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**Expungement and the Rehabilitation of New Jersey’s Offenders: How the *In re
Expungement Petition of J.S.* Court Got it Wrong**

Lauren Sharp

I. Introduction

In 2015, the New Jersey Supreme Court narrowed the interpretation of the New Jersey statute relating to expungement of criminal records.¹ Expungement is defined as the “extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person’s detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.”² The expungement statute has been narrowly interpreted “to preclude expungement when the petitioner has been convicted of multiple crimes even when those crimes occurred within a short span of time” in the decision of *In re Expungement Petition of J.S.*³ Justice LaVecchia authored the dissenting opinion and argued that the majority’s interpretation of N.J.S.A. 2C:52-2(a) was “too restrictive given ... [the] statute’s remedial purpose.”⁴ While in both the majority opinion and the dissenting opinion expungement is stated to be a remedial device, the majority’s narrow interpretation of the expungement statute does not allow the statute to reach its full rehabilitative purpose.

In the opinion of the author of this note, the majority wrongly defined the word “crime” as containing only one offense. The New Jersey Supreme Court had to decide whether or not offenders who plead guilty to multiple offenses that were committed in a short period of time

¹ *In re Expungement Petition of J.S.*, 223 N.J. 54 (2015).

² N.J. STAT. ANN. § 2C:52-1

³ *In re Expungement Petition of J.S.*, 223 N.J. 54 (2015) [hereinafter “*Petition of J.S.*”].

⁴ *Id.* at 78 (LaVecchia, J., dissenting).

could be entitled to expungement of their criminal record.⁵ The majority chose to define crime narrowly as constituting only one offense. This narrow definition lead the majority to deny the expungement petitions of two men who committed multiple offenses in a short period of time and to rule that only offenders who had committed crimes during a “single, uninterrupted event” could apply for expungement of their criminal records.⁶ In view of the remedial nature of expungement and the definition of crime, the majority should have ruled in favor of the expungement petitions of J.S. and G.P.B.

In Part II of this Note the relevant New Jersey expungement statutes and *Petition of J.S.* will be examined.⁷ In Part III the leading cases in expungement up until *Petition of J.S.* will be analyzed.⁸ Part IV will consider the public policy issues expungement tries to remedy and how the majority’s narrow interpretation of expungement requests will go against that intention.⁹ In Part V, the Part V rehabilitative nature of expungement in New Jersey will be highlighted to demonstrate that tge majority wrongly interpreted N.J.S.A. 2C:52-2 and erroneously denied petitioners’ petitions for expungement.¹⁰

II. Background/Overview

In this section the legislative history and background of the relevant New Jersey statutes relating to the expungement of criminal records will be discussed together with the facts and opinion of *In Re Expungement Petition of J.S.*

A. What is Expungement?

⁵ *Id.* at 58.

⁶ *Id.*

⁷ *See infra* Part II.

⁸ *See infra* Part III.

⁹ *See infra* Part IV.

¹⁰ *See infra* Part V.

Expungement allows individuals who are convicted of crimes to have their records sealed.¹¹ When an individual who has committed a crime has his record expunged, he is given a second chance to lead a productive life without the burden of a criminal record. Expungement of records is utilized as a means to rehabilitate offenders, who might face difficulty gaining access to housing, employment, and in some cases even loans to attend school because of their criminal records.¹² For example, an individual who has a criminal record that is expunged will not have to indicate on an application for employment that he has previously been convicted of a crime.¹³ Expungement is rehabilitative in nature and is present in some form in virtually every state in the United States.¹⁴ In New Jersey, in order to petition for expungement of a criminal record, an “eligible” person must file a petition for expungement in the Superior Court, in the county where the arrest or prosecution of the crime took place.¹⁵ A court proceeding then takes place to consider whether or not expungement of the petitioner’s record is appropriate.¹⁶

Expungement is a critical part of the rehabilitative process and the reintegration of an offender back into society after he is released. While some may argue that expungement may increase the incentive for a first-time offender to commit a crime, in fact expungement acts as a deterrent for the individuals who are truly rehabilitated through the criminal justice system.¹⁷ Expungement provides incentives for ex-convicts who wish to reintegrate into society and

¹¹ Paul Bergman, *Expunging or Sealing an Adult Criminal Record*, NOLO, <http://www.nolo.com/legal-encyclopedia/expungement-of-criminal-records-basics-32641.html> (March 25, 2016).

¹² Michael Booth, *Christie OKs Measure Easing Expungement*, N.J. LAW JOURNAL (Jan. 19, 2016), available at <http://www.njlawjournal.com/id=1202747403262?keywords=christie+oks+measure+easing+expungement&publication=New+Jersey+Law+Journal> (March 25, 2016).

¹³ Bergman, *supra* note 11.

¹⁴ *Id.*

¹⁵ NEW JERSEY COURTS, *How to Expunge Your Criminal and/or Juvenile Record* (Nov. 19, 2015), available at https://www.judiciary.state.nj.us/prose/10557_expunge_kit.pdf (March 23, 2016).

¹⁶ *Id.*

¹⁷ Murat Mungan, *Reducing Crime Through Expungements*, FSU COLLEGE OF LAW, PUBLIC RESEARCH PAPER NO. 786, 786, (2016).

establish a law-abiding life going forward.¹⁸ It is much more important to an ex-convict seeking employment to have their record expunged than it would be to a career criminal.¹⁹ As such, an ex-convict who has had his record expunged is much less likely to commit crime in the future because he faces “greater expected informal sanctions [such as losing employment by] recidivating.”²⁰ Expungement can be used as a tool to reduce crime through lowering recidivism rates.²¹

There are two classes of individuals who are most often affected by having a criminal record: the young and the indigent.²² Often, indigent individuals are forced to engage in crime in order to survive.²³ Once convicted, there is even less hope for an indigent person to obtain employment than there was prior to the conviction.²⁴ This creates a cycle that involves high recidivism rates and leads to more juvenile offenders. If an indigent person is denied access to jobs because of a criminal record, he is unable to reconcile his indigent status. It is not uncommon for indigent offenders to have children who also may have to turn to crime as a way to survive. This sequence could continue for years going forward if individuals are not able to have their criminal records expunged and are not given a chance to reintegrate into society as rehabilitated individuals.²⁵

In what way is the rehabilitation of an individual aided by the concealment of his criminal record? In order to establish the proposition that expungement rehabilitates an offender, the manner in which ex-convicts are treated in American society must be highlighted. If an

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2.

²¹ *Id.* at 2.

²² Joseph C. Dugan, *I Did My Time: The Transformation of Indiana’s Expungement Law*, 90 IND L.J.1321, 1326 (2015).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1327.

known ex-convict obtains employment, he may be subject to lower wages than a similarly situated person without a criminal record.²⁶ Also, a known offender may become socially isolated from individuals who do not want to be associated with someone they view as a criminal.²⁷ An organization known as “Ban the Box” highlights the discrimination with which offenders often face when trying to reintegrate into society.²⁸ The organization campaigns for removing from applications for employment, insurance, loans, housing and other services, the question and “check box” which asks individuals whether or not they have ever been convicted by a court.²⁹ The motivation behind banning the box in which offenders would have to identify that they have been convicted of a crime is that once this box has been checked “yes”, the individuals whom review such applications are likely to either consciously or sub-consciously discriminate against the applicant.³⁰ Whether or not you agree with banning the box, expungement of a criminal record would provide for similar results to those offenders who the court has deemed to be rehabilitated; those offenders would no longer have to “check the box.”

In conclusion, expungement of an offender’s criminal record allows an individual to be rehabilitated back into society. Expungement provides individuals who have been convicted of a crime with the opportunity of a fresh start. They no longer have a criminal record preventing them from obtaining employment or obtaining access to other social services. There has been extensive judicial recognition of the disability a criminal record places upon an individual, and in *Petition of J.S.*, the New Jersey Supreme Court could have expanded the concept of

²⁶ *Id.* at 1328.

²⁷ Mungan, *supra* note 17.

²⁸ BAN THE BOX, <http://bantheboxcampaign.org/?p=20#.VvLxz2QrKfR> (March 21, 2016).

²⁹ LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ban-the-box-campaign/> (March 23, 2016).

³⁰ Ban the Box, *supra* note 28.

expungement and in turn rehabilitate offenders into society; however, the Court instead chose to limit those offenders who have access to expungement.³¹

B. New Jersey Expungement Statutes

1. N.J. Stat. § 2C:52-32: How to Construe the Expungement Statute

N.J. Stat. § 2C:52-32 of the New Jersey Code of Criminal Justice, states that the chapter “shall be construed with the primary objective of providing relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby periodic violators of the law or those who associate themselves with criminal activity have a regular means of expunging their police and criminal records.”³² Chapter 52 is solely concerned with New Jersey’s expungement of criminal records.³³

2. N.J.S.A. 2C:52-2(a): The Mechanism of Expungement

N.J.S.A. 2C:52-2(a) is the New Jersey statute that relates to the expungement of criminal records.³⁴ It authorizes the expungement of the records of “certain criminal convictions.”³⁵ The pertinent language of the statute reads as follows:

In all cases, except as herein provided, wherein a person has been convicted of a crime under the laws of this State and who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of [ten] years from the date of his conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later, present a duly verified petition as provided in N.J.S.A. 2C:52-7 to the Superior Court in the county in which the conviction was entered praying that

³¹ *See, e.g.*, *United States v. Morgan*, 346 U.S. 502, 519 (1954) (Minton, J., dissenting) (writing that a record of a conviction is a “lifelong handicap ... [that] may at any time threaten [someone’s] social standing or affect his job opportunities”).

³² N.J. STAT. ANN. § 2C:52-32.

³³ *Id.*

³⁴ N.J. STAT. ANN. § 2C:52-2(a).

³⁵ *Id.*

such conviction and all records and information pertaining thereto be expunged.³⁶

Prior to 1979, the New Jersey expungement statute stated that in criminal cases where a person has “no subsequent conviction,” that individual could petition for expungement ten years from the date of such a conviction.³⁷ In 1979, the statute was amended to change the language from “subsequent conviction” to “any prior or subsequent crime,” a change that the majority of the New Jersey Supreme Court would strongly rely upon in subsequent argument interpreting this statute.³⁸ Prior to the 1979 amendment, offenders who had been subsequently convicted could apply for an expungement under the language of the previous statute.³⁹ After the 1979 amendment, only offenders who had participated in a “prior or subsequent crime” could apply for expungement of their records.⁴⁰ This amendment narrowed the availability of expungement to offenders. Previously, any offender who had a prior conviction could ask the court to consider their petition. A conviction is defined as the result of a criminal trial in which an individual is guilty as charged.⁴¹ Nothing was said about the number of crimes of which an individual had to be convicted, it was simply stated that a person had to have been previously convicted. After the 1979 amendment, only individuals who had participated in any prior or subsequent “crime” could apply. The amendment used the singular form of crime, therefore limiting the access of expungement to individuals who had participated in a single crime, rather than those who had a single conviction. The 1979 amendment was enacted three years after *In re Fontana*, a case that will be discussed at length later on in this note.

³⁶ *Id.*

³⁷ *In re Fontana*, 146 N.J. Super. 264, 266 (App. Div. 1976) (citing N.J. STAT. ANN. § 2A:164-28).

³⁸ *Petition of J.S.*, 223 N.J. at 58.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Black's Law Dictionary* 384 (9th ed. 2009).

In 2010 the statute was amended again to add two provisions, the first of which provided that expungement could be requested after five years had passed since the offender was convicted. If the petitioner establishes a “compelling interest,” he can obtain expungement prior to the ordinary ten-year time period.⁴² A “compelling interest” may be established in special circumstances including satisfactory completion of probation or release from prison, or if the court “finds in its discretion that expungement is in the public interest.”⁴³ The statute instructs the court the factors to consider when determining whether expungement is in the public interest: the nature of the offense, and the applicant’s character and conduct since conviction.⁴⁴

In addition to the “compelling interest” prong, a “public interest” prong was also added in 2010. The public interest prong allowed for expungement of a criminal record if the following circumstances existed: “passage of five years[,] no additional convictions[,] and a finding that expungement is in the public interest.”⁴⁵ In *Petition of J.S.*, the majority determined that the 2010 amendments demonstrated that the legislature “intended the statute to ‘provid[e] relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity[.]’”⁴⁶

C. Summary of *In re Expungement Petition of J.S.*

In *Petition of J.S.*, petitions to expunge the criminal records of J.S. and G.P.B. were heard in a case consolidated by the New Jersey Supreme Court. At the trial level, the Superior Court granted both petitioners’ request for expungement. The state appealed both decisions of the Superior Court to the Appellate Division.⁴⁷ The Appellate Division reversed both petitioners’

⁴² *Petition of J.S.*, 223 N.J. at 68.

⁴³ N.J. STAT. ANN. § 2C:52-2(a)(2).

⁴⁴ *Id.*

⁴⁵ N.J. STAT. ANN. § 2C:52-2(a)(2).

⁴⁶ *In re Expungement Petition of J.S.*, 223 N.J. 54 (2015) (citing N.J. STAT. ANN. § 2C:52-32).

⁴⁷ *In re G.P.B.*, 436 N.J. Super. 48, 50 (App. Div. 2014).

In re Expungement Petition of J.S., 2013 N.J. Super. Unpub. LEXIS 2087 (App. Div. Aug. 22, 2013).

grants of expungement and the Supreme Court of New Jersey granted certification to hear the petitioners' appeals.⁴⁸

1. *In the Matter of the Expungement Petition of J.S.*

J.S., a former New Jersey resident, was arrested twice for selling marijuana to an undercover police officer.⁴⁹ He was arrested two times in a five-day period and charged with nine offenses.⁵⁰ All of his charges were heard on the same date during a single trial proceeding.⁵¹ He was sentenced to a three-year term of probation for third and fourth degree distribution charges.⁵² Five years after completing probation, he filed a petition for expungement.⁵³

The trial court granted J.S.'s petition for expungement reasoning that his two offenses were committed under a "single spree."⁵⁴ The term "single spree" emanates from *In re Fontana*, a case that will be discussed at length later on in this note.⁵⁵ The Appellate Division reasoned that if two crimes were committed in a "single spree" those "offenses constituted a solitary crime" when it decided *In re Fontana*.⁵⁶ The Appellate Division overruled the lower court's ruling of *In re Ross*, which will also be discussed at length later on in the analysis.⁵⁷ Under *Ross*, the Appellate Division ruled that the crimes committed by J.S. were "prior or subsequent" to

⁴⁸ *In re Expungement Petition of J.S.*, 223 N.J. 54 (2015); *In re Expungement Petition of G.P.B.*, 219 N.J. 620 (2014).

⁴⁹ *Petition of J.S.*, 223 N.J. at 60.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Petition of J.S.*, 223 N.J. at 61.

⁵⁴ *Id.* (citing *In re Fontana*, 146 N.J. Super. 117 (App. Div. 2008)).

⁵⁵ *In re Fontana*, 146 N.J. Super. 264 (App. Div. 1976); *see supra* Part III.

⁵⁶ *Id.*

⁵⁷ *In re Ross*, 400 N.J. Super. 117 (App. Div. 2008); *see supra* Part III.

each other and therefore, because expungement is only permitted for one “crime,” it could not be permitted.⁵⁸

2. *In the Matter of the Expungement of the Criminal Records of G.P.B.*

G.P.B. is a New Jersey resident who committed several offenses in furtherance of a conspiracy.⁵⁹ These offenses included one count of conspiring to offer gifts to a public official and three counts of offering gifts to a public servant. The conspiracy involved offering gifts to local officials of a specific municipality in order to promote his business.⁶⁰ G.P.B. pled guilty to four offenses heard at one trial where he ultimately was sentenced to thirty days at a corrections facility, 100 hours of community service and a fine.⁶¹ G.P.B. petitioned for expungement ten years after his convictions.⁶²

The trial court granted his petition under the belief that all of his crimes constituted a continuing conspiracy and could therefore be linked together as “one ‘crime’” under N.J.S.A. 2C:52-2(a).⁶³ The Appellate Division reversed this decision because the four offenses G.P.B. committed occurred over the course of two days.⁶⁴ The Appellate Division believed that since the offenses did not occur at the same time, they could not be labeled under the same “crime,” and therefore were not eligible for expungement.⁶⁵

3. *Consolidation and In re Expungement Petition of J.S.*

Both J.S. and G.P.B. appealed the Appellate Division’s reversal of the trial courts’ grant of expungement. On petitioners’ appeals, the New Jersey Supreme Court considered the issue of

⁵⁸ *Petition of J.S.*, 223 N.J. at 62.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *In re G.P.B.*, 436 N.J. Super. 48, 52 (App. Div. 2014).

⁶⁵ *Id.*

whether the statutory language of N.J.S.A. 2C:52-2 “bars expungement of convictions of a defendant who pleads guilty in a single proceeding to multiple offenses ... committed within a short period of time.”⁶⁶ The majority reasoned that the legislature, when enacting N.J.S.A. 2C:52-2, desired to limit expungement “to offenders who have committed no more than an isolated infraction in an otherwise law-abiding life.”⁶⁷ As such, it ruled that the “plain language” of the statute precluded the “expungement of convictions when the petitioner has been convicted of multiple crimes, even when those crimes occurred within a short span of time.”⁶⁸

Relying heavily on *In re Ross*, a 2008 Appellate Division case in which the “one-night spree” reasoning of *In re Fontana* was rejected when applied to the expungement statute, the majority denied petitioners’ expungement petitions.⁶⁹ The “one-night spree” terminology had originally been used by the trial court to rationalize expungement of J.S. and G.P.B.’s records.⁷⁰ The concept of the “one-night spree” came from *In re Fontana*, a 1976 New Jersey Appellate Division case.⁷¹

The majority used the analysis of the language of the statute to buttress their position that the legislature’s intent when enacting the statute was to “bar expungement when the offender has committed a second crime ... whether or not those crimes [we]re resolved in the same judgment of conviction.”⁷² On the other hand, the dissent relied upon a public policy argument to support its contention that the expungement statute should be more liberally construed.⁷³ Justice LaVecchia believed that “the statutory language does not plainly support the approach chosen by

⁶⁶ *Petition of J.S.*, 223 N.J. at 58.

⁶⁷ *Id.* at 66.

⁶⁸ *Id.*

⁶⁹ *Id.* at 62.

⁷⁰ *Id.* at 61.

⁷¹ *Id.* at 61.

⁷² *In re Expungement Petition of J.S.*, 223 N.J. 54, 75 (2015) (LaVecchia, J., dissenting).

⁷³ *Id.* at 78 (LaVecchia, J., dissenting).

the majority.”⁷⁴ Rather, Justice LaVecchia read the ambiguous nature of the language of the statute to permit a more liberal construction, which would better further the rehabilitative nature of the legislation.⁷⁵

III. Rehabilitation of Offenders and the Need for Liberal Construction of an Expungement Statute

The majority’s decision in *Petition of J.S.* is contrary to New Jersey jurisprudence promoting the rehabilitation of offenders through a narrow construction of the expungement statute. Past cases decided by the New Jersey courts relating to petitions for expungement of criminal records will be discussed, as well as New Jersey’s approach to jurisprudence regarding the expungement statute. This section will also discuss the manner in which the New Jersey courts have used crime as a capacious term, encompassing offenses and convictions under the same heading.

A. Standard of Review

The New Jersey Supreme Court reviewed the trial and appellate court’s decisions interpreting N.J.S.A. 2C:52-2(a) de novo.⁷⁶ The New Jersey Supreme Court looked to the legislative intent of the statute by analyzing the plain language and applying those words in the context of expungement in “a way that would not produce an absurd result.”⁷⁷ The majority felt that if the legislature wanted expungement to be available “to offenders such as petitioners, convicted of multiple crimes that occurred in close succession . . . not concurrently, it may amend” the statute to demonstrate that intent.⁷⁸ Alternatively, the dissent interpreted the statute

⁷⁴ *Id.* at 79 (LaVecchia, J., dissenting).

⁷⁵ *Id.* (LaVecchia, J., dissenting).

⁷⁶ *Id.* at 54.

⁷⁷ In re Expungement Petition of J.S., 223 N.J. 54 (2015).

⁷⁸ *Id.* at 58.

as allowing expungement of an “indictable offense or offenses when a person has not been convicted of a crime prior or subsequent to the judgment ... he seeks to expunge ... [t]he judgment ... may contain multiple counts ... he or she is a ‘one-time offender.’”⁷⁹

B. The “Single Spree” and *In re Fontana*

In 1976, Fontana was charged in six different indictments relating to charges of larceny and breaking and entering.⁸⁰ Thirteen years after being convicted, Fontana petitioned for expungement of his record under N.J.S.A. 2A:164-28, which would later be repealed in 1979.⁸¹ The statute under which Fontana was ultimately granted expungement stated:

“in all cases wherein a criminal conviction has been entered against any person whereon sentence was suspended ... and no subsequent conviction has been entered against such person, it shall be lawful after the lapse of ten years from the date of such conviction for the person so convicted to present a duly verified petition to the Court, wherein such conviction was entered, setting forth all the facts in the matter and praying for the relief provided in this section.”⁸²

The trial court judge denied Fontana’s petition because he did not feel that the statute gave him the authority to expunge more than one conviction and Fontana had been convicted of six offenses.⁸³ On appeal, the Appellate Division allowed the expungement of Fontana’s record because “the crimes which form the basis of the convictions ... were committed within a comparatively short time.”⁸⁴ The Appellate Division noted in its decision that the judgments of all of Fontana’s convictions were entered on the same day.⁸⁵ As such, the Appellate Division

⁷⁹ *Id.* at 83 (LaVecchia, J., dissenting) (citing N.J. STAT. ANN. § 2C:52-2(a)).

⁸⁰ *In re Fontana*, 146 N.J. Super. 264, 266 (App. Div. 1976).

⁸¹ *Id.*

⁸² *Fontana*, 146 N.J. Super. at 266 (citing N.J. STAT. ANN. § 2A:164-28).

⁸³ *Id.* at 267.

⁸⁴ *Id.* (citing *State v. McBride*, 127 N.J. Super 399 (App. Div. 1974), *aff’d* 66 N.J. 577 (1975)).

⁸⁵ *Id.*

believed that Fontana’s criminal activity could be viewed as occurring in a “one-night spree.”⁸⁶ In their decision, the Appellate Division chose to give “special consideration” to Fontana’s expungement request, which they believed they had the ability to do given the discretionary nature of the statute.⁸⁷

Three years after *In re Fontana* was decided, the New Jersey legislature repealed the statute under which it had been decided. The current expungement statute, N.J.S.A. 2C:52-2 was amended that same year.⁸⁸ The majority in *Petition of J.S.* stated that because the Legislature chose not to amend the statute in 1979 to reflect the *Fontana* decision, the majority should view that as an indication of the Legislature’s dissatisfaction with the *Fontana* decision.⁸⁹ “The Legislature that enacted N.J.S.A. 2C:52-2 is presumed to have been aware of the judicial construction of the expungement statute’s earlier version.”⁹⁰ This is misguided. Rather, it is more likely that the New Jersey Legislature did not enact such an addendum to its amendment of the expungement statute because the Legislature felt it unnecessary given the result of *In re Fontana*. The dissent articulated this belief in its opinion stating that rather than the majority’s approach that the legislature, in failing to amend the statute to conform to *Fontana*, evidenced the legislature’s dissatisfaction with the decision, the absence of any mention of *Fontana*’s principles demonstrated that the Legislature did not intend to eliminate the “*Fontana* approach [of] a one-time spree.”⁹¹

In the *Petition of J.S.*, the dissent addresses the Legislature’s exclusion of *Fontana*, and notes that if the Legislature actually disapproved of *Fontana*, that the “one-night spree” would be

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Petition of J.S.*, 223 N.J. at 58.

⁸⁹ *Id.* at 75.

⁹⁰ *Id.* at 75.

⁹¹ *Id.* at 85 (LaVecchia, J., dissenting).

specifically noted as something not to be allowed in expungement petitions.⁹² Essentially, if the Legislature wanted to overrule *Fontana*, as the majority implied, there could have been an explicit provision written into the statute to state that expungement could only be granted to petitioners who were convicted of a single crime during one single event.

C. *In re Kollman*

In 2012, the New Jersey Supreme Court reversed the denial of an application for expungement when it decided *In re Kollman*.⁹³ In that case, the petitioner had been indicted on three counts of selling drugs on three separate occasions. The petitioner was permitted to plead guilty to one count under his plea deal.⁹⁴ Ten years after he was convicted, Kollman petitioned for expungement of his record, offering proof that he had since finished college, participated in the community and worked full-time, in addition to the fact that he had not been subsequently arrested.⁹⁵

The trial court denied Kollman's request because the judge believed it went against the public's best interest to hide Kollman's conviction and the Appellate Division confirmed.⁹⁶ The New Jersey Supreme Court reversed the appellate and trial courts' denial of Kollman's petition for expungement. The Court noted that the purpose of the expungement statute was "to give a second chance to one-time offenders convicted of less serious offenses who have led law-abiding lives since conviction[.]"⁹⁷ In the decision, the Court noted "Kollman has led an exemplary and law-abiding life since his conviction, which weighs heavily in favor of expungement."

⁹² *Id.*

⁹³ *In re Kollman*, 210 N.J. 557 (2012).

⁹⁴ *Id.* at 562.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

In *Kollman*, the Court articulated what they felt was the Legislature’s intent when it amended N.J.S.A. 2C:52-32. The Court believed that the Legislature intended for the statute to be “construed with the primary objective of providing relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity[.]”⁹⁸ The Court also articulated the factors a court should consider when determining whether expungement is in the best interest of “public interest.” The statutory language states that expungement can be allowed if “the court finds in its discretion that expungement is in the public interest, giving due consideration to the nature of the offense, and the applicant’s character and conduct since conviction.”⁹⁹ The Court felt that a “fact-specific inquiry” needed to be considered for each expungement petition in order to determine if a petitioner reaches eligibility for expungement.¹⁰⁰ The individual petitioning for expungement bears the burden to prove he has satisfied these elements.¹⁰¹

In *Kollman*, the petitioner demonstrated he had been an active member of the community who held a steady job and completed a college degree since being convicted of his crime.¹⁰² In *Petition of J.S.*, J.S. provided similar evidence yet his claim is unable to be heard on the merits because of the majority’s decision.¹⁰³ This is just one example of the manner in which the majority’s limitation of the expungement statute has hindered an individual’s ability to be heard by the court for an expungement petition that could potentially be awarded on its merits.

D. *In re Ross*

⁹⁸ *Id.* at 568 (citing N.J. STAT. ANN. § 2C:52-32).

⁹⁹ N.J. STAT. ANN. § 2C:52-2(a)(2).

¹⁰⁰ *Kollman*, 210 N.J. at 575.

¹⁰¹ *Id.* at 573.

¹⁰² *Id.* at 580.

¹⁰³ *Petition of J.S.*, 223 N.J. at 63.

The majority's decision in *Petition of J.S.* "follows the path set down by the Appellate Division in *In re Ross*, but it is not a path that is compelled."¹⁰⁴ The Ross decision was handed down in 2008, prior to the 2010 amendment of N.J.S.A. 2C:52-2. The dissent in *Petition of J.S.* argued that "when it enacted N.J.S.A. 2C:52-2, [the] Legislature 'deliberately chose to alter the more expansive view of expungement that had existed under N.J.S.A. 2A:164-28 and that was exemplified by [the] decision in *Fontana*.'"¹⁰⁵ The dissent's argument is that if the Legislature had intended for the expungement statute to be construed under *Ross* as the majority wrote, it would have amended the statute accordingly in the 2010 amendment.¹⁰⁶

The Appellate Division determined that "the words 'prior' and 'subsequent' modify the term 'crime,' not the term 'conviction'" when they decided *In re Ross*.¹⁰⁷ The modification of the term "crime ... leads to the conclusion that if two crimes are committed on separate occasions, they are precluded from expungement regardless of whether the two crimes carry a single sentencing date and there-fore a single date of conviction."¹⁰⁸ Ross committed his crimes "months" apart and therefore was ineligible for expungement of his record.¹⁰⁹ Ross argued that since his convictions were entered on the same day under the same proceeding that his conviction for battery could be expunged.¹¹⁰ His other conviction, false swearing, was ineligible for expungement under the New Jersey Statute.¹¹¹

Similarly to what the majority believed with respect to the Legislature's amendment of the expungement statute after *In re Fontana*, the dissent believes that if the Legislature had

¹⁰⁴ *Id.* at 86 (LaVecchia, J., dissenting).

¹⁰⁵ *Petition of J.S.*, 223 N.J. at 75 (LaVecchia, J., dissenting) (citing *In re Ross*, 400 N.J. Super. 117, 123-24 (App. Div. 2008)).

¹⁰⁶ *Id.* (LaVecchia, J., dissenting).

¹⁰⁷ *Id.* (citing *In re Ross*, 400 N.J. Super. 117, 120-24 (App. Div. 2008)).

¹⁰⁸ *In re Ross*, 400 N.J. Super. 117, 122 (App. Div. 2008).

¹⁰⁹ *Id.* at 119.

¹¹⁰ *Id.* at 121.

¹¹¹ *Id.* at 120.

intended to codify the decision of *In re Ross*, the Legislature would have articulated such intent in the revision of the statute.

E. Conflicting Use of the Terms “Crime” and “Offense” in the Jurisprudence of New Jersey Courts

1. Prosecutorial Discretion

The dissent in *Petition of J.S.* noted that prosecutorial discretion plays a major factor in whether or not an offender will be able to apply for expungement of his record.¹¹² For example, if a prosecutor permits an offender to make a plea deal, the nature of that deal will determine whether or not an offender can later expunge his record; this is demonstrated by *In re Kollman*.¹¹³

When an offender is arrested and placed on trial for a crime, the prosecutor has the discretion to determine what crime or crimes with which to charge the individual. Under the majority’s construction of the expungement statute in New Jersey, if a prosecutor decides to charge an individual found selling drugs to two individuals with one count of selling drugs, that individual will be able to apply for expungement after the requisite time period has passed.¹¹⁴ On the other hand, if that same offender committed the same crime in a different county, another prosecutor might decide to charge the offender with two counts of selling drugs, which would then mean the individual will be unable to apply for expungement.¹¹⁵ This creates an inequity, which the dissent in *Petition of J.S.* believes “is not clearly indicated from the plain language of the statute.”¹¹⁶

¹¹² *Revise the NJ Expungement Statute*, N.J. LAW JOURNAL (Aug. 21, 2015), <http://www.njlawjournal.com/id=1202735421034/Revise-the-NJ-Expungement-Statute?slreturn=20150829153000> (March 20, 2016).

¹¹³ *Id.*

¹¹⁴ *Petition of J.S.*, 223 N.J. at 81 (LaVecchia, J., dissenting).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The *Petition of J.S.* majority wrote that the legislature, in their construction of the expungement statutes, has attempted to limit expungement to those offenders who have been convicted of “no more than an isolated infraction in an otherwise law-abiding life.”¹¹⁷ An isolated infraction does not have to mean one single offense. G.P.B. plead to four offenses, which were all committed to further a single conspiracy.¹¹⁸ In fact, G.P.B. was charged with three counts of the *same* crime during trial and his ultimate conviction.¹¹⁹ On appeal, G.P.B. argued that any overt acts relating to that *single* conspiracy should be considered under the heading of a single crime.¹²⁰ The majority disagreed with G.P.B.’s contention that offenses relating to a single conspiracy constituted a single “crime.”

The dissent, on the other hand, believed that a “single criminal transaction can give rise to multiple counts.”¹²¹ The dissenters cited Black’s Law Dictionary, which defines “separate offense” as including “[a]n offense arising out of a *different* event entirely from another offense under consideration.”¹²² The ambiguity raised by the phrase “prior or subsequent crime” makes it difficult to justify the majority’s narrow reading of a rehabilitative statute such as the expungement statute.¹²³

2. When an Event Constitutes an Offense vs. When an Event Constitutes a Crime

In 1983, the New Jersey Appellate Division decided *State v. A.N.J.* The Appellate Division found that even though A.N.J. had been convicted of a disorderly persons conviction after already committing two similar convictions, his record could be expunged.¹²⁴ The statute

¹¹⁷ *Id.* at 66.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *In re Expungement Petition of J.S.*, 223 N.J. 54, 65 (2015).

¹²¹ *Id.* at 81 (LaVecchia, J., dissenting).

¹²² *Id.* (citing *Black's Law Dictionary* 1188 (9th ed. 2009)).

¹²³ *Id.*

¹²⁴ *State v. A.N.J.*, 192 N.J. Super. 350, 353 (App. Div. 1983).

that was applied in *A.N.J.* was N.J.S.A. 2C:52-32.¹²⁵ The court wrote that “[n]otwithstanding the language of *N.J.S.A. 2C:52-32*, the legislature surely has not restricted the expungement opportunity to the ‘one-time offender.’”¹²⁶ N.J.S.A. 2C:52-32 provides that the system of expungement in New Jersey is not meant to “create a system whereby *periodic* violators of the law ... have a [] means of expunging their ... records.”¹²⁷

State v. A.N.J. is distinguishable from *Petition of J.S.* because in *A.N.J.*, the offender was not convicted of a “crime,” but rather, he was convicted of a disorderly offense.¹²⁸ The Appellate Division in *State v. A.N.J.* noted in their decision, “disorderly persons offenses are *not* crimes.”¹²⁹ Under N.J.S.A. § 2C:1-4, an offense becomes a crime once it is accompanied by an authorization of imprisonment in excess of six months.¹³⁰ Disorderly offenses are not considered crimes because there is no right to trial on those offenses and they do not carry any imprisonment in excess of six months.¹³¹ Even though disorderly persons offenses are not considered crimes, they are still classified as “2C” criminal offenses under New Jersey Law.¹³²

On appeal from the trial judge’s dismissal of his expungement petition, the Appellate Division ruled that a conviction for a crime could be expunged even though an individual had previously committed a disorderly persons offense.¹³³ Similarly, a disorderly persons offense can be expunged even if two prior convictions occurred.¹³⁴ On appeal to the New Jersey Supreme Court, the Court upheld the Appellate Division’s decision to grant *A.N.J.*’s expungement.¹³⁵

¹²⁵ *Id.* at 353.

¹²⁶ *State v. A.N.J.*, 192 N.J. Super. at 353.

¹²⁷ N.J. STAT. ANN. § 2C:52-32 (emphasis added).

¹²⁸ *State v. A.N.J.*, 192 N.J. Super. at 353.

¹²⁹ *Id.* at 354. (emphasis added)

¹³⁰ N.J. STAT. ANN. § 2C:1-4(a).

¹³¹ *Id.*

¹³² N.J. STAT. ANN. 2C:1-4.

¹³³ *State v. A.N.J.*, 192 N.J. Super. at 353.

¹³⁴ *Id.*

¹³⁵ *State v. A.N.J.*, 98 N.J. 421, 422 (1985).

In *State v. A.N.J.*, the New Jersey Supreme Court liberally construed an expungement statute, a statute related to disorderly persons offenses. The Court could have decided to narrowly construe the statute and only allow individuals with one disorderly persons offense to have their records expunged, but that is not what they chose to do. Rather, the Court allowed offenders who had committed multiple offenses to have their records expunged. The only difference between the facts of A.N.J. and those of J.S. and G.P.B. is the type of offense committed. If J.S. and G.P.B. had been convicted of committing two or three disorderly persons offenses, their records may have been eligible for expungement.

IV. Public Policy: Access to Expungement and Rehabilitation of Offenders

The New Jersey Legislature, in its discussion about the rehabilitation of offenders, found that it is in the public interest for the Legislature and the courts to do what they can to rehabilitate convicted offenders.¹³⁶ The Legislature intended to do this by “removing all impediments and restrictions” to the opportunity for convicted offenders to obtain employment or participate in programs they may be hindered from joining solely on the basis of a criminal record.¹³⁷ In the *In re Kollman* opinion, the Court reasoned that the legislature amended the expungement statute in 2010 to “[t]o promote employability.”¹³⁸ The majority’s decision in *Petition of J.S.* limits the legislature’s intention to promote rehabilitation and employability of offenders. By limiting the number of offenders who are able to have their criminal records expunged, the majority is limiting the number of offenders who will be able to be fairly

¹³⁶ N.J. STAT. ANN. § 2A:168A-1.

¹³⁷ *Id.*

¹³⁸ *In re Kollman*, 210 N.J. 557, 562 (2012).

employed and rehabilitated into society. Remedial legislation is “deserving of liberal construction.”¹³⁹

It is well known that millions of adults have criminal records. Those records affect those offenders’ reentry into society after incarceration.¹⁴⁰ “Criminal records can present barriers to employment, licensing, and housing, among other things.”¹⁴¹ Expungement is a way to “provide relief from a conviction’s onerous collateral life-long consequences.”¹⁴² That is why expungement is so important to society and it is crucial that it be broadly construed in order to further its remedial purpose.

As set forth in Part II of this note, the expungement statute was amended in 2010. This amendment was a result of a “series of recommendations by the Executive Branch in 2007.”¹⁴³ The Governor’s Office recommended “modifying the expungement statute ‘to promote employability’ of rehabilitated ex-offenders, including ‘allowing first offenders to seek expungement in a wider variety of cases’ and ‘reducing the time frame requirements for compelling cases.’”¹⁴⁴

The dissent in *Petition of J.S.* disagreed with the majority’s argument that allowing expungement for petitioners such as J.S. and G.P.B. was contrary to protecting the public interest.¹⁴⁵ The dissent acknowledged the majority’s concern about protecting the public interest

¹³⁹ *Petition of J.S.*, 223 N.J. at 81 (LaVecchia, J., dissenting) (citing *Maglies v. Estate of Guy*, 193 N.J. 108, 123 (2007)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Revise the NJ Expungement Statute, *supra* note 112.

¹⁴³ *In re Kollman*, 210 N.J. at 571.

¹⁴⁴ *Id.*; See *A Strategy for Safe Streets and Neighborhoods, Executive Summary*, issued by Gov. Jon S. Corzine (2007), at 24, <http://www.nj.gov/oag/crimeplan/safe-exec-summ-complete.pdf> (*Safe Streets Strategy*); see also S. 3061 (Sponsors’ Statement), 213th Leg. 7 (N.J. Nov. 23, 2009) (noting that proposed change to expungement statute embodied recommendations of *Safe Streets Strategy*); A. 1771 (Sponsors’ Statement), 213th Leg. 8 (N.J. Jan. 8, 2008) (same).

¹⁴⁵ *Petition of J.S.*, 223 N.J. at 84 (LaVecchia, J., dissenting).

but rebutted that concern by noting that “the public interest is fully protected by the layers of review that can support denial of an expungement application.”¹⁴⁶ What the majority has done by limiting those offenders who can petition for expungement is to diminish the potential for an offender to fully rehabilitate back into society. Rather, what they should have done is rely on the safeguards in place to protect the public interest that are built in to the expungement process, New Jersey’s court system. When an individual petitions for expungement, it is the trial judge, who then decides to either grant or deny that petition.¹⁴⁷ The trial judge considers the individual and the evidence of rehabilitation since committing their crime, if that exists.¹⁴⁸ Safeguards also exist in the statute itself, “for example, ... expungement cannot be obtained for many serious crimes or when [t]he need for the availability of the records outweighs the desirability of having a person freed from any disabilities.” A court evaluating a petition for expungement has the discretion to “evaluate the person, the nature of his offense and his conduct since his conviction.”¹⁴⁹

When a court decides to expunge an offender’s criminal record, one of the factors considered is whether or not expungement is in the public interest.¹⁵⁰ They do this by considering both the nature of the offense and whether the need for the availability of records outweighs the desirability of expungement.”¹⁵¹ “In practice, trial judges will balance the [] factors as they decide whether expungement serves the public interest in a particular case. In doing so, they weigh the risks and benefits to the public of allowing or barring expungement.”¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ NEW JERSEY COURTS, *supra* note 16.

¹⁴⁸ *Id.*

¹⁴⁹ *Revise the NJ Expungement Statute*, N.J. LAW JOURNAL (Aug. 21, 2015), available at <http://www.njlawjournal.com/id=1202735421034/Revise-the-NJ-Expungement-Statute?slreturn=20150829153000>.

¹⁵⁰ *In re Kollman*, 210 N.J. at 562.

¹⁵¹ *Id.*

¹⁵² *Id.* at 577; *See In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law*, 139 N.J. 323, 327 (1995).

A. Bill A206: An Expansion of Expungement after *In re Expungement Petition of J.S.*

On January 19, 2016, New Jersey Governor Chris Christie signed new expungement legislation into law.¹⁵³ Bill A206 is intended to facilitate the expungement of criminal records.¹⁵⁴ Upon taking effect, the bill will “reduce the waiting period for expungement from [ten] years to five years.” For convictions such as a disorderly persons offense, where the wait period for expungement is currently five years before an offender can apply, the offender will now only have to wait three years.¹⁵⁵ Under this new bill, offenders can apply for expungement either three or five years after their “most recent conviction ... for that crime.”¹⁵⁶

Assemblyman Jerry Green of Union was a primary sponsor of Bill A206.¹⁵⁷ After the bill received legislative approval in September 2015, Assemblyman Green spoke about the impact the bill will have on New Jersey offenders, stating “expungement offers an incentive against recidivism. It gives people who currently have little chance of finding ... employment the opportunity to leave past mistakes behind them, find a job and be productive.”¹⁵⁸

Assemblywoman L. Grace Spencer of Essex was a primary supporter of the bill.¹⁵⁹ When discussing her motivation for supporting this bill, Spencer said that she felt that many offenders feel the heavy burden of a criminal record for the rest of their lives.¹⁶⁰ Spencer viewed a criminal record as a roadblock for offenders who were trying to reintegrate into society.

In addition to lessening the wait period for offenders to be eligible to apply for expungement of their criminal record, A206 will also allow expungement of “criminal

¹⁵³ Christie, *supra* note 13.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ LEGINATION, INC, *Bill Track 50: N.J. A206*, available at <https://www.billtrack50.com/BillDetail/458258>.

¹⁵⁷ Booth, *supra* note 12.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

conviction records for certain people who have ... a sentence of special probation in Drug Court.”¹⁶¹ This is a significant expansion of the class of individuals who shall be able to apply for expungement of their records. The New Jersey Legislature and Governor Christie appear to be doing what they can to broaden the availability of expungement to offenders. In fact, a companion bill to A206, A1662, similarly expands the class of individuals who can apply for expungement.¹⁶² Bill A1662 allows a judge to expunge the record of an identity theft victim charged with a crime caused by the person responsible for the theft.¹⁶³ In that case, the identity theft victim does not have to wait for any period of time in order to apply for expungement.¹⁶⁴

Bill A206 was signed into law by Governor Christie a little over four months after the New Jersey Supreme Court decided *Petition of J.S.*, less than four months after the Court decided to limit the people who could apply for expungement under N.J.S.A. 2C:52-2(a), Governor Christie expanded the group of people who could apply for expungement of their criminal records. This bill demonstrates the desire of New Jersey’s government to rehabilitate and reintegrate offenders back into society by widening the scope of those individuals who may apply for an expungement.

B. A Three-Year Follow-Up on New Jersey’s Offenders

A study of recidivism rates in New Jersey was conducted by the Department of Corrections in 2010 in the form of a three-year “follow-up.” In 2010, 11,388 inmates were

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Michael Booth, *Christie OKs Measure Easing Expungement*, N.J. LAW JOURNAL (Jan. 19, 2016), available at <http://www.njlawjournal.com/id=1202747403262?keywords=christie+oks+measure+easing+expungement&publication=New+Jersey+Law+Journal>.

¹⁶⁴ *Id.*

released from jail.¹⁶⁵ Forty-four percent did *not* have a prior history of incarceration.¹⁶⁶ In fact, fifty-six percent of the individuals had no prior criminal history.¹⁶⁷ That means, of 11,388 inmates released, approximately 6,378 of those inmates were in jail for their first offense. Of the overall sample taken, about fifty-three percent of the inmates had been re-arrested by the time follow-up took place.¹⁶⁸ Of those fifty-three percent who were re-arrested, forty-two percent were re-convicted and thirty-two percent were re-incarcerated.¹⁶⁹ These percentages have remained pretty steady since the three-year follow-ups began in 2007.¹⁷⁰ The follow-up looked into both juvenile and adult offenders. Of the total number, approximately sixty-eight percent of offenders had not returned to prison within the conclusion of the three-year follow-up.¹⁷¹ In the report the position was taken that offenders who had not been re-incarcerated had likely “returned to their communities are productive citizens.”¹⁷² There is no statistic in the report regarding the number of these offenders who are or will become eligible for expungement.

V. Conclusion

The United States is known by many for its imprisonment of a “greater proportion of its population than any other country.”¹⁷³ Although the United States may be known for its high incarceration rate, the current trend throughout the country is to rehabilitate offenders and reintegrate them back into society. Expungement is a means to accomplish this goal.

¹⁶⁵ STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS, *Release Outcome 2010: A Three-Year Follow-up*, available at http://www.state.nj.us/corrections/pdf/offender_statistics/2007_Release_Recidivism_Report.pdf (March 13, 2016).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS, *Release Outcome 2010: A Three-Year Follow-up*, available at http://www.state.nj.us/corrections/pdf/offender_statistics/2007_Release_Recidivism_Report.pdf (April 4, 2016).

¹⁷² *Id.*

¹⁷³ JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 10 (1st ed. 2015).

Expungement serves “to eliminate the collateral consequences imposed upon otherwise law-abiding citizens who have had a minor brush with the criminal justice system.”¹⁷⁴ In New Jersey, expungement was made more difficult by the Supreme Court’s decision in *Petition of J.S.*. This decision is contrary to the trend in New Jersey, as mentioned previously in Part IV of this note, in which lawmakers are campaigning for bills that would expand the expungement statute. Bill A206, signed into law by Governor Christie of New Jersey is an example of such legislation.

In order to reduce the prison population, it is crucial for New Jersey’s offenders to be given the opportunity to reintegrate back into society. As seen above, when given the opportunity to return to their communities as “productive citizens,” offenders are simply not being re-incarcerated.¹⁷⁵ These offenders are enabled to return to their communities, as law-abiding, productive citizens, through expungement. The expungement statute needs to be liberally construed in order to provide the State of New Jersey with the opportunity to execute its purpose: rehabilitating New Jersey’s offenders.

¹⁷⁴ *In re Expungement Petition of J.S.*, 223 N.J. 54, 66 (2015) (LaVecchia, J., dissenting) (citing *In re Kollman*, 210 N.J. 556, 568 (2012)).

¹⁷⁵ State of New Jersey, *supra* note 171.