

Criminal Record Clearing in a Nutshell



Spring 2021

COVID-19 & online services

During the pandemic, the Record Clearance Project is providing services by phone and video only. We hope to offer in-person sessions as soon as it is safe to do so. Please check our website at sjsu.edu/expunge for updates.

Please check with other services listed (Sheriff, Public Defender) regarding how to access them.

Laws change. Individual cases differ.



Because laws and legal procedures change, please check to be sure that the information here is current at the time you use it.

This is general information and may not apply to your individual, specific situation.

Adapted from a slideshow by the Stanford Community Law Clinic by Shaun Naidu, Jr. and Margaret Stevenson.
An earlier version was developed from materials prepared by the East Bay Community Law Center

Getting started: Get a RAP sheet

RAP = Record of Arrests and Prosecutions

State Department of
Justice (“LiveScan”)

- Includes all counties
- Arrives in ~ one week

RCP LiveScan

appointments:

expunge@sjsu.edu

Find LiveScan offices at
[https://oag.ca.gov/fingerp
rints/record-review](https://oag.ca.gov/fingerprints/record-review)

County

- Usually more complete than state RAP
- Arrives in ~ one month
- Get from Sheriff’s office

Important: Make sure that there are no **warrants** pending before going to the Sheriff’s Office

Speed Screenings

After getting a RAP sheet, feel free to contact the RCP for details regarding the next Speed Screening expunge@sjsu.edu



Students review clients' RAP sheets and advise them about next steps toward expungement

RCP provides:

Court petition preparation

In Santa Clara County:

RCP has limited capacity to assist people in court.

All meetings online or by phone during pandemic



The Public Defender's office assists with expungement petition preparation at the Reentry Resource Center.

(408) 535-4290

Record Clearing Options



Record cleaning options

The following information applies to California state convictions only

- **Expungements = dismissals of convictions**
(jail sentences, including 1170(h) / “realignment”)
- **Reducing felonies to misdemeanors**
(“wobblers,” Prop 47 and Prop 64)
- **Certificates of Rehabilitation** (prison sentences that don’t have PC 1170(h) in sentence now)
- **Sealing** (drug diversions , factual innocence, juvenile offenses, offenses related to being involved in human trafficking, marijuana)

Expungements

“Expungement” = dismissal of a conviction

What does an expungement do?

withdraws a plea bargain or dismisses a conviction

Expungements are either:

- required (“mandatory”), or
- up to a judge (“discretionary”)



Whether expungement is mandatory or discretionary depends on:

- The sentence, *and*
- What happened *after* the sentence



Expungements

General summary of expungement laws

Law

Applies to

PC 1203.4 jail sentences **with** probation

PC 1203.4a jail sentences **without** probation

PC 1203.41 all AB 109 / 1170(h) sentences

[all are *after* Oct 2011]

PC 1203.42 all prison cases that would be AB109 now
(conviction now has Penal Code section 1170(h) in the sentence
for the specified conviction)

[all are *before* Oct 2011]

Exception: many sex and child pornography
offenses cannot be dismissed

Expungements

When probation **was** part of the sentence:

For record clearances, it does not matter whether probation was formal (reporting) or court (non-reporting)

- If a person successfully completed probation

no new convictions during probation
no probation violations



- then the court must dismiss the conviction (“mandatory”)



PC 1203.4

Exception: Requests to dismiss many Vehicle Code offenses *must* be heard in court

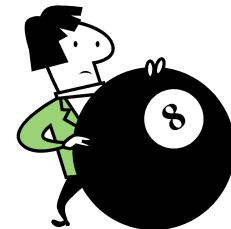


Expungements

When probation **was** part of the sentence:

- ❑ If a person did not successfully complete probation,
new conviction during probation
probation violation

- ❑ then the dismissal of the conviction is up to a judge (“discretionary”)
A judge will decide in court whether it is “**in the interests of justice**” to dismiss the conviction



Expungements

Early termination of probation

Example: 5 years probation, terminated after 4 years

- If a judge grants a person early termination of probation,
 - ✓ even after an earlier probation violation
 - ✓ even with victim restitution due

PC 1203.3

People v. Seymour (2015) 239 Cal.App.4th 1418

- then the court must dismiss the conviction (“mandatory”)

PC 1203.4



Expungements

When probation **was not** part of the sentence

- If the Petitioner had no new convictions during the one year following the conviction,
- then the court must dismiss the conviction (“mandatory”)



Exception: Vehicle Code infractions are *ineligible* for dismissal

Note: PC 1203.4a – the expungement law that applies when probation is *not* a term of sentence – does not apply to felonies. For the (rare) felony with no probation, see if it is a wobbler or Prop 47 or Prop 64 felony. If so, ask to reduce the felony to a misdemeanor and seek to dismiss.

Expungements

When probation **was not** part of the sentence

☐ If the Petitioner had another conviction within one year following the conviction,

☐ then the dismissal of the first conviction is up to a judge (**discretionary**)

A judge will decide in court whether it is “**in the interests of justice**” to dismiss the conviction



Expungements

AB 109 = Realignment = §1170(h)

October 2011 law turned many offenses that used to be state prison sentences into ones to be served in county jail

All convictions which now have 1170(h) as part of the sentence are **eligible** for expungement

Dismissal of all convictions where 1170(h) is part of the sentence is discretionary:

A judge will decide in court whether it is “**in the interests of justice**” to dismiss 1170(h) convictions



People with a split sentence (released with a “tail”) can apply for expungement one year after completing supervision PC 1170(h)(B)(5)

People with straight time (no “tail”) can apply two years following release from custody PC 1170(h)(A)(5)

Expungements

Many prison cases can be dismissed.

Since January 2018, **state prison convictions** *prior* to AB 109 are eligible to be dismissed, the same as those *after* AB 109's start date of October 2011.

If the sentence for a conviction now includes Penal Code 1170(h) (=AB 109 / realignment), state prison sentences prior to October 2011 can be dismissed “in the interests of justice.”



Expungements

General summary of expungement laws

Can / Must

Law Applies to

be dismissed

1203.4 sentences w/
probation **can** if in “interest of justice” to dismiss
must if successfully complete probation

1203.4a sentences **must** if go one year w/ no new convictions
w/out probation **can** if in “interest of justice” to dismiss

1203.41 all AB 109 / **can** if in “interest of justice” to dismiss
1170(h) sentences
[all are *after* Oct 2011]

1203.42 all prison **can** if in “interest of justice” to dismiss
cases that would
be AB109 now (conviction now has 1170(h) in sentencing law)
[all are *before* Oct 2011]

Expungements

When can a person file for expungement?

- Not serving time
- Not on probation, parole or supervision
- No criminal charges pending

Owing money to the County does NOT bar expungements

Expungements: balance due to County

In July 2021, debt from **administrative fees** like probation or booking **will be eliminated** in all of California.

The court can forgive (“commute”) debt for fines at a record clearance hearing.

Restitution owed a victim cannot be waived. A judge can dismiss a conviction when restitution is due, leaving the balance in place.

Immigration status

There is no immigration status requirement to be eligible to petition for expungement.

However, criminal histories can affect immigration cases. The Record Clearance Project asks its clients who have immigration issues to consult an attorney who specializes in immigration law before beginning the expungement process.



Now some practice!

Five people come to you to ask which of their convictions *must* be dismissed and which *can* be dismissed.

Assume that

- Unless shown, the people are eligible to file for expungement (dismissal)
- They have no probation violations other than from new convictions shown on their records
- The last conviction shown is their last conviction

Abbreviations used:

Infrac = Infraction;

Misd = misdemeanor,

Fel = Felony

Mand = Mandatory dismissal

Disc = discretionary dismissal

Inelig = ineligible for dismissal

Is dismissal of Ms. B's convictions Mandatory, Discretionary or Ineligible?

Incarceration: Probation,
Sentence: jail, prison supervision,
or none parole, or none

1.1.2000	Misd	resist arrest	2 days	0	Mand	Disc	Inel	
3.1.2000	Misd	petty theft	2 days	0	Mand	Disc	Inel	
6.1.2002	Fel	sales contrl subs not marijuana	3 months	3 years	Mand	Disc	Inel	
1.1.2006 1.1.2010	Fel	child endangermt probation violation	6 months	5 years		Mand	Disc	Inel
1.1.2012	Fel	domestic violence	10 months	3 years	Mand	Disc	Inel	

Is dismissal of Mr. C's convictions Mandatory, Discretionary or Ineligible?

Incarceration: Probation,

Sentence: jail, prison supervision,
or none parole, or none

Date	Offense	Incarceration	Probation	Sentence	Dismissal Type	Dismissal Type	Dismissal Type
1.1.2000	Misd resist arrest	2 days	1 year	Mand	Disc	Inelig	
3.1.2000	Misd domestic battery	2 months	3 years	Mand	Disc	Inelig	
1.1.2004	Fel sales contrl subs (now 1170(h) sentence)	2 years prison	3 years parole	Mand	Disc	Inelig	
6.1.2007	Fel child endangermt probation terminated early	6 months	5 years	Mand	Disc	Inelig	6.1.2009
1.1.2011	Fel poss contrl subs successfully completed	drug diversion		Mand	Disc	Inelig	1.1.2013

not applicable –
no conviction to
dismiss

Is dismissal of Ms. D's convictions

Mandatory, Discretionary or Ineligible?

Incarceration: Probation,

Sentence: jail, prison supervision,
or none parole, or none

1.1.1999	Fel	child endangermt	45 days jail	3 years	Mand	Disc	Inelig
2.2.2000	Fel	assault w/ deadly weapon	2 months jail	2 years	Mand	Disc	Inelig
6.6.2002	Fel	sale of marijuana (adults involved, not on school or daycare)	6 months jail	2 years	Mand	Disc	Inelig
8.8.2006	Fel	sale of heroin (now 1170(h) sentence)	2 years prison	2 yrs parole	Mand	Disc	Inelig
9.9.2012	Fel	own/rent drug house per 1170(h)	16 months jail	1 year tail	Mand	Disc	Inelig

Is dismissal of Mr. E's convictions Mandatory, Discretionary or Ineligible?

Incarceration: Probation,

Sentence: jail, prison supervision,
or none parole, or none

Date	Charge	Incarceration	Probation	Disposition	Mand	Disc	Inel
1.1.2006	Fel child endangermt	6 months	5 years		Mand	Disc	Inel
1.1.2008	probation terminated early						
1.1.2010	Fel poss contrl subs not marijuana		drug diversion		Mand	Disc	Inel
1.1.2011	Fel assault w/ deadly weapon	8 months	3 years		Mand	Disc	Inel
12.1.2018	Misd disorderly conduct	2 days	3 years		Mand	Disc	Inel

What? Still on probation!
-> wait till 12.1.2021 or
ask for early termination
of probation

What does *not* change after expungement

- Still counts as a strike if it previously counted as a strike
- Firearm ban remains unchanged
- Sex offender registration remains unchanged
- Driver's license suspension remains unchanged
- Still counts as a "prior"



What *does* change after expungement

Expungement often helps with:

- Employment
- Housing
- Family unification
- Immigration*
- Student loans
- Civil rights
- Fundamental fairness
- Dignity value

* Check with an immigration attorney before proceeding to determine possible consequences for immigration situation

- **Expungements = Dismissals of convictions**
(jail, probation, 1170(h) sentences)
- **Reducing felonies to misdemeanors**
("wobblers," Prop 47 and Prop 64)
- **Certificates of Rehabilitation**
(prison sentences that don't have PC 1170(h) in sentence now)
- **Sealing**
(drug diversion, human trafficking, juvenile, factual innocence)



Why reduce a felony if the conviction is dismissed?

Even when a conviction is dismissed, reducing a felony to a misdemeanor can help with:

- Regaining firearm privileges
- Immigration
- Public housing access (drug felonies)
- Student loans (drug felonies)
- Family reunification
- Visiting people in custody
- Occupational licensing

Reducing felonies to misdemeanors



Many felonies sentenced to jail are **wobblers**.

Those jail felonies are eligible to be reduced to misdemeanors using Penal Code section **17b**.

To see if a felony is a wobbler, look up whether the current sentence for the offense includes:

Jail **OR** prison

Jail **OR** 1170(h)

Some wobblers:

second degree burglary

assault with deadly weapon

child endangerment

possession of meth

grand theft

auto theft

domestic violence

DUI with injury

Example: wobblers



Cal. Penal Code sections 459 and 460(b) define **second degree burglary**; section 461(b) defines sentencing:

[Burglary in the second degree is punished by] imprisonment in the **county jail** not exceeding one year or imprisonment pursuant to **subdivision (h) of Section 1170**.

Cal. Penal Code section 245(a)(1) **assault with a deadly weapon**:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the **state prison** for two, three, or four years, **or** in a **county jail** for not exceeding one year...

Example: wobblers



Cal. Penal Code section 487 **grand theft**, section 489(c)(1):

Grand theft is punishable ... by imprisonment in a **county jail** not exceeding one year, **or** pursuant to subdivision **(h)** of **Section 1170**.

Cal. Vehicle Code section 10851(a) **auto theft**:

Any person who drives or takes a vehicle not his or her own, without the consent of the owner ... shall be punished by imprisonment in a **county jail** for not more than one year or pursuant to subdivision **(h)** of **Section 1170** ...

Reducing felonies to misdemeanors



When a jail sentence has a wobbler felony, a judge can reduce it to a misdemeanor at any time.

- The judge can reduce and dismiss a felony in the same petition
- The judge considers evidence of rehabilitation and the interests of justice



Reducing felonies to misdemeanors



Proposition 47 requires:

- misdemeanor instead of felony sentence for three drug possession offenses, Health & Safety Code sections:

11350 (possession of cocaine and other controlled substances)

11357 (possession of concentrated cannabis – also look at Prop 64)

11377 (possession of methamphetamines and other controlled substances)

PC 1170.18 and other sections

Prop 47 allows sentences for the above offenses to remain as felonies if the person has a previous conviction for crimes such as rape, murder, or child molestation, or is required to register as a sex offender per PC 290(c).

Reducing felonies to misdemeanors

Proposition 47 requires:

- misdemeanor instead of a felony sentence for the following theft offenses when \$950 or less is involved:

- commercial burglary during business hours (PC 459)
- theft (PC 487, 488) and petty theft with a prior (PC 666)
- receiving stolen property (PC 496(a))
- forging/writing bad checks (PC 473, PC 476a)

Re 476a: unless the person has 3 or more prior convictions for forgery or insufficient funds checks

Re 473: unless the person is also convicted in the same case of identity theft (PC 530.5)



Prop 47 allows sentences for the above offenses to remain as felonies if the person has a previous conviction for crimes such as rape, murder, or child molestation, or is required to register as a sex offender per PC 290(c).

Prop 64: marijuana-related expungement and reduction of felonies

Prop 64 can improve records for many marijuana-related offenses (reduce some felonies, seal some convictions) if the conviction was for violation of Health and Safety code section:

- 11357 (possession)
- 11358 (cultivation)
- 11359 (possession with intent to sell) or
- 11360 (transportation, sales)



Different rules apply if people under age 21 are involved or present, if offense occurred on school or daycare.

ATTORNEY OR PARTY WITHOUT ATTORNEY:		STATE BAR NO.:	FOR COURT USE ONLY
NAME:			
FIRM NAME:			
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	
TELEPHONE NO.:	FAX NO.:		
E-MAIL ADDRESS:			
ATTORNEY FOR (name):			
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:			
PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S)			CASE NUMBER:
<input type="checkbox"/> RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(d))	<input type="checkbox"/> REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))		FOR COURT USE ONLY
		Date:	
		Time:	
		Department:	

1. CONVICTION INFORMATION (Check all that apply)

- 11357 - Possession of Marijuana
- 11358 - Cultivation of Marijuana
- 11359 - Possession of Marijuana for Sale
- 11360 - Transportation, Distribution, or Importation of Marijuana
- 11362.1 - Personal Use of Marijuana

2. REQUEST (check all that apply)

- PETITION: Petitioner is currently serving a sentence in the above-captioned case and now requests the court recall/resentence/dismiss the conviction.
- APPLICATION: Applicant has completed his/her sentence in the above captioned case and now requests the court dismiss & seal/re designate the conviction.

3. WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE

- Petitioner/applicant waives the right to have this matter heard by the original sentencing judge. The presiding judge of the court may designate any judge to rule on this matter.

4. WAIVER OF APPEARANCE

- Petitioner/applicant understands there is a right to personally attend any hearing held in this matter. Petitioner/applicant gives up that right; the matter may be heard without his/her appearance.

Dated:



SIGNATURE OF PETITIONER/APPLICANT

Form CR-401 (Proof of Service for Petition/application adult crimes) may be used to provide proof of service of this petition/application. Page 1 of 1

Form Approved for Optional Use
Judicial Council of California
CR-400 (New July 1, 2017)

PETITION/APPLICATION (Health and Safety Code, § 11361.8)
ADULT CRIME(S)

Health and Safety Code, § 11361.8
www.courts.ca.gov

For your protection and privacy, please press the Clear
This Form button after you have printed the form.

Print this form

Save this form

Clear this form

Form for Prop 64

Use forms
CR-400 and CR-403 for
Prop 64 cases

<http://www.courts.ca.gov/>
Click on "Forms" tab

Search in the drop-down menu
for Criminal forms

Read the Proof of Service Info
sheet at

[https://www.courts.ca.gov/do
cuments/cr106info.pdf](https://www.courts.ca.gov/documents/cr106info.pdf)

and then fill out the form at
[https://www.courts.ca.gov/do
cuments/cr106.pdf](https://www.courts.ca.gov/documents/cr106.pdf)

Prop 64: marijuana-related expungement and reduction of felonies

Recent law required automatic dismissal of most marijuana convictions and reduction of most marijuana felonies.

Public Defender must make “a reasonable effort” to notify people if the DA is challenging their case.

In Santa Clara County, the DA’s office cleared thousands of marijuana-related cases listed in county records.

Summary of felony reduction rules

<u>Law</u>	<u>Applies to</u>	<u>Type of case</u>	<u>Can / Must</u>	<u>be reduced</u>
17b	jail only	wobbler = be to jail OR prison/1170(h)	can	sentence can
P 47	jail + \$950 or less prison	drug possession	must	1170(h) + theft-related
P 64	jail + 1170(h) + prison	marijuana-related (including sales)	must	

Now some practice!

Following are some felony convictions.

Assume that all offenses involved people who were over the age of 21 and not on school grounds (matters for Prop 64)

Decide what law applies, if any:

17b, Prop 47 or Prop 64

Then decide whether the conviction can be reduced, must be reduced or can't be reduced.

Is reduction of Mr. A's convictions
Mandatory, Discretionary or Ineligible?

Incarceration: jail, 1170(h),
or prison _____ Law

Can / Must / Can't

_____ be reduced

Auto theft jail 17b P 47 P 64 Can Must Can't
VC 10851

Possess meth prison 17b P 47 P 64 Can Must Can't
HS 11377

Assault with jail 17b P 47 P 64 Can Must Can't
deadly weapon PC 245

Assault with prison 17b P 47 P 64 Can Must Can't
deadly weapon PC 245

Is reduction of Ms. B's convictions
Mandatory, Discretionary or Ineligible?

Incarceration: jail, 1170(h),
or prison Law

Can / Must / Can't
be reduced

Grand theft jail 17b P 47 P 64 Can Must Can't
(\$450) PC 487

Sale of prison 17b P 47 P 64 Can Must Can't
marijuana (adults involved, not at school or daycare)
HS 11359

Possess jail 17b P 47 P 64 Can Must Can't
marijuana HS 11379 (adults involved, not at school or daycare)

Robbery prison 17b P 47 P 64 Can Must Can't
PC 211

Reducing misdemeanors to infractions

Some misdemeanors can be reduced to infractions

Examples:

PC 415: disturbing the peace

Bus & Prof C 25658(b): minor buying or drinking alcohol in public

VC 23109(c): speed contests on highway

VC 5201.1: obscured license plate

VC 12500: driving without a license

VC 14601.1: driving with a suspended license

- **Expungements = Dismissals of convictions**
(jail, probation, 1170(h) sentences)
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- **Certificates of Rehabilitation**
(prison sentences that don't have PC 1170(h) in sentence now)
- **Sealing**
(drug diversion, human trafficking, juvenile, factual innocence)



Certificates of Rehabilitation

Certificates of Rehabilitation are available for convictions that cannot be expunged

A Certificate of Rehabilitation does not dismiss a conviction.

It does:

- ✓ certify rehabilitation by a judge
- ✓ relieve registration requirement for some sex offenses
- ✓ demonstrate evidence of the rehabilitation needed for many professional licenses

PC 290.5

Certificates of Rehabilitation: Requirements

Residence requirements

- must have lived in California for five years immediately before filing,
and

Time requirements

- starting with either the
 - last release from last custody, or
 - last conviction not resulting in custody sentence (whichever is later)
- person must have no new convictions for 7 years (for most offenses)
Judge can shorten the 7 years if it is “in the interests of justice” to do so

Procedure:

Certificates of Rehabilitation

Expunge all eligible jail convictions *before* applying for Certificate of Rehabilitation

File application with court

Include supporting statement and documents
(similar to filing for discretionary expungements)

District Attorney's office conducts an investigation

Judge considers request for Certificate of Rehabilitation
at a hearing

Change in registration requirements for most sex offenses

Starting in July 2021, most people who now must register as sex offenders can ask the court to end their registration.

A new law creates three levels (“tiers”) of registrants:

Tier 1: can ask to be removed after registering for 10 years*

Tier 2: can ask to be removed after registering for 20 years*

Tier 3: continues lifetime registration requirement

* Time spent incarcerated does not count for the required years; time is added for convictions for failure to register

For most people who meet the time requirements, “the petition for termination [of registration] shall be granted...”

- **Expungements = Dismissals of convictions**
(jail, probation, 1170(h) sentences)
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("wobblers," Prop 47 and Prop 64)
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(prison sentences that don't have PC 1170(h) in sentence now)
- **Sealing**
(drug diversion, human trafficking, juvenile, factual innocence)



Sealing

Once a case is sealed, no conviction exists and there is nothing to dismiss.

Upon successful completion of a deferred entry of judgment [drug diversion] program, the arrest upon which the judgment was deferred shall be **deemed to have never occurred**.

The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was **not arrested or granted deferred entry of judgment** for the offense, except [in employment applications for peace officer].

There is similar language for other types of cases where record sealing is allowed.

Sealing

Limited types of records may be sealed:

- successful drug diversions
 - Prop 36 or Deferred Entry of Judgment (“DEJ”)

PC 1210.1

PC 1000.4

- arrests not leading to conviction or factual innocence (“it wasn’t me”)

PC 851.87-.92, 1000.4, 1001.9, 1005,
effective January 1, 2018

PC 851.8

- many juvenile offenses

Welf. & Inst. C 781, 786

- most offenses committed by survivors of trafficking as a “direct result” of being trafficked

PC 236.14

Sealing of most offenses committed as a result of human trafficking

A person subject to human trafficking can have conviction records destroyed if:

- Person was being trafficked at time he/she committed the crime
- Crime was direct result of being trafficked
- Person is distancing him/herself from trafficking
- Destroying records is “in the interests of justice”

File within “reasonable time” after seeking services for or ending trafficking

Exceptions: some convictions that cannot be dismissed include robbery, first degree burglary, carjacking and more serious offenses such as rape, murder, arson, kidnapping and other felonies listed in PC 667.5(c)

- **Expungements = Dismissals of convictions**
(jail, probation, 1170(h) sentences)
- **Reducing felonies to misdemeanors**
("wobblers," Prop 47 and Prop 64)
- **Certificates of Rehabilitation**
(prison sentences that don't have PC 1170(h) in sentence now)
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(drug diversion, human trafficking, juvenile, factual innocence)



Procedure:

How to apply for expungement

NEW LAW!

Effective
January 2021

Automatic dismissal of convictions for

- convictions (including felonies) with probation when person has no probation violations or new convictions, and
- misdemeanor and infraction convictions without probation where the person went for one year with no new convictions

Will automatically be expunged – no application needed

Person must not be serving time, under supervision or probation, not charged with any offense and not required to register per 290.

Procedure:

How to apply for expungement

Automatic removal of arrests if found not guilty or DA does not prosecute after:

- one year for misdemeanors,
- three years for felonies, or
- successful completion of diversion.

NEW LAW!
Effective
January 2021

No application needed.

Exception: felony arrests where sentencing information includes state prison are not automatically removed.

Removing the arrest is like sealing = deemed not to have occurred

Exceptions: applications for peace officer, law enforcement agency or court records, firearms, holding office, some Health & Safety code sections

Procedure:

How to apply for expungement

Disclosure prohibited of removed arrests and dismissed convictions

neither courts nor the state Dept of Justice can report dismissed convictions or removed arrests

Applies both to automatic dismissals and petitions

Exceptions:

applications for peace officer, law enforcement agency or court records, firearms, holding office, some Health & Safety code sections

plus other sections

NEW LAW!

Effective
January 2021

Procedure:

How to apply for expungement

Apply in the county where the conviction took place

File a separate petition for each **case number**

One case may have several “counts” (“charges”);
once the one case is dismissed, all the counts are dismissed

Two ways to apply for expungement:

- *filing a form*
 - no court appearance
 - fill out application form
- *going to court*
 - court appearance required
 - prepare a petition

Procedure:

How to apply for expungement

Filing a form (no court appearance)

Useful for **mandatory** dismissals (court must dismiss the conviction)

- When person successfully completed probation
- If didn't get probation, when person did not have another problem with law enforcement within the year following the conviction



Procedure:

How to apply for expungement

Other counties (not Santa Clara):
 California has “Judicial Council”
 forms to file for expungements:
 forms CR-180 and CR-181

www.courts.ca.gov/forms.htm -
 drop down menu: “criminal”

Send to the court clerk’s office
 in the county where the
 conviction took place.

Keep a copy.

CR-180

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	CASE NUMBER:
PETITION FOR DISMISSAL (Pen. Code, §§ 17(b), 17(d)(2), 1203.4, 1203.4a, 1203.41, 1203.43, 1203.49)	FOR COURT USE ONLY DATE: TIME: DEPARTMENT:

1. On (date): _____, the petitioner (the defendant in the above-entitled criminal action) was convicted of a violation of the following offenses or was granted deferred entry or judgment for the following offenses:

Code	Section	Type of offense (felony, misdemeanor, or infraction):	Eligible for reduction to misdemeanor under Penal Code, § 17(b) (yes or no)	Eligible for reduction to infraction under Penal Code, § 17(d)(2) (yes or no)

If additional space is needed for listing offenses, use Attachment to Judicial Council Form (form MC-025).

2. **Felony or misdemeanor with probation granted (Pen. Code, § 1203.4)**
 Probation was granted on the terms and conditions stated in the docket of the above-entitled court; the petitioner is not serving a sentence for any offense, nor on probation for any offense, nor under charge of commission of any crime, and the petitioner (check all that apply):

a. has fulfilled the conditions of probation for the entire period thereof.

b. has been discharged from probation prior to the termination of the period thereof.

c. should be granted relief in the interests of justice. (Please note: You must explain why granting a dismissal would be in the interests of justice. You may complete and attach the Attached Declaration (form MC-031) or submit other relevant documents.)

3. **Misdemeanor or infraction with sentence other than probation (Pen. Code, § 1203.4a)**
 Probation was not granted; more than one year has elapsed since the date of pronouncement of judgment. Petitioner has complied with the sentence of the court and is not serving a sentence for any offense or under charge of commission of any crime; and the petitioner (check one):

a. has lived an honest and upright life since pronouncement of judgment and conformed to and obeyed the laws of the land.

b. should be granted relief in the interests of justice. (Please note: You must explain why granting a dismissal would be in the interests of justice. You may complete and attach the Attached Declaration (form MC-031) or submit other relevant documents.)

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Form Approved for Optional Use
 Judicial Council of California
 CR-180 [Rev. January 1, 2017]

PETITION FOR DISMISSAL

Penal Code, §§ 17(b), 17(d)(2),
 1203.4, 1203.4a, 1203.41, 1203.43 and 1203.49
www.courts.ca.gov

Procedure:

How to apply for expungement

The petition shows the judge that “**the interests of justice**” support dismissing the conviction by:

- a Declaration (sworn, personal statement showing that “that was then, this is now”), and
- supporting documents
 - letters of support from
 - co-workers
 - friends and family
 - church
 - community volunteer placements
 - certificates of accomplishments
 - other evidence of moving forward and giving back



Employment rights of people with criminal convictions



Expunged convictions shielded

Most California employers cannot ask about or consider expunged convictions in employment decisions

No employer, whether a public agency or private individual or corporation, **shall ask** an applicant for employment to disclose, through any written form or verbally, information . . . **concerning a conviction that has been judicially dismissed or ordered sealed...**

. . . nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, **any record ... concerning a conviction that has been judicially dismissed or ordered sealed ...**

Referring to PC sections 1203.4, 1203.4a, 1203.45 and 1210.1.

Since 2019, those getting Certificates of Rehabilitation are included in this protection.

When California employers can consider expunged convictions

Exceptions to Labor Code section 432.7: employers can consider dismissed convictions in the following circumstances:

- peace officers §§ (b), (e)
- health facilities § (f)
- PC § 290-related arrests for positions with regular access to patients
- HS § 11590-related arrests for positions with access to medication
- concessionaires [selling or contracting] with government §§ (k), (l)
though keep in mind new § 432.9 – Ban the Box – re government employment
- employer required by law to obtain conviction information § (m)
- position requires possession/use of firearm in employment § (m)
- conviction bars applicant from holding position, notwithstanding dismissal § (m)
- employer is prohibited from employing applicant with conviction § (m)

“Ban the Box” on most job applications in California

“Ban the Box”: most employers in California with more than 5 employees may not ask applicants about criminal histories on employment applications or initial interviews.

They must wait until after “a conditional offer of employment” before asking about criminal history

BAN THE BOX!



Exceptions: Employers can ask on the application form about conviction history if

- the agency is required to do a background check
- the position is with a criminal justice agency
- farm labor contractors

Most employers cannot have an absolute ban on hiring anyone with a conviction history.

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense in the permanent ranks of the unemployed.

Court decision in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)

Employers must make an **individualized assessment** of each applicant to consider:

- The **nature and gravity of the offense** or conduct;
- The **time that has passed** since the offense, conduct and/or completion of the sentence; and
- The **nature of the job** held or sought.

Different employers can see different information

Once a conviction is dismissed (“expunged”), it remains on a rap sheet, with a notation that the conviction was dismissed.

Rap sheets are highly private documents. The law limits who is permitted to see them.

Government employers, law enforcement and the courts can see full record, including expunged convictions

Banking and hospitals / medical facilities
have greater access than private employers

Different employers can see different information: Licensing boards

Different licensing boards can see different things

Examples: Real estate agents, Security guards, Accountants

People with convictions can present evidence to persuade licensing boards to give permission to work by showing rehabilitation, including

- Time passed since last conviction
- Expungement of conviction(s)
- Letters of support
- Whether convictions are “substantially related” to license desired

Different employers can see different information: Licensing boards

Most boards regulated by the Dept of Consumer Affairs cannot deny a license to someone based on:

- Convictions that have been dismissed (expunged)
- Most criminal convictions older than 7 years
- Arrests, diversions, sealed records

NEW LAW!
Effective July
2020

If the conviction is within the last 7 years, or is “serious” older felony, the board cannot deny someone a license unless the conviction is “substantially related” to license desired

Most boards are not supposed to ask people applying for a professional license about criminal history. The boards can run a LiveScan check; the Dept of Justice will report results.

Different employers can see different information: Licensing boards

Expungement and Certificates of Rehabilitation can be useful. Current law still protects people with convictions and rehabilitation.

[A] person shall not be denied a license **on the basis of a conviction ... that has been dismissed...**

Business & Professions Code 480(c), revised language from AB 2138 effective 2020

[A] person shall not be denied a license **on the basis** that he or she has been convicted of a crime ... if he or she has obtained a **certificate of rehabilitation** ... or has made a showing **of rehabilitation** ...

Business & Professions Code 480(b), revised language from AB 2138 effective 2020

Different employers can see different information: Caregivers

Employers in the care-giving fields must request criminal history reports of job applicants

Examples: Child care workers
Disabled people's assistants
Elder care workers

- the California Department of Social Services will notify the employer if applicant has a conviction
- caregivers with a criminal record can ask the Department of Social Services for an 'exemption' to be eligible to work

PC §11105.3; Exemption process outlined at California Department of Social Services <http://cclid.ca.gov/PG404.htm>. New legislation to reform DSS has been proposed.

Different employers can see different information: private employers

Private employers do not have access to state computer files

Examples: Target, Cisco, Safeway cannot see rap sheets

Private employers usually buy **background check reports**

In California, **background check companies** are not *supposed to* report:

- past arrests, or
- convictions that are older than 7 years

Background check companies

Applicants must give permission for employers to order a background check report.

Employers must offer the applicant a copy of the report

Cal. Civil Code 1786.26(b)(1), Cal. Civil Code 1786.16(a)(2), (b) and 15 USC 1681j

Getting a copy of the report allows people to know what is on their report.

Mistakes on background reports are common

People who are the subject of an unlawful report can sue for \$10,000

Cal. Civil Code 1786.50

Answering questions on a job application

Keep in mind: An employer can use an employee's false statements on a job application as a legal reason to not hire or to fire someone, even after years of work

Learn what is actually on a record:

many people are unaware of what is on their record

Read the application question **carefully**

Does it ask about current convictions only?

Does it ask about felonies only?

Does it ask about recent convictions only?

Does it ask about ever having been convicted of a crime?

The employer's questions are unlawful, but what can I do?

- Practice responses to questions
 - Career training agencies can help
- Get it in writing if possible (e.g., job application form, letters of rejection)
- Take notes about who said what, when
- Talk to others about a specific employers' actions

Some additional resources:

General:

- All of Us or None: www.allofusornone.org
- Collateral Consequences Resource Center: www.ccresourcecenter.org
- Clean Slate Clearinghouse: www.cleanslate.csgjusticecenter.org
- Californians for Safety and Justice: www.safeandjust.org/resources
- Root and Rebound: www.rootandrebond.org
- The Papillon Foundation: www.papillonfoundation.org

Employment:

- (in San José) Alexander Community Law Center workers' rights clinic
<http://law.scu.edu/kgaclc/#services> (408) 288-7030
- National Employment Law Project www.nelp.org
- National H.I.R.E. network: www.reentry.net





Email the SJSU Record Clearance Project at

RCP website:
www.sjsu.edu/expunge

expunge@sjsu.edu