· WISCONSIN POLICY RESEARCH INSTITUTE ·

WPRI
REPORT
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Black Robes & Blue Collars

How to Let Wisconsin's Judges Help Job-Seekers and Employers

Problems with Wisconsin's Expungement Law

Sentence Adjustment Petitions:
Is this Truth-in-Sentencing Provision Really Working?

President's Note

Five months ago, WPRI issued "Unlocking Potential," a report on reducing recidivism in Wisconsin — a noble goal that everyone from crime victims to taxpayers to employers to prison officials can rally behind.

We pointed out that only one in 20 male inmates, and fewer women, are "lifers" in this state. The majority will be out in less than five years and return to the same neighborhoods where their victims often live. As it is right now, about 30 percent typically end up back inside within three years of release — a major reason Wisconsin may soon need to build a new prison. One that taxpayers can't afford.

We put the spotlight on work and education and mentoring programs, and we highlighted the potential use of social impact bonds — a way to infuse private capital into programs that can reduce the burden on the state Department of Corrections.

We also recommended that the state review and explore a little-used sentence adjustment mechanism that originally was inserted into state law as part of truth-in-sentencing reforms. As you will see in our policy brief, "Sentence Adjustment Petitions: Are They Working?," in the second half of this report, we don't think that mechanism — which is supposed to allow well-behaved, low-level, nonviolent offenders to petition a judge for release after serving 75 percent or 85 percent of their sentences — works in practice the way legislators probably initially envisioned.

The state's existing expungement statute for low-level, nonviolent offenders doesn't work well in practice, either — as you will see in the other policy brief, "Problems with Wisconsin's Expungement Law," that we issue today. There is a crucial flaw. Judges are allowed to consider expungement eligibility at the wrong time in the legal process. Meanwhile, the use of the statute from county to county and by race is uneven.

Violent criminals are not eligible for either sentence adjustments or expungement, and we don't think they should be.[1] Legislators have long given more leeway to low-risk offenders, however, in the hope they will prosper and earn the dignity that comes with a job instead of dependence on government. That can be tough when you're part of the 40 percent of the unemployed looking for jobs in Milwaukee who have a record.

If the unemployed fail, we all do. Especially in Milwaukee, the talent pipeline is exceedingly thin. According to the Metropolitan Milwaukee Association of Commerce, there will be 45,400 additional jobs in metro Milwaukee in the next 10 years, the same time period over which the labor force is expected to fall by 42,600. Wisconsin clearly needs to find a way to grow and retain its workforce.

Judges can help. We call this report "Black Robes & Blue Collars" because we are not advocating for the early release programs of yore that enabled bureaucrats to open the doors for prisoners whom judges want locked up. We just need to make sure that judges have the information, opportunity and discretion to make the decisions that our legislators meant to entrust to them.

Most inmates are not highly educated. Only 5 percent of men and 6 percent of women in our prisons have an associate or bachelor's degree or something beyond that. Wisconsin's unemployment rate is exceedingly low right now though, just 3.7%, and employers are looking for help. Blue-collar jobs are available — as are policy options to keep low-risk offenders out of expensive prison cells.

We highlight two of those options in our report today, and we hope policy-makers will consider them.

Mike Nichols
WPRI President

[1] No court may order that a record of a conviction be expunged for a Class H or I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense or if the felony is a violent offense, as defined in state statute.

MISSION

About WPRI

Founded in 1987, the Wisconsin Policy Research Institute is a nonprofit, nonpartisan 501(c)(3) guided by the belief that free markets, individual initiative, limited and efficient government and educational opportunity are the keys to economic prosperity and human dignity.

WPRI REPORT

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Problems with Wisconsin's Expungement Law

How the Law is Used and How to Make It More Equitable and Effective

Executive Summary

Call it a second chance — all across the country, states are approving expungement laws that allow ex-offenders to clean up their records.

In Wisconsin, an existing law allows for the expungement — basically, the sealing of the record — of minor criminal offenses for anyone who was under age 25 at the time of the offense if a judge finds that the offender will benefit and society will not be harmed.[1]

There are numerous limitations: The maximum punishment for the crime cannot be more than six years, which eliminates the vast majority of felonies from consideration.[2] No defendant, regardless of the charge, is eligible if he or she has a prior felony conviction. And unless a judge declares a defendant eligible at the time of sentencing, the offender's record can never be expunged. Under current law, only if the judge makes the defendant eligible at that time — prior to serving the sentence — can the defendant be considered for expungement at a later date.

In order to help policy-makers understand how, when and where the expungement law is used in Wisconsin, WPRI partnered with researchers at Court Data Technologies in Madison to identify over 10,000 cases filed since Jan. 1, 2010, and later expunged, and then linked each of those back to original Wisconsin court documents identifying the county in which the crime was committed, the nature of the crime, the defendant's race and his or her age at the time of the offense. Cases with multiple counts must be expunged fully or not at all. But in addition to looking at the number of cases expunged, the study looked at the number of counts — individual charges within a case — that were expunged.

The goal of the study was to determine how often cases are being expunged in Wisconsin, the types of cases most frequently expunged and whether expungement decisions vary by county, age or race.

Ultimately, we hope to help policy-makers determine whether Wisconsin's expungement law should be altered and made more logical, equitable and effective in helping both low-level offenders find work and companies find employees.

We found that of the approximately 10,000 expunged cases examined, most were criminal misdemeanors or involved charges for which the defendant had been found not guilty. We also found significant differences in the prevalence of expungement by age, location and race.

Background on the Use of Expungements

The numbers across the nation are eye-opening: 70 million Americans — one out of every three working-age adults — have some kind of criminal conviction.[3] Those criminal records have lifelong consequences affecting everything from getting a job or a loan to joining the military to getting into college. The problem is particularly acute in Milwaukee, where 42 percent of the unemployed seeking jobs reportedly have a criminal history.[4]

The campaign to clean up minor criminal records of some of these offenders — mostly younger individuals who committed low-level crimes — is spreading across the country. Koch Industries, with 60,000 workers in the United States, removed questions about prior criminal convictions from its job applications in 2015, joining other big companies such as Walmart, Target, Home Depot and Starbucks.

"Do we want to be judged for the rest of our life for something that happened on our worst day?" a top Koch executive told *USA Today* in explaining the move.

A top official at the Federal Reserve Bank of Chicago says seal ing minor criminal records puts people back to work.

"Expungement is one of many tools that will assist people that have a prior, nonviolent felony conviction," says Steve Kuehl, the bank's economic development and Wisconsin state director. "These are individuals who have paid their debt to society. We have to ask ourselves: (Do) people who have been in prison need to keep paying over and over again for that, or can we move forward?"

Last year, four states passed laws reforming expungement statutes, and this year, the Georgia Supreme Court ruled the state's expanded expungement law applied to old cases, not just offenses occurring since the law's expansion. The Pennsylvania Supreme Court ruled that any five-year period free of arrest made an offender eligible for expungement of a summary conviction, the most minor type of conviction in that state.

In Wisconsin, three bills making their way through the Legislature would change the time of consideration of eligibility by judges from when it currently occurs — at sentencing. Two of the bills change the eligibility determination to no sooner than one year after the offender completes his or her sentence. The third bill also moves expungement decisions — including eligibility — to the point after the sentence has been served. But it also clarifies the law so that, for employment purposes, an expunged record is not considered a conviction.

Types of Cases and Charges Being Expunged in Wisconsin

An average of slightly over 2,000 cases — many with multiple counts — are expunged each year in Wisconsin. That number has been pretty steady since 2012.

Our analysis included every case filed from Jan. 1, 2010, through April 14, 2017 — ultimately covering over 10,000 expunged cases with almost 21,000 different counts or charges. Of the precisely

Types of expungements

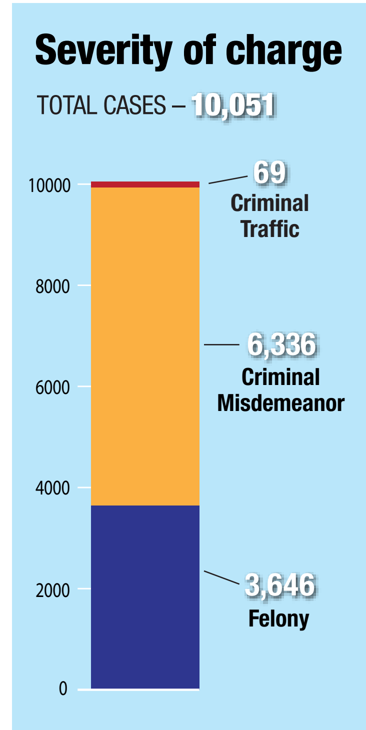
Statute	Sample description	Counts*
961.41(3g)(e)	Possession of THC (2nd+ Offense)	2074
943.20(1)(a)	Theft-Movable Property <=$2500	1324
947.01(1)	Disorderly Conduct	1194
961.573(1)	Possess Drug Paraphernalia	969
947.01	Disorderly Conduct	812
946.41(1)	Resisting or Obstructing an Officer	756
940.19(1)	Battery	741
943.01(1)	Criminal Damage to Property	658
946.49(1)(a)	Bail Jumping-Misdemeanor	354
961.41(1)(h)1	Manufacture/Deliver THC (<=200g)	348
943.50(1m)(b)	Retail Theft - Intentionally Take (<=$500)	336
940.225(3m)	4th-Degree Sexual Assault	222
961.41(1m)(h)1	Possess w/Intent-THC (<=200 grams)	212
961.41(3g)(am)	Possession of Narcotic Drugs	188
450.11(7)(h)	Possess/Illegally Obtained Prescription	186
961.41(3g)(b)	Possession of Controlled Substance	176
943.14	Criminal Trespass to Dwelling	145
948.09	Sex with Child Age 16 or Older	112
943.20(1)(b)	Theft-Business Setting <=$2500	104
961.41(3g)(d)	Possess Amphetamine/LSD/Psilocin	104
946.49(1)(b)	Bail Jumping-Felony	102
943.34(1)(a)	Receiving Stolen Property (<=$2500)	85
961.42(1)	Maintain Drug Trafficking Place	77
961.41(1m)(h)2	Possess w/ Intent-THC(>200-1000g)	76
941.23(2)	Carry Concealed Weapon	71
961.41(3g)(c)	Possession of Cocaine/Coca	71
346.67(1)	Hit and Run	70
943.10(1m)(a)	Burglary-Building or Dwelling	69
943.41(5)(a)	Credit Card-Fraudulent Use (<=$2500)	68
346.04(2t)	Resisting/Failing to Stop/Fleeing	64
940.19(2)	Substantial Battery-Intend Bodily Harm	63
943.20(1)(d)	Theft-False Representation <=$2500	60
346.04(3)	Vehicle Operator Flee/Elude Officer	59
943.017(1)	Graffiti	54
943.201(2)(a)	Misappropriate ID Info - Obtain Money	52
943.15(1)	Entry into/onto Bldg/Constuct.Site/Room	43
941.20(1)(a)	Endanger Safety/Use/Dangerous Weapon	38
948.21(1)(a)	Neglecting a Child	33
961.41(3g)(g)	Possession of Methamphetamine	32
941.23	Carrying a Concealed Weapon	31
943.23(3m)	Take/Drive Veh. w/o Consent-Abandon Veh.	31
343.44(1)(b)	Operating While Revoked (Rev due to alc/contr subst/refusal)	29
346.63(1)(a)	OWI (1st)	28
943.38(2)	Forgery-Uttering	28
943.01(2)(d)	Criminal Damage to Property (Over $2500)	27
948.40(1)	Intent. Contribute/Delinquency Child	26
813.125(7)	Violate/Harassment Restraining Order	25
941.01(1)	Negligent Operation of Motor Vehicle	25
961.41(1)(b)	Manufacture/Deliver Non-Narcotics	25
941.10(1)	Negligent Handling of Burning Material	24
948.02(2)	2nd-Degree Sexual Assault of Child	24
943.24(1)	Issue of Worthless Checks(<=$2500)	23
940.30	False Imprisonment	22
943.50(1M)(A)	Retail Theft-Alter Price (<=$2500)	21
940.44(1)	Intimidate Victim/Dissuade Reporting	20
944.20(1)(b)	Lewd, Lascivious Behavior-Exposure	20
941.20(1)(b)	Operate Firearm While Intoxicated	19
948.10(1)	Exposing Genitals to Child	19
346.62(3)	Reckless Driving-Cause Bodily Harm	18
940.235(1)	Strangulation and Suffocation	18
943.23(3)	Drive or Operate Vehicle w/o Consent	17
943.41(5)(a)1a	Fin.Trans.Card-Fraudulent Use (<=$2500)	16
943.41(5)(a)1b	Fin.Trans.Card-Fraudulent Use (<=$2500)	16
941.24(1)	Possession of Switchblade Knife	15
941.30(2)	2nd-Degree Recklessly Endangering Safety	15
943.23(4m)	Operate Vehicle w/o Consent-Passenger	15
943.41(3)(a)	Credit Card-Theft by Acquisition	15
56.0	Unclassified Forfeiture	14
944.30(1)	Prostitution-Nonmarital Sex. Intercourse	14
961.41(1)(h)2	Manufacture/Deliver THC (>200-1000g)	14
940.20(2)	Battery to Law Enforcement Officers, Firefighters or Commission Wardens	12
941.316(2)(b)	Intentionally Abuse Hazardous Substance	12
943.50(1m)(d)	Retail Theft-Intent.Conceal (<=$2500)	12
948.03(2)(b)	Child Abuse-Intentionally Cause Harm	12
450.11(7)(a)	Obtain Prescription Drug w/ Fraud	11
948.10(1)(B)	Exposing genitals - Child act as actor/ close age of actor and child	11
450.11(9)(b)	Manufacture or Deliver Prescription Drug	10
943.12	Possession of Burglarious Tools	10
943.203(2)(a)	Identity Theft - Obtain Money or Credit	10
943.23(2)	Take and Drive Vehicle w/o Consent	10

**This list does not include counts that were dismissed. It does include charges for which there were at least 10 different expungements from 2010-2016.*

20,957 counts in cases filed during that period, we found that more than a third — 7,362 — had been dismissed or involved charges for which the defendant was found not guilty. We broke down the rest — 13,595 charges that involved convictions — by statute.

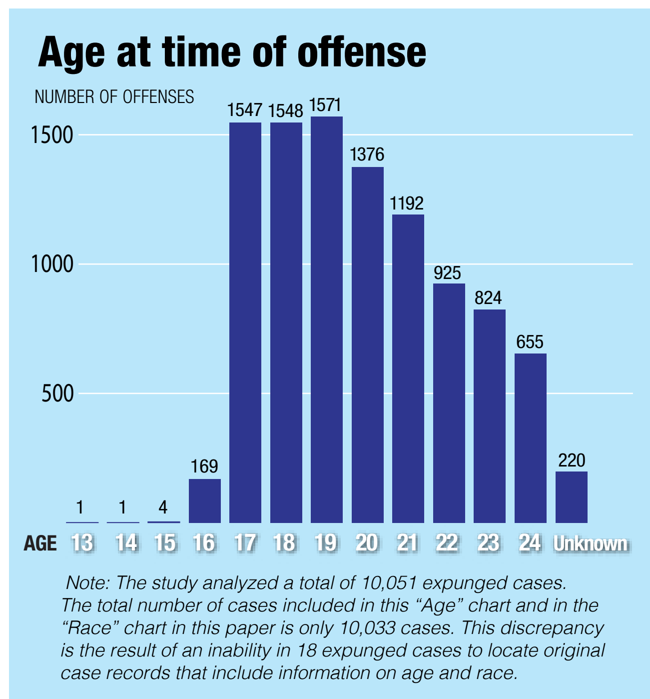
The chart on Page 5 illustrates the fact that most defendants currently benefiting from the expungement statute were charged with possession of small amounts of marijuana or drug paraphernalia, minor thefts such as shoplifting or disorderly conduct. When looking at cases (rather than counts within those cases), almost two-thirds of the expungements — 6,336 of 10,051 — were for cases wherein the most serious charge was a criminal misdemeanor. Slightly more than a third — 3,646 — included low-level felonies, and a sliver involved traffic cases that rose to the level of a criminal offense.

In sum, the original intent of Wisconsin's expungement law — clearing minor criminal infractions from the records of young offenders so that a forgivable mistake does not affect job prospects — is being met. However, it is being met much less frequently for some classifications of defendants than for others.



Age of Defendants

Expungements are available in Wisconsin only to individuals who committed crimes prior to the age of 25. The younger the defendant, our analysis reveals, the more apt judges are to agree to expunge a record. For instance, over twice as many individuals (1,547) who committed crimes as 17-year-olds had records expunged as individuals (655) who committed crimes as 24-year-olds.



Note: The study analyzed a total of 10,051 expunged cases. The total number of cases included in this "Age" chart and in the "Race" chart in this paper is only 10,033 cases. This discrepancy is the result of an inability in 18 expunged cases to locate original case records that include information on age and race.

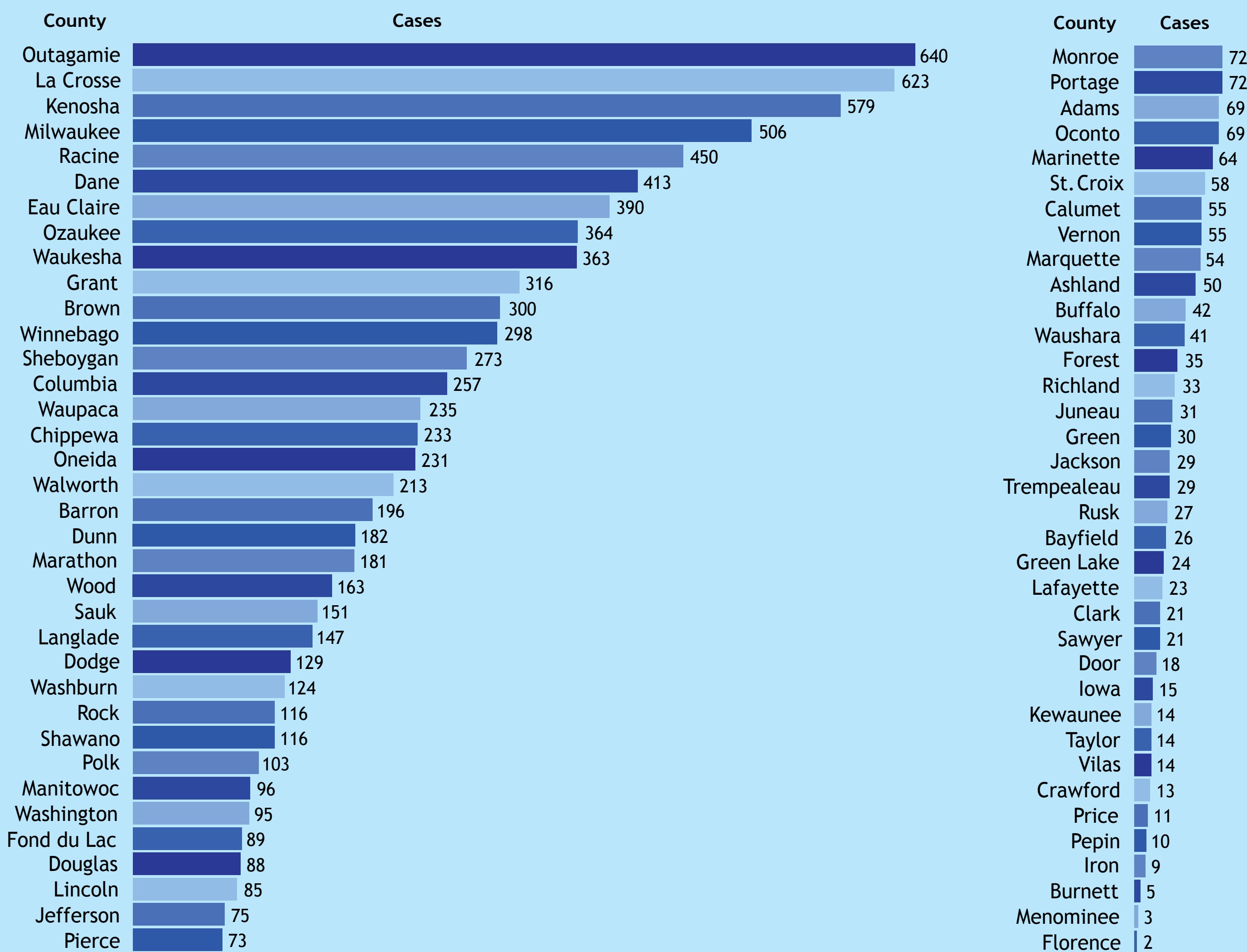
Prevalence of Expungement and Comparison of Counties

Slightly over 10,000 cases filed since Jan. 1, 2010, were expunged by judges in Wisconsin.

Determining the precise number of eligible cases is beyond the purview of this analysis because that would entail examining not merely every case filed since 2010 — because individuals with prior felonies are excluded from eligibility — but also linking each expunged case to every other case filed in the history of Wisconsin that involved the same defendant. Such an analysis would be too time-consuming and expensive.

However, we did identify all cases filed between the beginning of 2010 and the end of 2016 for all defendants charged with a Class H felony or lower, including criminal misdemeanors and criminal traffic cases. Over that period, there were approximately 215,000 of those types of cases, and logic tells us that most would not involve a defendant with a prior felony. Ergo, we know that the number of expunged cases is a small percentage of all cases that are eligible, although we can't say for certain what that percentage is.

In addition to attaining a rough estimate of expungement-eligible cases statewide, we used the same methodology to get



similar approximations of eligibility in the counties of Kenosha, La Crosse, Milwaukee, Outagamie and Ozaukee. These counties vary greatly in size, economics, demographics and numbers of criminal cases and charges.

By any measure, one would expect Milwaukee County — the biggest county in the state with 951,000 people — to have more expungements than anywhere else. That is not the case.

- **Milwaukee has over three times the number of charges in the expungement-eligible crime categories that Outagamie, La Crosse or Kenosha counties do. Yet, in the 2010-'16 period examined, Milwaukee County had fewer total expungements (506) than Outagamie (640), La Crosse (623) or Kenosha (579).**

- **Milwaukee County has approximately 10 times the number of expungement-eligible crimes that Ozaukee County does but only 39 percent more expungements (506 in Milwaukee vs. 364 in Ozaukee).**

Determining the number of expungement-eligible crimes in any particular county is time-consuming and costly, and we had to limit our analysis to the handful of counties that raised very obvious questions when compared to Milwaukee County. But even a cursory look at the number of expungements in other counties where we did not analyze expungement-eligibility figures raises questions that policy-makers and judges might want to ponder further:

- **Why are expungements virtually unheard of in certain counties, albeit smaller ones? Burnett, Florence, Iron and Menominee counties all had fewer than 10 expungements over the seven years examined, meaning whole years go by without a single expungement granted in those counties.**

- **Ozaukee and Waukesha counties are similar demographically. Both are among the wealthiest in Wisconsin and overwhelmingly Caucasian. The difference: Waukesha has 398,000 residents, while Ozaukee has 88,000. Yet the number of expungements is virtually identical: 364 in Ozaukee and 363 in Waukesha. Meanwhile, Washington County, which borders the other two counties, had only 95.**

- **Eau Claire and Fond du Lac counties are about the same size, each with slightly more than 100,000 residents. Yet, Eau Claire had 390 expungements, while Fond du Lac had 89.**

- **Though on opposite sides of the state, Grant and Calumet counties each has around 50,000 residents. But Grant had 316 expungements, while Calumet had 55.**

- **Clark and Oneida counties each has about 35,000 residents. But Oneida had over 10 times as many expungements (231) as Clark (21).**

- **Washburn and Burnett are neighboring counties in northwestern Wisconsin, and each has about 15,000 residents. Their median household income and poverty levels are virtually identical. But Washburn had 124 expungements, while Burnett had five.**

We wondered if one partial explanation for the differences in expungement rates between Ozaukee and Milwaukee counties, for instance, might be that even within the relatively narrow universe of expungement-eligible cases we examined, the cases outside of Milwaukee County are on the whole for less-serious crimes — in other words, more likely to be misdemeanors than low-level felonies. Comparisons of misdemeanor charges in the two counties did not prove this hypothesis correct, however. The explanation lies elsewhere.

One obvious explanation for much higher expungements rates in Ozaukee, Kenosha, La Crosse and Outagamie counties than in Milwaukee County is economic. Median household income is $43,800 in Milwaukee County and only $36,000 in the city of Milwaukee, which comprises most of the county. Kenosha, La Crosse and Outagamie all have median household incomes of more than $50,000. Ozaukee, one of the 25 wealthiest counties in the country, has a median household income of $76,400. Poverty rates tell a similar story. The poverty rate in the city of Milwaukee is 29 percent, almost six times higher than the 5 percent rate in Ozaukee County.

Higher-income defendants are able to afford higher-quality defense attorneys. Low-income defendants frequently cannot afford representation at all and either have to use a court-appointed public defender or, in less serious cases, represent themselves. Defendants with harried or less proficient attorneys, let alone no attorney at all, will be far less likely to know when or how to press for expungement.

Other possible explanations for the low level of expungements in Milwaukee County compared to smaller, wealthier counties could include differing attitudes of judges, the possibility that much higher percentages of our sample in Milwaukee County have prior, disqualifying felonies than is the case in other counties, or racism.

Race of Defendants

We are not, of course, able to prove or disprove the existence of racism or the impact it may or may not have on the justice system. We are, however, able to break down expungements by race and compare them to estimates of expungement-eligible cases by race.

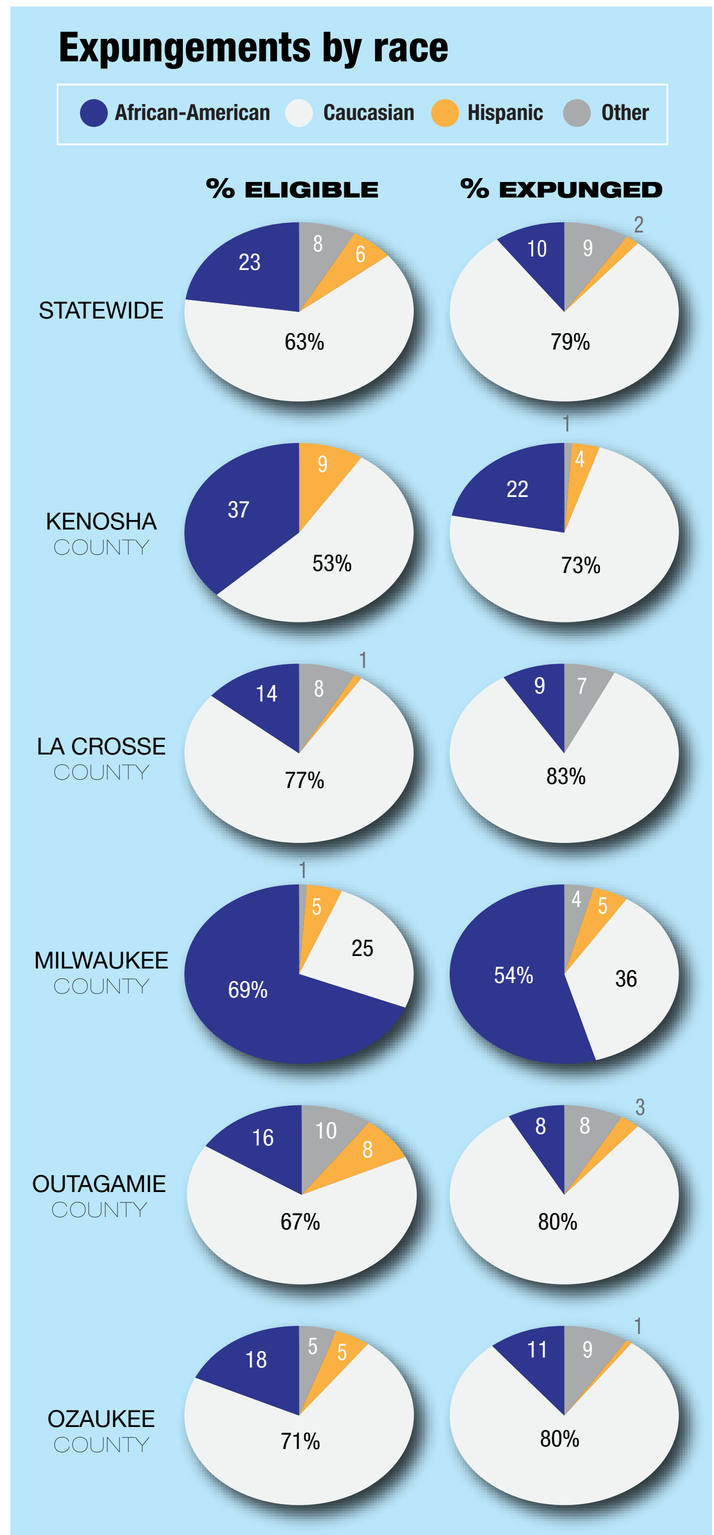
Our estimates of percentages of "eligible" individuals were determined by, again, looking at all cases filed from the beginning of 2010 involving defendants younger than 25 at the time of the offense. Again, we included all criminal cases except for those more serious than Class H felonies at the time of sentencing. We believe this method provides a fair, though not perfect, estimate of the percentages by race of eligible defendants. The resulting data shows a sharp disparity between white defendants, African-American defendants and, to a lesser degree, Hispanic defendants.

Statewide, only 10 percent of those granted expungements since 2010 are African-American and only 2 percent are Hispanic — much lower numbers than appear to have been eligible (23 percent and 6 percent, respectively). Conversely, statewide, 79 percent of those granted expungements were white, while only 63 percent of those generally eligible were white.

Analysis at the county level showed similar patterns:

- **In Milwaukee County, 69 percent of the cases eligible for expungement involved African-American defendants. But of the cases actually expunged, only 54 percent involved African-Americans. White defendants represented 25 percent of the cases eligible for expungement in the county but made up 36 percent of the cases expunged, the data shows.**

- **Similar patterns exist in the other counties examined. For example, in Kenosha County, African-Americans represented 37 percent of the cases eligible for expungement but only 22 percent of the cases expunged. Meanwhile, 53 percent of the cases eligible involved Caucasians, but 73 percent of the cases expunged involved white defendants.**



Conclusion & Recommendations

Judges are most apt to expunge charges that were dismissed or cases that involved misdemeanors committed by individuals in their late teens or early 20s. The older the defendant, the less likely he or she is to have a record expunged — either because he or she is more likely to have prior offenses or because judges are more apt to grant second chances to individuals they think may have made a foolish, regrettable mistake of youth than someone who is older and should be wiser.

The disparities by race and county are troubling. Whatever the reason — economics and the related lack of legal representation, bias, differences in prior criminal records, differing attitudes among judges — it is clear that the defendants in the one place with the highest widespread levels of unemployment and poverty in the state, the city of Milwaukee, have much less likelihood of securing an expungement than most other Wisconsinites.

Unemployed Milwaukeeans with records of nonviolent, low-level crimes are not the only ones who could benefit from better, more equitable use of expungement law, however. Burnett County, for example, has very low median household income ($41,000), a higher-than-average poverty rate and one of the highest unemployment rates in Wisconsin (6.8 percent on March 2017). Nearly 25 times as many defendants are granted expungements in neighboring Washburn County, where the unemployment rate is also relatively high at 5.3 percent.

Reasons for the disparities range from obvious to speculative, but there are three ways that the process can be improved:

- **Common sense says that the decision on whether to make a defendant eligible for expungement should be moved from the time of sentencing to a point after an offender has served that sentence. Under current law, a judge at the time of sentencing weighing whether to give a defendant a shot at a second chance has little information on which to make that decision. Moving the decision on eligibility to a later point will give the judge an opportunity to consider a defendant's post-sentencing behavior. It also will give defendants an opportunity to focus on and ask for expungement when they are less immersed in other legal questions and at greater distance from the prosecution of their case.**

- **Increase the focus on making sure defendants have knowledge of how to seek expungements and ask for legal assistance. It is worth noting that in Milwaukee, there is some help available for people seeking expungements. Nonprofit groups such as Clean Slate Milwaukee help former inmates get jobs by helping clean up their records; and another advocacy group for the poor, Legal Action of Wisconsin, helps youths who have minor criminal records expunge those cases through the Juvenile Re-entry Assistance Program (JRAP), which provides free legal assistance to people ages 18 to 24 who live in public housing. These efforts, however, likely pale in comparison to the legal help available to higher-income individuals outside Milwaukee.**

- **Share expungement data with judges throughout Wisconsin.**

Endnotes

[1] For anyone sentenced before July 1, 2009, expungement is available only to those under age 21 at the time of the crime and if the crime was a misdemeanor.

[2] In Wisconsin, Class A through G felonies allow for sentences over six years. None of those felonies, as a result, are eligible to be expunged. Only Class H and I felonies are potentially eligible, and individuals charged with those types of felonies are also disqualified if they have a prior felony or their crime fits a definition of violent.

[3] Brennan Center for Justice.

[4] Public Policy Forum, 2015 study.

Sentence Adjustment Petitions: Are They Working?

A relatively small number of Wisconsin prison inmates can be released early if they successfully complete intensive treatment — and 250 more of them could soon make it out the door if the Legislature approves a proposal by Gov. Scott Walker to add staff to the addiction treatment program.

But that remains only a small percentage of the state's inmate population, which in March inched toward a near-record with almost 23,000 inmates in a system originally designed for 16,000.

If legislators are interested in more significantly reducing the number of low-risk inmates overburdening the state's prisons, they may want to tweak a different, rarely used, early-release program that is part of state statutes.

Both Republican and Democratic lawmakers passed so-called sentence adjustment legislation in 2002 as part of truth-in-sentencing laws that were meant to allow early release of nonviolent offenders who behave well in prison, complete treatment and education programs and show promise for safe re-entry into their communities – goals synonymous with finding employment. Sentence adjustments also save taxpayers money by freeing up bed space in prisons.

Presumably aware of the positive impact that similar early-release programs have had in states such as Texas and New York, Wisconsin legislators reaffirmed their interest in sentence adjustments when they wrote yet another version of the state's truth-in-sentencing law in 2011. It appeared they wanted to give some inmates the opportunity, toward the end of their prison terms, to petition judges to let them serve out their terms under supervision in the community.

But a new analysis by the Wisconsin Policy Research Institute reveals that sentence adjustment petitions are rarely approved, raising questions about whether the law is working as intended.

To shed light on the use — or non-use — of sentence adjustment petitions, WPRI partnered with Court Data Technologies in Madison to create a unique, computerized data search to analyze petition filings by county and judges' decisions on those petitions.[1]

The analysis shows that over the past three years, Wisconsin inmates filed petitions for sentence adjustments in 6,886 cases — over 2,200 per year from a prison system with nearly 23,000 inmates. In those cases, the states' 249 circuit judges granted 821 sentence adjustments — roughly 270 per year, or an average of just over one granted petition per circuit judge per year in Wisconsin's 72 counties.

Judges' decisions varied widely by county.

Last year, for example, La Crosse County's five circuit judges granted petitions in 45 percent of all the cases filed in their courts, 20 out of 44. The same year, Milwaukee County, with 47 circuit judges, granted only 10 of 463 petitions, and in 2014, they granted only two of 536 petitions.

Counties with similar demographics also varied. While La Crosse County led the state in percentage of petitions granted last year, Brown County's nine circuit judges granted petitions in only six of 115 cases, or about 5 percent. The five circuit judges in nearby Fond du Lac County granted petitions in only six of 103 cases last year, or nearly 6 percent, and granted zero of 32 in 2014. Most rural counties see only a small number of petitions, and very few are granted.

"I'm not sure why La Crosse County would grant a higher percentage of these petitions," said La Crosse County Circuit Judge Scott L. Horne, who was the DA before becoming a judge more than a decade ago. "In fact, I'm surprised we're the highest. It's not something we've ever discussed as a group."

La Crosse County has been a statewide leader in early intervention programs and the creation of a drug court to specialize in drug-related crimes, Horne said. So it's possible that the culture of the La Crosse County courts are prone to looking at ways to keep people out of prison or work to help them rejoin society if they do serve time.

Some legal experts have speculated that the race of offenders may play a role in judges' decisions to grant or deny sentence adjustment petitions. However, there doesn't appear to be a strong, identifiable pattern. Milwaukee County, with a large African-American inmate population, granted few petitions,

while Dane County, also with a large minority caseload, saw its 17 circuit judges last year grant 41 of 151 petitions, or 27 percent.[2]

To examine in detail the use of sentence adjustment petitions, WPRI and CDT analyzed more than 17,000 "court events" related to the petitions from 2014 to 2016, using data from the Wisconsin court system's case management system, called the Consolidated Court Automation Programs, or CCAP. To avoid having to travel to each of the state's 72 counties to inspect court records, CDT designed a computer program to search CCAP to determine the number of petitions filed and calculate how many were granted and denied — as well as to identify why they were denied or dismissed, if available.[3]

While the court records usually don't reflect judges' rationale for denying petitions, the analysis shows that eligible inmates are consistently filing the petitions and that judges are denying the vast majority of them.

Wisconsin saw 2,213 petition cases filed in 2014 (the number of actual petitions may be higher as some of those cases involved multiple filings because inmates must file one petition for each conviction). The number of petition cases dropped slightly to 2,185 in 2015, then rose last year to 2,288, which shows that their use by eligible inmates has been consistent over the past three years.

At the same time, judges' granting of petitions did increase over those three years, suggesting a slightly growing acceptance. The number of cases in which judges granted petitions rose from 257 in 2014 to 270 in 2015 and to 295 last year — a nearly 15 percent increase over three years. The remaining petitions either were denied or the status of the case is unknown.[4]

The reasons that sentence adjustments aren't more widely used as a tool to encourage good inmate behavior are varied and, in some cases, speculative.

It appears from WPRI's analysis that most judges view sentence adjustments negatively. They are accountable if "low-risk" inmates whom they released early go on to commit new crimes. Because judges and district attorneys are accountable to voters every few years, some experts suggest that judges simply avoid the risk by denying all or most petitions.

Why fewer than 10 percent of inmates filed petitions is also both obvious and speculative. One obvious reason is that the law is so narrow that most inmates don't qualify.
Only nonviolent offenders who have served 75 to 85 percent of their original sentences are eligible — and only a third of the state's inmates, roughly 7,500, are serving time for nonviolent crimes, according to the DOC's "Inmate Profile" study in 2014. Even within the categories of eligible felonies — such as robberies and arson — not all would be considered nonviolent. On top of that, there is no precise definition of what constitutes "good behavior" in prison.

As such, there is no data that show the number of inmates who are truly nonviolent and who have good behavior records. But by most objective measures, the number of inmates eligible for sentence adjustments remains a relatively small subset of the total prison population.

Complicating the process for inmates (and judges) is that the vast majority file their adjustment petitions "pro se," which means they're writing their own personal appeals and must meet the burden of proof for their worthiness without the help of a lawyer.

As a result, many appeals aren't very good, noted Mary Prosser, a University of Wisconsin-Madison Law School professor. Prosser teaches at the school's Legal Aid To Incarcerated Persons program, which assists 150 to 200 inmates a year with their petitions.

Many judges receive petitions that are incomplete or lack supporting documentation, such as inmates' plans to get a job once released or their records of treatment successes and behavior while in prison. As the inmates don't appear in court personally, Prosser noted, an incomplete or poorly documented appeal makes it difficult for judges to accurately assess inmates' progress in prison as well as ascertain the risk they pose if released.

Another more speculative reason sentence adjustment petitions aren't more widely used is for many inmates serving short sentences, the petitions seem to be of little or no use.

DOC records show that in 2015, 4,803 of the 8,599 inmates discharged from prison were released after serving a sentence of a year or less. Inmates with a one-year sentence can't even submit a petition until they have served nine months. Because the process itself can take two to three months to complete, inmates with short sentences already would have completed most — or all — of their prison terms by the time a judge received and ruled on their petitions.

For example, inmates convicted of a Class F felony with a two-year prison term would be able to file a petition after serving 18 months (75 percent of their sentence), meaning that a granted petition would shave — at best — only a few months off their prison time. Inmates convicted of a Class C, D or E felonies can't file until they've served 85 percent of their sentences, creating the same marginal benefit.

That may not be what the Legislature intended as the sentence adjustment process has merit and could be a useful tool, many legal experts noted.

For inmates, sentence adjustments can incentivize good behavior and positive approaches to treatment and counseling. For taxpayers, sentence adjustments can reduce costs — housing an inmate in prison costs $87 per day compared to $6 per day for supervision in a community corrections setting.

But there are also practical legal considerations.

A court, when sentencing a defendant, should be imposing the minimum amount of custody consistent with protecting the public, the gravity of the offense and the defendant's rehabilitative needs, said Kelly Thompson, who heads Wisconsin's State Public Defender's Office.

"But that necessarily involves (judges') guessing about future variables such as what services will be available, what kind of progress an inmate will make in treatment and how hoped-for rehabilitation will progress. Sentence adjustments, in theory, provide some ability for the court to take these developments into account and fine-tune the sentence based on conduct, progress and other changes," Thompson said.

But for the process to work, she said, it "needs to be meaningful."

Some Wisconsin inmates have other avenues for early release. (*See "How the Process Works" on Page 14.*)

But for the vast majority of inmates convicted after 2011, sentence adjustment petitions are the only available mechanism for early release in exchange for good behavior. WPRI's examination of three years of court records suggests that sentence adjustments are a relatively small tool within the state's justice system — and likely will remain so under current state law.

Conclusions and Options

If the intent of legislators under truth-in-sentencing was to offer a significant number of low-risk inmates the opportunity to get out early and save taxpayers money, there are several ways they could alter the statute:

- **Allow inmates to start the petition process much earlier — for instance, after serving 50 percent of their term — but still be required to serve 75 to 85 percent.**

- **Allow inmates to petition for a sentence adjustment after serving a smaller percentage of their time — for instance, 60 percent, and then be released whenever the judge has completed the review.**

- **Encourage expedited review of petitions, perhaps by removing the provision that requires prosecutors to be part of the process.**

- **Encourage more legal representation of prisoners who qualify for early release.**

Endnotes

[1] State court administrators warn that CCAP is a state circuit court case management system and that the website was developed as a tool for the public to easily access court records, not as a research tool, making it difficult to use CCAP to mine data from thousands of court records in each of the state's 72 counties. In fact, the firm hired by WPRI to analyze the data, Court Data Technologies, had never seen this done before and had to develop its own program to analyze the data.

[2] The computerized data-based research wasn't designed to analyze cases by race or inmate profile. That would have required personally analyzing thousands of case files in each Wisconsin county.

[3] Complicating the data search is the fact that county clerks file judges' sentence adjustment decisions differently. Some clerks file the decisions, checking off one of 16 categories that list reasons for granting or denying a petition. Some clerks file judges' decisions in a reporting category called "order concerning sentence adjustment," which is space for judges' comments or rationale. Some clerks file judges' decisions in both categories, creating two electronic records for one decision. Categories include "denied — summarily" and "denied — not in the public interest," which reflects state law that says judges don't have to give a reason to deny a petition.

To address that issue, Court Data Technologies created a word search for "granted," "denied" and "dismissed" to analyze the language of the "orders concerning sentence adjustment." But for most cases, the records provide little insight into judges' decisions to deny or grant.

[4] Even if court records were personally inspected, the form used to record the cases doesn't require clerks to record judges' reasons for denial, making it difficult to analyze why some counties' judges grant higher percentages of petitions, while most others grant very few or, in several cases, none.

How the Process Works

Here's how Wisconsin's sentence adjustment system works under current law, which took effect in 2002 and was revised in 2011:

• To qualify for sentence adjustment, a convicted felon serving time in Wisconsin must be nonviolent, with a record of good behavior while in prison. About a third of the state's prison inmates are serving time for what are defined as nonviolent crimes.

• Those convicted of a Class C, D or E felony (Class C includes robbery or arson, for example) may petition for sentence adjustment after serving 85 percent of their prison term. Those convicted of a Class F, G, H or I felony, such as burglary, theft, forgery or repeat drunken driving, may petition after serving 75 percent of their time. A study in 2006 of two counties' court records showed inmates with these lower-class felonies were the most likely to receive sentence adjustments.

• Inmates seeking sentence adjustment are required to file the petitions — one petition per conviction per year — with their sentencing judges, who then refer them to the district attorney who prosecuted the case. The DA has 45 days to review the petition and return it to the sentencing judge with a recommendation. The judge is not required to follow the DA's recommendation. In some cases, such as sex crimes, the DA must notify victims about the petitions and give instructions on how to object.

• Sentencing judges have broad latitude to grant or deny petitions, which they can do without comment or by invoking a category called "in the interest of justice." Judges have access to the original sentencing transcripts, as well as inmates' prison records, such as behavior and participation in treatment and education programs. Judges also can factor in law changes, such as inmates convicted under previous versions of truth-in-sentencing that in some cases would have resulted in less confinement time.

• Sentence adjustments do not reduce the overall length of a sentence. The judge can grant reduced prison time, but that time is added to the offender's extended supervision period, which is managed by a Wisconsin Department of Corrections agent.

• The reduced prison time for most inmates is not extensive.

About half of Wisconsin inmates are serving sentences of two years or less, according to the DOC's 2014 "Inmate Profile" study. That means an inmate serving two years for a Class F felony could petition a judge after 18 months (75 percent of time served). But the process itself can take two to three months from the time the petition is submitted, reviewed by the DA, researched by the judge and a final decision ordered. That means the sentence reduction, if granted, would be only a few months.

There are other forms of early release in Wisconsin primarily because the state's 22,717 inmates (as of March 2017) were sentenced under different sets of laws over the past two decades.

• Inmates convicted prior to Dec. 31, 1999, are subject to sentences under the state's old laws that still include probation and parole. That covers just over 2,000 inmates in Wisconsin prisons.

• Inmates convicted between October 2009 and August 2011 are eligible for "positive adjustment time" — essentially time off for good behavior. PAT became law as part of Act 28, signed by Gov. Jim Doyle, and eliminated by Act 38, signed by Gov. Scott Walker.

• Wisconsin has a small Earned Release Program (ERP) for inmates with drug and alcohol addiction who successfully complete intensive treatment programs while in prison. Eligibility is determined by the sentencing judge, who includes it as part of the offender's original sentence. As of December 2016, there were 5,572 inmates eligible for the program but only 617 enrolled. Walker's budget proposes to expand participation by 250 inmates by adding 16.25 new positions to staff the program at an annual cost of $836,700.

• Wisconsin also releases a few inmates every year because they're very old or have severe health problems. From Jan. 1 to Nov. 30 of 2016, the DOC received 11 petitions for "compassionate release," seven due to "extraordinary health conditions" and four due to "geriatric status." The DOC's program review committee approved three petitions, and the sentencing courts approved two and denied one. In 2015, the committee approved five petitions, and the courts approved four and denied one. (If the inmates were sentenced prior to 2000, the Parole Board alone can approve or deny compassionate release petitions.)