

Indiana Law on Expungement and Sealing*



RESTORATION
OF RIGHTS
PROJECT

A comprehensive new law enacted in May 2013 authorized “expungement” of all but the most serious violent and sexual offenses, and in addition “sealing” of non-conviction records and minor offenses that have been expunged. *See* Ind. Code § 35-38-9.¹ (The term “expungement” is not defined except by its practical effect, which involves restricting the use of records that have been expunged, as further explained below.) Expungement is available after a waiting period that varies depending upon the seriousness of the offense, and it is mandatory in the case of non-conviction records, misdemeanors and less serious felonies, as long as eligibility criteria are met.² Even where expungement is discretionary, relief may not be denied based on non-statutory criteria where “all evidence presented to the trial court militated toward expungement.” *See Cline v. State*, No. 38A04-1512-XP-2221 (Ind. Ct. App., 2016), discussed *infra*.

Certain offenses (including sexual or violent offenses, misconduct in office, or two or more separate felonies involving unlawful use of a deadly weapon) are ineligible for expungement. In addition, anyone convicted of an ineligible crime is not eligible for expungement of an otherwise eligible crime. *See Burton v. State*, 10A01-1606-XP-1327 (Ind. Ct. App., 2017), interpreting § 35-38-9-3(b).

As explained below, non-conviction records and records of misdemeanors and minor felonies are “sealed” upon expungement, which limits public access without a court order. While the records of more serious felonies “remain public” after expungement, there are limits on the uses to which they may be put. A petitioner must have completed the terms of a court-imposed sentence, and remained crime-free during the eligibility waiting period.³ The right to seek expungement is not subject to waiver as part of a plea agreement. The law was amended in March 2014 and June 2015 to add certain procedural provisions and modify eligibility requirements.⁴

1. Eligibility for expungement

a. **Non-conviction records and vacated convictions:** After a one-year waiting period, non-conviction records (including non-adjudication records in juvenile cases), and records of convictions vacated on appeal may be expunged and sealed by the circuit or superior court in the county where the charges were filed, or, if no charges were filed, in the county of arrest. § 35-38-9-1. Once records are sealed under this provision, no information concerning the arrest or charges may be

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,” except for non-public internal law enforcement documents created at the time of arrest. § 35-38-9-1(f). All court records, including those of appellate courts, must be permanently sealed or redacted. *Id.* Official online versions of opinions and memorandum decisions of the supreme court and court of appeals must also be redacted.

- b. **Misdemeanors and low-level felonies:** After waiting periods ranging from five to eight years, records of most misdemeanors and Class D felonies or level 6 felonies may be expunged, and are then automatically sealed and, with some exceptions, may not be disclosed even to a prosecutor, unless ordered by the court. Ind. Code §§ 35-38-9-2, -3, -6(a).⁵ Sealing is mandatory for these offenses if eligibility requirements are met. *See* note 3, *supra*. If sealed records are unsealed upon request of a prosecutor to use in a subsequent prosecution of the person, or to a defense attorney, they shall be resealed at the earliest possible time if the person is not convicted, but need not be resealed if a new conviction results. § 35-38-9-6(d).
- c. **Felonies:** Most serious felonies may also be expunged, with certain exceptions (e.g., offenses involving sex or violence), after waiting periods of eight or ten crime-free years from date of conviction, or three-to-five years from completion of sentence, but they are not sealed. *See* § 35-38-9-4, -5. The records of more serious felonies “remain public” after expungement, although they must be “clearly and visibly marked or identified as being expunged.” § 35-38-9-7. Expungement of these more serious felonies is discretionary, (and in the case of offenses committed while holding elective office and offenses “resulting in serious bodily injury,” may not be granted without the prosecutor’s consent, *see* § 35-38-9-5), although “[t]he expungement statutes are inherently remedial and, as such, should be liberally construed to advance the remedy for which they were enacted.” *See Cline v. State, supra*, quoting from *Taylor v. State, supra*.⁶

2. Waiting periods

A petition for expungement may be granted only after completion of sentence (including payment of fines and restitution) and only if the person has no pending criminal charges or existing/pending drivers’ license suspensions. *See, e.g.* Ind. Code § 35-38-9-2(e). Expungement is not

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available to any person who has been previously convicted of two or more felonies involving unlawful use of a deadly weapon. §§ 35-38-9-2(b), -3(b)(6), -4(b)(6), -5(b)(4). Persons convicted of misdemeanors or the lowest level felonies are eligible to petition for expungement five years after conviction (unless the prosecutor consents to a shorter period). *Id.* Persons convicted of less serious felonies may apply for expungement eight years after conviction or three years after completion of sentence whichever is later (unless the prosecutor consents to a shorter period), if the crime was not committed while holding elective office and did not involve sex or violence. §§ 35-38-9-2 through -4. Felonies committed while holding elective office or involving serious bodily harm may be expunged ten years after conviction, or five years after completion of sentence. Offenses involving human trafficking, sex crimes, and certain violent crimes are not eligible for expungement. § 35-38-9-5(b).

3. Procedures, scope of relief, and filing fees

Procedures for filing an expungement petition with the sentencing court are set forth in Ind. Code § 35-38-9-8. Expungement may be granted without a hearing unless the prosecutor objects. § 35-38-9-9(a). A petitioner may seek to expunge multiple convictions in multiple courts, but all petitions must be filed within one year — and after that year has passed, a person may not file another petition in their lifetime. § 35-38-9-9(h). Two exceptions apply:

- If a petition for mandatory expungement is denied in whole or part, it may be amended and refiled at a later date once eligibility requirements are met, and amended petitions based on denial may only seek expungement of convictions included in the original petition. § 35-38-9-9(i) and
- After the one-year filing period has passed, a person may file an amended petition seeking expungement of an additional conviction if that conviction's omission from the original petition was the result of "excusable neglect" or "circumstances beyond the petitioner's control," § 35-38-9-9(j).

Those filing for expungement must pay the filing fees required for filing a civil action (\$141), though those fees may be reduced or waived for indigent petitioners. § 35-38-9-8(d). There is no filing fee for petitions to expunge non-conviction records. § 35-38-9-1(c). An expungement case, and all documents filed in the case become confidential *only after* the court issues the order granting the petition. § 35-38-9-10(i).

The Indiana courts have published sample petitions for expungement at <http://www.in.gov/judiciary/2706.htm>. Possible sources of counsel to assist in filing for expungement are also listed at this court website.

4. Effect of expungement

- **Restoration of rights:** Civil rights, including voting rights and eligibility for public office and jury service, are restored upon expungement, as are firearm

rights ("to the extent not prohibited by federal law"). § 35-38-9-10(b).

- **Discrimination:** "It is unlawful discrimination for any person to" refuse to employ, admit or license or "otherwise discriminate against" a person because of a conviction or arrest record that has been expunged or sealed. § 35-38-9-10(a). A person whose record is expunged shall be treated "as if the person had never been convicted of the offense," except that an expunged conviction may be considered in imposing sentence in the event of a subsequent conviction. § 35-38-9-10(d). Any person that so discriminates commits a Class C infraction and may be held in contempt by the court issuing the order of expungement or by any other court of general jurisdiction. § 35-38-9-10(e). The non-discrimination provisions have been held to apply to law enforcement as well as other employment. *See H.M. v. State*, No. 49A02-1604-MI-700 (Ind. Ct. App. 2016).
- **Conviction inquiry:** In any application for employment, license or "other right or privilege, a person may be questioned about a previous criminal record only in terms that exclude expunged convictions or arrests, such as: 'Have you ever been arrested for or convicted of a crime that has not been expunged by a court?'" § 35-38-9-10(c).
- **Negligent hiring:** In any action alleging negligence an expungement order may be introduced as evidence of due care, and expunged convictions are not admissible as evidence of negligence against a person who relied on the expungement order. § 35-38-9-10(f) and (g).
- **Public access to records:** The records of convictions that have been expunged and sealed are not generally available to the public, or to prosecutors without a court order. The records of convictions that have been expunged but not sealed "remain public," although they must be "clearly and visibly marked or identified as being expunged." § 35-38-9-7.
- **Credit reporting:** Convictions that have been expunged may not be reported by credit reporting companies. *See* § 24-4-18-6(a).
- **Exceptions:** Expungement orders do not affect sex offender registration or driver's license suspension. § 35-38-9-6(e), -7(b). Expungement orders do not automatically restore firearms rights to persons convicted of domestic violence, who must wait five years before petitioning the court for restoration.

B. Felony knocked down to misdemeanor

Certain Class D felonies committed prior to July 1, 2014, or level 6 felonies committed after that date, may be converted to Class A misdemeanors upon entry of judgment on a one-time basis (DV and child pornography offenses are ineligible). Ind. Stat. § 35-50-2-7(c). In addition, court may convert conviction of Class D felony (or level 6 felony) to a Class A misdemeanor upon petition of the convicted person three years after completion of sentence, upon satisfaction of

certain conditions and with the agreement of the prosecutor, as long as there has been no intervening conviction. Ind. Code § 35-50-2-7(d). Sex offenses and offenses involving violence or official corruption are not eligible. If a person whose Class D felony conviction has been converted to a Class A misdemeanor conviction under subsection (c) is convicted of a felony within five (5) years after the conversion under subsection (c), the prosecuting attorney may petition a court to convert the person's Class A misdemeanor conviction back to a Class D felony conviction. § 35-50-7-2 (e). Expungement and sealing of records that have been converted is governed by § 35-38-9-2, discussed above.

C. Expungement of pardoned convictions

The Indiana courts have recognized the court's ability for judicial expungement following a pardon (discussed above). See *State v. Bergman*, 558 N.E.2d 1111 (Ind. Ct. App. 1990).

D. Deferred prosecution/adjudication

Indiana law authorizes deferral or continuance of prosecution for drug abusers and alcoholics with no more than one prior conviction and no other charges pending. See Ind. Code §§ 12-23-6.1-1, 12-23-7.1-1 et seq. The defendant "must waive a jury trial and consent to a trial by the court or must enter a guilty plea, with the general finding to be entered by the court to be deferred until the time that prosecution may be resumed." § 12-23-7.1-2. If the treatment is completed successfully, the charges must be dismissed. § 12-23-7.1-11. See also *State v. Nix*, 833 N.E. 2d 541 (Ind. Ct. App. 2005). With the consent of the defendant and the prosecuting attorney, a court may defer prosecution for up to one year for a defendant charged with a misdemeanor or infraction in which the use of alcohol or drugs was a contributing factor or material element of the offense or the defendant's mental illness was a contributing factor, Ind. Code § 12-23-5-1 et seq. The court may order the defendant to satisfactorily complete an alcohol or drug treatment program, undergo treatment for mental illness, or satisfy other conditions imposed by the court during this deferral period. § 12-23-5-2. If the defendant fulfills the conditions set forth by the court, the court "shall" dismiss the charges. § 12-23-5-4. A defendant is not eligible for deferral under this section if the offense giving rise to the prosecution involved a death or serious bodily injury, the defendant has at least two prior felony convictions, or other criminal proceedings (not arising out of the same incident) alleging the commission of a felony are pending against the defendant. § 12-23-5-7.

E. Juvenile adjudications

Expungement of juvenile adjudications ("true bills") is governed by Ind. Code § 31-39-8-2. (Juvenile proceedings not resulting in a "true bill" may be expunged under the provisions of § 35-38-9-1.) At any time, a person may petition the juvenile court to expunge all records pertaining to juvenile delinquency proceedings. *Id.* In reviewing the petition, the court considers numerous factors, including

the nature of the offense, case disposition, and the person's current status. § 31-39-8-3. Upon a court order of expungement, all records are destroyed or given to the petitioner. § 31-39-8-6. There exists no statutory authority to seal a juvenile record.

Notes

- * This description is taken from the April 2018 version of the Indiana profile from the Restoration of Rights Project. See <http://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/>.
 - 1 The process leading to enactment of this comprehensive scheme is described by the legislation's chief sponsor, Rep. Jud McMillin, in *Indiana's new law the product of 'many many compromises,'* Collateral Consequences Resource Center, December 15, 2014, <http://ccresourcecenter.org/2014/12/15/indianas-new-expungement-law-product-many-many-compromises/> [reprinted in this issue at pp. 261-263].
 - 2 The Indiana Court of Appeals has held that the word "shall" in § 35-38-9-2 left the court with no discretion to withhold expungement of a misdemeanor sex offense, notwithstanding the objections of the victim. *Taylor v. State*, 7 N.E. 3d 362 (Ind. Ct. App. 2014). The same mandatory term appears in §§ 35-38-9-1 (non-conviction records) and 35-38-9-3 (Class D felonies). The *Taylor* court pointed out that a victim's objections may be weighed only where expungement is discretionary, as is the case with more serious felonies under §§35-38-9-4 and -5.
 - 3 See *Marshall v. State*, 52 N.E.3d 41 (Ind. App. 2016), interpreting § 35-38-9-8(b)(6) to make "commission" of a crime a disqualifying event, although the statute itself refers to "conviction." The petitioner in *Marshall* had admitted to committing as a condition of a pre-trial diversion for Driving While Suspended.
 - 4 The 2014 amendments specify where a petition for expungement must be filed, provide that expungement proceedings may be closed (including to victims), change a petitioner's burden of proof from "clear and convincing" to "preponderance," remove a prohibition against a waiver or reduction of the filing fee for an indigent person, grant a defense attorney and a probation department access to expunged records if authorized by court order, and allow a court to accept filing of a subsequent petition for expungement that includes convictions not named in the original petition under certain circumstances. The 2014 amendments reduced waiting periods while requiring a petitioner to have completed the terms of the court-imposed sentence, and they added the prohibition on waiving the right to expungement as part of a plea agreement. They specify that access to expunged records will be granted to: (1) the supreme court and the state board of law examiners to determine a person's fitness for admission to the bar; and (2) a person required to access expunged records to comply with the federal Secure and Fair Enforcement for Mortgage Licensing Act. Finally, they specify the procedure to regain the right to possess a firearm by a person convicted of a misdemeanor crime of domestic violence after five years.
- The 2015 amendments disqualify any person convicted of two or more felonies involving a deadly weapon from seeking expungement of any conviction record; expand expungement eligibility to cover records of criminal charges and juvenile allegations instead of just arrest records; and expand protection of non-conviction records by requiring the courts to seal and redact their own non-conviction records. The 2015 amendments also added § 35-38-9-8.5, which clarifies the law's application to older offenses that were subject to indeterminate sentences. Eligibility for those offenses is now determined by an offense's current felony or misdemeanor classification. See P.L. 142-2015.

⁵ Exceptions allow for records to be disclosed to the state board of law examiners, persons required to access the records under the federal Mortgage Licensing Act, certain state and federal motor vehicle agencies, and the FBI and Department of Homeland Security in certain situations. § 35-38-6(a)(2).

⁶ In *Cline* [reprinted in this issue at pp. 264–265], the petitioner sought to expunge her 13-year-old felony forgery and methamphetamine distribution offenses after she had been released from probation and remained crime-free for 5 years, been consistently employed, and achieved a number of job-related credentials. The lower court denied the petition based on the nature of the conviction, the severity of the offenses, and the “relatively short” duration since release, factors not identified in the statute. In rendering its decision, the lower court also expressed particular disdain for methamphetamine offenders such as Cline. The Court of Appeals recognized that the lower court had discretion to deny a petition based on factors not listed in the statute, but found that the lower court abused that discretion since “all evidence presented to the trial court militated toward expungement,” and remanded the case:

Cline committed her offenses during her youth and has satisfied the statutory prerequisites for expungement. Beyond that, Cline has consistently been employed, and has obtained an Associate’s Degree in Business Administration, a CPR license, and a ServSafe certification. She testified that she had been promoted from food server to store management, but lost her job when store owners learned of her criminal record. Cline expressed a desire to return to management, a prospect more feasible with record expungement. The prosecutor offered no evidence or argument in opposition to expungement.

But see W.R. v. State of Indiana, 17A03-1703-XP-571 (Ind. Ct. App., 2017), affirming denial of expungement for two felony drug dealing convictions where the statutory requirements were met and the petitioner “led a generally successful life” but was subsequently convicted of a DUI misdemeanor, which was expunged in the same case. The court stressed the discretionary nature of the statute and distinguished the case from *Cline*, noting the “troubling articulation” of the lower court’s reasoning in *Cline* along with the fact that Cline had no subsequent convictions.