

Expungement

Digest for Judges

I.C. 35-38-9

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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.

Expungement Case Type

Under Ind. Admin. Rule 8(B)(3), expungement cases are filed using the XP case type.

Confidentiality of Expungement Documents

The petition, case file, and all documents filed in the expungement case are open to the public until an order granting the expungement is issued. Pursuant to Ind. Access to Court Records Rule 5(c)(1), because the petition must contain the petitioner's SSN, the confidential information shall be filed on green paper (if paper filing) or filed as a confidential document (if e-filed). A separate document with the confidential information redacted shall be filed on white paper (if paper filing) or filed as a public document (if e-filing). A separate ACR Form, found in the Appendix to the Ind. Access to Court Records Rules, identifying the information excluded from public access and the Rule 5 grounds for exclusion shall also be filed.

If the expungement is granted, the expungement case file and all records under the expungement case number become a confidential case file under A.C.R. Rule 5(A)(1); I.C. 35-38-9-10(i).

If the expungement is denied, the expungement case file and all records under the expungement case number remain publicly accessible. The denial order is distributed on white paper.

The expungement statute is a restricted use and sealing statute, court records are not deleted or destroyed under Ind. Code 35-38-9.

Records Exempt from Alteration

I.C. 35-38-9-0.6 exempts from alteration: An internal record made by a:

- law enforcement agency; or
- public defender agency;

that is not intended for release to the public.

- A nonpublic record that relates to a diversion or deferral program; or
- A disciplinary record or proceeding as it relates to a certification, or public entity.

Convictions and Persons Ineligible for Expungement

Persons Ineligible

Persons who have been convicted of two (2) or more unrelated felony offenses that involved the use of a deadly weapon, and sex or violent offenders may not petition for expungement. I.C. 35-38-9-2(b), 35-38-9-3(b)(6), 35-38-9-4(b)(4), 35-38-9-4(b)(7), 35-38-9-5(b)(4).

However, these, and all offenders, may petition for expungement of records that pertain to an arrest that did *not* result in conviction, a juvenile adjudication even if the arrest, criminal charge, or juvenile delinquency allegation resulted in an adjudication for an infraction, or resulted in a conviction or juvenile adjudication and the conviction or adjudication was expunged under sections 2 through 5 of this chapter, or was later vacated. I.C. 35-38-9-1(a)(1)(A)(B).

Persons not currently participating in a pretrial diversion program unless the prosecuting attorney authorizes the person to petition for an expungement.

Persons who are not a sex or violent offender and have not been convicted of two (2) or more unrelated felony offenses that involved the use of a deadly weapon, even if precluded from expunging felony convictions, may petition for expungement of

misdemeanor convictions. See I.C. 35-38-9-2(b).

Convictions Ineligible

Offenses described in:

- I.C. 35-42-1 (Homicide),
- I.C. 35-42-3.5 (Human and Sexual Trafficking),
- I.C.35-42-4 (Sex Crimes),
- Official Misconduct under I.C. 35-44.1-1-1, and
- a felony that resulted in death to another person

are not eligible for expungement.

Statutory Procedure

Section 1 Automatic Expungements:

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 justify 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.

Section 1 Expungements that Require a Petition:

A filing fee is not required for Section 1 expungement petitions. The petition must be verified and include the following information, required by I.C. 35-38-9-1(e):

- Petitioner:
 - DOB;
 - SSN;
 - Driver's license number; and
 - Aliases or other names;
- Information pertaining to each arrest or charging event, when known:
 - Date of arrest, criminal charges, or juvenile delinquency allegation;
 - County in which arrest occurred or where charges or allegations were filed;
 - Law enforcement agency employing the arresting officer;
 - Court which charges or allegations were filed;
 - Case or cause number; and
 - List of each criminal charge filed and its disposition.

A copy of all Section 1 petitions is served on the prosecuting attorney by the court. I.C. 35-38-9-1(f).

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).

Section 2, 3, 4, and 5 Expungement Petitions (Convictions)

All petitions seeking expungement of a conviction are assessed the civil filing fee unless waived due to the indigency of the petitioner.

A petitioner may file a Section 2 – 5 expungement petition only once in his or her lifetime. I.C. 35-38-9-9(i). To be considered “one petition,” petitions filed in separate counties for offenses committed in those counties must be filed within one 365-day period.

A petition for expungement of a conviction may expunge more than one conviction at the same time. The petitioner is required to consolidate all convictions from the same county in a single petition, and to address convictions from separate counties, a petition is filed in each county. I.C. 35-38-9-9(h).

The Section 2 – 5 expungement petition must be verified, describe any other petitions filed under the respective chapter, and set forth the information listed in I.C. 35-38-9-8(b), including:

- Petitioner’s:
 - Full name, other legal names, or aliases;
 - DOB;
 - SSN;
 - Driver’s license number;
 - Addresses from date of commission of first offense to date of petition;
- List of all convictions and collateral actions:
 - Cause number;
 - Date of conviction;
 - Date of appellate opinion, if applicable.

A “collateral action” means 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. I.C. 35-38-9-0.5.

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.

- Affirmation that no criminal investigation or charges are pending;
- Information pertaining to each conviction:
 - Case or cause number;
 - Date of arrest;
 - Date of conviction;
- Affirmations that:
 - Petitioner has not committed a crime within the required waiting period (I.C. 35-38-9-8(b)(6)); and
 - The required waiting period has elapsed (unless a copy of the prosecuting attorney's written consent to a shorter period is attached) (I.C. 35-38-9-8(b)(9)).

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

Prosecutor's Duties (Section 2 – 5 Petitions Only)

The prosecuting attorney is required to respond to the petition within thirty (30) days of its receipt. If the prosecutor does not reply on a timely basis, objections to the petition are waived and the trial court may consider the petition pursuant to I.C. 35-38-9-9. See I.C. 35-38-9-8(g).

If the prosecutor objects to the petition, the prosecutor is required to file the reasons for objecting with the trial court and serve a copy of the objections on the petitioner.

I.C. 35-38-9-9(c).

The prosecuting attorney is required to inform the victim of the victim's rights pursuant to I.C. 35-40-6 only when the petition involved convictions under section 4 and 5. The

expungement statute does not require notification of the victim for convictions for which expungement is not discretionary. I.C. 35-38-9-8(f).

“[E]xpungement petitioners do not have the right to cross-examine victims who provide victim statements as authorized by statute.” *Keene v. State*, 118 N.E.3d 801, 803–04 (Ind. Ct. App. 2019), *trans. denied*.

Hearing on Expungement Petition

A court may summarily deny an expungement petition without a hearing if the petition does not meet the requirements of I.C. 35-38-9-8 or facts contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

A court may summarily grant an expungement petition that meets the pleading requirements without a hearing if the prosecutor does not file a response or objection within thirty (30) days. I.C. 35-38-9-9(a).

If the prosecutor filed a timely written objection or response to the expungement petition, the court is required to set the matter for hearing but no sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(c).

The petitioner must prove by a preponderance of the evidence that the facts alleged in the verified petition are true. I.C. 35-38-9-9(d). At the time of the hearing, the victim may submit an oral or written statement in support of or in opposition to the petition. I.C. 35-38-9-9(d).

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).

Refiling Expungement Petitions

If an expungement petition is denied, in whole or in part, for reasons other than the court’s exercise of discretion, the petitioner may refile, in whole or in part, with respect to one (1) or more convictions. I.C. 35-38-9-9(j). Except as provided in I.C. 35-38-9-9(k), a refiled expungement petition may not include any convictions not contained in the original petition.

If an expungement petition pursuant to Sections 4 or 5 is denied due to the court’s exercise of its discretion, the petitioner may not refile until three (3) years has elapsed. I.C. 35-38-9-9(j).

A trial court *may* permit a petitioner to file an amended petition for expungement with

respect to convictions not included in the original petition only if the court finds:

- Petitioner intended in good faith to comply with I.C. 35-38-9-9(h) and (i);
- Petitioner’s failure was due to excusable neglect or circumstances beyond the petitioner’s control; and
- Permitting the petitioner to amend the expungement petition is in the best interests of justice. I.C. 35-38-9-9(k).

If the statute is amended after expungement has been granted in a manner which provides greater relief to a petitioner, the petitioner may file a petition for a supplemental order of expungement in the court that granted the expungement which “succinctly set forth the relief the petitioner seeks.” I.C. 35-38-9-9(l).

- If the court finds that the petitioner was granted relief prior to the amendment, and that the petitioner is otherwise entitled to the relief set forth in the amendment, the court shall grant the supplemental petition consistent with the amendment. I.C. 35- 38-9-9(l).

Granting an Expungement Petition: Required Findings

Section 1 Expungement Petitions

These findings apply only to petitions brought under I.C. 35-38-9-1 involving arrests, criminal charges, or juvenile adjudications without criminal convictions.

A court *shall* grant a Section 1 expungement petition if:

- the petitioner was arrested, charged with an offense, or alleged to be a juvenile delinquent;
- the arrest, criminal charge, or delinquency allegation:
 - did not result in a conviction or juvenile adjudication; or
 - resulted in a conviction/juvenile adjudication that was vacated;
- one (1) year has passed, or earlier with written consent of the prosecuting attorney, since:
 - the later of the date of arrest, criminal charge, or juvenile delinquency allegation; or
 - the date the opinion vacating the conviction or juvenile adjudication became final; or
 - one (1) year has not passed, but the prosecuting attorney has agreed in writing to an earlier time;
- the person is not currently participating in a pre-trial diversion program; and
- criminal charges are not pending against the person.

An order issued under this section should clearly state that the records are expunged

pursuant to I.C. 35-38-9-1(h). This will instruct the clerk and all agencies required to act upon the order how to handle the records in their possession, this section also applies to an expungement order issued without a petition (automatic expungement).

Section 2 Expungement Petitions

These findings apply only to petitions brought under I.C. 35-38-9-2 involving “Section 2” convictions: misdemeanors and Class D felonies and Level 6 felonies reduced to misdemeanors.

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.

A court *shall* grant a Section 2 petition if it finds, by a preponderance of the evidence that:

- petitioner was convicted of an offense that was sentenced as a misdemeanor;
- petitioner has not been convicted of two (2) or more unrelated felonies that involved the use of a deadly weapon;
- five (5) years have elapsed since
 - the date of petitioner’s conviction; or
 - the date of petitioner’s conviction, but the prosecuting attorney has agreed in writing to a shorter time period;
- criminal charges are not pending against the petitioner;
- petitioner has paid all fines, fees, and court costs and satisfied any restitution obligation placed on the petitioner as part of the sentence;
- petitioner has not been convicted of a crime within
 - the previous five (5) years; or
 - time period agreed upon in writing by the prosecuting attorney.

An order granting a Section 2 expungement petition should clearly state that the records are expunged pursuant to I.C. 35-38-9-6. This will instruct the clerk and all agencies who are required to act upon the order how to handle the records in their possession.

Section 3 Expungement Petitions

These findings apply only to petitions brought under I.C. 35-38-9-3 involving “Section 3” convictions: Class D felonies and Level 6 felonies with no bodily injury.

A court *shall* grant a Section 3 petition if it finds, by a preponderance of the evidence:

- petitioner was convicted of a felony offense that did not result in bodily injury to another person;
- the act for which the petitioner was convicted does not otherwise fall under I.C. 35-38-9-3(b);
- eight (8) years
 - have elapsed since the date of petitioner’s conviction; or
 - the prosecuting attorney has agreed in writing to a shorter time period;
- charges are not pending against the petitioner;
- petitioner has paid all fines, fees, and court costs and satisfied any restitution obligation placed on the petitioner as part of the sentence;
- petitioner has not been convicted of a crime within
 - the previous eight (8) years; or
 - the time period agreed upon in writing by the prosecuting attorney.

An order granting a Section 3 petition should clearly state that the records are expunged pursuant to I.C. 35-38-9-6. This will instruct the clerk and all agencies who are required to act upon the order how to handle the records in their possession.

Section 4 Expungement Petitions

These findings apply only to petitions brought under I.C. 35-38-9-4 involving “Section 4” convictions: felonies with no serious bodily injury.

A court *may* grant a Section 4 petition if it finds, by a preponderance of the evidence:

- Petitioner was convicted of a felony offense that did not result in serious bodily injury to another person;
- The act for which the petitioner was convicted does not otherwise fall under I.C. 35-38-9-4(b);
- eight (8) years have elapsed since the date of petitioner’s conviction; or
- three (3) years have elapsed since the date on which petitioner completed the sentence; or
- the waiting period required under I.C. 35-38-9-4(c) has not elapsed, but the prosecuting attorney has agreed in writing to a shorter time period;
- charges are not pending against the petitioner;
- petitioner has paid all fines, fees, and court costs and satisfied any restitution obligation placed on the petitioner as part of the sentence;
- petitioner has not been convicted of a crime within
 - the previous eight (8) years; or
 - the time period agreed upon in writing by the prosecuting attorney.

A person may be eligible for expungement under the Permissive Expungement Statute (Section 4) unless the felony **for which he stands convicted** resulted in serious bodily injury to another person; that the facts of the incident leading to the conviction show serious bodily injury is not enough to exclude a person from eligibility for expungement. *Allen v. State*, 159 N.E.3d 580 (Ind. 2020) (Emphasis added). However, in a permissive expungement under Section 4, a court may consider the facts of the crime, including whether there was injury, in deciding to grant the expungement. *Allen v. State*, 181 N.E.3d 454 (Ind. Ct. App. 2022), *trans. denied*.

An order granting a Section 4 petition should clearly state that the records are expunged pursuant to I.C. 35-38-9-7. This will instruct the clerk and all agencies who are required to act upon the order how they are to handle the records in their possession.

Section 5 Expungement Petitions

These findings apply only to petitions brought under I.C. 35-38-9-5 involving “Section 5” convictions: remaining non-excluded felonies.

A court *may* grant a Section 5 petition if it finds, by a preponderance of the evidence, that:

- petitioner was convicted of a felony offense that does not fall under I.C. 35-38-9-5(b);
- ten (10) years have elapsed since the date of petitioner’s conviction; or
- five (5) years have elapsed since the date on which petitioner completed the sentence; or
- the waiting period required under I.C. 35-38-9-5(c) has not elapsed, but the prosecuting attorney has agreed in writing to a shorter time period;
- charges are not pending against the petitioner;
- petitioner has paid all fines, fees, and court costs and satisfied any restitution obligation placed on the petitioner as part of the sentence;
- petitioner has not been convicted of a crime within the
 - previous ten (10) years; or
 - time period agreed upon in writing by the prosecuting attorney;
- the prosecuting attorney has consented in writing to the expungement of the person’s criminal records.

An order granting a Section 5 expungement petition should clearly state that the records are expunged pursuant to I.C. 35-38-9-7. This will instruct the clerk and all agencies required to act upon the order how to handle the records in their possession.

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).

Distribution of Expungement Orders

All expungement orders are distributed to the petitioner, the petitioner's attorney, and the county prosecutor's office.

Expungement orders should also be distributed to all entities in possession of records related to the expunged conviction(s) and any records concerning a collateral action, including:

- County Clerk;
- County Sheriff's Department;
- Department of Correction;
- BMV;
- All service providers and law enforcement agencies who are in possession of records

related to expunged cases;

- The attorney for a local law enforcement entity required to act under the order (required by Trial Rule 4.6(A)(4));
- The Indiana State Police
Attn: Records Division
100 N. Senate Ave., Rm. N301
Indianapolis, IN 46204
Expungement@isp.in.gov
- Other entities may also possess records related to expunged cases. If any of the below circumstances apply, the expungement order should also be sent to:
 - **if a no contact order was issued in one or more of the expunged cases.**
Indiana Supreme Court, Office of Court Services—Court Technology
215 N. Illinois St., Suite 700
Indianapolis, IN 46204
 - **if one or more of the expunged cases was appealed**
Clerk of the Appellate Court
216 State House
200 West Washington Street
Indianapolis, IN 46204
 - **if Petitioner's Official Driver Record contains entries related to any of the**

expunged cases

Indiana Bureau of Motor Vehicles
IGC North, Room 402
100 North Senate Avenue
Indianapolis, IN 46204
courtdocuments@bmv.in.gov

- **if Petitioner had a conviction in any of the expunged cases and was sentenced to executed time in the DOC**

Indiana Department of Correction
Attn: Records Division
302 W. Washington Street,
Room E-334
Indianapolis, IN 46204
Leah Tyler
lyler1@idoc.in.gov

- **if the XP order applies to court records stored under a separate MC cause number that pertains to a probation that was transferred to another county**

Clerks of Other Counties