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Sealing the Record: Helping Rehabilitated First-Time Drug Offenders to Get Jobs

Gregory A. Forest

Code Section Affected

Penal Code § 851.90 (new).
SB 599 (Perata); 2003 STAT. Ch. 792.

I. INTRODUCTION

Russ Giuntini has seen them at the clerk's office scouring through court records: private investigators—paid by national employers to screen applicants for jobs at places like Home Depot.¹ One major news source claimed that the number of security background checks being requested by employers increased dramatically in the wake of September 11, 2001.² According to the president of one background-investigation firm, 85% of major businesses routinely run background checks on job applicants.³

The investigators occasionally find records of arrests for drug possession where the individual was *never convicted* but was instead successfully treated in a drug diversion program.⁴ In California, it is illegal for such records to be used as a factor in employment screening.⁵ Despite this, it was happening, and as head of the Oakland-Emeryville-Piedmont-Berkeley Branch of the Alameda County District Attorney, Russ Giuntini was in a position to do something about it.⁶ Mr. Giuntini developed a new penal code section⁷ to allow a judge to *seal the records* of successful drug divertees and protect them from losing employment opportunities.⁸ The product of a collaborative effort with Senate Majority Leader

1. Telephone Interview with Russ Giuntini, Head District Attorney, Alameda County District Attorney's Office, Oakland-Emeryville-Piedmont-Berkeley Branch Office (Sept. 10, 2003) [hereinafter Giuntini Interview] (notes on file with the *McGeorge Law Review*).

2. Teresa M. McAleavey, *How to Have a Record Expunged*, THE RECORD (Bergen County, N.J.), June 23, 2002, at B (reporting, from CBS News, that "security background checks are up 20 percent and that as many as 70,000 background checks are performed a day throughout this country").

3. Anne Fisher, *I Got Caught Smoking Pot. Who's Going to Hire Me Now?*, FORTUNE, Sept. 16, 2002, at 224 (reporting that "85% of FORTUNE 500 companies now do background checks on applicants").

4. See Giuntini Interview, *supra* note 1 (stating that police records, including arrest records, are available for viewing in the court clerk's office).

5. CAL. LAB. CODE § 432.7(a) (West 2003); see also *infra* Part II.B.

6. See Giuntini Interview, *supra* note 1 (recording Mr. Giuntini's opposition to private investigators viewing arrest and police records of job applicants during the application screening process).

7. Voicemail message from Melissa Kludjian, Legislative Assistant to Senator Don Perata (Aug. 14, 2003) (notes on file with the *McGeorge Law Review*) (naming Russ Giuntini as the architect of SB 599).

8. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 1-4 (May 6, 2003) (citing the Alameda County District Attorney's Office as the source of the bill, and stating that "[t]he purpose of [the] bill is to provide for the sealing of arrest records for any person who successfully completes a court-administered drug diversion program" in order to prevent those records from being "used in any way that could result in a denial of employment").

Don Perata, Senate Bill 599 seeks to “rescue” non-violent drug users “from a potential life of crime” by helping them to get jobs.⁹

Some employers have objected to the practice of sealing criminal records as a form of “erasing the truth” about a job applicant.¹⁰ Sealing their criminal record, they argue, lets job applicants misrepresent their past.¹¹ In particular, it is important to keep records of past misdeeds available in subsequent cases for the purposes of sentencing enhancement.¹² Chapter 792 allows the drug possession arrest record to be used in the limited circumstances of criminal justice job screening and in the event of subsequent arrests,¹³ but otherwise affords job applicants a sense of security as they pursue a better life.¹⁴

II. LEGAL BACKGROUND

California laws restrict what employers may ask on a job application or in an interview.¹⁵ In fact, employers may only legally inquire about actual convictions, *not* arrests that did not result in a conviction.¹⁶ Despite this limitation, arrest records are readily available in the court records of the jurisdiction where the arrest was made and can be found by any investigator through routine investigative practices.¹⁷ Under existing law, records of an arrest for first-time drug possession that resulted in charges being dropped subsequent to completion of a drug treatment program (i.e. records of a “diverted” offense) may *not* be used by employers to deny a job opportunity.¹⁸

9. *Id.* at 4.

10. *Down the Memory Hole*, PROVIDENCE J.-BULL., Mar. 13, 2002, at B-4 (discussing a Rhode Island bill proposing to erase records of felony convictions in as little as five years).

11. Alayna DeMartini, *More Folks Trying to Clear Misdeeds from Public Files*, COLUMBUS DISPATCH, Mar. 3, 2002, at 1-A (arguing that sealing court records “allows job-seekers and others to lie about whether they were arrested or convicted of a crime”).

12. See Seth Stern, *Ex-Felons See Criminal Records as a “Life Sentence,”* CHRISTIAN SCI. MONITOR (Boston, Mass.), Apr. 1, 2002, at 4 (quoting Rhode Island Assistant Attorney General William Guglietta as stating that a past criminal record acts as an “anchor around your ankle” which “provides some deterrent” against re-offending).

13. CAL. PENAL CODE § 851.90(b)-(c) (enacted by Chapter 792) (referring to applications for employment as a peace officer and for determining eligibility for subsequent drug diversion).

14. See Tiffini Theisen, *Prisoners of the Past; Workers with Criminal Records Have Tough Time*, ORLANDO SENTINEL, Oct. 3, 2001, at G-1 (illustrating the tribulations of “job-seekers with criminal backgrounds”). Ex-felons often cannot find good jobs and become distraught as a result of constant rejection. *Id.* Others do find low-wage employment but remain fearful that they will lose their job or be barred from advancement. *Id.*

15. See discussion *infra* Part II.B (detailing California Labor Code and other laws governing job applications).

16. CAL. LAB. CODE § 432.7(a) (West 2003).

17. Lester S. Rosen, *Checking for Crimes; What Employers Can and Can't Find Out About Applicants*, S.F. EXAMINER, Aug. 22, 1999, at J-5.

18. See *infra* Part II.A (explaining the safeguards that were intended to attach to “drug diversion” under California Penal Code section 1000.4 as interpreted by the courts).

A. *Drug Diversion: California Penal Code Section 1000*

Under California law, counties have a choice between two alternative programs of intensive rehabilitation for first-time drug offenders who meet certain qualifications.¹⁹ The most common program is “deferred entry of judgment” under Penal Code section 1000.1, wherein the defendant pleads guilty to the charge and has the entry of judgment suspended pending completion of a drug treatment program.²⁰ Some counties, including those in the Bay Area, offer a pre-plea “drug court” under Penal Code section 1000.5, which allows the defendant to go through treatment and enter a plea only if he or she is unsuccessful.²¹ Referred to generally as “drug diversion,” these programs suspend criminal proceedings against the defendant and forestall the imposition of criminal sanctions for the offense while the individual is treated for his or her addiction.²² Once deferred, the defendant’s case is managed by the probation department, which files periodic reports with the trial court concerning the defendant’s participation in treatment.²³ After the defendant successfully completes the program, he or she returns to court where the charges are dismissed.²⁴ If the defendant fails to overcome his or her addiction, he or she may be kicked out of treatment, wherein criminal proceedings are reinstated.²⁵

19. CAL. PENAL CODE §§ 1000.1, 1000.5 (West 1985 & Supp. 2004); *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5 (May 6, 2003) (explaining the ambiguity in the term “drug diversion”).

20. CAL. PENAL CODE § 1000.1; *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5 (May 6, 2003) (stating that most counties offer deferred entry of judgment).

21. CAL. PENAL CODE § 1000.5; *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5 (May 6, 2003) (outlining the difference between the two programs and attributing “pre-plea” programs to counties in the Bay Area).

22. *See* Lynn Trinka Ernce, *Review of Selected 1993 California Legislation, Crimes; Diversion—Disclosure of Arrests*, 25 PAC. L.J. 524 n.1, 526 (1994) (referring to programs under sections 1000.1 and sections 1000.5 as “diversion” programs and explaining diversion “the procedure of postponing prosecution of the offense filed either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication”).

23. *See* Geoffrey Pope, Comment, *California’s Experience with Pretrial Diversion*, 7 SW. U. L. REV. 418, 422 (1975) (discussing the mechanics of diversion proceedings).

24. *See id.*; Telephone Interview with Randy Tryon, Director of Substance Abuse Programs, John H. Jones Communicare Clinic (Aug. 26, 2003) (notes on file with the *McGeorge Law Review*) (describing how treatment generally functions; for example, specific terms of drug diversion programs vary by county, but the program is essentially court-monitored probation with mandatory drug testing and group counseling sessions similar to Alcoholics Anonymous).

25. Pope, *supra* note 23, at 422.

Prior to the passage of Chapter 792, persons who successfully completed drug diversion or deferred entry of judgment were supposed to be exonerated of the drug charge.²⁶ The arrest and probation were “deemed to have never occurred” and the participant could indicate as such “in response to any question concerning his or her prior criminal record.”²⁷ Despite this clear protection in the Penal Code, records of the arrest remained a part of the viewable record contained in the filing system of the court where the charges were filed.²⁸

Furthermore, existing law provides that “[a] record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program *shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.*”²⁹ In two cases the California Court of Appeals for the Second District determined that individuals who successfully complete drug diversion or deferred entry of judgment should not suffer adverse consequences for their transgression.³⁰ Despite these rulings, employers are still able to view court files pertaining to drug diversion and use them in order to deny employment to individuals.³¹ However, doing so is a violation of the law, which subjects the company or agency to both civil and criminal sanctions.³²

26. See CAL. PENAL CODE § 1000.4(a) (West 1985 & Supp. 2004) (providing that, “[u]pon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. . . . [Record of the arrest] shall not . . . be used in any way that could result in the denial of any employment, benefit, license or certificate”).

27. *Id.*

28. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 3 (May 6, 2003) (stating that “companies hire private investigators that routinely perform court records searches in order to view [job applicant’s] files including the police reports and the findings therein”); Giuntini Interview, *supra* note 1 (stating that police and arrest records may be viewed by members of the public, including private investigators screening job applicants); Employment Screening Resources (“ESR”), *Special Report on Criminal Records—Part One*, at http://www.esrcheck.com/articles/article.php?article_id=article4.html (last visited Jan. 31, 2004) [hereinafter ESR article] (copy on file with the *McGeorge Law Review*) (stating that “private companies must obtain criminal records on a county by county basis at the actual courthouse,” and, “public records researchers [may] go to any courthouse in the United States to research whether a particular applicant has a criminal record”).

29. CAL. PENAL CODE § 1000.4(a) (emphasis added).

30. *B.W. v. Bd. of Med. Quality Assurance*, 215 Cal. Rptr. 130, 137, 169 Cal. App. 3d 219, 232 (1985) (determining that “the use of the words ‘shall not be used’ and ‘in any way,’ in referring to the record of arrest of a successful divertee, is indicative of an intent by the Legislature that the protection of section 1000.5 [renumbered to section 1000.4 which later became section 1000.4 by 1996 Cal. Stat. ch. 1132 sec. 6.5] be given the broadest application”); *Unzueta v. Ocean View Sch. Dist.*, 8 Cal. Rptr. 2d 614, 617, 6 Cal. App. 4th 1689, 1696 (1992) (describing the language of Penal Code section 1000.4 as “extraordinary and compelling,” and stating that “[i]t demonstrates the breadth of the Legislature’s underlying remedial purpose”).

31. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 599, at 3 (May 23, 2003) (arguing that, despite existing law, “employer’s [sic] performing background checks are able to view the information contained in court files to deny employment opportunities”); see discussion *infra* Part IV.

32. CAL. LAB. CODE § 432.7(c) (West 2003); see also ESR article, *supra* note 28, (warning that “[a]n employer may NOT ask about *arrests* or *detentions* that did not result in a conviction” and that “serious lawsuits” may result from relying solely on a name in a database, without properly investigating the actual court file); *infra* Part II.B.

B. Restrictions on Job Applicant Screening: California Labor Code Section 432.7 and California Fair Employment and Housing Commission Rules

The California Labor Code forbids employers from using arrest records as a factor in denying employment which applicant successfully completed a drug diversion program.³³ Section 432.7 prohibits any employer³⁴ from inquiring, orally or in writing, about any arrest that did not ultimately result in a conviction.³⁵ Included are defendants who successfully complete drug diversion, since charges are dismissed once they have successfully completed drug treatment.³⁶ Employers may not investigate or use any records pertaining to an applicant's participation in drug diversion as the basis for withholding a job opportunity.³⁷

The law even includes a private right of action against employers that discriminate on the basis of an applicant's criminal record.³⁸ Intentionally seeking information about an applicant's record of drug diversion or using the record to deny employment is punishable as a misdemeanor.³⁹ Pending cases are not covered by the section.⁴⁰ The law does not apply to the screening of applicants for employment as peace officers or other positions with certain criminal justice agencies.⁴¹ An exception also exists for the screening of potential concessionaires

33. CAL. LAB. CODE § 432.7(a) (limiting the information about which an employer may inquire regarding an applicant's criminal background).

34. *Id.* (defining employer as "a public agency or private individual or corporation").

35. *Id.* (prohibiting employers from inquiring about "an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program").

36. CAL. PENAL CODE § 1000.4(a) (West 1985 & Supp. 2004). Section 1000.4 states: "Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred." *Id.*

37. CAL. LAB. CODE § 432.7(a). Section 432.7 provides:

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 an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, 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 of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program.

Id.

38. *Id.* § 432.7(c) (allowing "the [job] applicant [to] bring an action to recover from that person [who violates this section] actual damages or two hundred dollars (\$200), whichever is greater, plus costs, and reasonable attorney's fees"); *id.* § 432.7(d) (providing that the "remedies under this section shall be in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law").

39. *Id.* § 432.7(c) (establishing that "[a]n intentional violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500)"); Robert Lazo, *Negligent Hiring: Nigg v. Patterson*, 25 BEVERLY HILLS BUS. ASS'N J. 82, 84 (1991) (confirming that "[a]n employer who utilizes an arrest which did not result in a conviction as a basis for an employment decision commits a misdemeanor under California Labor Code § 432.7").

40. CAL. LAB. CODE § 432.7(a).

41. *See id.* § 432.7(e) (referring to definitions in Penal Code section 13101).

on public land.⁴² A similar statute makes it illegal for employers to ask about minor marijuana offenses.⁴³

The rules of the Fair Employment and Housing Commission, given the force and effect of law in the California Code of Regulations, make it illegal for an agency to ask about a job applicant's criminal record in cases of an arrest that did not result in a conviction, convictions that were sealed or expunged, or crimes for which the defendant successfully completed diversion.⁴⁴ Also, under the Americans with Disabilities Act, employers are forbidden from using an applicant's history of drug addiction as a basis to deny employment.⁴⁵

III. CHAPTER 792

Chapter 792 changes existing law by adding California Penal Code section 851.90⁴⁶ which provides the means for the judge to seal the records in a drug diversion or deferred entry of judgment case.⁴⁷ Chapter 792 allows the judge to order the records in the case sealed "upon the written or oral motion of any party in the case, or upon the [judge's] own motion."⁴⁸ Such motion is allowed where sealing the records would be in the "interests of justice" in the eyes of the judge "presiding at the hearing where the charges are dismissed."⁴⁹ Other instances where California law allows for the sealing of arrest records are cases in which the defendant was both acquitted,⁵⁰ and it appears to the judge that the defendant

42. *Id.* § 432.7(k) (stating that the law does not apply to "any city, city and county, county, or district, or any officer or official thereof, in screening a prospective concessionaire . . . for purposes of consenting to, or approving of, . . . [an] application for . . . any beneficial interest in a concession, lease, or other property interest"); Kelly A. Ryan, *Public Entities, Officers, and Employees; Criminal History Information of a Prospective Concessionaire*, 24 PAC. L.J. 1022, 1024 (1993) (discussing the exception created by Chapter 1026 for prospective concessionaires by the 1992 amendments to section 432.7); 1983 Cal. Stat. ch. 1092, § 192 (creating the exception for screening conducted by the Los Angeles Olympic Games Committee).

43. CAL. LAB. CODE § 432.8; *see also* Rosen, *supra* note 17 (warning that an employer may not consider misdemeanor convictions "for minor marijuana offenses more than two years old").

44. *See* CAL. GOV'T CODE § 12935(a) (West 1992) (granting the Fair Employment and Housing Commission the power to "adopt, promulgate, amend, and rescind suitable rules, regulations, and standards . . . to interpret, implement, and apply all provisions of this part"); CAL. CODE REGS. tit. 2, § 7287.4(d)(1) (1995) (making it "unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning: (A) Any arrest or detention which did not result in a conviction; (B) Any conviction for which the record has been judicially ordered sealed, expunged or statutorily eradicated; [or] (C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5").

45. *See* Theisen, *supra* note 14 (claiming that "[t]he Americans with Disabilities Act says employers cannot discriminate against past drug addicts").

46. CAL. PENAL CODE § 851.90 (enacted by Chapter 792).

47. *Id.* § 851.90(a)(1).

48. *Id.*

49. *Id.*

50. *Id.* § 851.85 (West 1985). *But cf.* 7 PAC. L.J. 380, 381-82 (1975) (suggesting that the law "amply protects" those found factually innocent, but may create a suspicion or inference that those who are acquitted without the added benefit of a finding of factual innocence may appear to some "factually guilty" with acquittal attributed only to "the procedural maneuvering of an attorney").

was factually innocent. Records may also be sealed following juvenile cases,⁵¹ except for certain serious crimes.⁵²

Under Chapter 792, a job applicant can effectively prevent an employer from using the record of his or her diverted arrest as a reason to deny the applicant a job, since the applicant may now have the court seal the record from public view.⁵³ After their records are sealed pursuant to Chapter 792, persons may answer an inquiry concerning or about their past as if they were not arrested for the dismissed charge.⁵⁴ This section mirrors the provision in Penal Code section 1000.4 by which “the arrest [is] deemed to have never occurred” once the program is successfully completed.⁵⁵ However, the individual must still admit to the charge when applying for employment as a police officer.⁵⁶ Furthermore, the charge can be used to disqualify the individual from participation in drug court in a subsequent prosecution, should he or she re-offend.⁵⁷

IV. ANALYSIS

The sponsors of SB 599⁵⁸ saw their bill as a way to reduce recidivism, or, as they put it, “rescue . . . young adult offenders, who do not have a serious criminal

51. CAL. PENAL CODE § 851.7(a)-(b) (West 1985 & Supp. 2004) (allowing for records to be sealed upon release, dismissal of the charges or acquittal); *id.* § 1203.45 (West 2004) (pertaining to the sealing of juvenile records following dismissal of charges under section 1203.4); *see also* CAL. WELF. & INST. CODE § 781(a) (West 1998 & Supp. 2004) (setting the moment when records may be sealed at five years after the jurisdiction of the juvenile court ends or once the person reaches age eighteen).

52. CAL. WELF. & INST. CODE § 781(b) (indicating that “[n]otwithstanding any other provision of law, the court shall not order the person’s records sealed in any case in which the person has been found . . . to have committed an offense listed in [section 707(b)] which he or she had attained 14 years of age or older”); *id.* § 707(b) (listing, among several other crimes, murder, arson, rape, sodomy by force, kidnapping, attempted murder, torture, aggravated mayhem, carjacking, and voluntary manslaughter).

53. CAL. PENAL CODE § 851.90(a)(5) (enacted by Chapter 792) (“[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 be used in any way, . . . that could result in the denial of any employment, benefit, or certificate.”).

54. *Id.* § 851.90(a)(4) (“The defendant may . . . indicate in response to any question concerning the defendant’s prior criminal record that the defendant was not arrested or granted statutorily authorized drug diversion or deferred entry of judgment for the offense.”).

55. *Id.* § 1000.4 (West 1985 & Supp. 2004); *see supra* Part II (discussing the exoneration provided by section 1000.4).

56. *Id.* § 851.90(b) (enacted by Chapter 792) (“The defendant shall be advised that . . . this section does not relieve the defendant of the 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 Section 830.”).

57. *Id.* § 851.90(c).

The defendant shall be advised that . . . the arrest upon which the case was based shall be disclosed by the Department of Justice or the court in which the matter was heard in response to any subsequent inquiry by the district attorney, court, probation department, or counsel for the defendant concerning the defendant’s eligibility for any statutorily authorized drug diversion or deferred entry of judgment program in the future.

Id.

58. *See supra* Part I; *see supra* note 8-9 and accompanying text.

history, from a potential life of crime.”⁵⁹ Sponsors hoped that by having arrest records sealed, those persons who completed diversion would be more likely to contribute to society by getting jobs.⁶⁰ After all, the purpose of drug diversion is rehabilitation⁶¹—giving non-violent, first-time drug offenders a chance to receive drug treatment and, hopefully, a fresh start.⁶² If participants successfully complete the program by overcoming their addiction, then their record should not keep them from getting a decent job.⁶³ Since state law already prohibits employers from considering an applicant’s past participation in a drug diversion program, it makes sense to have such records sealed.⁶⁴ That is apparently the only way to keep some employers from using diversion records, Labor Code section 432.7 notwithstanding.⁶⁵

Even with the protections provided by the Labor Code and case law,⁶⁶ bill sponsors and experts in the field found that employers were not only accessing job applicants’ diversion records, but were using those records to deny employment.⁶⁷ Thus sealing the records is the practical mechanism necessary to fully implement

59. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 4 (May 6, 2003).

60. *Id.* (arguing that “rather than becoming socially destructive criminals, these young adults [will] become law abiding and productive members of our society”).

61. *See* *People v. Superior Court (On Tai Ho)*, 113 Cal. Rptr. 21, 23, 11 Cal. 3d 59, 61 (1974) (finding that:

diversion [under CAL. PENAL CODE §§ 1000-1000.4] permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction).

62. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 4 (May 6, 2003) (arguing that “it is highly imprudent to permit employers to violate state law and undermine state policy by denying jobs to persons who have successfully completed diversion programs”); *On Tai Ho*, 113 Cal. Rptr. at 23, 11 Cal. 3d at 61 (1974) (discussing the purpose of drug diversion to “restore [the divertee] to productive citizenship”).

63. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 4 (May 6, 2003) (suggesting that “[i]t is . . . very much in the public interest that . . . [divertees not be denied the opportunity to] become law abiding and productive members of our society”); *On Tai Ho*, 113 Cal. Rptr. at 23, 11 Cal. 3d at 61 (1974) (stating that diversion enables the divertee to reenter the job market “without the lasting stigma of a criminal conviction”).

64. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 4 (May 6, 2003) (stating that “if adopted, this legislation would deny potential employers access [to] information they are not legally permitted to use in making employment decisions”).

65. *See supra* Part I (describing how investigators would search court files for the arrest records of divertees).

66. *See supra* Part II (discussing protection under existing law).

67. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5-6 (May 6, 2003) (asserting that the purported exoneration in California Penal Code section 1000.4 “would be illusory if potential employers and other parties could access the files of the case”); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 599, at 3 (May 23, 2003) (expressing the concern that “employer’s [sic] performing background checks are able to view the information contained in court files to deny employment opportunities”); Hon. Walter J. Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20, 23 (1972) (arguing that “[e]mployers in general tend to make no distinction between persons with arrest records and persons with convictions. Both are considered bad employment risks”).

the legislative intent of drug diversion statutes.⁶⁸ In addition, keeping employers from viewing diversion records does not deny them any rights under existing state law.⁶⁹ It is notable that throughout the legislative process no opposition to SB 599 was recorded.⁷⁰

V. CONCLUSION

Drug diversion was intended to intercept initial drug users and others marginally involved with drugs before they succumbed to a more hardened addiction and more serious criminal activity.⁷¹ The laws establishing drug diversion explicitly state that successful participants should bear no stigma from their transgression.⁷² There is little reason to allow employers to avoid the clear intent of the drug diversion laws by using the records to keep successfully treated drug users from contributing to society.⁷³

68. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5-6 (May 6, 2003) (suggesting that the current state of the law is flawed because to “allow the person to state that he or she has never been arrested or convicted of a crime, without a sealing of the records[,] would be of little benefit to the person” because the records can be found via background checks).

69. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 599, at 3 (May 23, 2003) (emphasizing that “this legislation would deny potential employers access [to] information they are not legally permitted to use in making employment decisions”).

70. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF SB 599, at 3 (Sept. 9, 2003); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 599, at 5 (July 1, 2003).

71. See *supra* notes 61-63 and accompanying text (explaining that the purpose of drug diversion is rehabilitation).

72. See *supra* Part II.A (analyzing the intent and effect of California Penal Code section 1000.4).

73. See *supra* Part IV (discussing the motivations of SB 599’s sponsors).