
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 393 **Hearing Date:** March 28, 2017
Author: Lara
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Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Arrests: Sealing*

HISTORY

Source: San Francisco District Attorney George Gascón

Prior Legislation: SB 513 (Hancock) Chapter 798, Stats. 2013
SB 599 (Perata) Chapter 792, Stats. 2003

Support: California Attorneys for Criminal Justice; California Catholic Conference;
California Public Defenders Association

Opposition: California District Attorneys Association (Oppose unless amended)

PURPOSE

The purpose of this bill is to allow a person who has suffered an arrest that did not result in a conviction to petition the court to have his or her arrest sealed.

Existing law provides for the sealing of arrest records when a person has successfully completed a prefiling diversion program. (Penal Code § 851.87)

Existing law provides for the sealing of arrest records when a person successfully completes a drug diversion program and the charges are dismissed. (Penal Code § 815.90)

Existing law provides that the if records are sealed pursuant to the above, it will be deemed to not have occurred in the records of the Department of Justice but will be available to any peace officer application request.

This bill sets up a process for the sealing of the records of a person who successfully completed diversion or drug diversion.

This bill provides that a person who has his or her records sealed shall be advised that an order to seal records pertaining to an arrest has no effect on a criminal justice agency's ability to access and use those seal records and information regarding sealed arrests.

This bill provides that a person who suffered an arrest that did not result in conviction may petition the court to have his or her arrest and related records sealed.

This bill provides that for the purposes of sealing an arrest did not result in a conviction if any of the following are true:

- The statute of limitations has run on every offense upon which the arrest was based and the prosecuting attorney that would have had jurisdiction of the offense or offenses upon which the arrest was based has not filed an accusatory pleading based on arrest.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred, all of the charges have been dismissed, and none of the charges may be refiled.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred, all of the charges have been dismissed, and none of the charges may be refiled.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred and the arrestee has been acquitted of all the charges.

This bill provides that a person is not eligible to have their records sealed in either of the following circumstances:

- He or she may still be charged with any of the offenses upon which the arrest was based.
- Any of the arrest charges, or any of the charges in the accusatory pleading based on the arrest is a charge of murder or any other offense for which there is no statute of limitations, except when the person has been acquitted or found factually innocent of the charge.

This bill sets forth what a petition to seal an arrest must contain and provides that the court may deny a petition for failing to meet those requirements.

This bill provides that the petitioner has the burden of proof that he or she is entitled to have his or her arrest sealed as a matter of right or that sealing would serve the interests of justice and allows the prosecuting attorney and law enforcement to present evidence to the court at a hearing on the petition.

This bill provides that a petitioner who meets the criteria shall have his or her arrest records sealed as a matter of right. However if he or she was charged with one of the following offenses it shall only be upon a showing that the sealing would serve the interests of justice:

- Domestic violence, if there is a pattern of domestic violence.
- Child abuse, if there is a pattern of abuse.
- Elder abuse, if there is a pattern of elder abuse.
- An offense or charged based on physical violence on another person.
- If a person has a prior serious felony.

This bill provides that if any of the offenses was a violent act against a person the court shall provide a meaningful opportunity for the prosecuting attorney to contact the victim and the victim to respond to the petition.

This bill specifies the actions the court shall take if it issues an order sealing the record.

This bill sets for what will occur after an arrest record is ordered sealed including:

- A notation that the record is sealed in all criminal history.
- The sealed record shall not be disclosed to the public, a consumer reporting agency or anyone else.

- How a criminal justice agency or the courts shall respond to a request about a specific arrest from the public, a consumer reporting agency or anyone else.

This bill specifies that a criminal justice agency may continue to access and use a sealed arrest record and information relating to a sealed arrest as permitted by law.

This bill specifies that if law enforcement or the court uses a sealed record it shall be marked so that it is not released outside of the criminal justice sector.

This bill requires a consumer agency to delete all record of a sealed arrest once the agency learns that it has been sealed and shall not store or disseminate the information.

This bill provides that unless specifically authorized, a person who disseminates information relating to a sealed arrest is subject to a civil penalty of not less than \$500 and not more than \$2,500 per violation. The civil penalty may be enforced by a city attorney, deputy district attorney or the Attorney General.

This bill provides that the above penalty does not limit a private right of action.

Existing law provides that a consumer reporting agency make or furnish any investigative report containing specified items of information and requires them to verify the accuracy of information regarding criminal and civil actions during the 30 day period on which the report is furnished. (Civil Code § 1786.18)

This bill provides that in the case of information relating to an arrest, the duty to verify the accuracy and completeness of the information includes the duty to inquire with either the trial court in each county or the Department of Justice on a weekly basis to determine which if any of the arrests have been sealed.

COMMENTS

1. Need for This Bill

According to the author:

Current record sealing procedures are ineffective and do not provide a mechanism to properly seal arrests from people's records. Some penal code sections provide for the sealing of local records, but do not affect state-level records, which are usually referenced in background checks. Records used for background checks can be outdated. Consumer reporting companies fail to update their databases to reflect court-ordered record sealing, which means that individuals are deprived of the very benefit that the court order is intended to provide.

Currently, California law prohibits employers from asking an applicant about prior arrests that did not lead to convictions, yet many employers simply refuse to consider any applicant who has a criminal record. Although California has a comprehensive statutory process to expunge convictions, it has inconsistent standards for sealing arrest records for individuals not convicted. Many individuals who are arrested are never charged, sometimes their cases are charged but later dismissed, or an individual can even take their case to trial and be acquitted by a

jury. In each of these examples the record of arrest is still available publicly despite the fact that the individual was never convicted of a crime.

2. Sealing of Arrest Records

Under existing law a person who is arrested and successfully completes a prefiling diversion program or a drug diversion program may petition to have his or her records sealed. A person who is arrested and the charges are never filed or they are dropped or the person is acquitted does not have the ability to get his or her record sealed. This can give access to the arrest records by people doing an employment background check, even if legally they cannot ask about arrests not leading to conviction.

This bill sets up a process for a person to petition to have his or her records sealed when he or she was arrested but one of the following are true:

- The statute of limitations has run on every offense upon which the arrest was based and the prosecuting attorney that would have had jurisdiction of the offense or offenses upon which the arrest was based has not filed an accusatory pleading based on arrest.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred, all of the charges have been dismissed, and none of the charges may be refiled.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred, all of the charges have been dismissed, and none of the charges may be refiled.
- The prosecuting attorney filed an accusatory pleading based on the arrest, but no conviction occurred and the arrestee has been acquitted of all the charges.

A person has a right to the sealing of his or her records unless the accusatory pleading was one of the following:

- Domestic violence, if there is a pattern of domestic violence.
- Child abuse, if there is a pattern of abuse.
- Elder abuse, if there is a pattern of elder abuse.
- An offense or charged based on physical violence on another person.
- For a serious felony if a person has a prior serious felony.

In those circumstances a court may order the sealing upon a showing that it would serve the interests of justice.

3. After the Record is Sealed

This bill also clarifies the steps that prosecutor, law enforcement agency and the courts must take after a record is sealed. It can be used in the criminal justice system but not outside of it. If a member of the public or a consumer agency asks about a specific arrest they shall be informed the record has been sealed and no other information is available.

A consumer agency is required to destroy any records of an arrest once they learn it is sealed.

4. Civil Liability for Disclosure

Anyone who distributes information about a sealed arrest is liable for a civil penalty of \$500-\$2,500 which can be enforced by any prosecutor.

5. Support

California Attorneys for Criminal Justice supports this bill stating:

Many individuals who are arrested are not charged; however their arrest record still follows them throughout life. This affects employment and housing opportunities when prospective employers or landlords run background checks online as part of an application process and see an arrest record. This “red flag” can serve as a serious barrier for housing and employment opportunities. Although California has a comprehensive statutory process to expunge convictions, it has inconsistent standards for sealing arrest records for individuals not convicted.

Reports show that 1 in 3 adults are listed to have an arrest record, and approximately one-third of felony arrests in the 75 largest US counties did not lead to conviction. Additional reports conclude that people with unsealed arrest records have a significantly increased chance of earning lower wages, living in poverty and having fewer educational opportunities.

SB 393 will create a clear pathway to sealing an arrest record from public view when the arrest did not lead to a conviction. This will ensure individuals are not discriminated upon or that there are unnecessary barriers due to outdated records.

6. Opposition

The California District Attorneys Association opposes this bill stating:

Protecting those who were never convicted of a crime against negative employment consequences is certainly a worthwhile cause. It could be argued that expunging an arrest is sufficiently covered through the factual innocence petition process found in Penal Code section 851.8. If an arrestee is factually innocent and deserving of the records being sealed, the current provisions provide adequate relief.

SB 393 would create a process whereby someone is effectively entitled to a judicial declaration that an arrest never took place. This would apply to someone who was factually guilty of a crime, was convicted at trial, and had their conviction set aside or reversed for instructional error or voir dire issues, and for whatever reason, the People are unable to retry the case. We would be judicially declaring that someone who committed a crime, but for some reason cannot be held accountable, had no business being arrested in the first place. While we are sympathetic to those who are truly innocent, we are concerned that SB 393 extends this relief a bit too far.

We ask that you consider excluding from this, relief situations in which the petitioner was convicted at trial but had their conviction reversed or set aside for reasons other than factual innocence. This would seemingly preserve the goal of protecting innocent people from the negative consequences of an arrest that did not result in a conviction, while at the same time ensuring that we do not reward petitioners for success on appellate grounds that do not reflect actual innocence of the crime.