COLLATERAL CONSEQUENCES OF NON-CRIMINAL ADJUDICATIONS

Report approved by the NYCLA Board of Directors at its regular meeting on May 8, 2006.
NEW YORK COUNTY LAWYERS’ ASSOCIATION
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The New York County Lawyers’ Association (NYCLA) expresses grave concern regarding the collateral consequences of non-criminal adjudications affecting a large segment of the population. The potential and actual lifelong stigmatization of individuals never convicted of a crime must be addressed by the Legislature immediately.

This Report and annexed proposals address the urgent need to limit the collateral consequences arising from non-criminal adjudications for petty offenses. These consequences have risen exponentially as the public’s access to these records has grown, most directly from the creation of the New York State Office of Court Administration (OCA) database that pools such information, statewide, for any person who pays a $52 fee. The current state of the law mandates that only the official court records remain open, and this OCA database provides a statewide listing of all such cases upon payment of the fee. The reports generated by this database are frequently obtained as part of a standard background check when someone applies for a job, a loan, admission to co-operative housing or government-sponsored housing.

The practical result of this new technological advance is that there is currently no way under the law for a member of the public, who may have otherwise lived and will continue to live a law-abiding life, to seal the court record for an adjudication to a non-criminal petty offense such as Disorderly Conduct. Thus, such a non-criminal adjudication will never be eligible for removal from that permanent database.

The consequences of this permanent and accessible electronic record can be devastating and lifelong. While there is room for disagreement as to the breadth or timing of a sealing proposal, there is consensus that the accessibility of court records, created by new technology, is permanently stigmatizing a large portion of the population.

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1 Currently, all other agencies, including the Police Department and prosecutors’ records and fingerprint records, are sealed by law. The fundamental issue is that the court record is not sealed. However, by use of the database, what used to be discoverable only by traveling from courthouse to courthouse is now available at the touch of a button upon payment of the fee.
This Report and proposed alternative legislation address the current problem by altering the sealing structure within the Criminal Procedure Law to allow for a new type of sealing to occur when someone has been adjudicated for a non-criminal petty offense.

NYCLA is mindful of prior efforts calling for the automatic sealing of all such records, as well as articulated objections by prosecutors and law enforcement. The Report and alternative proposals that follow address competing concerns, as well as attempt to avoid an undue burden of additional litigation on the Courts.

Finally, NYCLA believes that the Human Rights Law should be appropriately amended in conformity with the purpose and goals of this Report, consistent with the annexed proposal by the Legal Action Center, in order that all impediments to access to housing, employment, education and financial services be removed for those adjudicated of a non-criminal petty offense.
Introduction

In the crushing volume of the New York City Criminal Court, plea bargaining is a necessary way of life. The most common results of this reality are pleas to violations and traffic infractions. The collateral consequences flowing from petty offenses, defined by New York law as non-criminal offenses,² are disproportionate. To an individual with such an adjudication, it can be a substantial hurdle in real life that goes far beyond the original criminal action. The current state of the law does not allow a person any avenue of relief.

The New York County Lawyers Association is gravely concerned that collateral consequences for petty offenses are disproportionately affecting a large segment of the population. Accordingly, the real potential for lifelong stigmatization of individuals who have never been convicted of a crime must be addressed immediately.³

While there is room for disagreement as to the breadth or timing of any sealing proposal, there is broad consensus that the accessibility of court records, created by new technology, is permanently stigmatizing a large portion of the population. That is a reality that NYCLA believes our society can ill afford.

I. The Problem

The collateral consequences that result from criminal adjudications are common knowledge to those in the criminal justice system. From immigration to housing to professional licensing, the resulting consequences of a criminal adjudication can frequently be more severe than the sentence meted out in the actual criminal case. Historically, the collateral consequences of non-criminal adjudications, however, had not been so apparent.

The collateral consequences of non-criminal adjudications have become a larger issue with results very similar to the consequences of criminal adjudications. Technology has now made these consequences dramatically apparent. Prior to the creation of a relatively new statewide search capability, these records were on file in courts, but there was no way to compile them electronically. Combined with the fact that a defendant’s fingerprint record was sealed, this meant that employers, credit agencies or co-operative boards could not realistically and readily obtain information about these non-criminal dispositions.

² Pen. L. § 10.00(3) & (6); Crim. Proc. L. § 1.29(39).
³ NYCLA also urges an amendment to the Human Rights Law and Criminal Procedure Law to provide protections for people with petty offense convictions. Specific suggestions by the Legal Action Center for amending Exec. L. § 296(16) and Crim. Proc. L. § 160.60 are attached in Appendix Two.
The New York State Office of Court Administration’s statewide searchable database, however, has taken adjudications for all non-criminal petty offenses and made them available to everyone who pays the $52 fee.

The unfortunate result of this instant access is that people are suffering actual housing and employment consequences, and credit companies regularly obtain these statewide searches when running background checks on individuals applying for credit. Real decisions are being made by those acquiring this previously unobtainable information, and those decisions are creating very harsh and very real side effects on people adjudicated of only petty, non-criminal offenses.

Hundreds of private, commercial background-screening businesses access these data sources and create their own repositories of criminal history information. A recent report by SEARCH for the Department of Justice found that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.” SEARCH, The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (December 2005).

In addition, collateral consequences can be critical impediments to the process of reentry from jail or prison, or from any involvement in the criminal justice system. Instead of deterring unlawful conduct, the web of collateral sanctions actually makes it more difficult to escape the cycle of crime – more difficult to find a job, maintain stable housing or obtain further education.4

In this Report, NYCLA proposes two potential solutions to address this emerging crisis. Whatever form a remedy takes, NYCLA firmly believes that some avenue of relief must be made available to alleviate these harsh collateral consequences.

II. The Purpose of the Proposals

The current state of the law mandates that the official court records remain open, and this OCA database provides a statewide listing of all such cases upon payment of a fee. The reports generated by this database are frequently obtained as part of a standard background check when someone applies, for example, for a job, a loan, or admission to a co-operative housing association.

The practical result of this new technological advance is that there is currently no way under the law for a member of the public, who may have otherwise lived a law-abiding life, to erase an adjudication to a non-criminal petty offense (such as Disorderly Conduct) from this permanent database.

II. Current State of the Sealing Laws

The sealing of official records generated during criminal cases is governed by three statutes:

A. Criminal Procedure Law § 160.50 regulates the sealing of records in cases that have "terminated in favor of the accused" such as acquittals, dismissals after appeal, no true bills from a grand jury, or dismissals after an Adjournment in Contemplation of Dismissal;

B. Criminal Procedure Law § 160.55 regulates the sealing of records in cases that resulted in adjudications to petty offenses⁵ such as Disorderly Conduct and Trespass; and

C. Criminal Procedure Law § 720.35 regulates the sealing of records in cases where a defendant's adjudication has been replaced by a youthful offender adjudication.

The sealing of records under both CPL §§ 160.50 and 720.35 results in what most people would commonly refer to as a case being truly "sealed." No one but the defendant and a very limited number of entities are allowed access to the records created from the case. "The records" that are sealed include the files of the Police Department, District Attorney’s Office, fingerprint records on file with the Division of Criminal Justice Services, and all official records and papers on file with any court.

The sealing of records under CPL § 160.55, however, is different. [In fact, the term “sealing” is a bit of a misnomer under this statute because the entire record of the adjudication is never completely "sealed." ] The fundamental difference between CPL §160.55 and the provisions of both CPL §§ 160.50 and 720.35 is that the court record is not sealed under CPL 160.55.

Thus, while a person convicted of a petty offense will have all related records of the Police Department and the respective District Attorney’s Office sealed, as well as his/her fingerprint records from that arrest, the official Court record remains open and is currently accessible for a fee on the Office of Court Administration’s database.

IV. One Potential Solution (Appendix One)

⁵There are three petty offenses that are excepted from the CPL § 160.55 sealing of petty offenses: Loitering (under Penal Law § 240.35(3)), Loitering for the Purpose of Engaging in Prostitution (under Penal Law § 240.37(2)), and Driving While Ability Impaired (under Vehicle and Traffic Law § 1192(1)).
One proposed solution outlines a procedural avenue to those individuals who are facing consequences from a non-criminal adjudication. If OCA developed a one-page form, the process would be relatively simple. After one year from the date of sentence, a defendant could apply to the Court, upon notice to the District Attorney’s Office, for sealing of the official Court record on his/her non-criminal, petty offense adjudication. [The three exceptions to CPL § 160.55 sealing (see Footnote 5) would not be eligible for such sealing.] In addition, in the absence of any opposition from the District Attorney’s Office, such petty offense adjudications would automatically seal under this section after 36 months from the date of sentence.

In practice, a defendant making application after one year would serve the District Attorney’s Office and file with the Court a copy of the form application. The clerk of the court would then calendar the matter for at least 20 days (depending upon the needs of the Court). The District Attorney’s Office could then choose to consent to the sealing application or challenge it. If consented to by that Office, the Court would then grant the application and take the appropriate steps. If challenged, the Court would then conduct a summary hearing (where sworn testimony need not be taken). This would be similar to a bail argument at an arraignment or sentencing arguments following a trial.

In those cases where no application has been made by a defendant within 36 months of the date of sentence, the Court record would be automatically sealed pursuant to this section unless the District Attorney’s Office wished to challenge such. Upon the filing of a Notice of Opposition to Sealing with the Court, and on notice to the defendant, the Court would then calendar a date at which both parties would be present and the District Attorney’s Office could challenge the sealing in a summary proceeding where the Court would determine that the case neither be sealed or if the District Attorney’s Office has satisfactorily demonstrated that the interests of justice require such, that the case not be sealed.

**Example: Possession of Marihuana as a Violation [Penal Law § 221.05]**

The Criminal Procedure Law provides a perfect example - involving adjudications to possession of marihuana - of how the issue of collateral consequences of non-criminal adjudications could be handled.

Criminal Procedure Law § 160.50(3)(k) authorizes an adjudication to Unlawful Possession of Marihuana [Penal Law § 221.05] to be treated as a termination in favor of the defendant where (a) the accusatory instrument only alleged violations of Article 221 [Offenses Involving Marihuana], (b) the sole controlled substance involved is marihuana, (c) the adjudication was only to a violation or violations, and (d) at least three years have passed since the offense occurred. CPL §§ 160.50(3)(k)(I) - (iv). This then leaves a procedure in place that allows for the fullest possible sealing (under CPL § 160.50) following an adjudication to a non-criminal, petty offense - PL § 221.05 - which happens
automatically after three years without any realistic input from either the District Attorney’s Office or the Court. 6

While it would be simpler to take the example provided in CPL § 160.50(3)(k) and consider expanding the types of petty offenses that would be automatically sealed under CPL 160.50, such automatic sealing may not take into consideration the legitimate law enforcement interest that a District Attorney’s Office may have for any particular defendant or for any particular petty offense. This proposal, by allowing the District Attorney’s Office an opportunity to oppose the application for sealing or be heard in opposition prior to the automatic sealing of any individual case, strikes a middle ground by permitting a meaningful opportunity for debate over whether the sealing should occur in individual cases, while still providing a procedural avenue of relief.

Unlike the automatic sealing requirements currently in place within the Criminal Procedure Law, this proposal ensures the prosecutor notice and an opportunity to be heard. Once notified, the District Attorney’s Office has an opportunity to evaluate both the defendant and the petty offense that may be sealed. If the defendant is an individual that the District Attorney’s Office would strongly oppose benefitting from this procedure, there is an avenue to meaningfully oppose the sealing. Also, if the adjudication is a type that the District Attorney’s Office feels strongly about, there is also the procedural ability to oppose it. Again, considering the high volume and quick pace of an arraignment courtroom where the majority of sealed terminations occur, this proposal gives the District Attorney’s Office an opportunity to evaluate the particulars of a defendant and a case that is simply not realistic during an arraignment shift and may not be apparently appropriate unless a period of time has elapsed.

The 12- and 36-month “cooling off” periods prevent an onslaught of applications that would otherwise be made were they allowed at the time of sentence. This should keep the procedure from overwhelming an already strained local Criminal Court structure. Waiting for 12 or 36 months would also allow both the District Attorney’s Office and the Court the time necessary to determine whether or not the defendant has fully complied with the terms of his/her sentence (e.g., law-abiding life during conditional discharge, payment in full of fines/restitution, completion of any program or community service obligations).

The Legislature has carved out three exceptions from the CPL 160.55 sealing construct (see Footnote 5). This proposal does not alter the Legislature’s original intent because those three exceptions would not be eligible for sealing under this proposal. Thus, the original carveouts from the existing sealing structure would remain untouched.

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6 Considering the high volume and quick pace of an arraignment courtroom where the majority of pleas to this charge occur, it is unrealistic that either the District Attorney’s Office or the Court would actually avail itself of the opportunity to argue that the interests of justice required that the Court order an Unlawful Possession of Marihuana adjudication to remain unscaled (as CPL § 160.50(1) allows).
VI. **Another Potential Solution** (Appendix Two)

An alternate solution to the problem that was developed and sponsored by the Legal Action Center and also recognized by NYCLA is in many ways procedural, yet important on a practical level for people actually affected by the dissemination of information about petty offenses. In contrast, the first sealing proposal described in this Report may have a number of problems in practice and scope that may substantially undercut its effectiveness.

First, it is important to distinguish between two very different uses of records of petty offenses -- legitimate law enforcement use and the imposition of collateral sanctions. Prosecutors have expressed concern about retaining access to these records for “legitimate law enforcement purposes.” By some accounts, the only legitimate use would arise in the context of a new criminal case. If law enforcement retains access to the sealed court record for use in any new criminal proceeding, then there is no legitimate law enforcement purpose in keeping a record unssealed.

Preserving such access cleanly separates legitimate law enforcement purposes from collateral punishments. With law enforcement access preserved, the only purpose for not sealing a record would be to impose collateral sanctions outside the criminal justice system. The first proposal may not adequately distinguish between these uses, offering only a choice between full sealing (denying access to law enforcement) and no sealing.

The second alternate proposal detailed in Appendix Two defines the acceptable use of the court records of petty offenses by retaining law enforcement access to the sealed court records in the context of any new criminal proceeding, while prohibiting the dissemination and use of these records for the purpose of imposing collateral sanctions. This provision effectively accomplishes the goal and the longstanding public policy of this State of protecting those who have been charged with a criminal offense, but never convicted of a crime, from collateral consequences arising from the prosecution.⁷

Second, there is some concern that the “early” procedure requiring a motion on notice to the District Attorney’s Office creates a substantial barrier in practice for indigent people -- those people least able to access the justice system but most likely to be caught in its net. Long experience with the application process for certificates of relief from disabilities (CRDs) -- powerful tools to mitigate collateral sanctions -- highlights our concern. CRDs are available, among other ways, upon an administrative application to the sentencing court.⁸ According to the New York State Division of Criminal Justice Services (DCJS), between 1972 and 2003, fewer than 100,000 CRDs were issued.⁹ On average, that is fewer than 3,200 a year. To provide some context, in 2004 in New York City

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⁹ Source: DCJS.
alone there were more than 44,000 guilty pleas to the petty offense of Disorderly Conduct, P.L. § 240.20. Extensive anecdotal evidence indicates that the low CRD numbers are not because the vast majority of applications are denied, but because the vast majority of eligible individuals never apply. There is some concern that the “early” sealing proposal may have the same result.

In addition, in light of the second alternate proposal’s carveout for legitimate law enforcement use, the first proposal’s three-year waiting period before the automatic sealing of petty offenses continues to facilitate the imposition of collateral consequences in areas such as employment and housing during a particularly vulnerable period when people need assistance getting back on their feet. We must be mindful here of the root of the problem – the practice of keeping records of petty offenses available in “criminal databases” subjects these people to a stigma that the level of the offense (as determined by the Legislature) is not intended to create. The alternate proposal of automatic sealing upon completion of the terms of the sentence for a petty offense – with the opportunity for the prosecution to object – overcomes this problem, conforms to current sealing procedures, and does not create an additional burden on the court system.

Conclusion

The New York County Lawyers’ Association is gravely concerned that collateral consequences for petty offenses are disproportionately affecting a large segment of the population. Accordingly, the real potential for lifelong stigmatization of individuals who have never been convicted of a crime must be addressed immediately.

The absence of any avenue for a member of the public, who may have otherwise lived and will continue to live a law-abiding life, to seal the court record of a non-criminal petty offense such as Disorderly Conduct is of paramount concern, particularly with the advent of a permanent and accessible electronic record.

While there is room for disagreement as to the breadth or timing of any sealing proposal, there is broad consensus that the accessibility of court records, created by new technology, is permanently stigmatizing a large portion of the population. That is a reality that NYCLA believes our society can ill afford.

Susan J. Walsh
Chair, Task Force on the Criminal Courts

McGregor Smyth and Michael Yavinsky
Subcommittee Co-Chairs
Appendix One

FIRST ALTERNATIVE PROPOSAL
SYNOPSIS OF PROPOSED
CRIMINAL PROCEDURE LAW § 160.57

The creation of the proposed Criminal Procedure Law § 160.57, which follows, would provide an avenue of relief by altering the existing sealing structure within the Criminal Procedure Law to allow for a new type of sealing to occur when someone has been convicted of either a violation or a traffic infraction and:

a. one year has passed from the date of sentence; and

b. the defendant has made application to the sentencing Court, on notice to the District Attorney’s Office; and

   EITHER

c. the District Attorney’s Office consents to the sealing;

   OR

d. the District Attorney’s Office challenges the sealing, on notice to the defendant, and a summary proceeding takes place where the Court determines that the case should be sealed or that the District Attorney has satisfactorily demonstrated that the interests of justice require that the case not be sealed.

   OR

e. in the absence of an earlier application, 36 months have passed from the date of sentence; unless

f. the District Attorney’s Office challenges the sealing, on notice to the defendant, and a summary proceeding takes place where the Court determines that the case should be sealed or that the District Attorney has satisfactorily demonstrated that the interests of justice require that the case not be sealed.

If the sealing application is granted, then the official Court record would be sealed. This would then eliminate the petty offense from the OCA database. If the sealing application is denied by the Court, then the official court record would remain open to the public.
Proposed Criminal Procedure Law § 160.57: Application for Sealing of Court Record Following Termination of Criminal Action by Adjudication for Noncriminal Offense

Proposal

AN ACT to amend the criminal procedure law, in relation to sealing court records involving adjudications for certain petty offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 160.57 to read as follows:

§ 160.57 Application for Sealing of Court Record Following Termination of Criminal Action by Adjudication for Noncriminal Offense.

1. A person convicted of a traffic infraction or a violation, other than a violation of loitering as described in paragraph (d) or (e) of subdivision one of section 160.10 of this chapter or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, and whose case was sealed pursuant to section 160.55 of this article, may move in accordance with the provisions of this section for an order sealing the court record of such action or proceeding. In the absence of an earlier application for an order to seal, after 36 months from the date of sentence, an adjudication of a traffic infraction or a violation pursuant to this subsection, such record shall be automatically sealed by operation of law, unless the people file a notice of opposition upon notice to the defendant, no less than 20 days prior to the sealing date and no earlier than 90 days prior to the expiration of 36 months.

2. A motion to seal shall be filed in writing with the local criminal court or superior court in which the adjudication and sentence occurred not earlier than 12 months following the date of sentence. Such motion must be made upon not less than 20 days notice to the district attorney.

3. Where, upon motion to seal the court record pursuant to this section, both parties consent to such sealing, the court shall enter an order sealing the court record unless the interests of justice require otherwise. For purposes of this subdivision, a party that is given written notice of a motion to seal pursuant to this section shall be deemed to consent to such termination unless, prior to the return date of such motion, such party files a notice of opposition thereto with the court.

4. Where the people file a notice of opposition prior to the return date or the proposed sealing date pursuant to subdivision one, the court shall conduct a summary hearing on the return date in which it may receive any relevant evidence. Upon request, the court must grant a reasonable adjournment to either party to enable them to prepare for the hearing. Following such hearing, an order to seal pursuant to this section shall be granted unless the district attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise. Where the court has determined that sealing pursuant to this section is not in the interests of justice, the court shall put forth its reasons on the record.

5. Upon the entering of an order to seal, the court record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action shall be sealed as if it had been terminated in favor of the accused and that the record of such action or proceeding shall be sealed.

6. Upon the entering of an order to seal or the expiration of 36 months from the date of sentence without
opposition by the People, all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with any court shall be sealed and not made available to any person or public or private agency.

7. Upon the granting of a motion to seal pursuant to this section, or upon the expiration of 36 months from the date of sentencing without opposition, such records shall be made available to the person accused or to such person’s designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state division of parole when the accused is on parole supervision as a result of conditional release or a parole release granted by the New York state board of parole, and the arrest which is the subject of the inquiry is one that occurred while the accused was under supervision or (v) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer of peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto, or (vi) the probation department responsible for supervision of the accused when the arrest that is the subject of the inquiry is one that occurred while the accused was under such supervision.

8. The chief administrator of the courts, in consultation with the director of the division of criminal justice services and representatives of appropriate prosecutorial and criminal defense organizations in the state, shall adopt forms for the motion to seal, the notice of opposition to sealing, and the order granting sealing pursuant to this section.

Section 2. Subdivision three of section 160.50 of the criminal procedure law is amended by adding subsection (m) to read as follows:

(m) A sealing order pursuant to section 160.57 of this chapter was entered.

Section 3. This act shall take effect on the first of November next succeeding the date on which it shall have become a law, and shall apply to all qualifying criminal actions, regardless of sentence date, except that, with respect to actions for which the sentence date occurred prior to such effective date.
Proposals to Improve Successful Reentry Into Society of Qualified Individuals with Criminal Records

The Legal Action Center

2006

(Excerpts. Full document available at http://www.reentry.net.)
Memorandum in Support of Amending the Human Rights Law So That Individuals with Confidential Youthful Offender Adjudications and Sealed Convictions for Non-Criminal Offenses are Protected Against Discrimination

Proposed Amendment

Under current law, employers cannot ask job applicants about arrest terminated in their favor nor use those arrests in making employment decisions. Furthermore, individuals with criminal convictions are protected against discrimination if their conviction is not job-related and they do not pose a threat to safety or property. However, individuals who have confidential youthful offender (YO) adjudications or sealed convictions for non-criminal offenses have none of these protections, frustrating New York State's important policy goal of helping them lead productive and crime-free lives. We propose that § 296(16) of the Executive Law be amended to extend the same protections to people with YO adjudications, a disposition granted by a judge to alleviate a youthful defendant from the stigma of a criminal conviction, and to people with non-criminal offenses, as those whose criminal cases have been terminated in their favor.

16. It shall be an unlawful discriminatory practice... for any person, agency, bureau, corporation or association... to make any inquiry about... or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual... which was followed by a termination of that criminal action or proceeding in favor of such individual... or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a traffic infraction or violation sealed pursuant to section 160.55 of the criminal procedure law, in connection with the licensing, employment... to such individual....

Need for Amendment

Section 296(15) of the Executive Law prohibits unfair employment and licensure discrimination, as provided in Article 23-A of the Corrections Law, against individuals who have criminal convictions. Section 296(16) of the Executive Law provides even greater protection to individuals whose cases have been terminated in their favor, not allowing employers even to ask about or use the arrest in making employment decisions. The state enacted these laws to prevent people who have never been convicted of a crime from suffering the stigma and discriminatory consequences that so often result from the disclosure and use of criminal history information.

YO adjudications, which are not judgments of convictions (see C.P.L. § 720.35), and convictions for non-criminal offenses, fall under neither of these categories, and thus individuals with these histories are entirely without protection against unfair employment and licensure discriminatory practices. Because of the failure to include them within the protection of the Human Rights Law, these two groups of individuals have no remedy if employers refuse to hire them. Indeed, it makes no sense that they have even less protection than people with adult criminal convictions. New York State should correct this oversight.
Memorandum in Support of Amending Criminal Procedure Law §160.60
To Correct Unforeseen Gaps in Sealing Law Protections

Proposed amendment

New York’s sealing laws were enacted to prevent the inappropriate disclosure or use by employers of sealed criminal history information about records of arrests that did not result in a criminal conviction. For cases that are terminated in an individual’s favor, §160.60 of the Criminal Procedure Law explains the legal effect of such termination. However for the two other groups whose cases are sealed or afforded comparable confidential protections, youthful offenders (YO) and individuals with non-criminal dispositions, no such provision exists. To remedy this, we propose the following amendment:

§ 160.60 Effect of termination of criminal actions in favor of the accused, or by youthful offender adjudication or conviction for noncriminal offense.

Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section 160.50 of this chapter, or by a youthful offender adjudication, as defined in section 720.35 of this chapter, or by a conviction for a traffic infraction or violation sealed pursuant to section 160.55 of the criminal procedure law, the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he or she occupied before the arrest and prosecution....

Need for amendment

Section 160.60 of the criminal procedure law restores individuals whose cases have terminated in their favor to the legal status they had before the arrest occurred. It allows these individuals not to respond in the affirmative to inquiries about the sealed arrest or prosecution. Individuals who have confidential YO adjudications and sealed non-criminal convictions have no such protection. Thus, even though their cases are sealed or confidential, an employer can legally ask if individuals have these dispositions. And, because New York’s two laws that protect individuals with past arrests or conviction records from unfair employment discrimination do not apply to these two groups, (see Exec. L. §§296(15) and (16); Article 23-A of the Correction Law, Corr. L. §§750-755), employers not only can ask about these dispositions, they can lawfully refuse to hire individuals with these histories.

An increasing number of employers are obtaining access to sealed criminal history records from sources that simply did not exist when the sealing laws were originally enacted. Records pertaining to sealed cases involving non-criminal convictions, not yet sealed at the court level, are available on the Office of Court Administration’s new electronic criminal history information database. Rapidly increasing numbers of employers are also using consumer credit agencies to conduct background checks on job applicants and employees, and are being given reports containing information about non-criminal convictions even though that is in violation of the state Fair Credit Reporting Act provisions. (G.B.L. §380-ja(1)).

Amending C.P.L. §160.60 will remedy the problems outlined above by bringing statutory protections for confidential YO adjudications and sealed non-criminal convictions in line with §160.60, thus ensuring that the same fundamental protections are afforded to records of individuals in all three categories of cases where arrests do not end in a criminal conviction.
Memorandum in Support of Amending the Criminal Procedure Law § 160.55 To Seal Court Records

Proposed Amendment:

Pursuant to CPL § 160.55, when a person is arrested and fingerprinted for a crime, but is convicted only of a non-criminal offense (with limited exceptions which this proposal would not change), the fingerprints and associated photographs are destroyed, and associated police and prosecution records are sealed, under the same terms as such records are sealed under §160.50. Court records, however, are not sealed. With the advance in technology and the proliferation of commercial background check companies that increasingly purchase their data directly from the Office of Court Administration, people who plead guilty to non-criminal convictions with the understanding that their records will be sealed now suffer unexpected disclosures and resulting barriers to employment and housing based on these minor, non-criminal convictions. To prevent unfair discrimination based on these sealed non-criminal convictions, we propose the following amendment:

CPL §160.55 (1)(c) should be amended to read:

“All official records and papers relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor’s office shall be sealed and not made available to any person or public or private agency, except as provided in paragraphs (d) or (e) of this subdivision;

This paragraph shall not apply to published court decisions or opinions, or records and briefs on appeal.

CPL §160.55(1)(d) should be amended to read:

(d) the records referred to in paragraph (c) of this subdivision shall be made available to the person accused or to such person’s designated agent, and shall be made available to (i) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (ii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iii) the New York state division of parole when the accused is under parole supervision as a result of conditional release or parole release granted by the New York state board of parole and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (iv) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision. Records made available to an officer or agency under this paragraph shall be used only by the officer or agency and shall not be re-disclosed, except with the consent of the accused or pursuant to a lawful court order, to any other person or public or private agency.

CPL §160.55(1)(e) shall be amended to read:

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(e) the court records referred to in paragraph (e) of this subdivision shall be made available to the court's own personnel or to a prosecutor, on the court's own motion or on the motion of a party, in the event that the criminal action or proceeding is re-opened, or in the event that the accused person is subsequently charged with an additional crime or offense, or in the event that the accused person subsequently becomes a witness and disclosure of his criminal record is required by this chapter or by court order. Disclosure under this paragraph shall occur, under the specified circumstances, only if the court determines that disclosure is required by law or in the interest of justice. Records made available to the court or the prosecution under this paragraph shall also be made available to the subject of the record. Records made available to the court or the prosecution under this paragraph shall be used only in the particular proceeding and shall not be re-disclosed, except with the consent of the accused or pursuant to a lawful court order, to any other person or public or private agency. At the conclusion of the proceeding, they shall be re-sealed.

[provision providing disclosure if accused subsequently moves for a marijuana ACD is deleted as superfluous; in this situation, disclosure would be required by law under the amended wording]

Existing CPL §160.55(1)(e) shall be re-designated (f).

CPL § 160.55, subd. 3 is replaced by the following language:

3. A person against whom a criminal action or proceeding was terminated as defined in subdivision one of this section [delete more specific language], prior to the effective date of this section, may upon motion apply to the court in which such termination occurred, upon not less than twenty days notice to the district attorney, for an order granting to such person the relief set forth in subdivision one of this section, and such order shall be granted unless the district attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise.

An additional section of the new law, not part of the Consolidated Laws, should provide,

The office of court administration shall develop and promulgate regulations which shall require the implementation of the amendments made by chapter .......of the Laws of 2006, requiring the sealing of court records under CPL § 160.55, with respect to criminal actions or proceedings terminated after the effective date of that section, but prior to the effective date of said amendments.

Need for Amendment:

Availability of non-criminal conviction information on the court level has become a serious problem because court records are now computerized, and the court system sells easy, computerized access to licensed investigative agencies, among others. Indeed, access to court records is easier than access to NYSIID (rap sheet) information. The result is that potential employers, creditors, and others who investigate applicants now often use court records, instead of rap sheet inquiries, to learn about criminal histories. These electronic court records contain not only the charge that led to conviction but also additional charges that appear in arrest.
documents or accusatory instruments that were dropped by the prosecution or dismissed by the court, in many cases because they were unproven or inaccurate.

The Legislature’s purpose in enacting CPL § 160.55, to shield persons who were arrested but not convicted of crimes from employment discrimination and damage to their reputations arising from the unproven charges, has been undermined and frustrated. These protections must be restored, and reinvigorated, by sealing the computerized court records and preventing employers from gaining access to information that they would not legally be allowed to gain from the Division of Criminal Justice Services or any other agency.

The proposed amendment restores the Legislature’s original intent, while also respecting the purpose behind the Legislature’s 1992 amendment (chapter 249, laws of 1992) clarifying that court records were not to be sealed under § 160.55. At the time § 160.55 was originally enacted, the goal of eliminating employment-related discrimination against this class of persons could be accomplished by sealing fingerprint-related records. Court records were not normally used to investigate job applicants because of the practical difficulty of traveling to every courthouse to look them up. The Legislature’s 1992 amendment was not meant to facilitate the discrimination that § 160.55 prohibits, but to assure that persons who pled down to infractions or violations could not hide their past petty-offense convictions in the event of future violations of the law. (See, e.g., memo of Dept. of Motor Vehicles, expressing concern that sealing of court records could impair the Department’s efforts to maintain accurate driving records and impose appropriate license sanctions.) The amendment would allow intended uses of these records while preventing unintended uses.

The amendment allows access to court records sealed under § 160.55 when a sealed case is reopened (e.g., when a defendant has failed to perform restitution or community service), when the defendant is re-arrested, or when the former defendant testifies as a witness. This serves the legitimate desire of the prosecution to consider the previous charges in formulating their recommended disposition of the new case, and also serves the legitimate need of trial attorneys to be able to cross-examine witnesses about their prior convictions and bad acts. The provisions reinforce the distinction between CPL § 160.50, under which cases terminated in the defendant’s favor are to be deemed a nullity, and CPL § 160.55, under which a conviction exists but should not be the basis for discrimination in employment or other non-criminal contexts.

The amendment also limits the use of unsealed records and prohibits re-disclosure by persons and agencies who have obtained lawful access. This prohibition is implicit in existing law, but making it explicit will provide added protection. Cf. § 995-d of the Executive Law, making DNA records confidential and prohibiting unauthorized redisclosure of such records outside the limited contexts in which disclosure is lawful.

Finally, the proposed legislation requires the court system to implement record-scaling for completed cases. This is readily achievable, particularly for computerized records and for paper records which are specifically requested. These Court records already bear an indication that they are sealed under CPL § 160.55. There is no reason to require a person whose law enforcement records are already sealed to come into court and move for sealing of the court records. Imposing such a requirement would nullify the value of the amendment for many tens of thousands of persons who would otherwise benefit from it.