

# **“To elaborate . . .”**

*A monthly column by Marcia J. Oddi*

## **Indiana appellate court records – how accessible?**

### **Introduction**

Orville Lynn Majors, a nurse at Vermillion County Hospital in Clinton, Indiana, was found guilty in 1999 of killing six elderly patients by injecting them with potassium chloride. The trial took place in Clay County. Majors was sentenced to 360 years. The Supreme Court affirmed the trial court in an opinion issued April 14, 2002.<sup>1</sup>

According to the docket maintained by the Clerk of the Supreme Court, Court of Appeals and Tax Court (“Clerk”), the record in this case, which is still under appeal, consists of 38 volumes, plus 2 supplemental volumes, 7 volumes of exhibits, and 14 envelopes of exhibits, making it one of the largest ever seen by the Clerk’s Office.<sup>2</sup>

Post-conviction proceedings are underway and the most recent docket entry, an order of Randall T. Shepard, Chief Justice, from August 12, 2005, indicates that the record has been released to one of Majors’ attorneys, who must return it within 6 months from the date indicated in the Court’s order, unless the attorney petitions the court for additional time.

The order concludes: “Once the decision in the post-conviction appeal has been certified as final, the record shall return to the custodial care of the clerk for handling consistent with the usual practice.”

### **Availability of records of criminal cases**

Once all appeals are concluded in the Majors case, the record will remain on file in the Records Department of the Clerk’s office in the Statehouse for five more years.<sup>3</sup> Then, as is the practice with all criminal records, it will microfilmed and

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<sup>1</sup> Orville Lynn Majors v. State of Indiana, 773 NE 2d 231 (2002).

<sup>2</sup> What exactly is a “case record”? Per David Schanker, Chief of Staff for the Clerk of the Courts: “Prior to the change in the appellate rules effective January 1, 2001, the Record on Appeal consisted of trial court documents, transcripts of hearings and/or trials, and evidence. Each volume of the record could be no more than 250 pages in length (unless it was one volume, in which case it could be up to 350 pages), and it was bound at the top and usually had a stiff black cover. Under the new appellate rules, portions of the Clerk’s Record (which consists of trial court documents and portions of transcripts) are bound in an appendix filed with the appellant’s or appellee’s brief. Volumes of the appendix are bound on the side and must adhere to the 250 page limitation. Transcripts are received by the Clerk’s Office directly from the trial courts; they are bound on the side (usually with a clear front cover) and have a 250 page limit.”

<sup>3</sup> The five years begins after final disposition of the case by the Supreme Court (or the Court of Appeals if there is no petition to transfer). Appeals to federal court do not affect the Clerk’s

the physical record itself well be moved to the Clerk's Office site at the State Records Center on Indianapolis' east side.

According to David Schanker, Chief of Staff for the Clerk of Courts, the records in all criminal cases are stored at the Clerk's Office site at the State Records Center for an additional fifteen years (the total retention period is 20 years), after which they may be transferred to State Archives, or destroyed. The retention schedule is approved by the Commission on Public Records, but is based on an order of the Indiana Supreme Court dated January 15, 2002, and Administrative Rules 6 and 7.

The documents in most cases are public records,<sup>4</sup> whether all appeals have been concluded, the appeal has been perfected (the case file has been transmitted to the judges or justices), or the appeal is pending (briefs are being submitted). According to Schanker, "if we receive a request for a copy of a document in a case that already has been transmitted to the Court, we still can arrange to provide the copy, but it takes a little bit longer." Photocopies, as with all court documents, are \$1.00 per page.

#### **Availability of records in civil cases**

The 20-year retention requirement does not apply to civil cases. Under the retention schedule for civil cases, microfilming is done 60 days after final disposition by the Supreme Court, or by the Court of Appeals or Tax Court when no further review is sought. After the case has been microfilmed, the hard copy is offered first to the party who paid for the transcript to be produced, and then to other parties. Hard copies not claimed by a party are transferred directly to the State Archives Division, for evaluation, sampling, or weeding pursuant to archival principles.

The Clerk's Office microfilming program began in the early 1980s. Some earlier cases were microfilmed at that time, back to as far as 1960, but no more than an handful exist for the period between 1960 and 1980.

Kevin Murley, who staffs the Clerk's Office Records Department located in the basement of the Statehouse, has worked there three years and seems to have every document at his fingertips. He explains that until this year, even though all the case files were on microfilm, accessing the requested records and making prints of them via the microfilm reader was fairly time-consuming.

This year his office acquired a Canon microfilm scanner that can convert microfilm images to digital data. In other words, it "prints" directly to PDF files, which can be e-mailed as attachments, or saved to CD-ROM. The device is also better at locating cases on the microfilm. The result is faster retrieval, plus cost

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retention schedule, although if a case has been transferred to the custody of the federal court, it can delay microfilming.

<sup>4</sup> The exception being confidential or sealed documents.

savings to other state agencies needing copies of records, such as the public defender, as well as to attorneys and others.

The price schedule to nongovernmental customers for emailed PDF documents ranges from a \$5.00 minimum to \$10.00 for up to 50 pages. Documents over 50 pages cannot be emailed. Documents on CD-ROM range from \$20.00 for under fifty pages to \$50.00 for more than 120 pages.

### **Online access to appellate documents and the case docket**

Internet access is available to the opinions of the Supreme Court and the Tax Court, and to the published opinions of the Court of Appeals. The Court of Appeals decisions designated as not-for-publication<sup>5</sup> by the judges, however, are not available online. These rulings, which constitute more than 70%<sup>6</sup> of the Appeals Court's work product, must be obtained as photocopies through the Clerk's office.

The Clerk makes the combined docket for the appellate courts available online. Not currently available online are many of the various courts' orders, and the parties' briefs and filings. These must be accessed through the Clerk's office as photocopies, unless the case has reached the point where it has been microfilmed.<sup>7</sup>

### **The Future.**

What is next? The federal courts have gone to electronic filing of documents. This means that the party's documents are already in digital form when the federal courts receive them. Transcripts are created digitally. The courts' orders and opinions are also. The records in a case may be accessed online through the federal PACER (Public Access to Court Electronic Records) system. A "Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program" is available online.<sup>8</sup>

The Indiana Supreme Court has adopted a new access rule for court records, Administrative Rule 9, which went into operation January 1, 2005. Among other things, the rule clarified what personal information is to be excluded from electronic records.

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<sup>5</sup> Indiana Appellate Rule 65.

<sup>6</sup> The 2004 Annual Report of the Court of Appeals of Indiana, p. 4 of the document (p. 5 of the PDF) shows the total percent of 2004 cases published to be 27.1%. In 2003 it was 28.7%; in 2002, 28.3%; in 2001, 28.1%; in 2000, 26.1%. The Annual Reports are available online at: <http://www.in.gov/judiciary/appeals/>.

<sup>7</sup> As noted earlier, criminal records are microfilmed five years after final disposition; civil cases are microfilmed 60 days after final disposition.

<sup>8</sup> <http://pacer.psc.uscourts.gov/documents/epachron.pdf>. An overview of PACER is available here: <http://pacer.psc.uscourts.gov/pacerdesc.html>.

The next step, if the State is to follow the course of the federal courts, would be the proposal by the Court of rules for electronic filing, and the institution of a training and phase-in program. No such rule changes are pending currently.

### **Accessing the Past.**

What about records more than 20 years old – those for which there is no microfilm and that are no longer the responsibility of the Clerk’s office? Many case records are located in the miles of bankers’ boxes in the State Records Center. According to Dr. Alan January, Program Director at the Indiana State Archives since 1990, there are more than 52 skids of uncataloged 20<sup>th</sup> century appellate court records. Case documents from the early to mid-20<sup>th</sup> century are very difficult to find. Access to a case file, if it is among those stored at the Center (finding that out is your first hurdle), must be arranged through the Commission on Public Records.

Skipping backward to the earliest Indiana court records, 18<sup>th</sup> and 19<sup>th</sup> century order books, docket books, pleadings and briefs are stored in State Archives. This agency, with funding provided by the Supreme Court, is currently engaged in a push to open up Indiana court records from 1817-1868. But it will be very slow going.

I took a trip out to Public Records and State Archives, located in the east side of Indianapolis, in October, and was given a guided tour though the temperature and humidity controlled vault where these early records are kept. My guide was Vicki Casteel, the Visual Collections Archivist at the Indiana State Archives.

Each of these 1817-1868 cases is folded up in thirds, like a will or similar document may be folded today. At some point in history the case records were wrapped in kraft-type paper and boxed in narrow file boxes. Most have remained undisturbed for more than a century. There are 12,522 of these cases.

They are all, of course, hand-written in fading ink. The box shown me, Box 1, included appeals decided during the “Dec. Term 1817” through the “July Term 1820.”

Using the original index ledgers, plus a card index created in the 1930s, Casteel has created a database of the case files. In the earlier indexes, only the first party in each case was named. She has added the second party’s name, plus computerized the database so that it may be sorted and searched.<sup>9</sup>

Casteel’s work is Stage 1 of the project to make these old records accessible. Stage 2 will involve the preservation of the old cases. They are to be carefully unfolded, cleaned when necessary, flattened, and placed in acid-free folders.

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<sup>9</sup> The “draft” database is current available online as a downloadable Microsoft Access file at: <http://www.in.gov/judiciary/supreme/lectures/blackford.html>. It is the last link on the page, labeled “Database of Historic Supreme Court Cases: 1816-1872.”

Many will need to be placed in a humidity-controlled chamber prior to unfolding, or they will come apart.

The case records will be checked against the database to be sure the information is correct. Subject information will be added.

After the 1817-1868 cases have been processed, there are bankers boxes of the 1869-1900 records. These records may include the trial transcript. Then, on to the 20<sup>th</sup> century, where there are the 52 skids of uncataloged court records.

State Archives has only six people on its staff. I'm told their active volunteer programs are what keeps them going. Archives is hoping that Indiana lawyers will volunteer to help with the Stage 2 processing of the 1817-1868 records.

For information on volunteering, or to contribute to the Friends of the State Archives, "to help safeguard the record of Indiana's governmental heritage," access the "Friends of State Archives" site<sup>10</sup>, or contact volunteer coordinator, Barb Wood. Archives: 317-591-5222, e-mail: [volunteers@fisa-in.org](mailto:volunteers@fisa-in.org), or c/o Indiana State Archives, 6440 E. 30th St., Indianapolis, IN, 46219

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<sup>10</sup> <http://www.fisa-in.org/index.html>