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Ninth Circuit Review—State Expungement Statutes and Their Effect on Federal Criminal Statutes: United States v. Potts

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RECENT DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE IN THE NINTH CIRCUIT: PART II

V. STATE EXPUNGEMENT STATUTES AND THEIR EFFECT ON FEDERAL CRIMINAL STATUTES: UNITED STATES V. POTTS

In *United States v. Potts*,[1] the Ninth Circuit Court of Appeals considered the effect of a state expungement provision[2] on a federal criminal statute which requires a prior felony conviction as an element of the offense.[3] In so doing, the court overruled its previous decision in *United States v. Hoctor*,[4] a precedent of less than three years. At the same time, the court reiterated its position that a state expungement statute is relevant to a determination of whether or not one has been convicted of a felony for purposes of applying a federal criminal law. The approach taken by the court in these two cases is in conflict with other circuits[5] which have considered the issue. Moreover, when the opinions are analyzed in light of this conflict and the dissenting opinion of Judge Carter in *Hoctor*[6] and the concurring opinion of Judge Sneed in *Potts*[7] it can be seen that the court significantly failed to properly analyze federal law and to provide adequate support for its opinion.

In *Hoctor* the defendant was charged with receiving explosives in interstate commerce. He was prosecuted under a federal statute making

1. 528 F.2d 883 (9th Cir. 1975).

2. The Washington expungement statute provides that upon fulfillment of the conditions of probation, a defendant may withdraw his plea of guilty, and enter a plea of not guilty, or if convicted on a plea of not guilty, the court may set aside the verdict of guilty; and in either case,

> the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: *Provided*, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

WASH. REV. CODE ANN. § 9.95.240 (1961).

3. Potts was convicted of violating 18 U.S.C. App. § 1202(a)(1) (1970). *See* note 20 *infra*.

4. 487 F.2d 270 (9th Cir. 1973).

5. *See* notes 44-57 *infra* and accompanying text.

6. 487 F.2d at 272.

7. 528 F.2d at 887.

it unlawful for anyone convicted "of a crime punishable by imprisonment for a term exceeding one year" to transport or receive explosives in foreign or interstate commerce.[8] In sustaining the district court's dismissal of the charge against Hoctor, the circuit court relied on the express wording of the Washington expungement statute,[9] state supreme court decisions interpreting the statute,[10] and an opinion by the Washington Attorney General.[11] As the court then believed, the expungement statute "absolutely erased" Hoctor's conviction from his record, restoring to him the "same rights" and "the same status" as any citizen.[12] The court agreed with Hoctor's claim that the expungement statute "removed him from the class of persons subject to § 842(i),"[13] the federal statute in question.[14]

In rejecting the government's contention that the expungement provision could not affect Hoctor's criminal liability under federal law, the court read section 842(i) in light of section 848. This latter section provides:

> No provision of this chapter [including section 842(i)] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.[15]

The court determined that section 848 was applicable. First, Washington law and section 842(i) deal with the same subject matter—the rights and disabilities of convicted felons.[16] Second, reading section

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8. Hoctor was indicted under 18 U.S.C. § 842(i) (1970), which provides in part:

(i) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . .

to ship or transport any explosive in interstate or foreign commerce or to receive any explosive which has been shipped or transported in interstate or foreign commerce.

9. 487 F.2d at 271. *See* note 2 *supra.*

10. 487 F.2d at 271. The court relied on Matsen v. Kaiser, 443 P.2d 843 (Wash. 1968) and Tembruell v. Seattle, 392 P.2d 453 (Wash. 1964).

11. 487 F.2d at 271.

12. *Id.*

13. *Id.*

14. *See* note 8 *supra.*

15. 18 U.S.C. § 848 (1970).

16. 487 F.2d at 272. On a somewhat questionable basis, the court found that the two statutes dealt with the same subject:

848 as stating that state law was presumed to apply if no contrary federal provisions were set forth, the court found the state law concerning the status of a conviction was relevant to determine if Hoctor had suffered a conviction.[17] This latter conclusion was based on the fact that no standards are provided in the federal statutes for determining "when an individual has been convicted of a crime for the purposes of [section 842(i)]."[18] Finally, the court concluded that since the expungement provision predated section 842(i), Congress, had it intended to do so, could have made clear its intent to override the state statute.[19]

In *Potts*, the defendant was charged with a violation of a federal statute, section 1202, which prohibits a convicted felon from receiving, possessing, or transporting a firearm in interstate commerce.[20] Although dealing with the effect of the same Washington expungement statute, the court admitted that *Hoctor* was "wrongly decided,"[21] and

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[t]he only difference between them is that the federal law focuses specifically on the control of explosive materials while the state statute deals in the most general terms with the rights and disabilities of persons having criminal records.

Id.

However, the court failed to take cognizance of WASH. REV. CODE ANN. § 9.41.040 (1961), which specifically prohibits a person convicted of a violent crime from possessing a pistol. This section, rather than the expungement statute, more accurately covers the same subject matter as 18 U.S.C. § 842(i).

17. 487 F.2d at 272. The court stated earlier that "[w]e agree with the District Court that the expungement procedure, *as interpreted in Washington*, effectively insulated Hoctor from prosecution." *Id.* at 271 (emphasis added).

18. *Id.* at 272.

19. *Id.* The court stated, "In light of § 848, we will not imply that it so intended."

20. 18 U.S.C. App. § 1202 (1970) provides in part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

. . . .

and who receives, possesses, or transports in commerce or affecting commerce, . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

This statute differs from the one under which Hoctor was prosecuted, section 842(i) (see note 8 *supra*), since the latter requires as an element a conviction of "a crime punishable by imprisonment for a term exceeding one year." However, section 1202(c)(2) uses the same phrase to define a "felony" for the purposes of section 1202. Further, the federal statute applies notwithstanding the fact that the defendant is sentenced to a shorter period, provided the state statute under which sentence is imposed provides a possible punishment of at least one year. United States v. Glasgow, 478 F.2d 850, 852 (8th Cir. 1973). In McMullen v. United States, 349 F. Supp. 1348 (C.D. Cal. 1972), the court stated:

The action taken under state law by the state Judge in disposing of the case does not change the nature and character of the offense insofar as its classification under the federal statutes and regulations are concerned.

Id. at 1351.

21. 528 F.2d at 884.

that "the statute [did] not operate absolutely to erase a conviction for all purposes."[22] However, despite this reversal of *Hoctor*, the court did not indicate that the *Hoctor* panel was in error in allowing state law to determine the applicability of a federal criminal statute. The basis of the court's opinion was grounded solely upon the effect of the expungement statute under Washington law.

The court believed that the *Hoctor* panel had been "misled by an opinion of the Washington State Attorney General."[23] It therefore interpreted the Washington statute based on a re-evaluation of the authorities relied upon in *Hoctor*.[24] Based on these cases and another case "not called to [the court's] attention at the time *Hoctor* was submitted,"[25] the court noted the interpretation of a proviso to the expungement statute which provided that even an expunged conviction could be pleaded and proved in a subsequent prosecution.[26] Thus, Potts earlier conviction could still be used to bring him within section 1202.

These decisions make it clear that the Ninth Circuit considers state law relevant not only to a determination that a person has in the first instance suffered a conviction, but also to a determination that a conviction is still a conviction.

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22. *Id.* at 885.

23. *Id.* at 884 n.2. The court noted that the opinion of the Washington Attorney General

> relied heavily on *People v. Taylor*, 178 Cal. App. 2d 472, 3 Cal. Rptr. 186 (1960). In *Taylor*, the court held that a conviction expunged pursuant to a California statute similar to § 9.95.240 could not be used to prove a violation of a state statute prohibiting the possession of firearms by a convicted felon. However, the California state legislature, apparently disagreeing with the *Taylor* interpretation of the California expunction statute, "immediately nullified" the holding of *Taylor* by a 1961 amendment to the statute.

Id. at 884-85 n.2.

24. See note 10 *supra*.

25. 528 F.2d at 885. The "new" case relied on by the *Potts* court was State v. Knott, 493 P.2d 1027 (Wash. Ct. App. 1972).

26. The proviso in WASH. REV. CODE ANN. § 9.95.240 (1961) states:

> *Provided*, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

The court found that this provision specifically restricted the effect of the expungement. While the Washington state court decisions construing this provision noted that it is the only exception to the broad restoration of rights accorded by the expungement statute, they also indicated it was consonant with the "benevolent policy" behind the statute. 528 F.2d at 885. The *Potts* court found that since State v. Knott, 493 P.2d 1027 (Wash. Ct. App. 1972), allowed an expunged conviction to be used to impeach a witness, it could clearly be pleaded and proved as part of a subsequent criminal prosecution. 528 F.2d at 885.

The dissenting opinion of Judge Carter in *Hoctor* and the concurring opinion of Judge Sneed in *Potts* took issue with the court's approach. As framed by Judge Carter in *Hoctor*, the issue before the court was "whether a state legislature may define the terms of a federal statute," and "whether a prior conviction ceases to be a prior conviction when a state law 'expunges' it."[27] This same issue was before the court in *Potts*. Both Carter and Sneed expressed a belief that the court was in error in finding the state expungement law relevant to the interpretation and application of a federal criminal statute.

Judge Carter correctly criticized the majority opinion in *Hoctor* for its preemption analysis. He noted that the majority misapplied section 848, the legislative preemption section.[28] According to Carter, section 842(i) and the Washington state expungement statute, contrary to the court's conclusion, did not concern the same subject matter. He referred to a House Report which stated:

> [T]his section [section 848] sets forth the intent of Congress that this chapter shall not be construed to operate to the exclusion of State statutes concerning explosive materials . . . .[29]

He concluded that, because the Washington state expungement statute did not deal with explosive materials, section 848 was not relevant. Judge Carter then continued with what he considered to be a proper application of section 848. He directed his attention to section 845(b)[30] which allows the Secretary of the Treasury to relieve a person of the disabilities of section 842(i).[31] Carter noted that section 845(b)

> gives the Secretary power to do exactly what the state expungement purports to do—determine that a particular person may be trusted with explosives despite a prior conviction. Since Congress intended this

27. 487 F.2d at 272.

28. *Id.* at 274. *See* text accompanying note 15 *supra.*

29. H.R. REP. No. 1549, 91st Cong., 2d Sess. 71 (1970), *quoted in* 487 F.2d at 274.

30. 18 U.S.C. § 845(b) (1970) provides:

> [a] person who had been indicted for or convicted of a crime punishable by imprisonment for a term exceeding one year may make application to the Secretary for relief from the disabilities imposed by this chapter with respect to engaging in the business of importing, manufacturing, or dealing in explosive materials, or the purchase of explosive materials, and incurred by reason of such indictment or conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the indictment or conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. A licensee or permittee who makes application for relief from the disabilities incurred under this chapter by reason of indictment or conviction, shall not be barred by such indictment or conviction from further operaitons under his license or permit pending final action on an application for relief filed pursuant to this section.

31. *See* note 8 *supra.*

> determination to be made to the satisfaction of the Secretary, whose discretion is guided by federal policy, the scheme intended by Congress is disrupted if a state, guided by state policies, may make the determination to nullify a conviction for purposes of § 842(i). If the state's determination should differ from the Secretary's we would face a direct conflict between state and federal authority. Congress surely intended no such conflict. § 845(b) suggests the congressional desire that, for purposes of § 842(i), only federal authority can "expunge" a conviction.[32]

Thus, he found "a direct conflict between the state statute and § 845(b): by giving effect to the state statute in this case we would deprive the Secretary of the final authority vested in him by Congress."[33]

It appears that Judge Carter was correct in his preemption analysis and his conclusion would dispose of the issue before the court. More importantly, his analysis pinpoints the questionable interpretation of federal law upon which the majority opinion was based, *i.e.*, that section 848 evidenced a congressional intent that state law should apply unless displaced by a specific federal enactment. Indeed, in a case subsequent to *Hoctor*, the Ninth Circuit stated with regard to its holding in *Hoctor* that it had reconciled Washington law with federal law "in light of congressional intent not to override prior State law extant in the field, expressly provided in section 848 . . . ."[34] It is highly questionable whether such an interpolation of intent can be given to section 848.[35]

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32. 487 F.2d at 294.

33. *Id.*

34. United States v. Andrino, 497 F.2d 1103, 1107 n.4 (9th Cir. 1974). *See also* Hyland v. Fukuda, 402 F. Supp. 84, 91 (D. Hawaii 1975). In *Andrino*, which arose after *Hoctor* but prior to *Potts*, the court examined the effect of the expungement statutes of both California (CAL. PENAL CODE § 1203.4 (West 1970)) and Nevada (NEV. REV. STAT. § 176.225 (1975)) on prior state convictions in regard to the defendant's convictions of violating sections of both Title IV and Title VII of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 922(a)(6), 924(a) (1970); 18 U.S.C. App. § 1202(a)(1) (1970). In upholding the defendant's convictions, and finding that the California expungement statute did not afford relief to Andrino, the court expressly distinguished the *Hoctor* holding on the grounds that Washington and California

> are at direct variance in treating this particular problem under their laws. Since the determination of Andrino's status under California law is quite clear in that he should be deemed *not* exempt from liability under the expungement statute, the remaining question posed and resolved in *Hoctor* as to a Federal and Washington State conflict is avoided.

497 F.2d at 1107 n.4. Having thus found that Andrino's status under California law did not exempt him from liability, the court stated it was unnecessary to consider the possible effect of the Nevada expungement statute. *Id.* at 1107.

35. The *Potts* majority, in a footnote (528 F.2d at 886 n.5) characterized the approach of the Eighth Circuit, (*see* notes 47-52 *infra* and accompanying text) which is

This assumption that state law was intended to apply was also implicit in *Potts* where it was even less supportable since Title VII,[36] which contains section 1202,[37] contains no legislative preemption section comparable to section 848.

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the same as Sneed's approach, as a preemption analysis. Judge Sneed disputed this characterization stating that

> [p]reemption relates to situations in which both the federal and state governments have authority to legislate and the federal legislation indicates that it is intended to replace state legislation pro tanto. Here the issue is simply the extent to which a federal criminal statute requires reference to state law in its interpretation and application. Judge Koelsch's characterization suggests an "ouster" of state law under the Eighth Circuit's interpretation when in fact such law is merely deemed irrelevant to the proper interpretation of a federal criminal statute.

Id. at 888.

Thus to the extent the issue is one of relevancy, and not preemption, it is questionable that a preemption statute can be used as evidence of congressional intent that state law will apply to define the scope of a federal criminal statute. The purpose behind a preemption provision like section 848 is simply to indicate that a state law dealing with the same subject matter as a federal law can still be given effect without violating the supremacy clause.

In this respect it is significant to note that the language of section 848 states that "[n]o provision of this chapter shall be construed as indicating an *intent on the part of Congress to occupy the field* in which such provision operates . . . ." 18 U.S.C. § 848 (1970) (emphasis added). It is difficult to see how such a statement of negative intent on preemption can be construed as a statement of positive intent that all state law should apply absent contrary provisions in federal law.

Also worthy of note is the decision of the Seventh Circuit, in Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (*see* notes 53-61 *infra* and accompanying text), which found that the purpose of Congress in enacting a provision analogous to section 848 was "to avoid a claim of preemption." Therefore the court could find no congressional intent to make a state expungement statute relevant to a determination of whether one has been convicted for the purpose of applying federal law.

36. Not only is there no legislative preemption section, there is evidence that Congress might have intended section 1203 to be an exclusive statement of the exceptions from liability under section 1202. Senator Long of Louisiana, the sponsor of Title VII, including the present sections 1202 and 1203, stated in introducing the bill that:

> [w]hen a man has been convicted of a felony, *unless*—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.

114 CONG. REC. 13,868 (1968) (emphasis added). Also, immediately before the approval of this bill by the Senate, Senator Long stated that these provisions seek

> to make it unlawful for a firearm—be it a handgun, a machinegun, a long-range rifle, or any kind of firearm—to be in the possession of a convicted felon who has not been pardoned and who has therefore lost his right to possess firearms. *It would not apply to a person pardoned by a Governor or a President* if the pardon specifically provides that he will have the right to carry firearms. *He would then have that right. Otherwise, he would not have it.*

Id. at 14,773 (emphasis added). For the persuasiveness of these comments as evidence of legislative intent see Stevens v. United States, 440 F.2d 144 (6th Cir. 1971).

37. Section 1202, which Potts was convicted of, was enacted as part of Act of June 19, 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 236.

In relation to this assumption of congressional intent, Judge Carter identifies the proper analysis to be followed in determining the relevancy of state law: the court should look for an expression of intent by Congress that state law is to apply.[38] In *Hoctor*, prior to addressing the court's pre-emption analysis, he engaged in an independent analysis of section 842(i),[39] an analysis that would apparently be applicable to any federal statute that does not involve a question of pre-emption. After a preliminary examination of the terms used by Congress, Carter stated that "[t]he expungement should be allowed to affect the terms of [section 842(i)] only if the state's policy coincides with the federal purpospose."[40] Concluding that the policies did not coincide, Justice Carter stated that

> we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control.[41]

He concluded his analysis of section 842(i) by stating that while it is clear Congress intended that state law be relevant to determine if one has been convicted, "[t]here is . . . no indication, plain or otherwise, that Congress intended to allow state law to say a conviction is not a conviction for the purposes of § 842(i)."[42]

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38. 487 F.2d at 270.

39. *Id.* at 273.

40. *Id.*

41. *Id.*, *quoting* Jerome v. United States, 318 U.S. 101, 104 (1942) (citations omitted).

42. *Id.* at 274.

Judge Ely has recognized that it is a question of congressional intent whether state expungement law should relieve a party of one of the penalties imposed by federal law. However, he finds that if there is congressional intent that state laws apply to determine a conviction, then there must be a congressional intent that state law be examined to determine the effect of post-conviction procedures on the conviction. In Kelly v. Immigration & Naturalization Serv., 349 F.2d 473 (9th Cir. 1965), a case involving the proper application of California's old expungement statute (CAL. PENAL CODE § 1203.4 (West 1970)) to the Immigration and Naturalization Act's deportation statute which has since been repealed (8 U.S.C. § 1251(a) (1970)), Ely dissented and explained the rationale for his position when he stated:

> [O]ur court has said that while it will respect California law, insofar as California law provided for the crime and the "conviction," it may not accord to California the same respect in the application of its statute or of its decisions in the interpretation of the effect of a subsequent procedure taken under a California statute of the same dignity as that which created the crime. Not only does the logic of this approach escape me, but it is also true, I believe, that such a pronouncement is opposed to a principle which was hitherto thought to have been quite well established,

Similarly, Judge Sneed, in *Potts*, argued that expungement statutes "do not rewrite history; they merely provide that previous history is immaterial for certain purposes under state law."[43] In his view, only Congress can make a determination that a prior event (the conviction of a person in a state court) is irrelevant to the application of a federal criminal statute. To this end he stated it was necessary to examine the federal statutes

> to determine the extent to which state expunction statutes are to be considered as relevant either to the finding of a "conviction" by a court of a state or the presence of an "exemption" within the scope of 18 U.S.C. App. § 1203.[44]

Under section 1203(2),[45] a person is exempted from section 1202 only if he has received a presidential or gubernatorial pardon. Thus, Judge Sneed concluded:

> A search of these provisions yields no express or implied reference to such statutes. I conclude from this that Congress chose to consider state expunction statutes irrelevant [both for determining if one has suffered a conviction or if they are entitled to an exemption].[46]

Other circuit courts, interpreting both section 1203 and sections analogous to section 845(b), have applied the same reasoning as Justices Carter and Sneed. In *United States v. Kelly*,[47] the Eighth Circuit reversed a lower court which had dismissed a charge of violation of section 1202 on the basis of a Minnesota expungement statute.[48] Like

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349 F.2d 473, 475. (For a discussion of the Ninth Circuit's approach in this area, *see* note 62 *infra*).

Ely seems particularly concerned by the anomolous situation that exists when state law determines a conviction but not the subsequent effect of such a conviction. This concern overlooks the possibility that Congress may have in fact intended this anomaly. Insofar as the state law is used to determine whether there is a conviction, Congress is allowing at least 50 different interpretations of the federal statute. To the extent that it does not deem state law relevant beyond this initial determination, it may be minimizing this variance.

43. 528 F.2d at 887.

44. *Id.*

45. 18 U.S.C. App. § 1203(2) (1970) provides:

This title shall not apply to—

. . . .

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

46. 528 F.2d at 887.

47. 519 F.2d 794 (8th Cir. 1975).

48. MINN. STAT. ANN. § 242.31 (West 1972) provides that:

Judge Sneed, the court believed that section 1203(2) provided the only method for relieving one from the disabilities of section 1202.[49] The court relied on its earlier interpretation of those sections in *United States v. Mostad*,[50] where it stated:

> The Act exempts from its provisions ". . . any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President of [sic] such chief executive, as the case may be, to receive, possess or transport in commerce a firearm. . . ." The defendant is not such a person. *He belongs to a general class of convicted felons whose civil rights have been restored by a statute that is silent with respect to the right of such persons to possess firearms.*[51]

The *Kelly* court believed that Congress, by recognizing that only certain pardons would relieve one of criminal liability under section 1202, did not "wish to recognize other means which the states might employ to expunge felony convictions . . . ."[52] Thus no congressional intent to

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[w]henever a person committed to the authority upon conviction of a crime is discharged from its control other than by expiration of the maximum term of commitment . . . or by termination of its control . . . such discharge shall, when so ordered by the authority, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof . . . .

Whenever a person has been placed on probation by the court . . . and, after satisfactory fulfillment thereof, is discharged therefrom, the court, on application of the defendant or on its own motion and after notice to the county attorney, in its discretion may likewise so order.

The effect of such orders is to restore to the convicted person all civil rights and relieve him of all disabilities arising from the conviction; however the conviction may still be used in a subsequent criminal prosecution for another offense. *Id.* In effect it is the counterpart of the Washington expungement statute. *See* note 2 *supra.*

49. 519 F.2d at 796.

50. 485 F.2d 199 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974).

51. *Id.* at 200. (emphasis added). *Mostad* concerned the relationship of another Minnesota statute, MINN. STAT. ANN. § 609.165 (West 1964), to section 1203(2) in terms of applying section 1202. This Minnesota statute provides, in part:

> Subd. 1. When a person has been deprived of his civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.
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> Subd. 2. The discharge may be:
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> (1) By order of the court following stay of sentence or stay of execution of sentence; or
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> (2) By order of the Minnesota corrections authority prior to expiration of sentence; or
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> (3) Upon expiration of sentence.

52. 519 F.2d at 796. *See* United States v. Sutton, 521 F.2d 1385, 1389-90 (7th Cir. 1975); Thrall v. Wolfe, 503 F.2d 313, 317-18 (7th Cir. 1974), *cert. denied*, 402 U.S. 972 (1975). *See* notes 57 & 61 *infra* and accompanying text.

make state expungement laws relevant to determination of liability could be found.

In *Thrall v. Wolfe*,[53] the Seventh Circuit interpreted section 925(c)[54] which is analogous to section 845(b) and provides that a convicted felon can apply to the Seretary of the Treasury for relief from the disabilities imposed under Title IV.[55] The court found that a gubernatorial pardon which specifically provided that the defendant would be entitled "to receive, possess, or transport in commerce a firearm"[56] did not relieve one of liability under the title.[57] The court believed that the relief under section 925 was intended to be exclusive.[58]

The court also took note of section 927,[59] which contains language similar to section 848, and stated, similar to Judge Carter's assertion with regard to section 848, that

> [t]he section was doubtless inserted for the purpose of avoiding a claim of pre-emption. [The title under which the defendant was indicted] deals with federal control of firearms, not the scope and efficacy of pardons and it is difficult to view the Montana's pardon as "on the same subject matter". . . . Further, absent an express contrary intention, the scope of a federal statute normally is not dependent on state law.[60]

As final support for its reasoning the court stated that if Congress had intended a gubernatorial pardon to work to the same effect it could so

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53. 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 402 U.S. 972 (1975).

54. 18 U.S.C. § 925(c) (1970) provides in part:

> (c) . . . A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

55. This includes 18 U.S.C. § 922(g) (1970), the section Thrall was found to have violated. Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 402 U.S. 972 (1975). This section makes it unlawful for one convicted of "a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport any firearm or ammunition in interstate commerce . . . ."

56. Such a provision would be required under a separate title of the Omnibus Crime Control and Safe Streets Act of 1968, Title VII. 18 U.S.C. App. 1203(2) (1970).

57. 503 F.2d at 316. *See* note 52 *supra* and accompanying text. *See also* note 61 *infra* and accompanying text.

58. 503 F.2d at 317.

59. 18 U.S.C. § 927 (1970) is identical to 18 U.S.C. § 848 (1970). *See* text accompanying note 15 *supra*.

60. 503 F.2d at 317 (citations omitted).

state, as it had done in section 1202.[61]

As indicated by Judges Sneed and Carter, as well as the other circuits that have considered the issue, the proper approach for determining whether state expungement law should apply to the operation of federal statutes is whether Congress has expressly indicated an intent that it should apply. The Ninth Circuit has recognized this as the proper approach when dealing with the effect of state expungement statutes on federal deportation laws.[62]

To the extent the *Hoctor* court may have implicitly based its holding upon an assumption that Congress intended state law to apply unless displaced by federal law, it recognized the importance of congressional intent as dispositive of the issue of whether a state conviction remained a conviction for purposes of applying federal law. However it seemed to have erred in finding that Congress, in enacting section 848, intended state law to be relevant. That section merely states Congress' desire that state provisions covering the same conduct as federal statutes should still be given effect. In *Potts*, there was even less authority for finding such a congressional intent since there was no applicable preemption provision. On the other hand, Judges Sneed and Carter, and the other

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61. *Id.* at 317. *See* notes 53 & 58 *supra* and accompanying text.

62. In cases involving deportation of aliens for a conviction under state law, the Ninth Circuit has recognized that the proper approach to determine the effect to be given a state expungement statute is to find an express congressional intent that it should erase the conviction for federal purposes. Applying this approach, the Ninth Circuit has found state law relevant only to the extent of determining that one has suffered a conviction, since it can find no evidence that Congress intended expungement statutes to apply. Thus in De la Cruz-Martinez v. Immigration & Naturalization Serv., 404 F.2d 1198 (9th Cir. 1968), *cert. denied*, 394 U.S. 955 (1969), a claim was made by the petitioner that, because his conviction for unlawful possession of marijuana and heroin had been expunged under California law, he was not subject to deportation pursuant to 8 U.S.C. § 1251(a)(11) (1970) (allowing an alien to be deported upon conviction of a narcotics offense). In rejecting this contention, the court stated:

> It would defeat the purpose . . . (of federal law) if provisions of local law, dealing with rehabilitation of convicted persons, could remove them from the ambit of (federal penal enactments) . . . . *We do not think Congress intended such a result.*

404 F.2d at 809, *quoting* Matter of A— F—, 8 I. & N. Dec. 429, 445-46. *See also* Tsimbidy-Rochu v. Immigration & Naturalization Serv., 414 F.2d 797 (9th Cir. 1969); Brownrigg v. Immigration & Naturalization Serv., 356 F.2d 877 (9th Cir. 1966); Kelly v. Immigration & Naturalization Serv., 349 F.2d 473 (9th Cir.), *cert. denied*, 382 U.S. 932 (1965). This same approach has been followed in the Fifth Circuit. Gonzalez de Lara v. United States, 439 F.2d 1316 (5th Cir. 1971).

For a discussion of Judge Ely's dissent in Kelly v. Immigration & Naturalization Serv., 349 F.2d 473 (9th Cir.), *cert. denied*, 382 U.S. 932 (1965), and criticism of most of these cases, *see* note 42 *supra*.

circuits, while properly recognizing the issue as one of congressional intent, generally, if not always, have found state law irrelevant for determining the application of federal statutes. It therefore appears that they require Congress to specifically list a state expungement statute in the section providing exemptions from federal liability. The approaches in this respect appear to represent the two extremes in finding the existence of congressional intent.

CONCLUSION

It is clear that the Ninth Circuit's interpretation of congressional intent, as to whether state expungement statutes should apply to the operation of federal statutes, in both the *Hoctor* and *Potts* cases is out of line with the other circuits and also inconsistent with the reasoning used in its own immigration cases. Although *Potts* purportedly overruled *Hoctor*, it did so only to the extent of reinterpreting the state law itself, without questioning the underlying assumption that state law was relevant in the first place. It can be argued that there is a certain logic in allowing state law to determine both whether there has been a conviction and whether and for what purposes that conviction still exists, but as a matter of statutory interpretation it would appear that the other circuits are correct. Congress appears not to have intended that state expungement statutes be used to nullify state convictions for purposes of federal criminal statutes requiring a prior felony conviction as an element of the crime. Indeed, Congress has recently demonstrated that it will specifically include state expungement statutes as a means of extinguishing a conviction when it intends to do so. The new Federal Rules of Evidence, effective July 1, 1975, provide in part:

> (c) Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate or rehabilitation, *or other equivalent procedure based on a finding of rehabilitation* of the person convicted . . . .[63]

Therefore, unless Congress expressly indicates such an intent the courts should not read it in to the statute.

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63. FED. RULES OF EVID., Rule 602 (1976).