certificate: two years from the end of the most recent sentence if there is a felony on the record, or one year from the end of the sentence if there are only misdemeanors on the record.<sup>67</sup>

### ***Certificate of Relief from Disability***

This Certificate allows the petitioner to apply for or regain a license for some 27 different professions that require licenses issued by the Department of Financial and Professional Responsibility.<sup>68</sup> Eligibility requirements are similar to those of the Certificate of Good Conduct; there are no time requirements, but there is an additional criterion: There must be no relationship between the crimes on the record and the professional license sought. For example, if the criminal history contains such offenses as criminal trespass, criminal trespass to a residence, burglary, residential burglary, etc., an applicant may wish to rethink her plans to become a landscape architect. The Certificate of Relief from Disabilities can be applied for through the Clerk of the Circuit Court.

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<sup>64</sup> 730 ILCS 5/5-5.5-25(b)(i).

<sup>65</sup> 730 ILCS 5/5-5.5-40.

<sup>66</sup> 730 ILCS 5/5-5.5-5.

<sup>67</sup> 730 ILCS 5/5-5.5-30(c).

<sup>68</sup> 730 ILCS 5/5-5(h)(1).

### ***Health Care Workers Waiver***

Another form of remedy, allows licensure for petitioners who wish to pursue careers in some health care fields. “Health Care Worker is defined as: [H]ome health care aides, nurse aides, personal care assistants, private duty nurse aides, day training personnel, or an individual working in any similar health-related occupation where he or she provides direct care or has access to long-term care residents or the living quarters or financial, medical, or personal records of long-term care residents. [This Act] also applies to all employees of licensed or certified long-term care facilities who have or may have contact with residents or access to the living quarters or the financial, medical, or personal records of residents.”<sup>69</sup> The waiver is available through the Illinois Department of Public Health, see: <http://dph.illinois.gov/search/site/waiver>. The list of disqualifying offenses, and the procedures for filing the waiver can be found here: <http://www.idph.state.il.us/nar/disconvictions.htm>.

### ***Mechanics of Filing a Petition to Expunge or Petition to Seal***

Individual clerks’ offices will have specific instructions on how to file a petition to expunge or seal a record. However, the following information is generally applicable.

Notices must be sent to the Illinois State Police, the arresting agency, the State’s Attorney of the county where the case occurred, and the Office of Corporation Counsel. The Corporation Counsel is the lawyer who represents the town where the arrest took place. Some towns are large enough to have in-house legal staff, though most do not.

Every county has their own procedures, but most will require applicants to attend a hearing. The applicant will be notified of when and where to appear.

Once the petition is filed, there will be a 60-day waiting period (60 business days). This period allows time for any party to the petition to raise an objection. If an objection is not received within this time frame, the objection will be discounted. Objections can be made for two general reasons: statutory or discretionary.

Statutory objections can be made if the case is not eligible for either expungement or seal, or if the requisite amount of time has not yet elapsed from the end of the most recent sentence. If the basis of the objection is discretionary, the applicant should engage counsel. Discretionary objections can be based on a number of things: the nature of the offense, a pattern or practice of behavior, a history of alcoholism or drug abuse, the lack of burden on the applicant if the record isn’t expunged, and the general public safety.

If there are no objections, or if the applicant has overcome the objections, the judge will sign the order. The clerk has the responsibility to make sure that the correct people get a copy of the Order. If the petition is denied, the applicant has 60 days to file a “Motion to Reconsider.”

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<sup>69</sup> 225 ILCS 46/10

An applicant who is denied may also file a notice of appeal and pursue the action through the court system.

Once the applicant is in possession of the signed Order, pains must be taken to safeguard the document. It is the only proof that the record has been expunged or sealed. Circumstances, usually related to immigration status, can arise where such confirmation is necessary.

If the arrest or conviction took place outside Illinois, Illinois law will not be of any use in expunging the record. One must contact a legal source in the state where the arrest or conviction occurred. Similarly, if the arrest or conviction was a *federal* matter, federal remedies must be pursued.

In general, a fee must be paid at the time the Petition is filed – these vary from county to county and can be waived if the Petitioner can show that they have insufficient income to pay the fee. More information on this process is available from the Clerk of the Circuit Court in the county where the petition is filed. However, in another addition to the Act, the filing fees will be waived in all Illinois counties with a population of 3,000,000 or more for the entire calendar year of 2017.<sup>70</sup>

### **Where to Obtain the Correct Forms**

The newest version of the Petitions to Seal and Expunge Criminal Histories are available on the website for the Illinois Supreme Court here: <http://www.illinoiscourts.gov/Forms/approved/expungement/expungement.asp>

The forms for Executive Clemency, Certificates of Sealing (under 730 ILCS 5/3-3-2(10), and Military Expungement Exception can be found on the website for the Illinois Prisoner Review Board at: <http://www.illinois.gov/prb/Pages/default.aspx>

The forms for the Certificates of Rehabilitation for Cook County petitioners are available on the website for the Clerk of the Circuit Court of Cook County. Non-Cook residents may wish to contact the Clerk of the Court in their respective counties, or seek legal assistance.

### **Limitations**

There are several avenues available to either hide or limit access to criminal histories, but expungement, seal or issuance of a certificate is not absolute. For instance, sealed records can be viewed by any entity allowed by law to access a sealed record.<sup>71</sup> Likewise, expungement or seal does not create judicial amnesia. While the laws prohibit inquiry into a record ordered expunged or sealed,<sup>72</sup> knowledge of a criminal history can be gained from a source other than law

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<sup>70</sup> P.A.- 099-0881, 20 ILCS 2630/5.2(d)(15)

<sup>71</sup> 20 ILCS 2630/3.

<sup>72</sup> 20 ILCS 2630/12.

enforcement. Consider the following example: Someone broke their neighbor's window during a dispute. They later had the offense expunged. Sometime after that, they apply for a job that requires an extensive background check. Though his official record indicates "No Record Found," if the neighbor mentions the incident to the investigator, that knowledge may be used to deny the applicant the job.

One of the biggest loopholes in the process of criminal background checks involves violations of municipal ordinances. For example, a youthful offender (age 16) is arrested for possession of drug paraphernalia. Rather than charge the youngster with a violation of state law, which would place her under the jurisdiction of the juvenile justice system (thus making the record unavailable), she is charged with a violation of the law of the city or county. Such a minor crime is usually disposed of by the payment of a fine. However, paying a fine, even without court supervision, is a "conviction." Under the concurrent jurisdiction portion of the Juvenile Courts Act, the confidentiality standards afforded to juvenile adjudications do not apply.<sup>73</sup> As a result, many young people walk around unaware that they have a conviction on their record until they are denied some essential service.

In addition to these problems, one must consider that the internet can be at least as dangerous as it is useful. Arrest and conviction information is sold on the open market, just as any other commodity. Should one of the internet background companies publish your information (including your mug shot), a court order to expunge or seal the record has no effect. You may need to enforce your rights under the Fair Credit Reporting Act.<sup>74</sup>

The Illinois law does not mention what happens to records that have been forwarded to the FBI. Orders to expunge and/or seal are sent to the FBI with the understanding that they will honor the order. Other countries, especially Canada, get their "Do Not Allow to Enter" information from the FBI, and it is unclear how often this information is updated. Travel to or through Canada has become increasingly problematic since 9/11. In a recent matter, the province of British Columbia refused entry to a party who wished to travel through the area to Alaska for a hunting trip. The provincial authorities based their decision on the fact that the client had a "Did Not Appear" ticket on his record. The original ticket was to answer a summons for a non-licensed dog from 1981. Similarly, a DUI on the record can be cause for refusal of entrance or subject the traveler to paying a surety bond. Travelers may wish to contact provincial authorities to discuss any potential difficulties.

In another limitation, run-ins with the Illinois Department of Children and Family Services (the agency that oversees juvenile neglect and dependency actions), which result in a hearing or in an action removing or censuring a child-care worker from his/her position or changes the status of a foster parent or prospective adoptive parent, are not governed by

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<sup>73</sup> 705 ILCS 405/5-125.

<sup>74</sup> 15 U.S.C. § 1681.

expungement law. Anyone finding themselves in these circumstances should take advantage of any method of redress offered by that agency.

## **Conclusion**

This chapter is merely an overview of the expungement process. There are many issues that are not discussed. For instance, there is no discussion of the rights of victims of violent sexual crimes to have their court records sealed, which is essential to the process of restorative justice. There is no mention of why the statute mandates that those persons who can become eligible to have their records sealed must be so informed by the Court, while there is no corresponding provision in the expungement section. There is silence on the entire issue of Criminal Identification Theft and the rights of victims. Expungement and immigration issues might require an entire chapter to themselves. But even without a discussion of these issues, it is easy to see that a topic this important, governed by a statute this complex, cannot be reduced to lists, bullet points and flow charts. Those who are affected by the process need to be educated not only in *how* but also in *why* the expungement/seal process should be made usable to those who need its provisions.

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