



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 21, 2018

Title

Criminal Procedure: Petition to Seal Arrest
and Related Records

Agenda Item Type

Action Required

Effective Date

January 1, 2019

Rules, Forms, Standards, or Statutes Affected

Approve forms CR-409, CR-409-INFO, and
CR-410

Date of Report

August 10, 2018

Recommended by

Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Contact

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Executive Summary

The Criminal Law Advisory Committee recommends the Judicial Council approve three new optional forms, including an information sheet, in response to recent legislation that added section 851.91 to the Penal Code. ([Sen. Bill 239](#); [Stats. 2017, ch. 537](#)). Section 851.91 outlines the procedure for an individual who suffered an arrest that did not lead to a conviction to file a petition to have the arrest and related records sealed. Penal Code section 851.91(b)(3) directs the Judicial Council to develop forms to incorporate the new statutory basis for resentencing and dismissal relief. Since a significant number of petitioners are likely to be self-represented, the forms strive to use plain language (also known as “plain English”) so that users can readily understand the forms on their first reading.

Recommendation

The Criminal Law Advisory committee recommends that the Judicial Council, effective January 1, 2019, approve:

1. *Petition to Seal Arrest and Related Records* (Pen. Code, § 851.91) (form CR-409);

2. *Order to Seal Arrest and Related Records* (Pen. Code, §§ 851.91, 851.92) (form CR-410); and
3. *Information on How to File a Petition to Seal Arrest and Related Records Under Penal Code Section 851.91* (form CR-409-INFO).

The forms are attached at pages 5–8.

Relevant Previous Council Action

The Judicial Council has not previously circulated the proposed forms for public comment.

Analysis/Rationale

Policy implications

Senate Bill 393 (Lara; Stats. 2017, ch. 680), effective January 1, 2018, added section 851.91 to the Penal Code, which outlines how an individual who suffered an arrest that did not lead to a conviction can file a petition to have the arrest and related records sealed. Penal Code section 851.91(b)(3) directs the Judicial Council to develop forms to incorporate the new statutory basis for dismissal relief.¹ Since a significant number of petitioners are likely to be self-represented, the forms strive to use plain language (also known as “plain English”) so that users can readily understand the forms on their first reading.

The forms

The *Petition* incorporates the new statutory basis for relief under Penal Code section 851.91 and allows the petitioner to:

- Provide information about the arrest the petitioner is requesting to be sealed;
- Request relief as a matter of right; and
- Request relief in the interests of justice.

The information sheet, *Information on How to File a Petition to Seal Arrest and Related Records Under Penal Code Section 851.91* (form CR-409-INFO), provides the petitioner with information on:

- What is a petition to seal arrest and related records;
- What happens if the court grants the petition;
- What information should be included in the petition;

¹ Subdivision (b)(3) states, “The Judicial Council shall furnish forms to be utilized by a person applying to have his or her arrest sealed pursuant to this section. The petition form shall include all of the information required to be included in the petition by paragraph (1) of subdivision (b), shall be available in English, Spanish, Chinese, Vietnamese, and Korean, and shall include a statement that the petition form is available in additional languages and the Internet Web site where the form is available in alternative languages. The forms shall include notice of other means to address arrest records, including a determination of factual innocence under Section 851.8 and deeming an arrest a detention under Section 849.5.”

- When the petition should be filed;
- Who should be served;
- Whether translations of the petition are available; and
- Other means to seal or limit arrest records.

The optional *Order to Seal Arrest and Related Records* (*Pen. Code*, §§ 851.91, 851.92) (form CR-410) provides the court with the ability to:

- Grant the relief; or
- Deny the relief and state the reasons for the denial.

Comments

A total of six comments were received. Three commenters, including the Superior Court of San Diego County and the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subcommittee, agreed with the proposal. The Superior Court of Ventura County agreed with the proposal if modified, and provided two suggestions that the committee accepted. Mr. Albert De la Isla, a principal analyst with the Superior Court of Orange County, and an anonymous commenter also provided several comments. The comment chart includes the committee's responses to these comments, several of which the committee accepted.

Mr. De la Isla suggested adding to the *Petition* and *Order* "Diversion sealing" of records under Penal Code sections 1000.4 and 1001.9, based on local forms that the Superior Court of Orange County uses for petitions and orders to seal records. He noted that the court added Diversion sealings "so that we had one all-inclusive form as the advisements are all the same." The committee considered whether to include record sealing under sections 1000.4 and 1001.9 in the same forms as record sealing under section 851.91, and determined that the forms would be more accessible for self-represented litigants, without placing an undue burden on courts, if they solely addressed relief under section 851.91.

Alternatives considered

The committee considered making the forms mandatory but determined that optional forms would allow courts the flexibility of developing their own forms to fit their unique needs, while still providing the convenience of a standard form for those courts that choose to use them. Under rule 1.35(a) of the California Rules of Court, courts will be required to accept petitions submitted on the proposed optional Judicial Council form even if they develop their own petition and order forms.

The committee also considered including all the qualifying factors for relief as a matter of right in the petition form, so that a petitioner could address why he or she qualified for relief as a matter of right. However, the committee decided that simplifying the request for relief as a matter of right would make the petition process more accessible to petitioners without placing an undue burden on the courts. The qualifying factors for relief as a matter of right are listed in form

CR-409-INFO, *Information on How to File a Petition to Seal Arrest and Related Records Under Penal Code Section 851.91*, as background information for petitioners.

Fiscal and Operational Impacts

Expected costs include training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

Attachments and Links

1. Forms CR-409, CR-409-INFO, and CR-410, at pages 5–8.
2. Chart of comments, at pages 9–13.

Petition to Seal Arrest and Related Records (Pen. Code, § 851.91)

Clerk stamps date here when form is filed.

DRAFT
Not approved by the
Judicial Council
2018-03-19

Fill in the name and street address of the court that you are filing the petition in:

Superior Court of California, County of

Fill this out if a criminal complaint was filed or charged against the petitioner, and there is a case number and case name for that criminal case. Do not fill this out if an arrest happened but no criminal complaint was filed or charged in court:

Trial Court Case Number:

Trial Court Case Name:

People of the State of California
 v.

1 Your Information

a. Petitioner (*the person who is filing this petition*):

Name:

Last

First

MI

Date of birth: _____ (mm/dd/yyyy)

Street address:

Street

City

State

Zip

Mailing address (*if you have a lawyer for this case, give your lawyer's information*):

Street

City

State

Zip

Phone: _____

E-mail (*if available*): _____

State Bar number: _____

2 Notice of Court Hearing

A court hearing is scheduled on this petition as follows:

**Hearing
Date**

→ Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

If an interpreter is needed, please specify the language: _____

3 Information About Your Case

a. Date of the arrest you are requesting to be sealed: _____ (mm/dd/yyyy)

b. Where did the arrest happen? Include the city and county: _____

c. What law enforcement agency made the arrest? If it was a police department, include the city (*for example, ABC City Police Department*). If it was a county sheriff, list the county (*for example, XYZ County Sheriff*):

d. What is the arrest report number or police report number, if available?

Trial Court Case Name: _____

Trial Court Case Number: _____

- e. Include any other information about the arrest that is available from the prosecutor (district attorney/city attorney) or the court, including the case number that the prosecutor used to review the arrest or used to file a case against you. If you would like to explain the information provided, please do so below, or complete and attach the *Attached Declaration* (form MC-031) or submit other relevant documents.

- f. Add any information on offenses or charges based on the arrest. If you would like to explain the information provided, please do so below, or complete and attach the *Attached Declaration* (form MC-031) or submit other relevant documents.

- g. If the prosecutor filed a case against you, please include what the charges were (*for example, Pen. Code, § 242, for battery*).

- h. Choose one:

☐ I am entitled to have this arrest (the arrest described in item ② of this petition) sealed as a matter of right because the arrest did not result in a conviction, and I satisfy the requirements of Penal Code section 851.91.

OR

☐ I am requesting to have the arrest sealed in the interests of justice (Pen. Code, § 851.91(c)(2)(B)).
(Describe below how this is in the interests of justice. In deciding whether to grant this request, the court may consider any important factors, including: hardship and difficulties caused by the arrest; statements or evidence regarding your good character; statements or evidence regarding the arrest; your record of convictions; or any other important factors. You may provide statements or evidence from you, from others, or both.)

Please attach any additional signed and dated statements with the petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: _____



Signature of petitioner or attorney

This information sheet does not cover all of the questions that may arise in a case. Do *not* deliver this information sheet to the court clerk.

What is a petition to seal arrest and related records?

The petition is a request to the court to seal arrest and related records under Penal Code section 851.91. A separate petition must be filed for each arrest for which sealing is requested.

What information do I include in the petition?

Read the petition carefully and fill out all parts of the petition. The court may deny the petition based on incomplete information.

How will the court make its decision?

To have the arrest sealed as a matter of right, the court will determine whether the arrest did not result in a conviction (Pen. Code, § 851.91(a)(1)). The court will NOT seal the arrest as a matter of right if (1) you may still be charged with any of the offenses upon which the arrest was based; (2) the arrest or case was filed for murder or any other offense for which there is no statute of limitations (except if you have been acquitted or found factually innocent), or (3) you intentionally evaded law enforcement efforts to prosecute the arrest, including by engaging in identity fraud. (Pen. Code, § 851.91(a)(2).)

To have the arrest sealed in the interests of justice (Pen. Code, § 851.91(c)(2)(B)), you must describe how sealing the arrest is in the interests of justice through a personal statement from you and/or statements from others.

What do I do with the petition once I fill it out?

If a criminal case was filed based on the arrest you want to have sealed, take or mail this petition to the clerk's office in the court where the case was filed.

If no criminal case was filed or charged against you, take or mail this petition to the clerk's office in the court that handles criminal matters for the city or county where the arrest happened. If you don't know which court this is, you may want to contact a court in the county to ask. The clerk will give you a court date for the hearing, which should be at least 15 days from the date you file the petition.

It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

Must anyone else get the petition?

A copy of the petition must be served (delivered by hand or by mail) on the prosecutor of the city or county where the arrest happened *and* the law enforcement agency that made the arrest at least 15 days before the hearing on the petition. After you have served the petition on the prosecutor and the law enforcement agency, you will need to file a "proof of service" with the court.

What happens if the court grants my petition (request)?

If the court grants the petition, it will send a copy of the order to law enforcement and the California Department of Justice to update the arrest record, noting that the arrest is sealed. Records that are sealed under the court's order will not be disclosed except to you or a criminal justice agency (which includes courts, peace officers, prosecuting attorneys, city attorneys pursuing specific actions, defense attorneys, probation officers, parole officers, and correctional officers). Criminal history providers may disclose information to other criminal history providers. For more information, see Penal Code section 851.92.

Are translations of the petition available?

Translations of the petition are available in Spanish, Chinese, Vietnamese, and Korean at the California Courts website at www.courts.ca.gov/forms.htm.

Are there other ways to seal or limit arrest records?

Yes. You may request the court to deem an arrest a detention under Penal Code section 849.5; request a determination of factual innocence under section 851.8; receive an acquittal and a determination of factual innocence under section 851.85; have your conviction set aside based on a determination of factual innocence under section 851.86; and request relief after completion of a pre-filing diversion program under section 851.87.

CR-410**Order to Seal Arrest and Related Records (Pen. Code, §§ 851.91, 851.92)***Clerk stamps date here when form is filed.*

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not approved by the
Judicial Council
2018-03-19

① Name: _____
 Last First MI

Mailing address: _____
 Street

 City State Zip

Clerk fills in the name and street address of the court.

Superior Court of California, County of

Clerk fills in the number and name of the case.

Trial Court Case Number:

Trial Court Case Name:

People of the State of California
v.

② The court finds that the petitioner is eligible for the following requested relief and makes the following order:

- ☐ The court **GRANTS** the petition. The record of arrest in the following matter shall be sealed under the provisions of section 851.91, and the arrest deemed not to have occurred:

Law enforcement agency report number: _____

Prosecuting agency report number: _____

Court case number: _____

Other: _____

Petitioner may answer any question relating to the sealed arrest as though it did not happen, and petitioner is released from all penalties and disabilities resulting from the arrest, except as follows:

- The sealed arrest may be pleaded and proved in any later prosecution of the petitioner for any other offense, and will have the same effect as if it had not been sealed.
- The sealing of an arrest under section 851.91 does not relieve the petitioner of the obligation to disclose the arrest, if otherwise required by law, in response to any direct question contained in a questionnaire or application for public office, for employment as a peace officer, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.
- The sealing of an arrest under this section does not affect petitioner's authorization to own, possess, or have in his or her custody or control any firearm, or his or her susceptibility to conviction under Chapter 2 (commencing with section 29800) of Division 9 of Title 4 of Part 6, if the arrest would otherwise affect this authorization or susceptibility.
- The sealing of an arrest under this section does not affect any prohibition from holding public office that would otherwise apply under law as a result of the arrest.

③ ☐ The court **DENIES** the petition (*check one*):

- a. ☐ The petition does not meet the requirements listed in Penal Code section 851.91(b)(1).
- b. ☐ Petitioner's arrest does not qualify under Penal Code section 851.91(a).
- c. ☐ The court finds that sealing the arrest would not serve the interests of justice under Penal Code section 851.91(c)(2).
- d. ☐ Other: _____

Date: _____

Signature of judicial officer

This is a Court Order.

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Criminal Procedure: Petition to Seal Arrest and Related Records

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Anonymous	A	<p>These comments focus on the draft form CR-409. Here are some suggested revisions to this form. These suggestions are intended to 1) help the person completing the form, 2) help the courts, and 3) limit data errors or omissions that may be associated with the form.</p> <p>Section: "1 Your Information"</p> <hr/> <p>Consider relabeling "1" and "a." as follows: 1 "Petitioner Information"; then "a. Petitioner (the person seeking to seal an arrest)".</p> <p>"Name" - Consider structuring this field with separate lines for Last name, First name, Middle initial</p> <p>"Date of birth" - Structure field as mm/dd/yyyy</p> <p>Section: "2 Information About Your Case"</p> <hr/> <p>Consider relabeling "2" as follows: "Information about the Case"</p> <p>"Date of the arrest..." - Structure field as mm/dd/yyyy</p> <p>"e." Consider revising "...from the prosecutor or the court" to "from the district attorney/prosecutor or the court"</p> <p>"g." Consider revising "If the prosecutor" to "If the district attorney/prosecutor"</p>	<ul style="list-style-type: none">• The committee declines the suggestion because the "plain English" format is intended to aid self-represented litigants.• The committee accepts the suggestion.• The committee accepts the suggestion.• The committee declines the suggestion because the "plain English" format is intended to aid self-represented litigants.• The committee accepts the suggestion.• The committee accepts the suggestion.• The committee accepts the suggestion.

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Criminal Procedure: Petition to Seal Arrest and Related Records

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	Commentator	Position	Comment	Committee Response
			<p>"h." Revise the first option from "I am entitled to have the arrest described in item 1 of this petition..." to "I am entitled to have this arrest sealed as a ..."</p> <p>"h." Revise the second option to read: "I request that this arrest be sealed in the interests of justice (Pen. Code, § 851.91(c)(2)(B)). (Describe below how this is in the interests of justice. In deciding whether to grant this request, the court may consider the following: hardship and difficulties caused by the arrest; statements or evidence regarding your good character, from you, others, or both; statements or evidence regarding the arrest, from you, others, or both; your record of convictions; or anything else you consider important.)"</p> <p>Thank you for your consideration of these comments.</p>	<ul style="list-style-type: none"> The committee accepts the suggestion. The committee declines the suggestion as the instructions are worded to aid self-represented litigants.
2.	De la Isla, Albert Principal Analyst IMPACT Team—Criminal Operations Superior Court of California, County of Orange	N/I	<p>CR – 409 Petition Suggest adding hearing date, department and time on the petition so that when it is served on the prosecutor or police agency, they have notice of the hearing date.</p> <p>On our local form, we added the specific reasons why it is a matter of right for the defendant to</p> <p>3. I am entitled to have my arrest sealed as a matter of right:</p> <p>a. <input type="checkbox"/> No complaint was filed. The statute of limitations has run on every offense upon which the arrest was based and the prosecutor has not filed an accusatory pleading based on the arrest.</p> <p>b. <input type="checkbox"/> A complaint was filed. The charge(s) have been dismissed and charges may not be refiled.</p> <p>c. <input type="checkbox"/> A complaint was filed. No conviction occurred and I have been acquitted of all charges.</p> <p>d. <input type="checkbox"/> Pursuant to Penal Code § 1000.4 & 1001.9.</p>	<ul style="list-style-type: none"> The committee accepts the suggestion. The committee declines the suggestion as this information is already provided on the CR-409-INFO form in a somewhat different format.

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	Commentator	Position	Comment	Committee Response
			<p>We also added Diversion sealings as provided for in the revised code so that we had one all-inclusive form as the advisements are all the same.</p> <p>CR-409 – Instruction Sheet</p> <p>Instruction Sheet does state that the prosecutor or law enforcement agency needs to be served at least 15 days before the hearing date, but does not state that proof of service needs to be filed with the court. Proof should be filed with the court.</p> <p>CR – 410 Order</p> <p>Suggest adding to the order for sealing a statement that the record is ordered sealed pursuant to the provisions of 851.92. Our form states the following:</p> <p><i>The record of arrest is deemed not to have occurred, the petitioner may answer any question relating to the sealed arrest accordingly, and the petitioner is released from all penalties and disabilities resulting from the arrest, except as provided in Section 851.92 and as follows:</i></p> <p>Since we also included diversion dismissals on this form, we added:</p>	<ul style="list-style-type: none">• The committee declines the suggestion as the forms are more accessible for self-represented litigants, without placing an undue burden on courts, if they solely address relief under section 851.91.• The committee accepts the suggestion.• The committee declines the suggestion as this information is already provided on form CR-410 in a somewhat different format.• The committee declines the suggestion as the forms are more accessible for self-represented litigants, without placing an undue burden on courts, if they solely address relief under section 851.91.

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Criminal Procedure: Petition to Seal Arrest and Related Records

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	Commentator	Position	Comment	Committee Response
			<input type="checkbox"/> Successful Completion of Diversion: The petitioner may, except as specified in Section 851.90 subdivisions (b) and (c), indicate in response to any question concerning the petitioner's prior criminal record that they were not arrested or granted statutorily authorized drug diversion or deferred entry of judgment for the offense. <ul style="list-style-type: none"> • Subject to subdivisions (b) and (c), a record pertaining to an arrest resulting in the successful completion of a statutorily authorized drug diversion or deferred entry of judgment program shall not, without the defendant's permission, be used in any way that could result in the denial of any employment, benefit, or certificate. • The arrest upon which the pretrial diversion was based may be disclosed by the Department of Justice in response to any peace officer application request and does not relieve you of your obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Penal Code Section 830. • This order to seal records pertaining to an arrest has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Penal Code Section 851.92. 	
3.	Judicial Council of California Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subcommittee	A	<p>The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none"> • This proposal will have minimal impact—the JCC has created the forms needed to conform to the change of law. • The proposal is beneficial in that it leads to increased efficiency: petitions to seal arrest records will increase and the forms will streamline the process. 	No response required.
4.	McCready, John P. Citizen	D	<p>The proposed form does NOT detail an option for:</p> <p>"The arrest did NOT result in a subsequent court filing/conviction of ANY criminal charge (e.g. for a "Failure to Appear" arrest warrant-P.C.853.7")</p> <p>AND</p> <p>"The arresting charge does not match the CHARGE THAT WAS ACTUALLY FILED BY a City Attorney or Deputy District Attorney.</p>	The committee declines the suggestion as items e., f. and g. provide the petitioner with the option to include this information and explanation.

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Criminal Procedure: Petition to Seal Arrest and Related Records

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			PLEASE ADD THESE OPTIONS as they would better detail the intent of SB 393.	
5.	Superior Court of California, County of San Diego By: Mike Roddy Executive Officer	A		No response required.
6.	Superior Court of California, County of Ventura By: Cheryl Kanatzar Deputy Executive Officer	AM	<p>On the Petition: add a line for the clerk to include the Hearing date_____, Time_____, and courtroom_____ under the Trial Court Case Number and Trial Court Case Name information.</p> <p>On the Information Sheet:. under What do I do with the petition once I fill it out? ...move the last sentence in the first paragraph," The clerk will give you a court date for the hearing, which should be at least 15 days from the date you file the petition," to the end of the 2nd paragraph in that same section.</p>	<ul style="list-style-type: none">• The committee accepts the suggestion.• The committee accepts the suggestion.