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## Legal Rights Group Takes Illinois State Police to Court ... The Charge: Criminal Contempt of Court for Failure to Seal Court Ordered Criminal Records.

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# **LEGAL RIGHTS GROUP TAKES ILLINOIS STATE POLICE TO COURT. . .THE CHARGE: CRIMINAL CONTEMPT OF COURT FOR FAILURE TO SEAL COURT ORDERED CRIMINAL RECORDS**

*by* CHANTAL KAZAY

**I**n March, 2008, Phyllis Haynes, a fifty-five-year-old woman, applied to expunge from her record a 2006 charge that had been dismissed.<sup>1</sup> The expungement was granted by the court. However, soon afterwards, the state

police sent her a letter, later found to be in error, stating that the offense could not be expunged.<sup>2</sup> Haynes now joins 30 plaintiffs in challenging the failure of the Illinois State Police to follow court orders related to criminal record expungement and sealing.

In Illinois, certain people who have been arrested or convicted of a crime have a legal right to change how history is recorded. Illinois is among a handful of states with laws allowing individuals to have their criminal records expunged or sealed when certain conditions are met. An individual who has not been convicted of an offense, meaning there is only an arrest or dismissal, may petition the court for their records to be expunged.<sup>3</sup> In theory, expungement allows the criminal record to be erased from all public records.<sup>4</sup> An individual who has been convicted of a crime may petition the court to seal eligible records of a criminal conviction.<sup>5</sup> Sealing a conviction theoretically prevents the public, including employers, from gaining access to that record.

However, individuals who believe expungement or sealing will totally erase all records of their encounters with the criminal justice system are often in for a surprise. The process is not that simple.

#### ELIGIBILITY

The Illinois sealing statute dictates that in order for an individual's record to be eligible for sealing, they cannot have been convicted of a felony and must have been sentenced to supervision.<sup>6</sup> There are a few exceptions; misdemeanor convictions, such as assault and battery, are ineligible for sealing<sup>7</sup> while class four felony drug possession and prostitution offenses are eligible.<sup>8</sup>

Often a waiting period must be satisfied before sealing or expungement can occur. For example, if an individual is sentenced to supervision for misdemeanor retail theft, the crime can be sealed when a waiting period of three years has been completed.<sup>9</sup>

#### NOTIFICATION

When an individual files a petition for sealing with the circuit court in Illinois, the clerk is required to mail a copy of the petition to four agencies: the State's Attorney's office, the Illinois State Police, the arresting agency and the chief

legal officer.<sup>10</sup> Any objections to the petition must be made within 90 days of this notice.<sup>11</sup> Following an objection, a hearing is scheduled and evidence may be presented on the question of whether or not the record should be sealed.<sup>12</sup> If none of the parties object, the court may enter an order granting or denying the petition, which is then mailed to the four agencies.<sup>13</sup>

Lieutenant Scott Compton, Chief Public Information Officer for the Illinois State Police states, “the Illinois State Police complies with court orders that conform with the law.”<sup>14</sup> The process seems relatively straightforward, but something is preventing the law from being carried out as intended.

#### IDENTIFYING THE OBSTACLE

Randy Roberts, Executive State’s Attorney for Cook County, asserts that there are instances when the Illinois State Police does not receive notice of a petition for sealing and therefore cannot raise objections during the 90-day window. Roberts believes “the Illinois State Police is not trying to defy or subvert the judicial process.”<sup>15</sup> He adds, “They just want adequate notice of expungement and sealing petitions.”<sup>16</sup>

The Illinois State Police has taken the position that if they do not receive notice, as required by the statute, and a court order is entered to seal a record, the court order is contrary to the provisions of the statute, and is therefore void.<sup>17</sup>

Although there may be times when the Illinois State Police does not receive adequate notice of a petition, “that does not mean the Illinois State Police does not receive notice of the court order to expunge the criminal record” says Christopher Wilmes, Staff Attorney with the Legal Assistance Foundation of Metropolitan Chicago.<sup>18</sup> Upon receiving the court order, the Illinois State Police could object or file a motion to vacate the judgment, but they don’t.<sup>19</sup> Instead, Wilmes explains that “they send a letter saying they cannot comply with the order.”<sup>20</sup>

“The Illinois State Police’s stance is troubling because thousands of people are hurting,” says Wilmes.<sup>21</sup> Roberts, on the other hand, asserts that in a public safety office, his concern is “protecting law abiding citizens and victims of violent crimes.”<sup>22</sup> “The recidivism rate is high and if we are unaware of an

individual's previous criminal history because it was expunged, then that's a problem," says Roberts.<sup>23</sup>

#### THE CONSEQUENCES OF A FAILED PROCESS

In Illinois, even after a court orders a criminal record to be sealed, employers who conduct routine background checks may still be able to view it if the Illinois State Police did not follow the order.

"The most frustrating thing is when a client loses a job after their record has been ordered sealed," says Wilmes.<sup>24</sup> Wilmes specializes in employment litigation and helping individuals expunge or seal their criminal records. Currently, Wilmes represents plaintiffs in litigation relating to the Illinois State Police's refusal to seal criminal records when they are court ordered to do so.<sup>25</sup>

Wilmes believes government agencies that knowingly and repeatedly disregard court orders "should be held in criminal contempt of court."<sup>26</sup>

A visible criminal record can act as an insurmountable barrier for individuals hoping to secure employment or housing.<sup>27</sup> Although a criminal record can inform a community of a new neighbor's questionable past, that same record can impair that individual's re-integration to society, a noteworthy goal of rehabilitative criminal justice reform.<sup>28</sup> When communities assert their right to know the presence of past offenders, those offenders may find themselves shunned by the society that they are directed to re-enter.<sup>29</sup> The consequences of this shunning may include challenges securing employment, social service requirements, or perhaps, criminal recidivism as a method of financial support.<sup>30</sup>

#### LOOKING TOWARDS THE FUTURE

So, what's Wilmes' solution? Afford people the chance to start anew.<sup>31</sup> Illinois "is on the right track, since most states do not allow for expungement or sealing" says Wilmes.<sup>32</sup> Some of "my colleagues at other Illinois agencies are trying to pass House Bill 1831 which would clarify ambiguities in the current expungement and sealing statute," he adds.<sup>33</sup> However, until the statute is clarified, there will be people across the state of Illinois continuing to fight and litigate to expunge or seal their records.

## NOTES

- 1 Emma Graves Fitzsimmons, *Judge Orders Illinois State Police to Follow Decrees to Expunge Criminal Records*, Chi. Tribune, June 5, 2008, Metro §2, at 1.
- 2 *Id.*
- 3 20 ILCS § 2630/5 (2005).
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 20 ILCS § 2630/ 5(h)(7)(c) (2005).
- 11 20 ILCS § 2630/ 5(h)(7)(d) (2005).
- 12 20 ILCS § 2630/ 5(h)(7)(e) (2005).
- 13 20 ILCS § 2630/ 5(h)(7)(d) (2005).
- 14 Interview with Lieutenant Scott Compton, Chief Public Information Officer, Illinois State Police (Oct. 31, 2008).
- 15 Interview with Randy Roberts, Executive State's Attorney, State's Attorney for Cook County (Sept. 30, 2008).
- 16 *Id.*
- 17 Compton interview *supra* note 14.
- 18 Interview with Christopher Wilmes, Staff Attorney, Legal Assistance Foundation Metropolitan of Chicago (Nov. 19, 2008).
- 19 *Id.*
- 20 *Id.*
- 21 Interview with Christopher Wilmes, Staff Attorney, Legal Assistance Foundation Metropolitan of Chicago (Oct. 2, 2008).
- 22 Roberts interview *supra* note 15.
- 23 *Id.*
- 24 Wilmes interview *supra* note 21.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 Thomas R. Frenkel, *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997), 24 S. Ill. U. L.J. 627, 628 (2000).
- 29 *Id.*
- 30 *Id.*
- 31 Wilmes interview *supra* note 21.
- 32 *Id.*
- 33 *Id.*