

A FRESH START

*Wisconsin's Atypical Expungement
Law and Options for Reform*



WISCONSIN
POLICY FORUM

ABOUT THE WISCONSIN POLICY FORUM

The Wisconsin Policy Forum was created on January 1, 2018, by the merger of the Milwaukee-based Public Policy Forum and the Madison-based Wisconsin Taxpayers Alliance. Throughout their lengthy histories, both organizations engaged in nonpartisan, independent research and civic education on fiscal and policy issues affecting state and local governments and school districts in Wisconsin. The Wisconsin Policy Forum is committed to those same activities and to that spirit of nonpartisanship.

PREFACE AND ACKNOWLEDGMENTS

This report was undertaken to provide policymakers, criminal justice system leaders, workforce development leaders, and citizens with insight into how Wisconsin's expungement law compares with those in other states. We hope state policymakers will use the report's findings to inform discussions during upcoming policy debates.

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EXECUTIVE SUMMARY

In Wisconsin, an estimated 1.4 million individuals have criminal records, which may pose a major impediment to securing a job.ⁱ Meanwhile, with unemployment at its lowest point since 2000 and the baby boom generation retiring, businesses and workforce development leaders are looking for ways to remove obstacles for jobseekers. This report considers expungement as one strategy for doing so.

When a criminal case record is expunged, it is sealed from public access unless there is a court order to unseal it. In Wisconsin, an expungement order applies both to paper and electronic court records. Information about expunged cases is removed from the Wisconsin Circuit Court Access (WCCA) website, which is used by many employers to screen job applicants.¹ Criminal records only are eligible for expungement in certain cases based on criteria laid out in the Wisconsin statutes.ⁱⁱ

This report examines Wisconsin's expungement law and compares it with similar laws in other states. We also present possible changes for state policymakers to consider that could expand access to expungement and analyze their potential impact on case eligibility.

Key findings of our analysis include the following:

Wisconsin's expungement law contains several uncommon features relative to those in other states.

Our review found no other state where judges are required to make expungement decisions at sentencing (rather than after sentence completion) or where closed cases (those that already have been decided) are not eligible for expungement. In addition, Wisconsin is among a handful of states that limit expungement eligibility only to young offenders (under age 25) and that do not expunge cases that end in acquittals or dismissed charges. Overall, Wisconsin appears to have a stricter expungement law than all of its neighboring states except Iowa.

Modifying any of the atypical features of Wisconsin's expungement law could increase the number of eligible cases substantially. In the short term, the largest change would be allowing individuals to petition for expungement of closed cases. We found 30,638 closed Milwaukee County conviction cases between 2006 and 2017 that meet Wisconsin's current eligibility criteria but remain on the WCCA website. We looked at Milwaukee County because it has the largest caseload in the state. It is difficult to predict how many individuals would petition for expungement of closed cases in a given year if it were allowed.

Our analysis shows reforming Wisconsin's expungement law could reduce the prevalence of a common employment barrier among the state's shrinking pool of jobseekers.

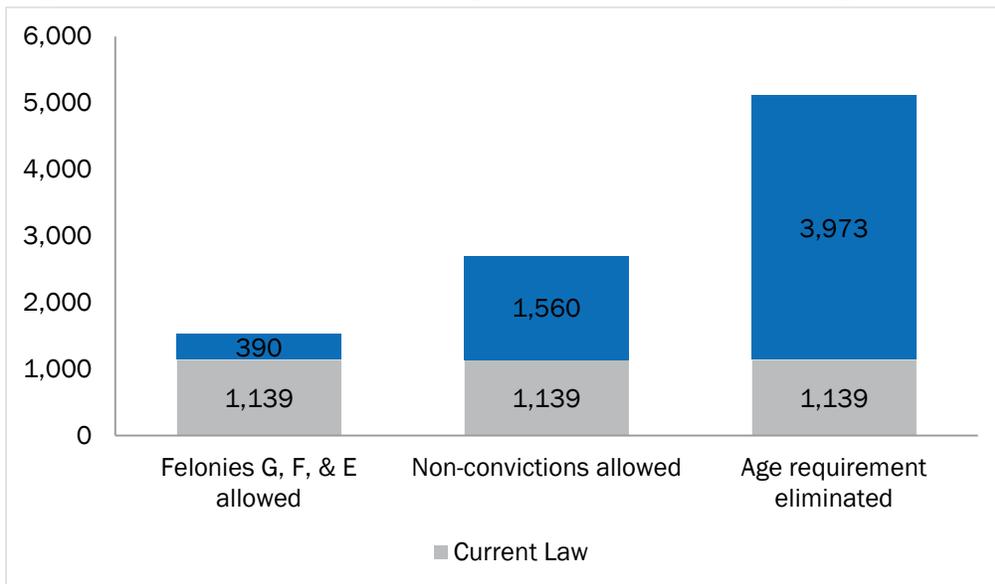
For several other possible changes, we are able to project the number of additional cases that could become eligible in Milwaukee County in 2019 based on recent trends. As shown in the chart below, allowing individuals age 25 and over to expunge the same types of conviction records as younger

¹ Public access to court records is provided online through WCCA, which is the website for the Consolidated Court Automation Programs (CCAP) case management system.

adults could have a large impact on case eligibility. Enabling individuals to expunge non-conviction records, such as dismissed charges or acquittals, also could have a large impact and could address a fairness issue, as current state law allows some conviction records to be expunged but does not address non-convictions.

Another option would be to allow more felonies to be eligible for expungement. Currently, only the two lowest classes of non-violent felonies are eligible (Class I and Class H), which carry a maximum sentence of six years. Allowing expungement of Class G, F, and E felonies (maximum sentence of 15 years) likely would have a more modest impact on case eligibility than the other changes considered in our analysis.

Projected additional Milwaukee County cases that could become eligible in 2019



Source: Wisconsin Policy Forum analysis of WCCA data

To put these numbers in perspective, only 506 cases were actually expunged in Milwaukee County between 2010 and 2016 according to an analysis by the Badger Institute, a free-market think tank. That is an average of less than 100 cases per year.ⁱⁱⁱ

In addition, a major caveat to our findings is that repeat offenders may not be able to clear their records entirely. For example, our analysis of a sample of 573 ex-offenders from Milwaukee County found 21.8% had been convicted of another more serious crime currently not eligible for expungement.

Expanding access to expungement would have workload and fiscal implications for state and county governments in Wisconsin that would need to be carefully managed. Shifting expungement decision-making until after sentence completion or expanding eligibility in a major way would result in increased demands on state courts and county clerks of court offices. Depending on how the law is structured, such changes also could affect other parts of the criminal justice system, including district attorney and public defender offices.

A key question would be whether court hearings should be required for all expungement petitions; or whether, instead, judges should be able to decide when hearings are needed. A vast increase in hearings could place a significant time and cost burden on the courts and other components of the criminal justice system, but it may be possible to allow judges to approve or reject many cases based on specified criteria without hearings.

Another variable that could have a major impact on state and local resources is whether there should be a statutory time limit for processing expungement petitions. The right balance would need to be found to process cases in a timely manner without overwhelming court caseloads.

Lawmakers will have to grapple with legitimate policy questions regarding whether employers and the public *should* have access to information about the criminal backgrounds of individuals. But our analysis shows reforming Wisconsin's expungement law could reduce a common employment barrier among the state's shrinking pool of jobseekers.

In recent years, many states have made substantive policy changes aimed at expanding the pool of individuals who are offered a "second chance" to build productive lives after fulfilling the conditions of a past criminal conviction. We hope this research provides insight to policymakers as Wisconsin considers similar proposals.

INTRODUCTION

In 2015, the Wisconsin Policy Forum analyzed the prevalence of several common barriers to employment among roughly 8,700 participants of major workforce development programs in Milwaukee County.^{iv} A striking finding was that 42% reported having a criminal background, which can be a major impediment to securing a job. Statewide, an estimated 1.4 million individuals have criminal records.^v

With unemployment in Wisconsin at its lowest point since 2000 and the baby boom generation continuing to enter retirement, businesses and workforce development leaders are looking for ways to reduce obstacles preventing unemployed jobseekers from participating in the workforce. This report examines expungement as one strategy for doing so.

When a criminal case record is expunged, the court seals the file and will not allow public access to it without a court order. In Wisconsin, an expungement order applies both to paper and electronic court records. Information about an expunged case is automatically removed from the Wisconsin Circuit Court Access (WCCA) website, which averages about one million page views per day, including many by employers screening job applicants.²

Expungement is granted only in certain cases based on criteria laid out in the Wisconsin statutes.^{vi} Roughly 2,000 criminal cases are expunged in Wisconsin each year.^{vii}

While expungement cannot make up for time spent incarcerated, which often sets individuals back in developing valuable skills and work experience, it nevertheless may represent a way to ease ex-offenders' paths to employment. Consequently, this report seeks to answer the following questions:

- *To what extent does state law in Wisconsin impose employment-related restrictions on individuals with criminal backgrounds?*
- *How does Wisconsin's law compare with those in other states regarding which cases are eligible for expungement?*
- *What changes, if any, might be considered by state lawmakers to reduce this issue as a workforce barrier for ex-offenders actively seeking employment?*
- *How many criminal court cases in Milwaukee County and statewide may be eligible for expungement if one or more of those law changes are made?*

We address these questions by reviewing Wisconsin's existing statutes and recent proposals considered by the Wisconsin Legislature; by reviewing relevant national and state-level research regarding expungement law; and by collecting and analyzing court data visible on the WCCA website. Our analysis was supplemented by interviews with state and local criminal justice experts.

² Public access to court records is provided online through WCCA, which is the website for the Consolidated Court Automation Programs (CCAP) case management system. One visit to the WCCA website may involve one or multiple page views. Source: <https://www.wicourts.gov/courts/committees/docs/wccaactionplan2017.pdf>

In recent years, Wisconsin and other states throughout the U.S. have focused increased attention on expungement and other policies that assist individuals with criminal records to access employment and other opportunities.^{viii} Many states have made substantive changes aimed at expanding the pool of individuals who are offered a “second chance” to build productive lives after fulfilling the conditions of a past criminal conviction. We hope this research provides valuable insight to state and local policymakers as Wisconsin considers upcoming proposals with similar objectives.

carrying a maximum sentence of up to six years, which added the two lowest classes of non-violent felonies (Class H and Class I) to the eligibility list. Only first-time felony convictions can be expunged, however, and these changes only apply to crimes committed after July 1, 2009.^{xii}

All juvenile ex-offenders in Wisconsin who have successfully completed their sentences are eligible for expungement of all convictions upon turning 17.

THE EXPUNGEMENT PROCESS IN WISCONSIN

For adult offenders in Wisconsin, expungement requests must be made and approved by a judge at sentencing. To approve an expungement request, the sentencing judge must determine the ex-offender will benefit and society will not be harmed.

While the approval must be made at sentencing, the actual expungement of criminal records takes place after the sentence has been completed. Until recently, it was unclear whether this was automatic or whether it was the ex-offender's responsibility to petition the court to expunge the record after completing the sentence. In *State v. Hemp*, the Wisconsin Supreme Court determined expungement should be an automatic process upon sentence completion if eligibility was determined at the time of sentencing.^{xiii} The court stated that the ex-offender's certificate of discharge should be forwarded to the court and there is no responsibility on the part of the offender to petition for expungement.

The expungement process is similar for juvenile offenders. Rather than at sentencing, however, individuals can petition to have their juvenile criminal records expunged at any point after turning 17. As with adult cases, the judge must determine the juvenile ex-offender will benefit and society will not be harmed.

Because of statutory limitations, the Wisconsin State Public Defender's Office is not able to provide lawyers to assist juvenile ex-offenders in filing petitions. This may have resulted in fewer juvenile offenders and their families pursuing expungement.

Collateral Consequences

The "collateral consequences" of conviction are penalties individuals face as a result of having a criminal record that are not part of an actual sentence. Those penalties may include future restrictions on employment, professional licensing, housing, financial aid for higher education, and more. Collateral consequences are not regulated and often are not well understood even by individuals working within the criminal justice system.

In lower-level criminal cases, the collateral consequences of a conviction can be an even greater penalty than the sentence itself. For example, a misdemeanor conviction may not involve any jail time, but the collateral consequences can last a lifetime.

The internet has made criminal records more publicly accessible, particularly in states like Wisconsin that have easily searchable online databases like WCCA. While many employers, landlords, and others value this easier access to information, the collateral consequences of convictions have become a greater burden for many ex-offenders.

Source: Collateral Consequences Resource Center

UNCOMMON FEATURES OF WISCONSIN'S LAW

To understand similarities and differences between Wisconsin's expungement law and those in other states, we analyzed national and state-level research and reviewed statutes from the five states surrounding Wisconsin. This analysis revealed several unusual features of Wisconsin's law, including the following:

Wisconsin is unique in requiring the decision on expungement to be made at the time of sentencing rather than after a sentence has been completed.

Currently, expungement must be approved at sentencing, which requires judges to make early decisions about whether an individual should be granted that request.^{xiv} In addition, ex-offenders are restricted from requesting expungement for closed cases (those that already have been decided), even if they otherwise meet the eligibility requirements. In our review of states where expungement is available, we found no other state where decision-making on the matter is required at sentencing or where expungement is *not* permitted for closed conviction records.^{xv}

Recent proposed legislation indicates support for changing the law. In the 2017-18 legislative session, the Senate and Assembly each approved bills to change the expungement statute but failed to reach agreement on a final version.

The Senate bill, which passed on a 30-2 margin, would have shifted decisions on expungement to after sentence completion.^{xvi} To do so, ex-offenders would have been required to petition the court for an expungement hearing at least one year after completing their sentence and pay a fee of \$100.

The Assembly bill included a number of additional provisions, such as allowing individuals to seek expungement of conviction records for closed cases.^{xvii} The Assembly amended the Senate bill with those additional provisions and then approved it on a 95-0 vote. The Assembly action returned the bill to the Senate, where senators had to approve the bill as amended. The Senate did not take up the amended bill, however, and the proposal was not adopted.

Wisconsin is among only a handful of states to restrict eligibility for expungement of adult criminal records to crimes committed by individuals under a certain age.

Wisconsin's restriction of expungement eligibility to crimes committed by individuals under the age of 25 is unusual nationally. A few other states impose age restrictions, including Maine, Mississippi, North Carolina,

Non-discrimination in employment

Wisconsin's law regarding non-discrimination in employment is more far-reaching than those in most other states.

The Wisconsin Fair Employment Act bars discrimination in employment and licensing decisions based on a criminal conviction, among other factors. Wisconsin is one of only six states (and Washington D.C.) to include private employers in their employment non-discrimination laws.

Notably, the Wisconsin Fair Employment Act allows employers to consider criminal records if the conviction "substantially relates to the circumstances of the particular job or licensed activity."

Source: Collateral Consequences Resource Center

Vermont, and West Virginia.^{xviii} Yet, most states allow individuals to expunge criminal records regardless of their age at the time the crime was committed.

Wisconsin is one of only three states with no provision limiting public access to records of cases resulting in no conviction.

Recent proposals in the Wisconsin Assembly would have allowed individuals to petition for expungement for cases that resulted in acquittals, dismissed charges, or not guilty verdicts, or that were reversed on appeal.^{xix} Those bills did not advance but could be taken up again in the future. Arizona and Idaho are the only other states with laws that lack a provision permitting expungement of non-convictions.^{xx}

While the state statute does not specify that non-convictions can be expunged, Wisconsin's Director of State Courts recently set a new limit on how long many non-conviction records will be displayed on the WCCA website.^{xxi} As of April 1, 2018, acquittals and dismissed cases will only be displayed on WCCA for two years. This does not necessarily represent a permanent policy change, however.

EXPUNGEMENT LAWS IN NEIGHBORING STATES

For additional perspective, we took a closer look at laws in the five states surrounding Wisconsin: Iowa, Illinois, Indiana, Michigan, and Minnesota. We provide brief descriptions of each of those state laws in **Table 1**, including the types of adult and juvenile cases eligible for expungement and the expungement process. This review illustrates the diversity of approaches among states.

Table 1: Expungement laws in Wisconsin’s neighboring states

State	Adult Cases	Juvenile Cases	Waiting Periods & Fees	More or Less Restrictive than Wisconsin?
Iowa	Expungement only allowed for non-convictions.	Records automatically expunged at age 21; individuals can petition for record sealing at age 19.	Waiting period: 180 days for adult non-conviction cases Fees: None	More
Illinois	All misdemeanors, most felonies, and all non-convictions are eligible for expungement regardless of offender age.	Records automatically expunged at age 21; individuals can petition for record sealing at age 18.	Waiting period: 3 years following sentence completion Fees: \$60+	Less
Indiana	All misdemeanors, most felonies, and all non-convictions are eligible for expungement regardless of offender age.	Records can be expunged at any time upon petition.	Waiting period: 1-10 years depending on case Fees: \$161 for convictions	Less
Michigan	Individuals can seal up to one felony and two misdemeanor convictions in their lifetime regardless of age at time of offense. Most felony convictions are eligible. Non-convictions for first offenses also eligible.	Juveniles can seal up to one felony and two misdemeanor convictions upon turning 18.	Waiting period: 5 years following sentence completion Fees: \$50	Less
Minnesota	All misdemeanors, many non-violent felonies, and all non-convictions are eligible for expungement regardless of offender age.	Records are automatically sealed with few exceptions.	Wait period: 1-5 years depending on case Fees: \$200+	Less

*Note: For more detailed information, see **Appendix**.

SUMMARY

Wisconsin’s expungement law has several characteristics that set it apart from other states. Those include requiring eligibility for expungement to be decided at sentencing, prohibiting expungement of convictions for crimes committed by individuals age 25 and over, and not explicitly allowing cases

resulting in non-conviction to be expunged. Modifying any of these uncommon features could have significant impacts on the number of eligible cases.

Our comparison reveals Wisconsin's law is stricter than four of its five nearest neighbors, as summarized in **Table 1**. While in Iowa, no adult criminal conviction records can be expunged, the four other states allow a wider range of felony convictions to be expunged or sealed. In addition, those four states decide expungement eligibility after offenders have completed their sentences, allow closed conviction cases to be sealed or expunged, permit offenders of any age to expunge criminal records, and allow non-conviction cases to be sealed or expunged.

Laws in these five neighboring states also have some common features that make expungement less accessible than in Wisconsin. For example, most have waiting periods before offenders may petition for expungement, which range from one to 10 years, often depending on the crime. Most also impose fees ranging from \$50 to \$200 or more.

OTHER EXPUNGEMENT ISSUES

Our research on expungement in other states, review of relevant literature, and interviews with justice system leaders revealed additional expungement issues for lawmakers to consider. Specifically:

Ambiguity in Wisconsin’s expungement statute leaves it open to interpretation, which appears to have resulted in a lack of uniformity in its application.

Wisconsin lacks guidelines for determining when a case is eligible for expungement. An advantage of this approach is it gives discretion to judges to make decisions based on the specifics of complex cases. A disadvantage, however, is that it appears to have led to inconsistent application of the law across the state.^{xxii}

For example, recent research by the Badger Institute, a free-market think tank, found geographic and racial disparities in expungement approvals in Wisconsin. Despite having more than three times as many expungement-eligible cases than Outagamie, La Crosse, and Kenosha counties, Milwaukee County had fewer cases expunged during the 2010-2016 timeframe than each of them.⁴ ^{xxiii} The same study also found that white defendants were overrepresented and African-American defendants were underrepresented among cases expunged in Milwaukee County during that period.

The definition of “successful completion of a sentence” also is unclear, as a 2017 Wisconsin Supreme Court case (*State v. Ozuna*) illustrates. The court refused expungement because the individual received a non-criminal underage drinking ticket while on probation for a criminal conviction, despite the Wisconsin Department of Corrections having certified he had successfully completed probation.^{xxiv} The court noted the defendant’s failure to abide by the “no alcoholic beverages” requirement of supervision, which suggests trial courts may be able to refuse expungement for even non-criminal misconduct.

While expungement clears criminal conviction records from the WCCA website, employers also can find those records on the Wisconsin Department of Justice’s (DOJ) online criminal history database.⁵

The DOJ’s database maintains a record of all criminal convictions, regardless of whether they have been expunged. Even records no longer on WCCA, therefore, are accessible online to potential employers.

A recent proposal in the Wisconsin Assembly would have required the Wisconsin DOJ to redact records of expunged crimes when responding to public records requests.^{xxv} That would have included removing their listings from the department’s online criminal history database. A similar bill recently passed by the Wisconsin Senate, however, did not include the DOJ redaction requirement.

Some legal experts also have noted Wisconsin’s expungement statute does not explicitly state that expunged convictions do not need to be disclosed to employers.^{xxvi} Since employers may be able to

⁴ According to the Milwaukee County District Attorney’s Office, one possible factor contributing to Milwaukee County’s lower rate of expungements could be its diversion programs, which are described later in this report.

⁵ The Wisconsin Criminal History Database is commonly known as the CIB (Crime Information Bureau) database.

find expunged records online in the DOJ's database, individuals may need to report them to potential employers to avoid risk of being disqualified from applicant pools.

In Wisconsin, as in other states, lack of awareness of expungement eligibility among ex-offenders appears to be a common barrier.

Expungement only can be beneficial to ex-offenders if they know it is a possibility. New strategies may be needed to raise awareness of the opportunity afforded by Wisconsin's expungement law, particularly if eligibility changes are made in the future.

Related Restrictions on Ex-offenders

Criminal records not only affect the general employment prospects of ex-offenders, but also the types of jobs they are able to pursue and other issues related to sustaining employment. Policy restrictions limit the rights of ex-offenders to be licensed for many professions, to access small business loans and grants, and to obtain financial aid for higher education. In some cases, housing assistance also is restricted.

Professional Licensing – According to the Council on State Governments, professional licenses for more than 100 licensed professionals are denied to many or all ex-offenders in Wisconsin. In some cases, the restrictions are mandatory for all offenses, while others are discretionary and/or only can be applied if the crime substantially relates to the specific profession. Examples are provided in the table below. Restrictions are set by state licensing boards established for each license rather than by policymakers, meaning changes typically are made on a license-by-license basis.

Examples of professional licenses not available to some or all ex-offenders

Health Care	Professional, Scientific, Technical	Other
Chiropractor	Architect	Barber/Cosmetologist
Paramedic	Certified Public Accountant	Driving Instructor
Physical Therapist	Engineer	Home Inspector
Physician (medicine)	Interior Designer	Real Estate Appraiser
Registered Nurse	Landscape	School Bus Driver
Veterinarian	Architect	
X-ray Technician		

Small Business Loans and Grants – U.S. Small Business Administration (SBA) loans and grants can be restricted from ex-offenders both by SBA and by the direct lender (a bank or other financial institution). The SBA requires applicants to provide information about their criminal backgrounds. Depending on their record, loan eligibility can be delayed or restricted entirely. In addition, banks and other financial institutions have their own policies for loan eligibility, which can involve restrictions on ex-offenders.

Higher Education (Financial Aid) – A number of restrictions affect the eligibility of ex-offenders to access financial aid, including federal Pell Grants, federal student loans, and federal work study. Restrictions vary depending on the case. Individuals convicted of drug-related and sexual crimes face added restrictions.

Housing assistance – Individuals on the state's sex offender registry and those convicted of producing methamphetamine drugs are not eligible for Section 8 housing vouchers. In addition, those who have been convicted of many other drug-related or violent crimes in the previous five-year period are not eligible for Section 8, though some discretion is given to Milwaukee County to decide this on a case-by-case basis.

Sources

Council on State Governments: <https://niccc.csgjusticecenter.org/search/?jurisdiction=50>

U.S. Small Business Administration: https://www.sba.gov/sites/default/files/lender_notices/Notice_5000-1401_-_Revised_Procedures_for_SBA_Forms_912_and_1081.pdf

U.S. Department of Education: <https://studentaid.ed.gov/sa/eligibility/criminal-convictions>

Milwaukee County: <http://county.milwaukee.gov/section8>

REFORM OPTIONS AND POTENTIAL IMPACTS

To gauge the potential impact specific law changes could have on the number of criminal cases eligible for expungement in Wisconsin, we analyzed information contained in the State of Wisconsin's online WCCA database. Our analysis specifically looks at the roughly 150,000 cases in Milwaukee County involving criminal felonies or misdemeanors that occurred between 2006 and 2017, the years for which WCCA contains complete information. We looked at Milwaukee County because it has the highest caseload in the state.

We provide a brief overview of the information visible on WCCA and then analyze five distinct changes that could be considered by state policymakers. These changes are based on differences we have identified between Wisconsin's law and those in many other states.

It is important to note that this analysis is not intended to identify the exact number of cases that would become eligible for expungement under each policy scenario. The complexity of each specific case makes it impossible to make that determination with certainty.⁶ Rather, it is meant to illustrate the *relative* impact each potential change could have on the overall pool of eligible cases.

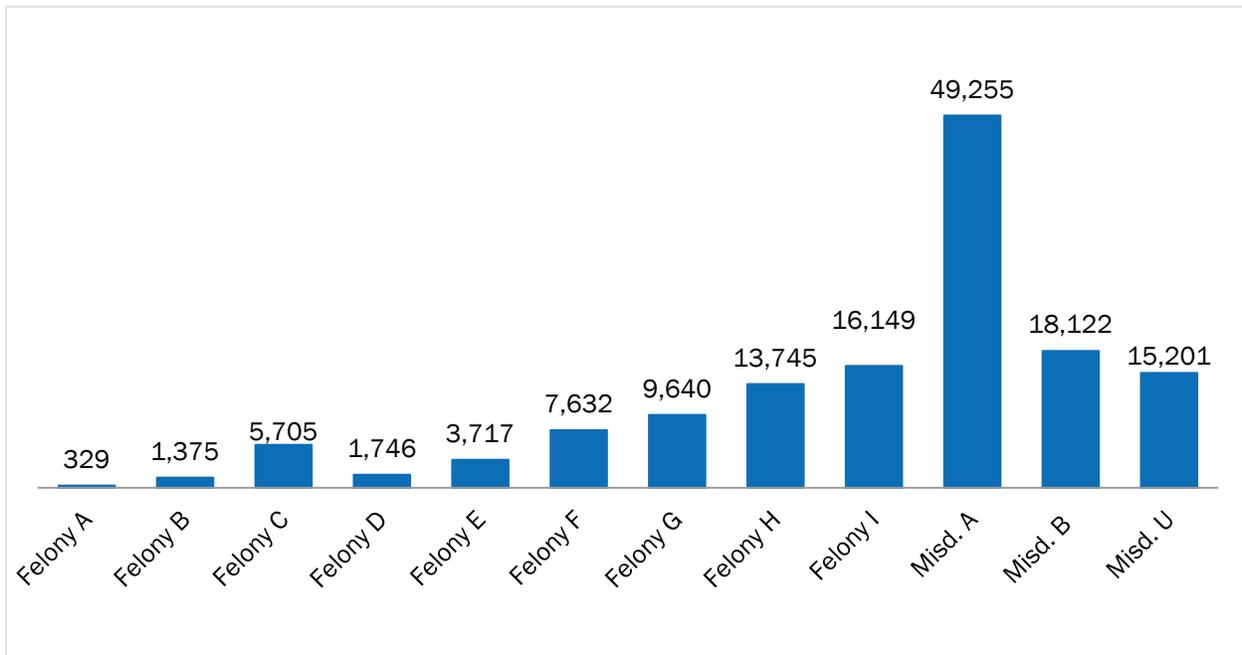
OVERVIEW OF MILWAUKEE COUNTY DATA

As previously noted, Wisconsin's expungement law currently applies only to misdemeanors and the two lowest classes of non-violent felonies (Class H and Class I). Between 2006 and 2017, misdemeanors were the most severe charge for 82,578 cases filed in Milwaukee County (57.9% of all cases), as shown in **Chart 1**.⁷ Class H or Class I felonies were the most severe charge for another 29,894 cases (21.0%). The remaining 30,144 cases (21.1%) involved more severe felonies (Class A through G) for which expungement currently is not an option. These data show Wisconsin's current law covers the most common offense categories.

⁶ For example, we examine cases based on the class (severity level) of each misdemeanor or felony conviction. While expungement eligibility in Wisconsin is largely based on the class of offense, state law contains exceptions within each felony class that make some offenses ineligible. We were not able to capture that level of detail in our analysis.

⁷ This analysis is based on 142,616 total cases for which data on offense severity was available. Class A misdemeanors are more severe than Class B misdemeanors. Class U misdemeanors are unclassified, with penalties varying widely.

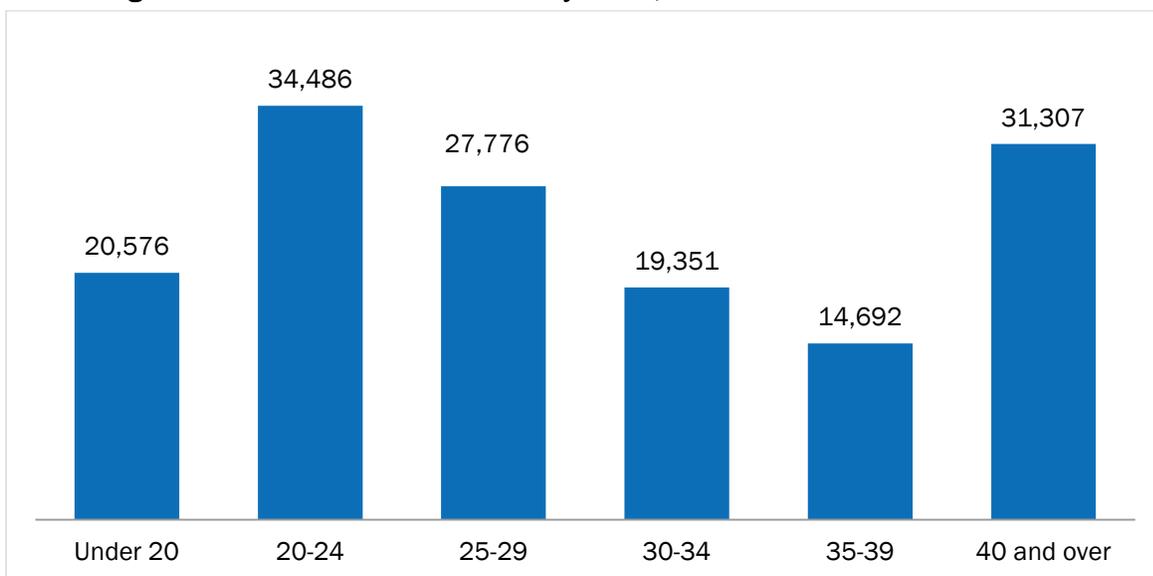
Chart 1: Most severe charge in Milwaukee County cases, 2006-2017



Source: Wisconsin Policy Forum analysis of WCCA data

While Wisconsin law permits individuals under the age of 25 to expunge criminal records, only 55,062 of 148,188 Milwaukee County cases (37.2%) between 2006 and 2017 involved offenders in that age range (**Chart 2**).⁸ Thus, a strong majority of cases (62.8%) involved offenders ages 25 or over who currently would not be eligible for expungement.

Chart 2: Age of offenders in Milwaukee County cases, 2006-2017

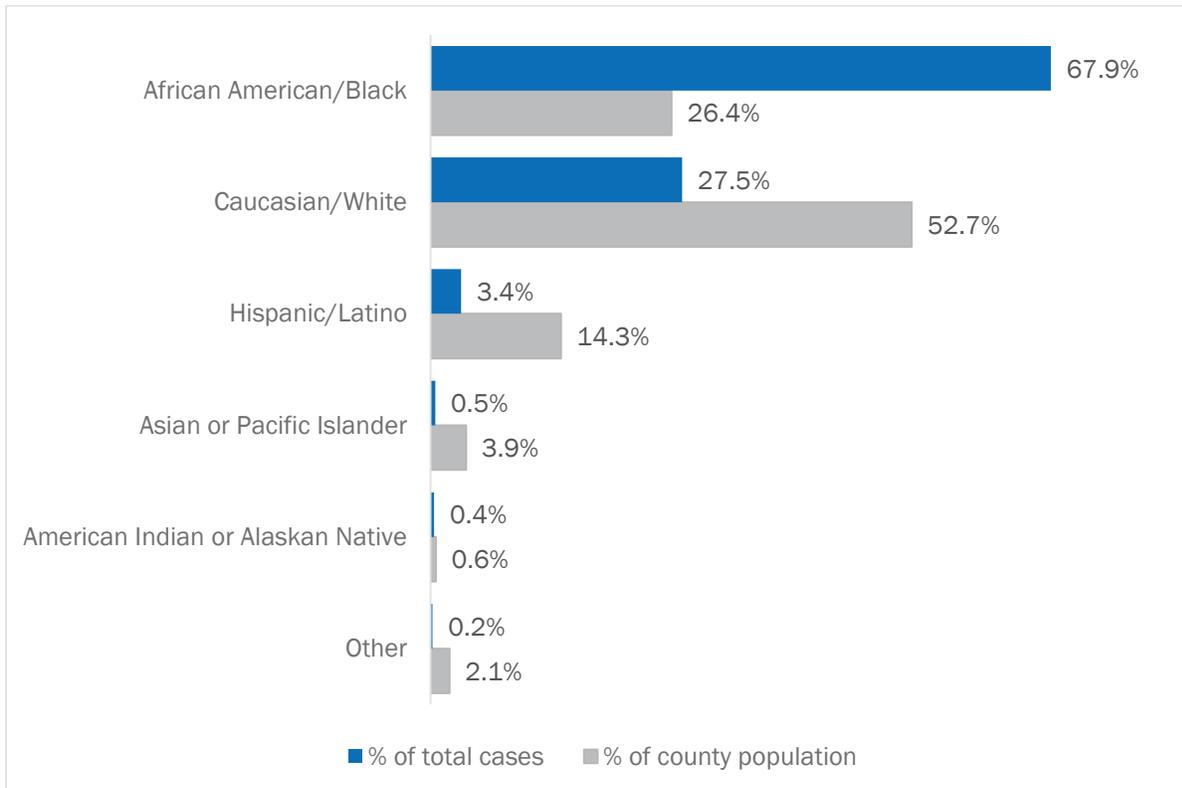


Source: Wisconsin Policy Forum analysis of WCCA data

⁸ This analysis is based on 148,188 cases for which data on the age of the offender was available.

For additional context, we analyzed the cases based on the race/ethnicity of the offenders and found African-Americans were substantially overrepresented. As shown in **Chart 3**, 67.9% of the cases during the 12-year period involved African-American offenders,⁹ while African-Americans only account for approximately 26.4% of Milwaukee County’s population.^{xxvii} Caucasians, Latinos, and Asians all are underrepresented among offenders; some Latinos may be counted in other categories, however.

Chart 3: Milwaukee County cases by race/ethnicity of offender, 2006-2017



Source: Wisconsin Policy Forum analysis of WCCA data

OPTION 1: ALLOW DECISION-MAKING AFTER SENTENCE COMPLETION

As previously noted, our analysis could not identify another state where expungement only can be approved at sentencing, as currently is the case in Wisconsin. Allowing judges to make expungement decisions after individuals have completed their sentences would change the expungement *process* but would not change the number of eligible cases. Ex-offenders would be able to petition for expungement any time after completing their sentence or after a designated waiting period. This change would only apply to new cases decided after the law change takes effect.

⁹ This analysis is based on 150,087 cases for which data on the race/ethnicity of the offender was available.

OPTION 2: PERMIT EXPUNGEMENT FOR CLOSED CASES

Currently, ex-offenders cannot petition to expunge conviction records for past cases that have been closed (decided) even if they meet the state’s other eligibility requirements regarding age and severity of offense. Allowing ex-offenders to petition for expungement of closed convictions – sometimes referred to as “retroactive expungement” – could open the door for many records to be expunged, even if no other changes were made.

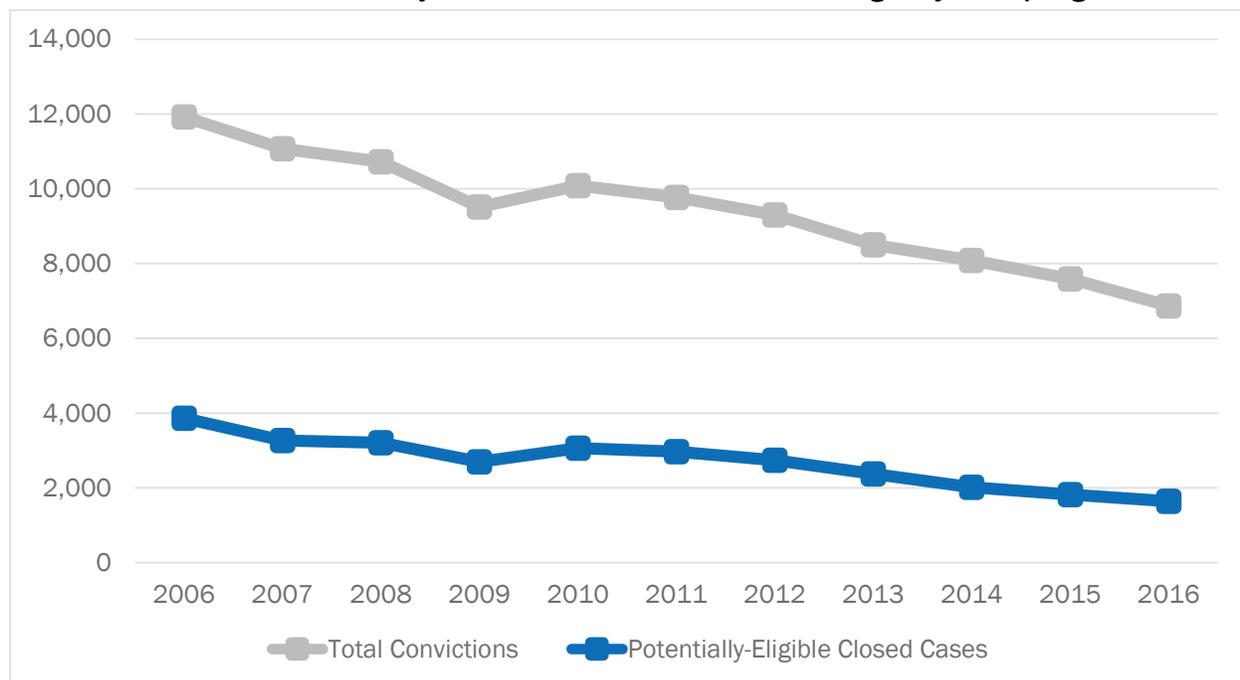
Whereas Option 1 only would apply to new cases moving forward, this option would extend to past cases as well. As with Option 1, ex-offenders would be able to petition for expungement at any time after completing their sentence or after a designated waiting period.

Among 107,443 closed Milwaukee County cases that resulted in convictions between 2006 and 2017, our analysis found 30,638 that meet Wisconsin’s current expungement eligibility criteria but remain on WCCA; each involved an offender under the age of 25 and an offense with a maximum severity of Class H felony or lower. While a portion of those cases may not be eligible because of the specific crime or individual involved, permitting expungement of closed cases nevertheless could impact a substantial number of ex-offenders.

In **Chart 4**, we show the highest possible number of closed cases that could become eligible for expungement if it were permitted, assuming all other eligibility requirements are the same as those for open cases. The actual number likely would be lower due to the specifics of each individual case.

The number of potentially-eligible closed cases has declined for many years, as have total convictions. Data for 2017 is excluded from this and subsequent charts because roughly half of all 2017 cases have not yet been decided.

Chart 4: Closed Milwaukee County cases that otherwise meet state eligibility for expungement



Source: Wisconsin Policy Forum analysis of WCCA data

The most recent bill approved by the Wisconsin Assembly would have allowed individuals to petition for expungement of closed conviction records that otherwise meet the state’s eligibility requirements. Our analysis shows that if a similar proposal passes in the future, many of these cases likely would become eligible.

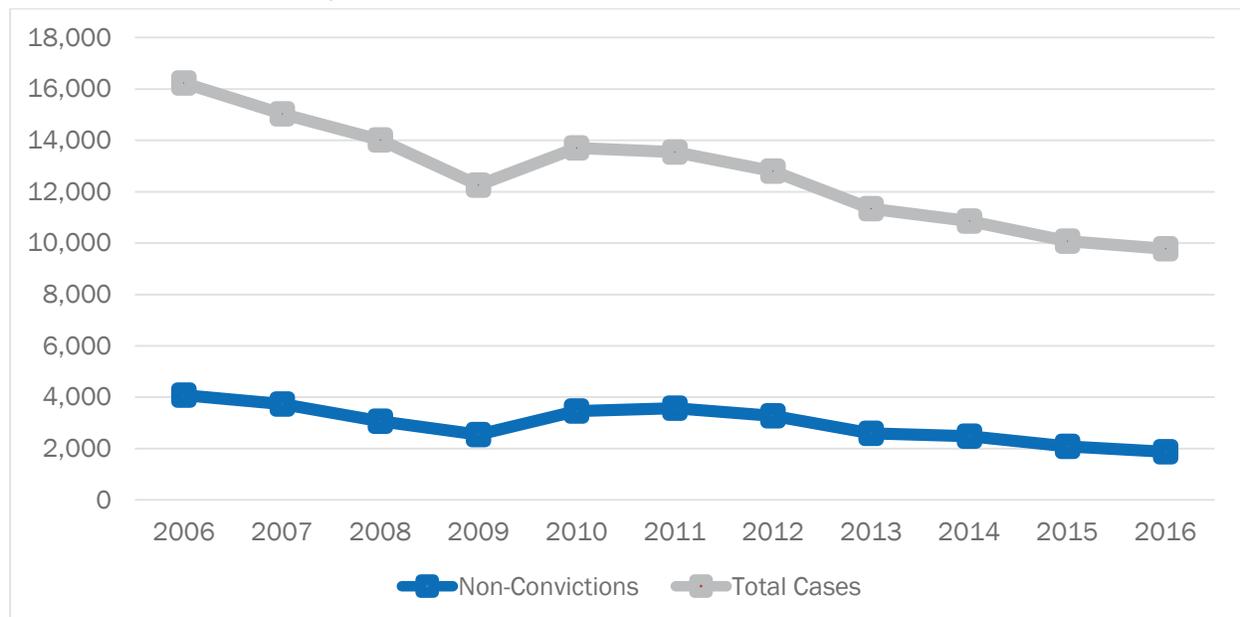
OPTION 3: ALLOW NON-CONVICTIONS TO BE EXPUNGED

Wisconsin is one of only three states with laws that do not permit expungement of cases resulting in non-convictions. As previously noted, however, the Director of State Courts recently implemented a change limiting the time period in which acquittals and dismissed cases are displayed on the WCCA website to two years. Permitting individuals to automatically and fully expunge all non-conviction records could address a fairness issue, as some individuals convicted of crimes are able to expunge their records, while some who are not convicted are unable to do so.

Non-convictions account for 33,818 of the 150,087 Milwaukee County cases (22.5%) on the WCCA website during the 2006-2017 timeframe and 1,878 cases in 2016 alone. As shown in **Chart 5**, the number of non-convictions has declined along with the number of total cases, with non-convictions consistently representing about 20-25% of the total. This includes non-convictions for all cases regardless of charge or age of defendant.

Since these cases occurred in the past, they could only become eligible for expungement if the state also began permitting expungement of closed cases. Looking to the future, it appears that permitting expungement of non-convictions could make hundreds of cases eligible each year in Milwaukee County alone.

Chart 5: Milwaukee County cases that resulted in non-convictions



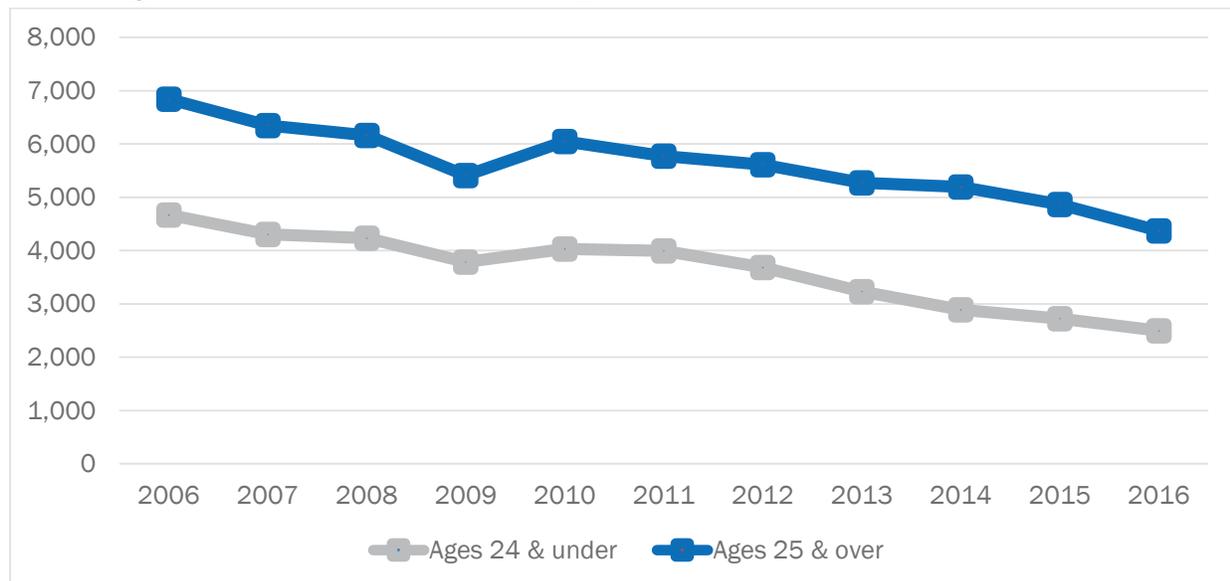
Source: Wisconsin Policy Forum analysis of WCCA data

OPTION 4: REMOVE AGE REQUIREMENT

Currently, only cases involving offenders under the age of 25 are eligible for expungement in Wisconsin. Between 2006 and 2017, 60.9% of Milwaukee County convictions (64,561 cases) involved offenders age 25 and over.¹⁰ Therefore, a decision by Wisconsin policymakers to drop the age requirement from the state's expungement law and allow individuals of any age to petition for expungement – as has been done in most other states – could have a large impact on case eligibility.

Chart 6 breaks down Milwaukee County convictions based on the age of offenders. For those age 25 and above, cases from the past only could become eligible for expungement if Wisconsin also began permitting expungement for closed cases. Our analysis shows that even in the absence of such a move, removing the age requirement would impact a sizeable number of future cases. In 2016 alone, 4,374 convictions involved offenders age 25 and over.

Chart 6: Ages of offenders in Milwaukee County criminal conviction cases



Source: Wisconsin Policy Forum analysis of WCCA data

OPTION 5: PERMIT EXPUNGEMENT OF MORE FELONIES

Current Wisconsin law allows only the two lowest classes of non-violent felony convictions (H and I) to be expunged. Those felonies carry a maximum prison sentence of up to six years. Allowing ex-offenders to expunge a wider range of felonies would align Wisconsin's law more closely with four of its five neighboring states: Illinois, Indiana, Michigan, and Minnesota.

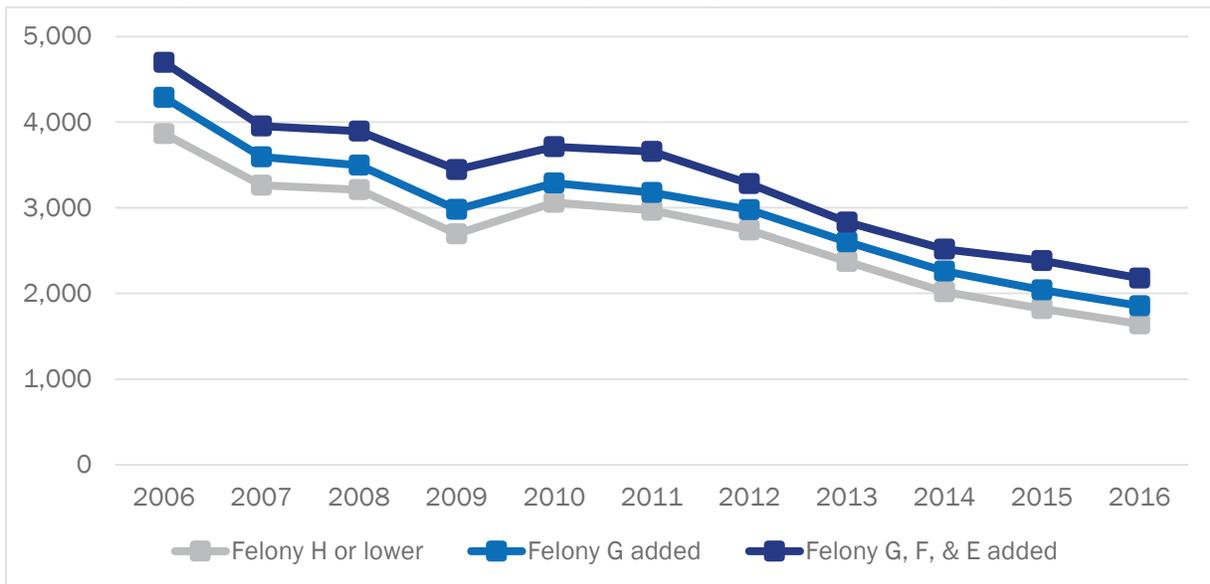
Chart 7 shows the number of Milwaukee County conviction cases on WCCA involving crimes with a maximum severity of Class H felony or lower, and illustrates how that number would increase if Class G felonies were added to the eligibility list, or if Class G, F, and E felonies were added. We see that

¹⁰ Whereas Chart 2 shows 62.8% of all cases involved individuals ages 25 and over, Chart 6 focuses exclusively on cases resulting in convictions.

adding Class G felonies would increase the number of cases eligible for expungement by roughly 200 to 250 cases each year, and adding all three classes would increase the number of eligible cases by roughly 450 to 550 cases annually. The chart only includes cases involving offenders ages 24 and under to correspond with current state law. Class G felonies carry a maximum sentence of 10 years and Class F and E felonies carry maximum sentences of 15 years.

Again, these are past conviction records that only could become eligible for expungement if the state also began permitting expungement for closed cases. Based on the recent trend, allowing expungement of additional classes of felony convictions would have a relatively modest but significant impact on the total number of eligible cases in future years.

Chart 7: Felony convictions in Milwaukee County involving offenders under the age of 25



Source: Wisconsin Policy Forum analysis of WCCA data

CASE RECORDS VS. CRIMINAL HISTORIES

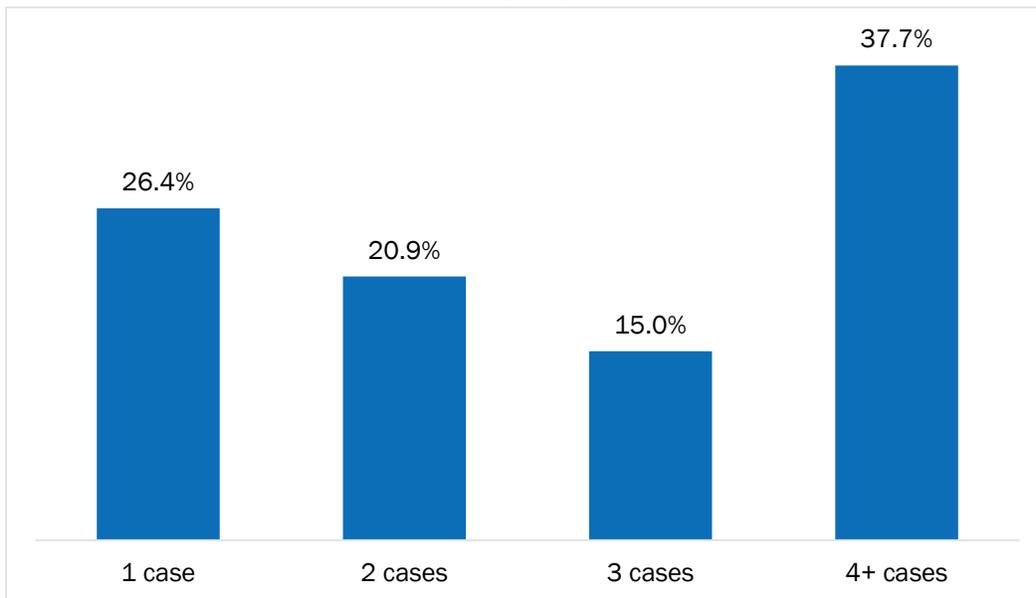
Our analysis thus far only has examined case records, and not the complete criminal histories of ex-offenders. It is important to note that while a potential change may make one criminal conviction record eligible for expungement, an ex-offender may have other convictions that still could pose a barrier to employment.

While we are not able to estimate the number of individuals who may be able to clear their entire criminal records through expungement under various policy scenarios, we did conduct analysis that provides some insight. First, we identified a sample of 573 individuals who were born in 1988 or 1989 and were convicted of a criminal misdemeanor or felony in Milwaukee County in 2006. We chose this group because they were not yet adults at the start of 2006 (when online WCCA records began in full) and thus could not have had previous adult conviction records that were not included in our data.

We then examined our entire 2006-2017 database to determine how many individuals in our sample were repeat offenders. As shown in **Chart 8**, only 26.4% of the individuals in our sample have just one criminal case on WCCA, while more than half (52.7%) have three or more cases. As a result, it is likely many individuals would not be able to clear their entire criminal histories through expungement.

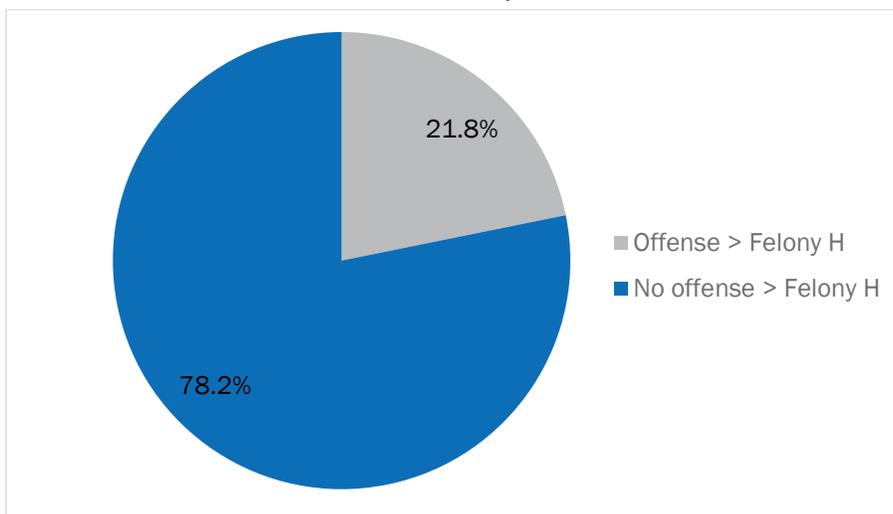
Because Wisconsin's law does not limit expungement to first offenses for misdemeanor convictions, some repeat offenders may be able to expunge multiple, low-level criminal conviction records. While 73.6% of individuals in our sample are repeat offenders, only 21.8% of the sample have been convicted of an offense more severe than a Class H felony, as shown in **Chart 9**.

Chart 8: Share of 573 individuals in sample by number of cases on WCCA



Source: Wisconsin Policy Forum analysis of WCCA data

Chart 9: Share of 573 individuals in sample with convictions more severe than Class H felony



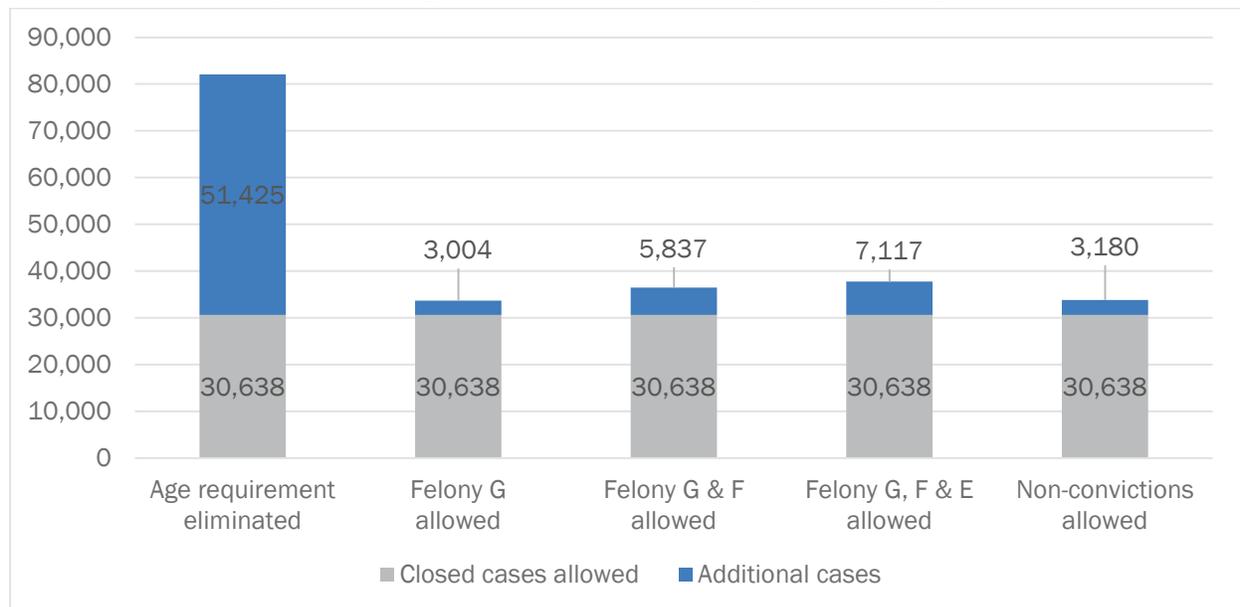
Source: Wisconsin Policy Forum analysis of WCCA data

SUMMARY/ADDITIONAL CONSIDERATIONS

The possible changes we examined would affect expungement eligibility in Wisconsin to varying degrees. **Chart 10** shows the highest possible number of Milwaukee County cases that could become eligible based on each potential change. We use the scenario in which expungement of closed cases is permitted as a baseline for each of the other potential changes because our analysis looks at past cases that would not be eligible without it. For future cases, the *relative* impact of each change likely would remain similar.

As **Chart 10** illustrates, permitting expungement for closed cases and eliminating the current age requirement likely would have the largest impact on case eligibility. Making additional felony classes or all non-convictions eligible would have more modest impacts. Of course, combining two or more of these changes could extend the opportunity for expungement to even larger pools of cases.

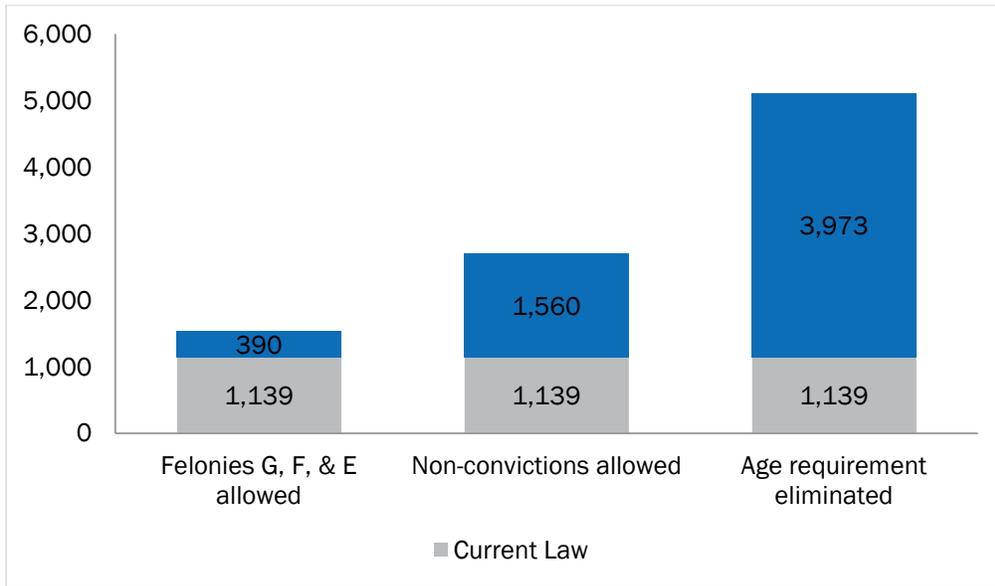
Chart 10: Relative impact of changes on maximum cases eligible for expungement, 2006-2017



Source: Wisconsin Policy Forum analysis of WCCA data

Chart 11 provides 2019 projections based on recent trends for both the number of expected cases eligible for expungement under current law, as well as for the number of additional cases that could become eligible for each possible change considered in our analysis. These estimates represent the *maximum* number of additional Milwaukee County cases that could become eligible for expungement in 2019 for each potential change. Closed cases are excluded here. These data again show removing the state's age requirement could have the largest overall impact on case eligibility in future years.

Chart 11: Projected additional Milwaukee County cases that could become eligible in 2019



Source: Wisconsin Policy Forum analysis of WCCA data

It is important to note that while we project up to 1,139 Milwaukee County cases would meet the state's current expungement eligibility requirements in 2019, data on actual expungements in recent years indicate far fewer cases are likely to be expunged. On average, fewer than 100 cases per year have been expunged in Milwaukee County in recent years, according to a recent report by the Badger Institute.^{xxviii}

Court Impacts

An important issue in considering changes to Wisconsin's expungement law is the potential effect they could have on the state's court system. For example, an increase in expungement petitions would result in additional work for county clerk of court offices across the state to process paperwork and remove records from the WCCA website. However, according to the Milwaukee County Clerk of Circuit Court's assessment of the potential changes considered in our analysis, that additional work is likely to be manageable.

For the courts themselves, however, a substantial increase in expungement cases could pose a bigger challenge if hearings are required for every case. For example, if decision-making on expungement were to shift from the time of sentencing to *after* sentence completion, would hearings be required for every petition? It appears that would have been the case if the most recent Wisconsin Senate bill had advanced. This same question could be asked if expungement were permitted for closed cases or the age requirement were removed, as those changes could increase petitions for expungement substantially.

The Wisconsin Court System does not express a position on which cases should or should not be eligible for expungement. According to the Director of State Courts, however, there is broad support among judges for shifting decision-making on expungement from sentencing to after sentence

completion.^{xxix} Many judges feel they are put in a difficult position having to make “crystal ball” decisions at sentencing hearings.

To reduce demand on the courts, it may be possible to allow judges to determine whether a case requires a hearing. For example, some petitions (e.g. for first-time, low-level convictions) may be easily approved, while others (e.g. for very serious convictions ineligible for expungement) may be easily dismissed with no hearing. Such an approach has been proposed by the Director of State Courts.^{xxx}

An additional issue is whether deadlines may be imposed on courts to process expungement petitions within a certain period of time. The right balance would need to be found to process cases in a timely manner without overwhelming court caseloads.

To potentially address the fiscal impact additional hearings could have on the courts, one option would be to impose fees on petitioners. Most states that permit expungement charge such fees, and some counties charge additional fees of their own. Both expungement reform bills considered by Wisconsin lawmakers in 2017 included new fees for some or all petitions.

The drawback of imposing new fees for expungement petitions, however, is that even small fees could represent a major barrier for low-income ex-offenders. To ensure equal access to expungement, some states provide fee waivers for qualifying low-income petitioners.

OTHER POLICY OPTIONS

In addition to possible changes to expungement eligibility, local and state policymakers could consider other related changes to reduce the employment barriers imposed by criminal records. A few examples are introduced below.

Expungement advocacy as a default

District attorneys in Milwaukee County and other counties could establish policies to specify that as a default, prosecutors advocate for expungement and that they should oppose it only if there is a compelling reason. No such policies exist currently.

Remove dismissed deferred prosecution cases from WCCA

In Milwaukee County, criminal cases sometimes are dismissed in agreements but remain on the WCCA website. This could be changed so they are less publicly visible online.

Under Milwaukee County's Early Intervention Program, cases are assessed based on risk. Those deemed low-risk are offered *diversion* in lieu of a charge, with a requirement that the offender follows certain rules, which often include paying restitution and not committing any new crimes during a designated period of time. These cases are not processed and are not added to WCCA.

Cases deemed moderate risk proceed differently. In those cases, the individual is charged with a crime but offered the opportunity to earn dismissal or a reduced charge if he or she follows rules that are agreed upon. This is referred to as a *deferred prosecution*. In some cases, the charges are ultimately dismissed, while in others, the charge is reduced from a felony to a misdemeanor. In all of these cases, however, the records are added to WCCA and cannot be removed.

Introduce certificates of rehabilitation

Certificates of rehabilitation are used as a complementary (or alternative) strategy to expungement in at least 14 states, including Illinois (**Figure 2**).^{xxxii} A similar approach was proposed and approved by the Wisconsin Senate in 2017 but was not enacted.^{xxxii}

Such certificates eliminate statutory restrictions on individuals with criminal records to ease access to jobs, professional licenses, and other needed services. Ex-offenders who prove their rehabilitation before a court acquire an official document that can be used with potential employers, landlords, and others. Typically, individuals can petition for a certificate of rehabilitation after a period of several years with no criminal convictions.

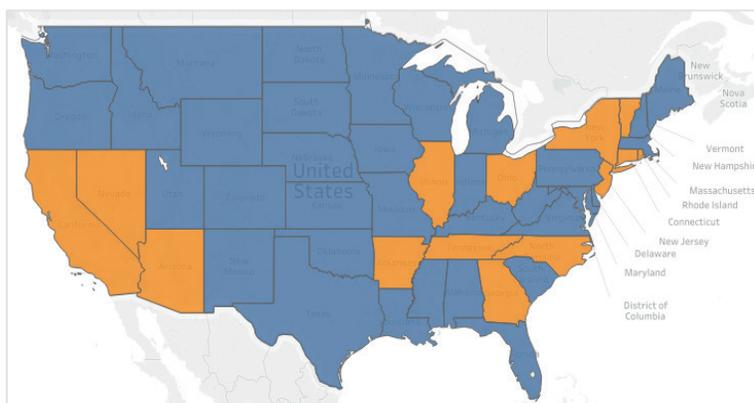


Figure 2: States that offer certificates of rehabilitation (in orange).
Source: *The Marshall Project*

Permit expungement of civil convictions

Many convictions are civil in nature and therefore not subject to Wisconsin's criminal expungement law. Some, such as retail theft and disorderly conduct, can impose similar barriers to employment and housing as criminal convictions. In 2015, the Director of State Courts recommended adding civil convictions to Wisconsin's expungement statutes.^{xxxiii}

CONCLUSION

Our analysis finds Wisconsin's expungement law contains several features that are uncommon nationally, such as requiring eligibility to be decided at sentencing, prohibiting expungement for individuals age 25 and over, and not allowing closed cases or cases resulting in non-convictions to be expunged. We also identify steps that could be taken to bring Wisconsin more in line with neighboring states.

Data in the online WCCA database show reforming Wisconsin's law could have a substantial impact on expungement eligibility. In the short term, perhaps the largest change that could be considered would be to **permit individuals to petition for expungement of closed cases**. We found 30,638 closed Milwaukee County conviction case records between 2006 and 2017 that meet Wisconsin's current expungement eligibility criteria but remain visible on WCCA, though it is difficult to predict how many individuals would petition for expungement of closed cases in a given year if it were allowed.

Based on recent trend data, we are able to make projections for the impact several other possible changes could have on Milwaukee County case eligibility in 2019:

Remove age requirement – If offenders age 25 and over were allowed to expunge records, then up to 3,306 additional cases could be eligible in 2019.

Expunge non-convictions – Expunging all cases resulting in non-convictions could make up to 1,246 additional cases eligible in 2019.

Make more felonies eligible – Allowing expungement of Class G felonies (carrying maximum sentences of 10 years) could add up to 138 cases to the eligibility pool in 2019. Adding Class F and E felonies (maximum sentences of 15 years) could add a combined 252 cases.

To put these numbers in perspective, only 506 cases were expunged in Milwaukee County between 2010 and 2016 according to analysis by the Badger Institute – an average of less than 100 cases per year.^{xxxiv}

While expungement may represent an opportunity for some individuals to remove a potential barrier to employment, a major caveat to our findings is that repeat offenders may not be able to clear their records entirely. Our analysis of a sample of 573 ex-offenders from Milwaukee County shows 21.8% have been convicted of another more serious crime currently not eligible for expungement.

Another point to bear in mind is that expanding access to expungement would have workload and fiscal implications for state and county governments in Wisconsin that would need to be carefully managed. Shifting expungement decision-making until after sentence completion or significantly expanding eligibility would result in increased demands on state courts and county clerk of court offices. Depending on how the law is structured, such changes also could affect other parts of the criminal justice system, including district attorney and public defender offices.

A key question is whether court hearings should be required for all expungement petitions; or whether, instead, judges should be able to decide when hearings are needed. A vast increase in

hearings could place a significant time and cost burden on the courts, but it may be possible to allow judges to approve or reject many cases without hearings based on a specified set of criteria.

Despite these considerations, and despite legitimate policy questions that may arise regarding whether employers *should* have access to information about the criminal backgrounds of potential employees, our analysis shows reforming Wisconsin's expungement law could reduce the prevalence of a common employment barrier among the state's shrinking pool of unemployed jobseekers. Consequently, this report should provide important insight for policymakers as they seek solutions to Wisconsin's growing workforce development challenges.

APPENDIX

EXPUNGEMENT IN STATES SURROUNDING WISCONSIN

Iowa – Iowa has one of the strictest expungement laws nationally for adult offenders. It is one of only nine states that do not permit expungement of *any* adult conviction records. As of 2015, however, cases resulting in acquittals or dismissed charges can be expunged after a 180-day waiting period, provided all court fees have been paid.^{xxxv}

Juvenile records are automatically expunged at age 21 for individuals not convicted of subsequent crimes.^{xxxvi} At age 19, individuals can petition to have their juvenile records sealed at no cost if they have maintained a clean record for at least two years.

Illinois - Illinois has perhaps the broadest expungement law in the nation.^{xxxvii} In August 2017, it was expanded to most felonies regardless of an applicant's prior record, following a waiting period of three years.^{xxxviii} (Murder, arson, sex offenses, and a few other crimes with registries remain ineligible for expungement.)

The law allows ex-offenders to seal multiple closed convictions, but if the same individual subsequently is convicted again, expungement is no longer an option. Illinois's law applies to all cases regardless of the age of the adult offender. The state imposes a \$60 fee and counties charge an additional filing fee that varies by county.^{xxxix}

Juvenile conviction records are automatically sealed at age 21 and individuals can petition for expungement at age 18.

Indiana – The Second Chance Act allows for sealing of all misdemeanors and most felonies, with restrictions on the most serious violent offenses.^{xl} Non-convictions also are eligible for expungement. Records are sealed but not destroyed, and serious felonies remain public but are marked as expunged. As in Illinois, individuals are allowed to seal multiple closed convictions, but if they are subsequently convicted of another offense, expungement is no longer allowed.^{xli}

Adult records can be expunged regardless of the offender's age following a waiting period that varies by the severity of the offense. The waiting periods are one year (after arrest) for non-convictions; five years (after sentence completion) for misdemeanors; eight years for non-violent felonies; and 10 years for eligible violent or sexual felonies. Eligibility is contingent on the individual not committing another crime during the waiting period. Juvenile records can be expunged at any time upon petition.

The State of Indiana imposes a filing fee of \$161 for expungement of cases involving a conviction. There is no fee for expunging non-conviction records.

Indiana's law has several features that distinguish it from those in many other states. For example, commercial record providers are prohibited from reporting expunged convictions, which is a significant concern nationally.^{xlii} Indiana's law also requires record sealing if statutory eligibility criteria are met, eliminating much of the ambiguity that exists in many other states, including Wisconsin.

Michigan – As of 2015, the State of Michigan’s law allows adults of any age to “set aside” (seal) up to one felony or two misdemeanor convictions in their lifetime after a five-year waiting period following sentence completion.^{xliii} All misdemeanors and most felonies are eligible for expungement. Non-convictions are eligible for expungement if they are a first offense. Juveniles also can expunge up to one felony or two misdemeanors upon turning 18.

Prior to 2015, the State of Michigan only allowed criminal records to be expunged for crimes committed by individuals under the age of 21. That age restriction was eliminated for crimes occurring after January 12, 2015.

The State of Michigan imposes a \$50 processing fee for expungement petitions.

Minnesota –All misdemeanor and many non-violent felony conviction records can be expunged after a waiting period of two to five years following sentence completion (or one year after completion of a diversion program or stay of adjudication). Waiting periods are based on the severity of the case. Felonies requiring registration are not eligible for expungement (murder, kidnapping, criminal sexual conduct, human trafficking, etc.)^{xliiv} Non-convictions can be expunged as well. There is no eligibility restriction based on age.

With the exception of felony convictions for individuals age 16 and over, all juvenile records are sealed and only made available to victims, schools, and government agencies for specified purposes.^{xliiv}

Ex-offenders are charged a fee of at least \$200 to petition for expungement, with exact fees varying by county. Waivers are available for those who are unable to pay the fees.^{xlivi}

Minnesota is one of a small number of states with criteria to guide a court’s discretion as to whether to allow expungement.

NOTES

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- ⁱⁱ Wisconsin State Legislature. Statutes: 973-015 (1m) – Special disposition. <https://docs.legis.wisconsin.gov/statutes/statutes/973/015>
- ⁱⁱⁱ Ibid.
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- ^{vii} Badger Institute. May 2017.
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- ^{ix} American Bar Association. <http://apps.americanbar.org/litigation/committees/criminal/articles/winter2016-0216-expunging-criminal-records-promotes-justice.html>
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- ^{xi} Wisconsin State Legislature. <https://docs.legis.wisconsin.gov/statutes/statutes/973/015>
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- ^{xiii} State v. Hemp. <https://caselaw.findlaw.com/wi-supreme-court/1687140.html>
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- ^{xvi} Wisconsin State Legislature. 2017 Senate Bill 53. <https://docs.legis.wisconsin.gov/2017/related/proposals/sb53>
- ^{xvii} Wisconsin State Legislature. 2017 Assembly Bill 331. <https://docs.legis.wisconsin.gov/2017/related/proposals/ab331>
- ^{xviii} Collateral Consequences Resource Center. April 2018.
- ^{xix} Mandell, Jeffrey and Erika Bierma. “WI Courts Continue to Limit Criminal Expungement, Even as Legislature Considers Expanding Scope.” Stafford Rosenbaum Attorneys. July 27, 2017. <https://www.staffordlaw.com/blog/article/wi-courts-continue-to-limit-criminal-expungement-even-as-legislature-consid>
- ^{xx} Collateral Consequences Resource Center. April 2018.
- ^{xxi} Wisconsin Court System. <https://www.wicourts.gov/courts/committees/docs/wccaactionplan2017.pdf>
- ^{xxii} Mandell, Jeffrey A. and Erika Bierma. July 2017.
- ^{xxiii} Badger Institute. May 2017.
- ^{xxiv} State v. Ozuna. <https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=131915>
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- ^{xxvii} U.S. Census Bureau. American Community Survey 5-Year Estimates 2012-2016.
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- ^{xxx} Ibid.
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- ^{xxxvii} Illinois General Assembly. <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=002026300K5.2>
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- ^{xxxix} Illinois Office of the State Appellate Defender. <https://www.illinois.gov/osad/Expungement/Documents/Criminal%20Exp%20Guide/ExpungementSealingOverview.pdf>

^{xi} City of Indianapolis and Marion County. [http://www.indy.gov/eGov/County/Clerk/criminal/Documents/IC%2035-38-9%20\(Second%20Chance%20Law%20-%20v2014\).pdf](http://www.indy.gov/eGov/County/Clerk/criminal/Documents/IC%2035-38-9%20(Second%20Chance%20Law%20-%20v2014).pdf)

^{xlii} Collateral Consequences Resource Center. April 2018.

^{xliii} Ibid.

^{xliiii} Michigan Legislature. Section 780.621.

[http://www.legislature.mi.gov/\(S\(wy44fjrfzwd3ye5z2lbate1\)\)/mileg.aspx?page=GetObject&objectname=mcl-780-621](http://www.legislature.mi.gov/(S(wy44fjrfzwd3ye5z2lbate1))/mileg.aspx?page=GetObject&objectname=mcl-780-621)

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^{xlv} Collateral Consequences Resource Center. April 2018.

^{xlvi} Minnesota Courts.

http://www.mncourts.gov/Documents/4/Public/Self_Help_Center/Step_by_Step_Guide_to_Expungements_FINAL_on_web.pdf