

# Expungements

## Detailed Information on Criminal Case Expungement

I.C. 35-38-9

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**Contact: Henry Flores; email: [henry.flores@courts.in.gov](mailto:henry.flores@courts.in.gov)**

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### NOTICE TO PUBLIC

This information is written to assist trial courts and circuit clerks. Please do not contact our office with questions because Indiana Supreme Court policies do not permit our office to provide legal advice to the public. We recommend that any person with questions about their case seek the advice of a licensed attorney. The Indiana Coalition for Court Access (<https://indianalegalhelp.org/>) can assist in finding low-cost legal help. Additionally, the Indiana Coalition for Court Access and Bar Associations provide options if you do not qualify for low-cost legal aid.

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This article is based on the IOCS's current understanding of Ind. Code 35-38-9. The statute is complicated, and there may still be some questions for which there are no clear answers.

All 2019 amendments to this chapter are not retroactive by default, applying only to expungement orders granted after June 30, 2019, but a person whose petition was granted before July 1, 2019, may file a petition for a "supplemental order of expungement" under I.C. 35-38-9-9 to obtain the benefits of the amendments. I.C. 35-38-9-0.6(c).

**IMPORTANT:** If an expungement of a conviction is granted under any section, the court shall also order the petitioner's arrest records, as set forth in I.C. 35-39-9-1(h), related to the conviction(s) also expunged. I.C. 35-38-9-6(g); I.C. 35-38-9-7(e).

When an individual seeks to expunge a conviction, the victim of their crime has a right to submit an oral or written statement in support or opposition of the petition for expungement, but the petitioner does not have the right to cross-examine the victim. *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

Although the law indicates some conviction records will be expunged, this is not a traditional expungement where records are destroyed. Instead, I.C. 35-38-9 provides a method to seal some arrest and conviction records and restrict the use of other conviction records. **Court records are not deleted or destroyed under I.C. 35-38-9.** Additionally, this chapter does not require any change or alteration of non-public internal records of law enforcement or public defender agencies, including records of diversion or deferral programs and disciplinary records as relating to licensing, certification, or public entity. I.C. 35-38-9-0.6(a).

A petition under I.C. 35-38-9 may “expunge” not only an arrest or conviction record, but “any records concerning a collateral action.” “Collateral action” is defined in I.C. 35-38-9-0.5 as “an action or proceeding, including an administrative proceeding, that is factually or legally related to an arrest, a criminal charge, a juvenile delinquency allegation, a conviction, or a juvenile delinquency adjudication. The term includes a proceeding or action concerning a seizure, a civil forfeiture, and a petition for specialized driving privileges.”

Pursuant to I.C. 35-38-9-9.5, upon receipt of a request to expunge records related to a collateral action and a properly certified expungement order, a circuit or superior court in the county in which the collateral action occurred shall consider the following procedural requirements:

- Notify the prosecuting attorney of the county in which the court is located of the request and set the matter for hearing; or

- If the record conclusively establishes that the petitioner is entitled to an expungement of records related to a collateral hearing, the court may grant the request without a hearing;

- If the underlying expungement was a was granted under sections 1 through 3, the records of the collateral action shall be expunged or marked as expunged (for an expungement granted under sections 4 through 5 of this chapter), unless the court finds that the collateral action does not relate to the expunged arrest or conviction;

- A request to expunge a collateral action may be made at any time after the original expungement order is issued;

- The petition should, if possible, be filed under the cause of the collateral action;

and

No filing fee is required.

**An individual's eligibility for "expungement" of any conviction under I.C. 35-38-9 is based on that individual's entire criminal history and not just the conviction which the person seeks to "expunge." See *Burton v. State*, 71 N.E.3d 24 (Ind. Ct. App. 2017).**

However, a trial court is not permitted to consider previously expunged convictions in determining whether to grant an expungement petition. *Mishra v. State*, 165 N.E.3d 602 (Ind. Ct. App. 2021).

### **Individuals Who May Not Seek "Expungement" of Misdemeanor Convictions:**

Pursuant to I.C. 35-38-9-2(b), the following individuals are prohibited from seeking expungement of misdemeanor convictions (including Class D felonies/Level 6 Felonies converted to misdemeanors):

- Sex or Violent Offenders as defined in I.C. 11-8-8-5; and  
Persons convicted of two or more felony offenses that involve the unlawful use of a deadly weapon and were not committed as part of the same episode of criminal conduct, as defined in I.C. 35-31.5-2-46.5.

A conviction includes a not responsible by reason of insanity verdict. See *Berryman v. State*, 127 N.E.3d 1246 (Ind. Ct. App. 2019).

### **Individuals Who May Not Seek Expungement of Felony Convictions:**

Pursuant to I.C. 35-38-9-3(b), I.C. 35-38-9-4(b) and I.C. 35-38-9-5(b), the following individuals are prohibited from seeking expungement of any felony convictions:

- Sex or Violent Offenders as defined in I.C. 11-8-8-5;
- Persons convicted of a felony that resulted in the death of another person;
- Persons convicted of:

Official Misconduct (I.C. 35-44.1-1-1)( unless the person is not an elected official or an elected or appointed judicial officer),

- Any Homicide Offense or attempt in I.C. 35-42-1,
  - Any Human and Sexual Trafficking Offense or attempt in I.C. 35-42-3.5, or
  - Any Sex Crimes Offense in I.C. 35-42-4 or attempt; and
  - A person convicted of unlawful possession of a firearm by a serious violent felon (does not apply to I.C. 35-38-9-3).
- Persons convicted of two or more felony offenses that involve the unlawful use of a deadly weapon were not committed as part of the same episode of criminal conduct, as defined in I.C. 35-31.5-2-46.5.

An individual convicted of Perjury (I.C. 35-44.1-2-1) may seek expungement under I.C. 35-38-9-4 and I.C. 35-38-9-5, but not under I.C. 35-38-9-3. *See* I.C. 35-38-9-3(b)(4). Consequentially, as Perjury is a Level 6 felony, an individual convicted of Perjury may not seek expungement of their Perjury conviction (unless the felony is converted to a misdemeanor) but presumably may seek expungement of other, more serious, felony convictions.

An individual convicted of a felony that resulted in death to another person may not seek expungement of any felony conviction.

Additionally, the following individuals may only seek expungement of a felony conviction pursuant to I.C. 35-38-9-5:

- An elected official, or an elected or appointed judicial officer, convicted of an offense other than official misconduct while serving the official's term or as a candidate for public office; and
  - A person convicted of a felony that resulted in serious bodily injury to another person.
  - A person convicted of official misconduct, if the person is not an elected official or an elected or appointed judicial officer.

## Expungement Categories:

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Once it is determined an individual may seek expungement based on their criminal history, the statute categorizes the method of expungement based on type of criminal case the individual seeks to expunge:

**Category 1:** Automatic Expungements and Arrests Without a Criminal Conviction (or Juvenile Adjudication). I.C. 35-38-9-1.

**Category 2:** All Misdemeanors (including Class D felonies/Level 6 Felonies converted to Misdemeanors pursuant to I.C. 35-50-2-7(b)). I.C. 35-38-9-2.

**Category 3:** Class D or Level 6 Felonies without Bodily Injury. I.C. 35-38-9-3.

**Category 4:** Felonies without Serious Bodily Injury or Death of Another Person. I.C. 35-38-9-4.

**Category 5:** Remaining Eligible Felonies without Death of Another Person. I.C. 35-38-9-5.

Each category has specific requirements such as a waiting period, notice requirements, and information to include in the petition. Each category also specifies the results if the petition is granted.

To be excluded, bodily injury/serious bodily injury must be an element of offense of which the petitioner was convicted. *See Allen v. State*, 159 N.E.3d 580 (Ind. 2020). Nevertheless, the permissive expungement statutes vests discretion in the trial court to deny expungement, thus the facts incident to the conviction may be considered. *Id*; *see also Allen v. State*, 181 N.E.3d 454 (Ind. Ct. App. 2022), *trans. denied*.

### **Category 1: Arrests without Conviction - I.C. 35-38-9-1**

#### **Automatic Category 1 Expungement**

Effective July 1, 2022, IC 35-38-9-1(b) now provides for automatic expungements of arrests in certain circumstances:

If a court dismisses all criminal charges or juvenile delinquency allegations filed and pending against a person (IC 35-38-9-1(b)(1)):

one (1) year has passed since juvenile delinquency allegations were filed against a

child and there is no disposition; and the state is not actively prosecuting the allegations (I.C. 35-38-9-1(b)(2)); or

If in a criminal trial a defendant is acquitted of all charges, or the defendant's conviction is later vacated; or if in a juvenile proceeding the court finds all allegations not true, or the juvenile's true finding is later vacated (I.C. 35-38-9-1(b)(3));

the court shall immediately order all records related to the criminal charges or juvenile delinquency allegations expunged. An expungement order that is issued based on non-prosecution under subdivision (2) goes into effect immediately. An expungement order issued under subdivision (1) or (3) may not go into effect earlier than sixty (60) days from the date of the dismissal, acquittal, or no true finding. However, upon motion by the prosecuting attorney, if the court finds that specific facts exist in the case which justifies a delay, the court may delay implementation of an expungement order under subdivision (1) or (3) for up to one (1) year from the date of the dismissal, acquittal, or no true finding.

IC 35-38-9-1(c) permits an individual to petition a court exercising criminal jurisdiction in the county if:

The person is arrested, and one (1) year has elapsed since the date of the arrest; and no charges are pending against the person;

Upon receipt of the petition, the judge shall immediately order the expungement of all records related to the arrest. Expungement under this subsection does not shorten the statute of limitations. A prosecutor may still file a charge under this subsection. Traditional Category 1 Expungement

An arrest that did not result in a conviction or juvenile adjudication even if the arrest, criminal charge, or juvenile delinquency allegation resulted in an adjudication for an infraction, a conviction/juvenile adjudication that was vacated on appeal, or a conviction that was expunged under I.C. 35-38-9-2 through -5. Absent consent of the prosecution, a person that is currently participating in a pretrial diversion program may not seek expungement of their arrest under this section. I.C. 35-38-9-1(a).

## **Waiting Period**

If the person was not convicted or adjudicated a delinquent child, the petition may be filed no earlier than one (1) year after the date of arrest, criminal charge, or juvenile delinquency allegation, whichever is later. The one-year period does not run from the date of dismissal or acquittal.

If the conviction or adjudication is vacated, the petition may be filed no earlier than one (1) year after the date of the opinion vacating the conviction or adjudication becomes final.

While the 2019 amendment allows arrest records to be expunged after a conviction is expunged, the statute is silent about whether there is a waiting period for a case in which the conviction is expunged.

The prosecuting attorney may agree in writing to a shorter waiting period. I.C. 35-38-9-1(d).

## **Where is the Petition Filed?**

The petition to expunge arrest records should be filed in the court where charges were filed or, if no criminal charges were filed, in a court in the county where the arrest occurred. I.C. 35-38-9-1(e).

## **Filing Fee**

There is no filing fee required for a petition under this section. I.C. 35-38-9-1(e).

## **Case Type**

As with the other petitions filed under this chapter, all petitions filed under this section should be assigned a new XP case number. Ind. Administrative Rule 8(B)(3).

## **Time Limits**

There are no time limits or limits to the number of petitions a person can file requesting expungement of arrest records.

## Is Notice to Prosecutor Required?

Yes. I.C. 35-38-9-1(f) requires the **court to serve a copy** of the petition on the prosecuting attorney (all other expungement categories make this a duty of the petitioner).

## What Must the Petitioner Include in the Petition?

The petition must be verified and set forth:

- The date of the arrest, criminal charges, or juvenile delinquency allegation, and conviction—if applicable;
- The county in which the arrest occurred, or the county in which the information, indictment, or allegation was filed;
- The law enforcement agency employing the arresting officer, if known;
- Court in which the criminal charges or juvenile delinquency allegation was filed;
- Any other known identifying information, such as the name of the arresting officer, case number, any aliases or other names used by petitioner, or petitioner's driver's license number;
- Petitioner's date of birth; and
- Petitioner's social security number.

See I.C. 35-38-9-1(e).

If a trial court grants a petition under this section, the order must include the above information required by subsection (c). I.C. 35-38-9-1(i).

## What Must the Petitioner Show the Court?

The petitioner must show by a preponderance of the evidence (I.C. 35-38-9-9(d)) that:

- The required waiting period has been met
- The petitioner's arrest:
  - did not result in a conviction or juvenile adjudication, or
  - resulted in a conviction or juvenile adjudication and the conviction or adjudication was vacated on appeal;
- The petitioner is not currently participating in a pretrial diversion or deferral

program; and

- No charges are pending against the petitioner.

See I.C. 35-38-9-1.

## Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9 (c).

## Does the Court have Discretion with its Finding?

No. The court shall grant the petition unless the petitioner has not met the burdens of I.C. 35-38-9-1(a) or if criminal charges are pending against the petitioner. I.C. 35-38-9-1(g)(2). The court may summarily deny the petition if the petition does not meet the requirements of I.C. 35-38-9-1 or if the statements in the petition indicate the petitioner is not entitled to relief. I.C. 35-38-9-1(g)(1).

## Result if Petition is Granted or if Automatic Expungement is Ordered

No information concerning the arrest may be placed or retained in any state central repository for criminal history information or in any other alphabetically arranged criminal history information system maintained by a local, regional, or statewide law enforcement agency.

I.C. 35-38-9-1(h)(1).

The records of the sentencing court, a court that conducted a collateral action, a juvenile court, the court of appeals, and the supreme court concerning the person shall be redacted or permanently sealed. I.C. 35-38-9-1(h)(3).

If a person whose records are expunged brings an action that might be defended with the contents of the expunged records, the defendant is presumed to have a complete defense to the action. For the plaintiff to recover, the plaintiff must show that the contents

of the expunged records would not exonerate the defendant. The plaintiff may be required to state under oath whether the plaintiff had records in the criminal justice system and whether those records were expunged. If the plaintiff denies the existence of the records, the defendant may prove their existence in any manner compatible with the law of evidence. I.C. 35-38-9-1(j).

It becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation, or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" I.C. 35-38-9-10(d)

The granting of an expungement petition is an appealable final order. I.C. 35-38-9-9(e).

The expungement case and all documents filed in the case become confidential when the court issues the order granting the petition. I.C. 35-38-9-10(i).

Records expunged or sealed under Section 1 must be removed or sealed in accordance with this section but may not be deleted or destroyed. Records expunged or sealed under this section remain available to the court and criminal justice agencies as needed to carry out their official duties. I.C. 35-38-9-1(k).

### **What if the Petition is Denied?**

A denial is an appealable final order. I.C. 35-38-9-9(e).

## **Records that are Sealed (Categories 2 and 3)**

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Although not exactly the traditional concept of "expungement," records that are expunged under Categories 2 and 3 are permanently sealed. Only a limited group of people are given access to the sealed files and generally only with court permission.

If the court issues an order granting a petition for expungement under sections 2 through 5, the court shall include in its order the information described in section 10(c)(the person's civil rights have been fully restored). I.C. 35-38-9-6(i).

## **Category 2: Misdemeanor (including Class D Felonies and Level 6 Felonies converted to misdemeanors). I.C. 35-38-9-2**

### **What Cases Qualify for Category 2?**

This category includes all misdemeanors (I.C. 35-38-9-2(a)) plus any Class D felony (for a crime committed before July 1, 2014) or Level 6 felony (for a crime committed after June 30, 2014) **that was converted to a misdemeanor**. I.C. 35-38-9-2(a)

**Note:** This category may include Perjury that was converted to a misdemeanor by the trial court entering the judgment of conviction pursuant to I.C. 35-50-2-7(c).

### **Waiting period**

A petition may be filed under this section at least five (5) years after the date of conviction unless the prosecuting attorney agrees in writing to a shorter period. I.C. 35-38-9-2(c).

With respect to Level 6 felonies reduced to a misdemeanor, the waiting period to obtain an expungement begins on the date a felony conviction is entered and does not start anew if that conviction is later reduced to a misdemeanor.

### **Where is the Petition Filed?**

The petition must be filed in a circuit or superior court in the county of conviction. I. C. 35-38-9-2(d). Although the statute subsequently states: "or if no criminal charges or juvenile delinquency allegation was filed, in the county where the arrest occurred," it is IOCS's opinion this clause is merely an extension of the previous clause requiring the filing to take place in a Superior or Circuit Court.

## **Filing Fee**

The petitioner is required to pay the filing fee for a civil case, but the court may reduce or waive this fee if the petitioner is indigent. I.C. 35-38-9-8(d).

## **Case Type**

As with the other petitions filed under this chapter, all petitions filed under this section should be assigned a new XP case number. Admin. R. 8(B)(3).

## **Time Limits**

A petition may be filed at any point after the waiting period, but a petitioner may file only one (1) petition for expungement during the petitioner's lifetime. A petitioner may seek to expunge more than one (1) conviction at the same time, and multiple petitions for expungement filed in separate counties are considered one (1) petition for the purpose of this lifetime limitation if they are filed within one (1) three hundred sixty-five (365) day period. I.C. 35-38-9-9(i).

In rare circumstances, the trial court may allow a petitioner to supplement their petition to request the expungement of additional convictions, but the trial court must find:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

The only other exception to the lifetime limit is if the petitioner's petition was denied on its merits. See "What if the petition is denied?" below. I.C. 35-38-9-9(j).

## **Is Notice to the Prosecutor Required?**

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(e).

## Response from Prosecutor

The prosecuting attorney must respond to the petition no later than 30 days after receipt. If the prosecutor fails to respond, they waive any objection to the petition. I.C. 35-38-9-8(g).

## Victim Notification

Because the trial court does not exercise discretion over these expungements once the statutory requirements have been met, *see Taylor v. State*, 7 N.E.3d 362, 365 (Ind. Ct. App. 2014); the Prosecutor is not required to notify the victim of their rights. I.C. 35-38-9-8(f). But the victim may still submit an oral or written statement in support of or opposition to the expungement petition. I.C. 35-38-9-9(d).

A petitioner has no right to cross-examine the victim. *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

## What Must the Petitioner Include in the Petition?

The petition must include the following in their petition:

- Their full name and all other legal names or aliases;
- Their date of birth;
- Their addresses from the date of the offense through the date of the petition;
- The court case number, if available;
- An affirmation that no criminal investigation or charges are pending against them;
- An affirmation that they have not committed another crime within the waiting period;
- A list of all past convictions, collateral actions, the case numbers (if known), the date of convictions, any appeals, and the date that any appellate decisions were handed down;
- Their social security number;
- Their driver's license number;
- Date of their arrest(s), if applicable;

- Date of conviction;
- Affirmation that the required waiting period has elapsed or copy of the prosecutor's written consent to a shorter period; and
- A description of any other petitions filed under this chapter. I.C. 35-38-9-8(b).

The petitioner may include any other information they believe could assist the court in making its determination. I.C. 35-38-9-8(c).

### **What Must the Petitioner Show the Court?**

The petitioner must prove by a preponderance of the evidence:

The waiting period has been met;

The person has no charges pending;

The person has paid all fines, fees, and court costs, and satisfied any restitution obligation; and

The person has not been convicted of a crime in the previous five (5) years (or less if the prosecutor has agreed to a shorter waiting period under I.C. 35-28-9-2(c)). I.C. 35-38-9-2(e).

Since the 2014 amendments, a petitioner is no longer required to prove the successful completion of the sentence and supervised release.

### **Hearing**

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a) and (c).

### **Does the Court have Discretion with its Finding?**

No, the court shall grant the petition if all statutory conditions are met. I.C. 35-38-9-2(e). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

## Result if Petition is Granted

Provisions under I.C. 35-38-9-6 apply. If the court orders the misdemeanor conviction records and any other records from collateral actions expunged, the court's order will:

- Prohibit the department of correction, the bureau of motor vehicles, each law enforcement agency, and any other person who incarcerated/provided treatment/services to the petitioner under a court order from releasing the records without a court order. I.C. 35-38-9-6(a)(1);
- Order the state police department to seal the petitioner's expunged records contained in the central repository for criminal history information including related references to the case. I.C. 35-38-9-6(a)(2);

Notify the Clerk of the Supreme Court to seal any records in the Clerk's possession that relate to the conviction, including any records concerning a collateral action. I.C. 35-38-9-6(a)(4);

Order the records of the sentencing court, a court conducting a collateral action, a juvenile court, the Court of Appeals, and the Indiana Supreme Court to be permanently sealed. The court records will be sealed and therefore excluded from public access as provided in Access to Court Records Rule 5. The court records will not be available for public access. I.C. 35-38-9-6(b); and

- Request the Indiana Supreme Court and Court of Appeals of Indiana to redact the name of the petitioner named as an appellant or appellee in any opinion or memorandum decision and provide a redacted copy to any publisher or organization that publishes this information however the Indiana Supreme Court and Court of Appeals are not required to destroy of any existing copy of an opinion or memorandum decision that includes the petitioner's name. I.C. 35-38-9-6(c).

Granting the expungement petition does not alter an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

Additionally, granting an expungement restores the civil rights of a petitioner, including the right to vote, to hold public office, and to serve as a juror. I.C. 35-38-9-10(c). But expungement of a crime of domestic violence under I.C. 35-38-9-2 does not restore a person's right to possess a firearm. This can only be restored in accordance with I.C. 35-47-4-7. I.C. 35-38-9-6(f).

It is unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation, or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b). In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" I.C. 35-38-9-10(d).

A law enforcement agency or a probation or community corrections department may inquire into whether a prospective employee has received an expungement and may discriminate against a prospective employee who has received an expungement from purposes of employment. I.C. 35-38-9-10(a).

The petitioner must be treated as if they had never been convicted of the offense. I.C. 35-38-9-10(e).

The expungement case (the "XP" case number) and all documents filed in the case also become confidential when the petition is granted. I.C. 35-38-9-10(i).

Prior to 2017, individuals convicted of certain sex offenses could expunge their conviction under this section. Now sex offenders may not have their conviction expunged. For those petitioners granted relief under the old statute that were required to register as a sex offender based on the commission of a felony which has been expunged under I.C. 35-38-9-2, the expungement does not affect the operation of the sex offender registry web site, any person's ability to access the petitioner's records, records required to be maintained concerning sex or violent offenders, or any registration requirement imposed on the petitioner; however, the expunged conviction must be clearly marked as expunged on the sex offender registry web site. I.C. 35-38-9-6(e).

### **Who has Access to the Sealed Records?**

The following individuals have a varying degree of access to records that have been sealed under this section:

## Law Enforcement Officers

A law enforcement officer acting in the course of the officer's official duty has full access to all records sealed under I.C. 35-38-9-2. I.C. 35-38-9-6(a)(1). I.C. 35-31.5-2-185 defines "law enforcement officer" as:

A police officer (including a correctional police officer), sheriff, constable, marshal, prosecuting attorney, special prosecuting attorney, special deputy prosecuting attorney, the securities commissioner, or the inspector general;

A deputy of any of those persons;

An investigator for the prosecuting attorney of the inspector general;

A conservation officer;

- the state fire marshal, the executive director of the department of homeland security;

An enforcement officer of the alcohol and tobacco commission;

- a fire investigator of the department of homeland security;

An enforcement officer of the securities division of the secretary of state; or

A gaming agent employed under I.C. 4-33-4.5 or a gaming control officer employed by the gaming control division under I.C. 4-33-20.

While prosecutors are listed in the general definition for "law enforcement officers" in the criminal code, specific provisions in the expungement statute govern when they have access to expunged records.

## Prosecuting Attorneys

Records sealed under this section may be disclosed to a prosecuting attorney when the record is needed to carry out the official duties of the prosecuting attorney, and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(A).

**Unsealing and Resealing Records.** Additionally, a prosecuting attorney may submit a written application to a court that granted an expungement petition under this chapter to gain access to any records that were permanently sealed if the records are relevant in a new prosecution of the person. If the prosecuting attorney shows that the records are relevant for a new prosecution of the person, then the court shall order the record

unsealed and give the prosecuting attorney access to the records. When the reasons to unseal no longer exist, the court shall order the records permanently resealed. However, if the records are admitted as evidence against the person in a new prosecution that results in the person's conviction or are used to enhance a sentence imposed on the person in a new prosecution, the court is not required to reseat the records.

#### Defense Attorneys

Records sealed under this section may be disclosed to a defense attorney when the record is needed to carry out the professional duties of the defense attorney, and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(B).

#### Probation Officers

Records sealed under this section may be disclosed to a Probation Officer when the record is needed to prepare a presentencing report, and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(C).

#### FBI and Homeland Security

The Federal Bureau of Investigation and the Department of Homeland Security have access to the records sealed under this section if disclosure is required to comply with an agreement relating to the sharing of criminal history information. I.C. 35-38-9-6(a)(3)(D).

#### The Supreme Court and Board of Law Examiners for a Limited Purpose

The Supreme Court, the executive director, and members of the state board of law examiners may have access to the records sealed under this section if it is necessary to determine whether an applicant possesses the necessary good moral character for admission to the Bar. I.C. 35-38-9-6(a)(3)(E). Employees of the state board of law examiners also have access to sealed records when permitted by the rules adopted by the state board of law examiners.

#### Secure and Fair Mortgage Licensing Act

A person required to access expunged records to comply with the Secure and Fair Enforcement for Mortgage Licensing Act (12 U.S.C. 5101 et seq.) or regulations adopted under that federal law. I.C. 35-38-9-6(a)(2)(F).

#### BMV and the Federal Motor Carrier Administration

Records sealed under this section may be disclosed to the bureau of motor vehicles, the Federal Motor Carrier Administration, and the Commercial Driver's License Information System (CDLIS) if disclosure is required to comply with federal law relating to reporting a conviction for a violation of a traffic law. I.C. 35-38-9-6(a)(3)(G).

- Schools for the purposes of employment and/or to grant access or admission to the school to an applicant contractor or a contractor if the person, contractor, or applicant contractor is likely to have contact with a student enrolled in the school, regardless of the age of the student.
- The state police department, if disclosure is required for the purpose of expunging or marking as expunged records in the central repository for criminal history information. I.C. 35-38-9-6(a)(3)(I).

#### Anyone Else

Anyone else requesting access to the records of the sentencing court, a juvenile court, the Court of Appeals, and the Supreme Court that have been sealed under this section must follow the procedures of Indiana Access to Court Records Rule 9 which requires a petition, notice, and hearing.

### **What if the Petition is Denied?**

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied, in whole or in part, the petitioner may refile a petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(j)

The court may allow a petitioner to supplement their petition to request the expungement of additional convictions not listed in the first petition only if the court finds:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

### **Category 3: Class D Felonies or Level 6 Felonies – No Bodily Injury. I.C. 35-38-9-3**

If the court issues an order granting a petition for expungement under sections 2 through 5, the court shall include in its order the information described in section 10(c)(the person's civil rights have been fully restored). I.C. 35-38-9-6(i).

#### **What Cases Qualify for Category 3?**

This category includes all eligible class D felonies (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) that did not result in bodily injury to another person.

#### **Waiting Period**

A petition may be filed under this section at least eight (8) years after the date of conviction unless the prosecuting attorney agrees in writing to a shorter period. I.C. 35-38-9-3(c).

#### **Where is the Petition Filed?**

The petition must be filed in a circuit or superior court in the county of conviction.

I.C. 35-38-9-3(d). Although the statute subsequently states: "or if no criminal charges or juvenile delinquency allegation was filed, in the county where the arrest occurred," it is IOCS's opinion this clause is merely an extension of the previous clause requiring the filing to take place in a Superior or Circuit Court.

## **Filing Fee**

The petitioner is required to pay the filing fee for a civil case, but the court may reduce or waive this fee if the petitioner is indigent. I.C. 35-38-9-8(d).

## **Case Type**

As with the other petitions filed under this chapter, all petitions filed under this section should be assigned a new XP case number. Admin. R. 8(B)(3).

## **Time Limits**

A petition may be filed at any point after the waiting period, but a petitioner may file only one (1) petition for expungement during the petitioner's lifetime. A petitioner may seek to expunge more than one (1) conviction at the same time, and multiple petitions for expungement filed in separate counties are considered one (1) petition for the purpose of this lifetime limitation if they are filed within one (1) three hundred sixty-five (365) day period. I.C. 35-38-9-9(i).

In rare circumstances the trial court may allow a petitioner to amend their petition to request the expungement of additional conviction, but the trial court must find:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

The only other exception to the lifetime limit is if the petitioner's petition was denied on its merits. See "What if the petition is denied?" below. I.C. 35-38-9-9(i).

## **Is Notice to the Prosecutor Required?**

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(e).

## Response from Prosecutor

The prosecuting attorney must respond to the petition no later than 30 days after receipt. If the prosecutor fails to respond, they waive any objection to the petition. I.C. 35-38-9-8(g).

## Victim Notification

Because the trial court does not exercise discretion over these expungements once the statutory requirements have been met, *see Taylor v. State*, 7 N.E.3d 362, 365 (Ind. Ct. App. 2014), the Prosecutor is not required to notify the victim of their rights. I.C. 35-38-9-8(f). But the victim may still submit an oral or written statement in support of or opposition to the expungement petition. I.C. 35-38-9-9(d).

A petitioner has no right to cross-examine the victim. *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

## What Must the Petitioner Include in the Petition?

The petition must include the following in their petition:

- Their full name and all other legal names or aliases;
- Their date of birth;
- Their addresses from the date of the offense through the date of the petition;
- The court case number, if available;
- An affirmation that no criminal investigation or charges are pending against them;
- An affirmation that they have not committed another crime within the waiting period;
- A list of all past convictions, collateral actions, the case numbers (if known), the date of convictions, any appeals, and the date that any appellate decisions were handed down;
- Their social security number;
- Their driver's license number;
- Date of their arrest(s), if applicable;

- Date of conviction;
- Affirmation that the required waiting period has elapsed or copy of the prosecutor's written consent to a shorter period; and
- A description of any other petitions filed under this chapter. I.C. 35-38-9-8(b).

The petitioner may include any other information they believe could assist the court in making its determination. I.C. 35-38-9-8(c).

### **What Must the Petitioner Show the Court?**

The petitioner must prove by a preponderance of the evidence:

- The waiting period has been met;
- The person has no charges pending;
- The person has paid all fines, fees, and court costs, and satisfied any restitution obligation; and
- The person has not been convicted of a crime in the previous eight (8) years (or less if the prosecutor has agreed to a shorter waiting period under I.C. 35-28-9-3(c)). I.C. 35-38-9-3(e).

The 2014 changes deleted the language requiring proof of successful completion of the sentence and supervised release.

### **Hearing**

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a) and (c).

### **Does the Court have Discretion with its Finding?**

No, the court shall grant the petition if all statutory conditions are met. I.C. 35-38-9-3(e). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

## Result if Petition is Granted

Provisions under I.C. 35-38-9-6 apply. If the court orders the misdemeanor conviction records and any other records from collateral actions expunged, the court's order will:

- Prohibit the department of correction, the bureau of motor vehicles, each law enforcement agency, and any other person who incarcerated/provided treatment/services to the petitioner under a court order from releasing the records without a court order. I.C. 35-38-9-6(a)(1).
- Order the state police department to seal the petitioner's expunged records contained in the central repository for criminal history information including related references to the case. I.C. 35-38-9-6(a)(2);
- Notify the Clerk of the Supreme Court to seal any records in the Clerk's possession that relate to the conviction, including any records concerning a collateral action. I.C. 35-38-9-6(a)(4);

Order the records of the sentencing court, a court conducting a collateral action, a juvenile court, the Court of Appeals, and the Indiana Supreme Court to be permanently sealed. The court records will be sealed and therefore excluded from public access. I.C. 35-38-9-6(b); and

- Request the Indiana Supreme Court and Court of Appeals of Indiana to redact the name of the petitioner named as an appellant or appellee in any opinion or memorandum decision and provide a redacted copy to any publisher or organization that publishes this information. However, the Indiana Supreme Court and Court of Appeals are not required to destroy any existing copy of an opinion or memorandum decision that includes the petitioner's name. I.C. 35-38-9-6(c).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

Additionally, granting an expungement restores the civil rights of a petitioner, including the right to vote, to hold public office, and to serve as a juror. I.C. 35-38-9-10(c).

It is unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation, or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b). In

applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" I.C. 35-38-9-10(d).

The petitioner must be treated as if they had never been convicted of the offense. I.C. 35-38-9-10(e).

The expungement case (the "XP" case number) and all documents filed in the case also become confidential when the petition is granted. I.C. 35-38-9-10(i).

### **Who has Access to the Sealed Records?**

The following individuals have a varying degree of access to records that have been sealed under this section:

#### Law Enforcement Officers

A law enforcement officer acting in the course of the officer's official duty has full access to all records sealed under I.C. 35-38-9-3. I.C. 35-38-9-6(a)(1). I.C. 35-31.5-2-185 defines "law enforcement officer" as:

A police officer (including a correctional police officer), sheriff, constable, marshal, prosecuting attorney, special prosecuting attorney, special deputy prosecuting attorney, the securities commissioner, or the inspector general;

A deputy of any of those persons;

- the state fire marshal, the executive director of the department of homeland security;

An investigator for the prosecuting attorney of the inspector general;

A conservation officer;

An enforcement officer of the alcohol and tobacco commission;

- a fire investigator of the department of homeland security;

An enforcement officer of the securities division of the secretary of state; or

A gaming agent employed under I.C. 4-33-4.5 or a gaming control officer

employed by the gaming control division under I.C. 4-33-20.

While prosecutors are listed in the general definition for “law enforcement officers” in the criminal code, specific provisions in the expungement statute govern when they have access to expunged records.

- Prosecuting Attorneys

Records sealed under this section may be disclosed to a prosecuting attorney when the record is needed to carry out the official duties of the prosecuting attorney and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(A).

**Unsealing and Resealing Records.** Additionally, a prosecuting attorney may submit a written application to a court that granted an expungement petition under this chapter to gain access to any records that were permanently sealed if the records are relevant in a new prosecution of the person. If the prosecuting attorney shows that the records are relevant for a new prosecution of the person, then the court shall order the record unsealed and give the prosecuting attorney access to the records. When the reasons to unseal no longer exist, the court shall order the records permanently resealed. However, if the records are admitted as evidence against the person in a new prosecution that results in the person’s conviction or are used to enhance a sentence imposed on the person in a new prosecution, the court is not required to reseal the records.

#### Defense Attorneys

Records sealed under this section may be disclosed to a defense attorney when the record is needed to carry out the professional duties of the defense attorney, and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(B).

#### Probation Officers

Records sealed under this section may be disclosed to a Probation Officer when the record is needed to prepare a presentencing report, and the disclosure is authorized by court order. I.C. 35-38-9-6(a)(3)(C).

#### FBI and Homeland Security

The Federal Bureau of Investigation and the Department of Homeland Security have access to the records sealed under this section if disclosure is required to comply with an agreement relating to the sharing of criminal history information. I.C. 35-38-9-6(a)(2)(D).

#### The Supreme Court and Board of Law Examiners for a Limited Purpose

The Supreme Court, the executive director, and members of the state board of law examiners may have access to the records sealed under this section if it is necessary to determine whether an applicant possesses the necessary good moral character for admission to the Bar. I.C. 35-38-9-6(a)(2)(E). Employees of the state board of law examiners also have access to sealed records when permitted by the rules adopted by the state board of law examiners.

#### Secure and Fair Mortgage Licensing Act

A person required to access expunged records to comply with the Secure and Fair Enforcement for Mortgage Licensing Act (12 U.S.C. 5101 et seq.) or regulations adopted under that federal law. I.C. 35-38-9-6(a)(2)(F).

#### BMV and the Federal Motor Carrier Administration

Records sealed under this section may be disclosed to the bureau of motor vehicles, the Federal Motor Carrier Administration, and the Commercial Driver's License Information System (CDLIS) if disclosure is required to comply with federal law relating to reporting a conviction for a violation of a traffic law. I.C. 35-38-9-6(a)(2)(G).

- Schools for the purposes of employment and/or to grant access or admission to the school to an applicant contractor or a contractor if the person, contractor, or applicant contractor is likely to have contact with a student enrolled in the school, regardless of the age of the student.
- The state police department, if disclosure is required for the purpose of expunging or marking as expunged records in the central repository for criminal history information.

#### Anyone Else

Anyone else requesting access to the records of the sentencing court, a juvenile court, the Court of Appeals, and the Supreme Court that have been sealed under this section must follow the procedures of Indiana Access to Court Records Rule 9 which requires a petition, notice, and hearing.

### **What if the Petition is Denied?**

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied, in whole or in part, the petitioner may refile a petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(j)

The court may allow a petitioner to amend their petition to request the expungement of additional conviction not listed in the first petition only if the court finds:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

### **Records that are Marked Expunged (Categories 4 and 5)**

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Major felony convictions are not "expunged" in the traditional sense. Instead, they remain accessible to the public, but the records must be marked and labeled as "expunged" and limits are placed on how the records may be used.

If the court issues an order granting a petition for expungement under sections 2 through 5, the court shall include in its order the information described in section 10(c)(the person's civil rights have been fully restored). I.C. 35-38-9-6(i).

## **Category 4: Felonies without Serious Bodily Injury or Death of Another Person. I.C. 35-38-9-4**

### **What Cases Qualify for Category 4?**

This category includes all eligible felonies that did not result in serious bodily injury or death to another person.

To be excluded, bodily injury/serious bodily injury must be an element of offense of which the petitioner was convicted. *See Allen v. State*, 159 N.E.3d 580 (Ind. 2020). Nevertheless, the permissive expungement statutes vests discretion in the trial court to deny expungement, thus the facts incident to the conviction may be considered. *Id.*

### **Waiting Period**

A petition may be filed under this section not earlier than the later of eight (8) years after the date of conviction or three (3) years from the completion of the person's sentence unless the prosecuting attorney agrees in writing to a shorter period. I.C. 35-38-9-4(c).

### **Where is the Petition Filed?**

The petition must be filed in a circuit or superior court in the county of conviction. I. C. 35-38-9-4(d). Although the statute subsequently states: "or if no criminal charges or juvenile delinquency allegation was filed, in the county where the arrest occurred," it is IOCS's opinion this clause is merely an extension of the previous clause requiring the filing to take place in a Superior or Circuit Court.

### **Filing Fee**

The petitioner is required to pay the filing fee for a civil case, but the court may reduce or waive this fee if the petitioner is indigent. I.C. 35-38-9-8(d).

### **Case Type**

As with the other petitions filed under this chapter, all petitions filed under this section should be assigned a new XP case number. Admin. R. 8(B)(3).

## **Time Limits**

A petition may be filed at any point after the waiting period, but a petitioner may file only one (1) petition for expungement during the petitioner's lifetime. A petitioner may seek to expunge more than one (1) conviction at the same time, and multiple petitions for expungement filed in separate counties are considered one (1) petition for the purpose of this lifetime limitation if they are filed within one (1) three hundred sixty-five (365) day period. I.C. 35-38-9-9(i).

In rare circumstances the trial court may allow a petitioner to amend their petition to request the expungement of additional conviction(s), but the trial court must find:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

The only other exception to the lifetime limit is if the petitioner's petition was denied on its merits. See "What if the petition is denied?" below. I.C. 35-38-9-9(i).

## **Is Notice to the Prosecutor Required?**

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(e).

## **Response from Prosecutor**

The prosecuting attorney must respond to the petition no later than 30 days after receipt. If the prosecutor fails to respond, they waive any objection to the petition. I.C. 35-38-9-8(g).

## **Victim Notification**

The prosecuting attorney must notify the victim of their rights under I. C. 35-40-6 at their last known address. I.C. 35-38-9-8(f). The victim may submit an oral or written statement in support of or opposition to the expungement petition. I.C. 35-38-9-9(d).

A petitioner has no right to cross-examine the victim. *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

### **What Must the Petitioner Include in the Petition?**

The petitioner must include the following in their petition:

- Their full name and all other legal names or aliases;
- Their date of birth;
- Their addresses from the date of the offense through the date of the petition;
- The court case number, if available;
- An affirmation that no criminal investigation or charges are pending against them;
- An affirmation that they have not committed another crime within the waiting period;
- A list of all past convictions, collateral actions, the case numbers (if known), the date of convictions, any appeals, and the date that any appellate decisions were handed down;
- Their social security number;
- Their driver's license number;
- Date of their arrest(s), if applicable;
- Date of conviction;
- Affirmation that the required waiting period has elapsed or copy of the prosecutor's written consent to a shorter period; and
- A description of any other petitions filed under this chapter. I.C. 35-38-9-8(b).

The petitioner may include any other information they believe could assist the court in making its determination. I.C. 35-38-9-8(c).

### **What Must the Petitioner Show the Court?**

The petitioner must prove by a preponderance of the evidence:

- The waiting period has been met;
- The person has no charges pending;

- The person has paid all fines, fees, and court costs, and satisfied any restitution obligation; and
- The person has not been convicted of a crime in the previous eight (8) years (or less if the prosecutor has agreed to a shorter waiting period under I.C. 35-28-9-4(c)). I.C. 35-38-9-4(e).

Since the 2014 amendments, a petitioner is no longer required to prove the successful completion of the sentence and supervised release.

## Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

## Does the Court have Discretion with its Finding?

Yes. Even after the petitioner has met the statutory requirements, the court maintains discretion to deny the petition. I.C. 35-38-9-4(e). The court's decision is reviewed for an abuse of discretion. *W.R. v. State*, 87 N.E.3d 30, 32 (Ind. Ct. App. 2017). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

## Result if Petition is Granted

The provisions under I.C. 35-38-9-7 apply. The conviction record, and any record relating to a collateral action, must be clearly and visibly marked as expunged. Despite the labelling, the records "remain public records," and are freely accessible by the public. I.C. 35-38-9-7(b).

While the expunged conviction cases remain public records and accessible, the actual expungement case (the "XP" case number) and all documents filed in the case become confidential when the petition is granted. I.C. 35-38-9-10(i). Granting the expungement

petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

The state police department, the BMV, and any other law enforcement agency in possession of records that relate to the conviction, or any collateral action must add an entry to the person's record of arrest, conviction, or sentence in the criminal history database stating that the record is marked as expunged. The BMV may still report convictions expunged under this section for a violation of traffic control law to the Commercial Driver's License Information System (CDLIS).

Additionally, granting an expungement restores the civil rights of a petitioner, including the right to vote, to hold public office, and to serve as a juror. I.C. 35-38-9-10(c).

It is unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation, or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b). In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" I.C. 35-38-9-10(d).

The petitioner must be treated as if they had never been convicted of the offense. I.C. 35-38-9-10(e).

### **Who has Access to Expunged Records?**

The public has full access to the criminal case, but the records must be clearly marked as expunged. I.C. 35-38-9-7(b).

### **What if the Petition is Denied?**

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied, in whole or in part, the petitioner may refile a petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(j)

The court may allow a petitioner to amend their petition to request the expungement of additional conviction(s) not listed in the first petition only if the court finds:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner's failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner's control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

## **Category 5: Remaining Eligible Felonies without Death of Another Person. I.C. 35-38-9-5**

### **What Cases Qualify for Category 5?**

Any remaining eligible felony not resulting in the death of another person, and only if the prosecutor has given written consent to have the criminal record expunged. I.C. 35-38-9-5(e)(5).

The following individuals may only seek expungement of a felony conviction under this section:

- an elected official, or an elected or appointed judicial officer, convicted of an offense, other than official misconduct, while serving the person's term or as a candidate for public office ;  
A person convicted of a felony that resulted in serious bodily injury to another person. I.C. 35-38-9-5(a); and
- a person convicted of official misconduct, if the person is not an elected official or an elected or appointed judicial officer.

To be excluded, bodily injury/serious bodily injury must be an element of offense of which the petitioner was convicted. *See Allen v. State*, 159 N.E.3d 580 (Ind. 2020). Nevertheless, the permissive expungement statutes vests discretion in the trial court to deny expungement, thus the facts incident to the conviction may be considered. *Id.*

## Waiting Period

A petition may be filed under this section not earlier than the later of ten (10) years after the date of conviction or five (5) years from the completion of the person's sentence unless the prosecuting attorney agrees in writing to a shorter period. I.C. 35-38-9-5(c).

## Where is the Petition Filed?

The petition must be filed in a circuit or superior court in the county of conviction. I. C. 35-38-9-5(d). Although the statute subsequently states: "or if no criminal charges or juvenile delinquency allegation was filed, in the county where the arrest occurred," it is IOCS's opinion this clause is merely an extension of the previous clause requiring the filing to take place in a Superior or Circuit Court.

## Filing Fee

The petitioner is required to pay the filing fee for a civil case, but the court may reduce or waive this fee if the petitioner is indigent. I.C. 35-38-9-8(d).

## Case Type

As with the other petitions filed under this chapter, all petitions filed under this section should be assigned a new XP case number. Admin. R. 8(B)(3).

## Time Limits

A petition may be filed at any point after the waiting period, but a petitioner may file only one (1) petition for expungement during the petitioner's lifetime. A petitioner may seek to expunge more than one (1) conviction at the same time, and multiple petitions for expungement filed in separate counties are considered one (1) petition for the purpose of this lifetime limitation if they are filed within one (1) three hundred sixty-five (365) day period. I.C. 35-38-9-9(i).

In rare circumstances the trial court may allow a petitioner to amend their petition to request the expungement of additional conviction(s), but the trial court must find:

- The petitioner intended in good faith to comply with the limitations;

- The petitioner’s failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner’s control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

The only other exception to the lifetime limit is if the petitioner’s petition was denied on its merits. See “What if the petition is denied?” below. I.C. 35-38-9-9(i).

### **Is Notice to the Prosecutor Required?**

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(e).

### **Response from Prosecutor**

The prosecuting attorney must respond to the petition no later than 30 days after receipt. If the prosecutor fails to respond, they waive any objection to the petition. I.C. 35-38-9-8(g).

The prosecuting attorney must consent in writing to the expungement of the petitioner’s criminal records. I.C. 35-38-9-5(c)(5).

### **Victim Notification**

The prosecuting attorney must notify the victim of their rights under I. C. 35-40-6 at their last known address. I.C. 35-38-9-8(f). The victim may submit an oral or written statement in support of or opposition to the expungement petition. I.C. 35-38-9-9(d).

A petitioner has no right to cross-examine the victim. *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

### **What Must the Petitioner Include in the Petition?**

The petition must include the following in their petition:

- Their full name and all other legal names or aliases;
- Their date of birth;
- Their addresses from the date of the offense through the date of the petition

- The court case number, if available;
- An affirmation that no criminal investigation or charges are pending against them;
- An affirmation that they have not committed another crime within the waiting period;
- A list of all past convictions, collateral actions, the case numbers (if known), the date of convictions, any appeals, and the date that any appellate decisions were handed down;
- Their social security number;
- Their driver's license number;
- Date of their arrest(s), if applicable;
- Date of conviction;
- Affirmation that the required waiting period has elapsed or copy of the prosecutor's written consent to a shorter period; and
- A description of any other petitions filed under this chapter. I.C. 35-38-9-8(b).

The petitioner may include any other information they believe could assist the court in making its determination. I.C. 35-38-9-8(c).

### **What Must the Petitioner Show the Court?**

The petitioner must prove by a preponderance of the evidence:

- The waiting period has been met;
- The person has no charges pending;
- The person has paid all fines, fees, and court costs, and satisfied any restitution obligation;
- The person has not been convicted of a crime in the previous ten (10) years (or less if the prosecutor has agreed to a shorter waiting period under I.C. 35-28-9-5(c)); and
- The prosecuting attorney has agreed in writing to the expungement of the person's criminal records. I.C. 35-38-9-5(e).

Since the 2014 amendments, a petitioner is no longer required to prove the successful completion of the sentence and supervised release.

## Hearing

Because the prosecuting attorney is required to consent to the expungement, no hearing is required under this section, but the court may exercise its discretion to hold a hearing on the petition. I.C. 35-38-9-9(a).

## Does the Court have Discretion with its Finding?

Yes. Even after the petitioner has met the statutory requirements, the court maintains discretion to deny the petition. I.C. 35-38-9-5(e). The court's decision is reviewed for an abuse of discretion. *W.R. v. State*, 87 N.E.3d 30, 32 (Ind. Ct. App. 2017). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

## Result if Petition is Granted

The provisions under I.C. 35-38-9-7 apply. The conviction record, and any record relating to a collateral action, must be clearly and visibly marked as expunged. Despite the labelling, the records "remain public records," and are freely accessible by the public. I.C. 35-38-9-7(b).

While the expunged conviction cases remain public records and accessible, the actual expungement case (the "XP" case number) and all documents filed in the case become confidential when the petition is granted. I.C. 35-38-9-10(i).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

The state police department, the BMV, and any other law enforcement agency in possession of records that relate to the conviction, or any collateral action must add an entry to the person's record of arrest, conviction, or sentence in the criminal history database stating that the record is marked as expunged. The BMV may still report convictions expunged under this section for a violation of traffic control law to the Commercial Driver's License Information System (CDLIS).

Additionally, granting an expungement restores the civil rights of a petitioner, including the right to vote, to hold public office, and to serve as a juror. I.C. 35-38-9-10(c).

It is unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation, or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b). In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" I.C. 35-38-9-10(d). However, while it is unlawful to refuse to grant or renew a professional license based on certain expunged convictions, that prohibition does not require any change or alteration to a prior disciplinary record or proceeding following an expungement. See *Whaley v. Med. Licensing Bd. of Indiana*, 184 N.E.3d 721 (Ind. Ct. App. 2022)

The petitioner must be treated as if they had never been convicted of the offense. I.C. 35-38-9-10(e).

Note "that the statute speaks only to the expungement of records, not the facts underlying the charged offense. Cf. *Whaley v. Medical Licensing Bd. of Ind.*, 184 N.E.3d 721, 725 n.2 (Ind. Ct. App. 2022) (observing that Indiana Code section 35-38-9-10, the 'anti-discrimination statute' only pertains to consideration of an expunged conviction ... and not 'to consideration of the facts underlying the conviction ....')." *Matter of A.B.*, 245 N.E.3d 644 (Ind. Ct. App. Sept. 4, 2024)

### **Who has Access to Expunged Records?**

The public has full access to the criminal case, but the records must be clearly marked as expunged. I.C. 35-38-9-7(b).

### **What if the Petition is Denied?**

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied, in whole or in part, the petitioner may refile a petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(j).

The court may allow a petitioner to supplement their petition to request the expungement of additional conviction(s) not listed in the first petition only if the court finds:

- The petitioner intended in good faith to comply with the limitations;
- The petitioner’s failure to include the additional conviction(s) was excusable neglect or due to circumstances beyond the petitioner’s control; and
- Allowing the amendment is in the best interest of justice. I.C. 35-38-9-9(k).

## Ancillary Expungement Issues

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As of July 1, 2021:

A criminal history provider also includes an entity that “regularly publishes criminal history information on the Internet or regularly makes criminal history information available through the Internet.” I.C. 24-4-18-2.

A criminal history provider (as defined in IC 24-4-18-2) that provides a criminal history report containing an expunged conviction is subject to the penalties described in IC 24-4-18-8.

See I.C. 35-98-9-12.

## “Expunging” Multiple Convictions

A petitioner may expunge multiple convictions at a time. All of the convictions for a single county must be consolidated into one petition and filed in a single XP case (with a single filing fee). A petitioner may seek expungement of convictions from other counties by filing consolidated petitions in those respective counties. The petitioner has one 365-day window in which to file their petitions in all counties in which they wish to seek expungement of convictions. Aside from the exceptions provided in I.C. 35-38-9-9(j) and (k), an individual may not seek an additional expungement of convictions or seek to

amend their petition to add convictions outside of that 365-day window. This limitation does not apply to expungement of arrests under I.C. 35-38-9-1. I.C. 35-38-9-9(i).

## **Recourse to a Petition for Misuse of an Expunged Conviction or Arrest Record**

Once a conviction or arrest record is sealed or expunged, it becomes unlawful discrimination (a Class C infraction) to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license, permit or certificate needed to engage in any activity/occupation/profession or discriminate in any other way because of the sealed/expunged record. I.C. 35-38-9-10(b) and (f). A person who feels he or she has been discriminated against by the unlawful use of an “expunged” conviction record may file a written motion of contempt with the court that authorized the expungement. Injunctive relief is also available.

## **Subsequent Arrest and/or Conviction**

If the petitioner is subsequently arrested or convicted for an unrelated offense, the expunged records may be considered by the court in determining the sentence for the new offense or for purposes of a habitual offender enhancement, enhancing the new offense based on a prior conviction, and may be admitted as evidence in the proceeding for the new offense as if the conviction had not been expunged. I.C. 35-38-9-10(e)(1), (2), and (3).

## **No waiver of Expungement in Pleas**

A person may not waive the right to expungement as part of a plea agreement. A purported waiver of the right to expungement is invalid and unenforceable as against public policy. This does not prohibit the finding of a waiver of the right to expungement based on a failure to comply with the provisions of I.C. 35-38-9. I.C. 35-38-9-11. But there is no standard given for finding a waiver of a right to expunge under I.C. 35-38-9-11(b), and the issue has not yet been litigated.

## **Other Statutory Methods to Expunge or Restrict Access to Court Records**

It is possible to expunge certain juvenile records under I.C. 31-39-8-1 et. seq. or IC 31-39-8-3.5 (automatic expungement of certain juvenile offenses), certain limited criminal history records under I.C. 35-38-5-5(b), and some protection orders under I.C. 34-26-7.5-1, et. seq.

It is also possible to restrict access to certain infraction records under I.C. 34-28-5-15.