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SEALING OF CRIMINAL CONVICTIONS IN NEW YORK UNDER CPL 160.59

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Handling Cases Involving the Sealing of Criminal Convictions in New York:

Understanding the Law & How to Effectively Represent Clients

Rick Collins, Esq. & Phil Nash, Esq.

Suffolk Academy of Law Lunch & Learn Program June 6, 2019

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Criminal Record Sealing: The Time Has Come

By Rick Collins

This article appeared in the June edition of the Nassau Lawyer.

We live in an age of divided politics, where the Left and the Right seem like they cannot bridge the chasm on even minor issues, let alone many of the more serious issues facing our country. So, when politicians from opposite sides of the aisle who do not see eye-to-eye on almost *anything* come together to introduce legislation in Congress, it is noteworthy. What issue can bring both sides together? For Republican Senator Rand Paul of Kentucky and Democratic Senator Cory Booker of New Jersey, that issue is the sealing or expungement of criminal records relating to nonviolent offenses.¹

After a person is convicted of a crime, either via plea or after trial, the judge imposes sentence and the defendant then serves that sentence, whether it is a period of incarceration, a term of probation, or the performance of community service. What happens next, however, is that reentry into productive society is hampered by the easy discoverability of a criminal conviction as part of a routine background check. As a result, those with convictions are chronically unemployed or underemployed, with a percentage needing taxpayer-subsidized assistance to survive. Recognizing that a criminal conviction presents countless obstacles including hurdles to employment, education, and housing, these federal legislators from both sides of the aisle are sponsoring a "second chance" bill to lessen the collateral consequences of a federal criminal conviction.

¹ REDEEM Act. S. 827, 115th Cong. (2017).

² John Malcolm & John-Michael Scibler, Collateral Consequences: Protecting Public Safety or Encouraging Rectabivism?, The Heritage Found, Legal Memorandum No. 200 (Mar. 7, 2017), available at https://goo.gl/hyq6CR.

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⁴ S. 827.

Sealing in New York

At the state level, the same issue bounced around Albany for many years, with the support of the Nassau County Bar Association and the New York State Bar Association (NYSBA). As Co-Chair of the NYSBA Criminal Justice Section's Sealing Committee, I helped draft the Report and Recommendations on criminal record sealing that was adopted as NYSBA policy in 2012. For five years, I was part of a broader coalition in support of various record sealing bills that were introduced in Albany, but mone passed . . . until now.

In April, New York joined the ranks of many states nationwide by enacting a broad criminal record sealing statute: Criminal Procedure Law section 160.59.6 The far-reaching impact of this change in the law, which becomes effective in October, will improve the lives of thousands of ex-offenders and their families.

Prior to section 160.59, the state's only sealing law was limited to circumstances in which the person completed a judicially sanctioned substance abuse treatment program as part of his or her sentence. That sealing law contains a "spring-back provision," so if sealing is granted on a case but the person is subsequently rearrested on new charges, the sealed records are no longer deemed sealed. That law does not extend the benefit of record sealing beyond those who struggled with drug or alcohol addiction and sought proper treatment as a condition of their sentence. Possession crimes, non-violent offenses, or a first-time DWI conviction would remain forever a part of a person's record. No matter how many years passed without any new contact with the criminal justice system, there was no mechanism under the law to seal these convictions from public view. As a result, thousands of non-

N.Y. State Bar Ass'n, Sealing Records of Conviction Regarding Certain Crimes (2012), available or https://goo.gl/R0aStM.

At the time of this article's publishing, the law has not been printed in an official reporter, but is available online at https://goo.gt/schQPF.

⁷ Crim, Proc. Law § 160.58.

⁸ The records will remain sealed it the new charges result in a dismissal or noncriminal disposition.

violent first time offenders in New York lived with the stigma of a criminal conviction, even decades after their sentence concluded and their debt to society was paid.

Section 160,59, passed as part of the 2017–18 budget negotiations, changes that and explands criminal record sealing to many non-violent crimes, both misdemeanors and felonies. Violent offenses and sex offenses are excluded from eligibility, as are people with two or more felony convictions or more than two misdemeanor convictions. The law permits two eligible offenses to be sealed, but not more than one eligible felony offense may be sealed. Sealing eligibility begins ten years from the date that sentence was imposed (the time is tolled if the person is incarcerated), provided there have been no new convictions since then.

The Mechanics and Effects of Sealing

To start the sealing process, the law directs that an application be filed with the court, addressed to the judge who oversaw sentencing. Should that judge no longer be on the bench, then the application is to be filed with the supervising judge. A copy must be served on the local District Attorney, and the prosecutor is given 45 days to file an opposition. If the DA's office opposes, then the judge must conduct a hearing. 12

Every sealing application must include a swom statement by the applicant detailing the reasons why the court should exercise its discretion and grant sealing. This statement is the applicant's chance to explain how living with the stain of a criminal conviction has negatively impacted his or her life, and also to demonstrate the extent of the positive changes that have been made over the years. Diplomas, employment history, character reference letters, and other "supporting documentation" are permitted to be included as exhibits. The applicant's statement, along with any exhibits, should aid the judge in

¹¹ Crim. Proc. Law § 160.59(2)(a), (3)(h), (5).

¹² Id. § 160,59(2)(c), (d).

determining the character of the applicant and the important effect that sealing would have on productive reintegration into society.¹⁵

If sealing is granted, then the conviction and any records related to that conviction are sealed and would only be made available to law enforcement in select circumstances. The new law does not contain a "spring back provision," so a subsequent conviction would not reopen previously sealed cases. The practical effect of sealing is that the conviction would no longer appear on a background check and information related to the conviction does not have to be disclosed when applying for employment, housing, or educational opportunities. ¹⁸ It is as if the sealed record never happened, and the applicant can finally close that chapter in his or her life.

The Federal REDEEM Act

Senators Paul and Booker seek to bring a similar "second chance" opportunity to the federal level through the Record Expungement Designed to Enhance Employment Act of 2017, or "REDEEM Act." There is no current federal statute that allows for the sealing of federal convictions. The REDEEM Act would change that, and would give those convicted of nonviolent crimes the chance to petition the court to have their records sealed.

Speaking in support of the legislation, Senator Paul said, "The biggest impediment to civil rights and employment in our country is a criminal record. Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. Many of these young people could escape this trap if criminal justice were reformed, if records were expunged after time served, and if non-violent crimes did not become a permanent blot preventing employment."²¹

⁵ See id. § 160.59(2)(b)(v), (7).

¹⁸ Ist § 160.59(8), (9)

¹⁹ REDEEM Acr, S. 827, 115th Cong. (2017).

²¹ Press Refease, Senator Cory Booker, U.S. Senators Booker and Paul Introduce Legislation Calling for Criminal Justice Reform (July 8, 2014), https://www.booker.senate.gov/?p=press_release&id=100.

The bill directs the judge considering a sealing application to weigh the interest of public knowledge and safety, plus the government's interest in maintaining the accessibility of the protected information, against the conduct and demonstrated desire of the petitioner to be rehabilitated and positively contribute to the community, and the interest of the petitioner in having the protected information sealed. Additionally, the law would specifically direct the court to consider the impact a conviction has on the petitioner to secure and maintain employment.²³

The REDEEM Act would incentivize states to create sealing laws in line with the federal statute by prioritizing those states in certain grant applications. The law would similarly incentivize states to increase the age of criminal responsibility to 18.25 This would be good news for New York, now that its laws have been changed.

Criminal Procedure Law section 160.59 comes after years of tireless work by members of many organizations and individuals. The sponsors—Democratic New York State Assemblyman Joseph R. Lentol and Republican State Senator Patrick M. Gallivan—reached across the aisle to get the job done. The new law will have profound beneficial effects on people throughout New York whose lives have been derailed by the lasting impact of a criminal record. The same opportunity is sorely needed at the federal level to permit thousands more to put their convictions behind them. With Rand Paul and Corey Booker agreeing on an issue, this is clearly an idea whose time has come.

Rick Collins is the NCBA Vice-President. A former prosecutor, he practices criminal defense in multiple jurisdictions as a principal in Collins Gann McCloskey & Barry PLLC. He acknowledges the contributions of NCBA member Philip Nash, Esq. in preparing this article.

²³ S. 827 § 2(a).

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McKinney's Consolidated Laws of New York Annotated

Criminal Procedure Law (Refs & Annos)

Chapter 11-a. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

Title H. Preliminary Proceedings in Local Criminal Court

Article 160. Fingerprinting and Photographing of Defendant After Arrest-Criticinal Identification Records and Statistics (Refs & Annos)

McKinney's CPL § 160.58

§ 160.58 Conditional sealing of certain controlled substance, maribuana or specified offense convictions

Effective: June 6, 2009 Currentness

- 1. A defendant convicted of any offense defined in article two hundred twenty or two hundred twenty-one of the penal law or a specified offense defined in <u>subdivision five of section 410.91</u> of this chapter who has successfully completed a judicial diversion program under article two hundred sixteen of this chapter, or one of the programs heretofore known as drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision, and has completed the sentence imposed for the offense or offenses, is eligible to have such offense or offenses sealed pursuant to this section.
- 2. The court that sentenced the defendant to a judicially sanctioned drug treatment program may on its own motion, or on the defendant's motion, order that all official records and papers relating to the arrest, prosecution and conviction which resulted in the defendant's participation in the judicially sanctioned drug treatment program be conditionally sealed. In such case, the court may also conditionally seal the arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors, which for purposes of this subdivision shall be limited to misdemeanor offenses defined in article two hundred twenty or two hundred twenty-one of the penal law. The court may only seal the records of the defendant's arrests, prosecutions and convictions when:
- (a) the sentencing court has requested and received from the division of criminal justice services or the Federal Bureau of Investigation a fingerprint based criminal history record of the defendant, including any sealed or suppressed information. The division of criminal justice services shall also include a criminal history report, if any, from the Federal Bureau of Investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the Federal Bureau of Investigation for this purpose. The parties shall be permitted to examine these records;
- (b) the defendant or court has identified the misdemeanor conviction or convictions for which relief may be granted;
- (c) the court has received documentation that the sentences imposed on the eligible misdemeanor convictions have been completed, or if no such documentation is reasonably available, a sworn affidavit that the sentences imposed on the prior misdemeanors have been completed; and

- (d) the court has notified the district attorney of each jurisdiction in which the defendant has been convicted of an offense with respect to which sealing is sought, and the court or courts of record for such offenses, that the court is considering sealing the records of the defendant's eligible misdemeanor convictions. Both the district attorney and the court shall be given a reasonable opportunity, which shall not be less than thirty days, in which to comment and submit materials to aid the court in making such a determination.
- 3. At the request of the defendant or the district attorney of a county in which the defendant committed a crime that is the subject of the sealing application, the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant's arrests, prosecutions and convictions. In making such a determination, the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section; (iii) the defendant's criminal history; and (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety.
- 4. When a court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same.
- 5. When the court orders sealing pursuant to this section, the clerk of such court shall immediately notify the commissioner of the division of criminal justice services, and any court that sentenced the defendant for an offense which has been conditionally sealed, regarding the records that shall be sealed pursuant to this section.
- 6. Records sealed pursuant to this subdivision shall be made available to:
- (a) the defendant or the defendant's designated agent;
- (b) qualified agencies, as defined in <u>subdivision</u> nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties; or
- (c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or
- (d) any prospective employer of a police officer or peace officer as those terms are defined in <u>subdivisions thirty-three</u> and <u>thirty-four of section 1.20</u> 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 or peace officer shall be

furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

- 7. The court shall not seal the defendant's record pursuant to this section while any charged offense is pending.
- 8. If, subsequent to the sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed; provided, however, that if such new misdemeanor or felony arrest results in a termination in favor of the accused as defined in subdivision three of section 160.50 of this article or by conviction for a non criminal offense as described in section 160.55 of this article, such unsealed records shall be conditionally sealed pursuant to this section.

Credits

(Added L. 2009, c. 56, pt. AAA, § 3, eff. June 6, 2009.)

Editors' Notes

PRACTICE COMMENTARIES

by Peter Preiser

2009

This section was enacted in 2009 to offer offenders whose criminal conduct had been found to be substantially influenced by substance abuse and subsequently demonstrated successful completion of a treatment program a way of clearing their past criminal records. It was enacted as a concomitant of a judicial diversion program established by the same bill (see CPL article 216, §§ 216.00, 216.05).

Basically the opportunity to seal the record of prior arrests and convictions applies to those who have been convicted of any crime defined in drug offense Penal Law articles 220 or 221 plus offenders convicted of one of the "specified" non drug crimes defined in CPL § 410.91 who was sentenced after successful completion of the new diversion program defined in CPL article 216, or of a similar judicially sponsored program colloquially known as "drug treatment alternative to prison" (or "DTAP")

Where a defendant qualifies under this section the court on it's own motion or upon application of the defendant may order that all official records and papers relating to the arrest, prosecution and conviction of the offense that resulted in participation in the drug treatment program be conditionally sealed. In such case the court also may conditionally seal the records pertaining to three prior drug misdemeanor arrests and convictions (subd. 2). Eligibility is not available where defendant is subject to a pending charged offense (subd. 7).

Conditional sealing is in the discretion of the sentencing court which must first receive fairly extensive background information, including not only defendant's prior convictions but also information as to evidence that was suppressed before trial. Where prior convictions occurred in another county the district attorney of that county must be notified and have an opportunity to comment (subds. 2 (d), 3). After receiving the

appropriate information the court may conduct a hearing upon application of the defendant or of a district attorney of one of the counties involved to consider any relevant evidence that would aid the court in its decision whether to seal the records. In so doing the criteria for decision will be based upon the circumstances and seriousness of defendant's criminal conduct, defendant's character, his or her successful completion of the judicially sanctioned treatment program, past criminal history, and the impact of sealing upon prospects for defendant's successful and productive integration into society as well as public safety (subd. 3).

Sealing under this section is pretty much the same as under <u>CPL § 160.50</u>, but availability of the records is broader because of the inclusion of other agencies as defined in <u>Executive Law § 835 [9]</u> and access is granted for law enforcement agencies acting within the scope of their duties without the requirement of a motion to the court to demonstrate need for the information (subds. 4-6).

Unlike sealing under <u>CPL § 160.50</u> or <u>160.55</u>, sealing under this section is conditional, because the records will immediately be reopened if the defendant is subsequently arrested or charged with any orime. But if the charge for that new crime is sealed in accordance with the provisions of <u>CPL §§ 160.50</u> or <u>160.55</u> the charges sealed hereunder will be resealed subject to the same condition (subd. 8).

Notes of Decisions (11)

McKinney's CPL § 160.58, NY CRIM PRO § 160.58 Current through L.2017, chapters 1 to 334.

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- CPL § 160.58 2009 statute enacted to aid only those whose drug or alcohol addiction
 led them to commit crimes.
 - o Applicant must have completed a "judicially sanctioned" drug treatment program
 - Used primarily by current drug courts
 - o under-utilized statute
 - If granted, records conditionally sealed
 - "spring-back provision" effectively placing the person on lifetime probation to retain the sealed status

McKinney's Consolidated Laws of New York Annotated

Criminal Procedure Law (Refs & Annos)

Chapter 11-a. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

Title H. Preliminary Proceedings in Local Criminal Court

Article 160. Fingerprinting and Photographing of Defendant After Arrest—Criminal Identification

Records and Statistics (Refs & Annos)

McKinney's CPL § 160.59

§ 160.59 Sealing of certain convictions

Effective: October 7, 2017
Currentness

<[Eff. Oct. 7, 2017.]>

- 1. Definitions: As used in this section, the following terms shall have the following meanings:
- (a) "Eligible offense" shall mean any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article six-C of the correction law. For the purposes of this section, where the defendant is convicted of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.
- (b) "Sentencing judge" shall mean the judge who pronounced sentence upon the conviction under consideration, or if that judge is no longer sitting in a court in the jurisdiction in which the conviction was obtained, any other judge who is sitting in the criminal court where the judgment of conviction was entered.
- 1-a. The chief administrator of the courts shall, pursuant to section 10.40 of this chapter, prescribe a form application which may be used by a defendant to apply for sealing pursuant to this section. Such form application shall include all the essential elements required by this section to be included in an application for sealing. Nothing in this subdivision shall be read to require a defendant to use such form application to apply for sealing.
- 2. (a) A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or convictions scaled. If all offenses are offenses with the same classification, the application shall be made to the court in which the defendant was last convicted.



§ 160.59 Sealing of certain convictions, NY CRIM PRO § 160.59

- (b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the defendant has been convicted, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the defendant as to whether he or she has filed, or then intends to file, any application for sealing of any other eligible offense; (iii) a copy of any other such application that has been filed; (iv) a sworn statement as to the conviction or convictions for which relief is being sought; and (v) a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.
- (c) A copy of any application for such sealing shall be served upon the district attorney of the county in which the conviction, or, if more than one, the convictions, was or were obtained. The district attorney shall notify the count within forty-five days if he or she objects to the application for sealing.
- (d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is filed in which case the application shall be assigned to the county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the defendant, including any sealed or suppressed records. The division of criminal justice services also shall include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the defendant.
- 3. The sentencing judge, or county or supreme court shall summarily deny the defendant's application when:
- (a) the defendant is required to register as a sex offender pursuant to article six-C of the correction law; or
- (b) the defendant has previously obtained sealing of the maximum number of convictions allowable under section 160.58 of the criminal procedure law; or
- (c) the defendant has previously obtained sealing of the maximum number of convictions allowable under subdivision four of this section; or
- (d) the time period specified in subdivision five of this section has not yet been satisfied; or
- (e) the defendant has an undisposed arrest or charge pending; or
- (f) the defendant was convicted of any crime after the date of the entry of judgement of the last conviction for which scaling is sought; or

- (g) the defendant has failed to provide the court with the required sworn statement of the reasons why the court should grant the relief requested; or
- (h) the defendant has been convicted of two or more felonies or more than two crimes.
- 4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, a defendant who stands convicted of up to two eligible offenses, may obtain sealing of no more than two eligible offenses but not more than one felony offense.
- 5. Any eligible offense may be scaled only after at least ten years have passed since the imposition of the sentence on the defendant's latest conviction or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the conviction for which the application for sealing is sought, shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.
- 6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the district attorney, the sentencing judge or county or supreme court shall conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application.
- 7. In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not limited to:
- (a) the amount of time that has elapsed since the defendant's last conviction;
- (b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense:
- (c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;
- (d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs:
- (c) any statements made by the victim of the offense for which the defendant is seeking relief;



§ 160.59 Sealing of certain convictions, NY CRIM PRO § 160.59

- (f) the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society; and
- (g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law.
- 8. When a sentencing judge or county or supreme court orders scaling pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on fide with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the division shall retain any finger-prints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.
- 9. Records sealed pursuant to this section shall be made available to:
- (a) the defendant or the defendant's designated agent;
- (b) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties; or
- (c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or
- (d) any prospective employer of a police officer or peace officer as those terms are defined in <u>subdivisions thirty-three</u> and <u>thirty-four of section 1.20</u> 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 or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation there-to; or
- (e) the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 USC 921 (a) (3).
- 10. A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.



11. No defendant shall be required or permitted to waive eligibility for sealing pursuant to this section as part of a plea of guilty, sentence or any agreement related to a conviction for an eligible offense and any such waiver shall be deemed void and wholly unenforceable.

Credits

(Added L.2017, c. 59, pt. WWW, § 48, eff. Oct. 7, 2017, Amended L.2017, c. 60, §§ 4, 5, eff. Oct. 7, 2017.)

McKinney's CPL § 160.59, NY CRIM PRO § 160.59 Current through L.2017, chapters 1 to 23, 25 to 163.

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CPL 160.59 EXCLUDIBLE FELONIES

PL 130.20 Sexual Misconduct; PL 130.25 Rape 3°; PL 130.30 Rape 2°; PL 130.35 Rape 1°; PL 130.40 Criminal Sexual Act 3°; PL 130.45 Criminal Sexual Act 2°; PL 130.50 Criminal Sexual Act 1°; PL 130.52 Forcible Touching; PL 130.53 Persistent Sexual Abuse; PL 130.55 Sexual Abuse 3°; PL 130.60 Sexual Abuse 2°; PL 130.65 Sexual Abuse 1°; PL 130.65-a Aggravated Sexual Abuse 4°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.67 Aggravated Sexual Abuse 2°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.85 Female Genital Mutilation; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 130.91 Sexually Motivated Felony; PL 130.95 Predatory Sexual Assault; PL 130.96 Predatory Sexual Assault Against a Child

PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child w/ a Controlled Subs. or Alcohol

PL 125.10 Criminally Negligent Homicide; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.12 Vehicular Manslaughter 2°; PL 125.13 Vehicular Manslaughter 1°; PL 125.14 Aggravated Vehicular Homicide; PL 125.15 Manslaughter 2°; PL 125.20 Manslaughter 1°; PL 125.21 Aggravated Manslaughter 2°; PL 125.22 Aggravated Manslaughter 1°; PL 125.25 Murder 2°; PL 125.26 Aggravated Murder; PL 125.27 Murder 1°; PL 125.40 Abortion 2°; PL 125.45 Abortion 1°; PL 125.50 Self-Abortion 2°; PL 125.55 Self Abortion 1°; PL 125.60 Issuing Abortion Articles

A Class A felony offense.

Class B violent felony offenses: PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°: PL 265.09 Criminal Use of a Firearm 1°: PL 265.13 Page 3 of 3 Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer: PL 120,07 Gang Assault 1°: PL 215.17 Intimidating a Victim or Witness 1°: PL 490.35 Hindering Prosecution of Terrorism 1°: PL 490 40 Criminal Possession of a Chemical Weapon or Biological

Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses: An attempt to commit any of the Class B violent felony offenses listed above: PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Ernergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121, 13 Strangulation 1"; PL 140.25 Burglary 2"; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor, PL 265.19 Aggravated Criminal Possession of a Weapon: PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°:

Class D violent felony offenses: An attempt to commit any of the Class C violent felony offenses listed above: PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menacing a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°: PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance: PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5). (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°, PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1"; PL 240.62 Placing a False Bomb or Hazardous Substance 1°: PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1":

Class E violent felony offenses: PL 110/266.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Falsely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime conspired to commit is one of the charges listed in this section.

A conviction that requires registration as a sex offender.

Criminal Certificate of Disposition Request Form for CPL 160.59 Sealing Application

| To: | | Connection | | | |
|---------------------------------------|---------------------------------------|--|---------------------|---|--------------------------|
| Number & Street Lity, State & Zip: | | Court | by selecting th | ddress and phone number of the court e County and Court Type in the Court L | ⇔cator et: |
| Phone: | | | http:/ | /vrvw.nycourts.gov/cours/index.shtm | Ĵ. |
| | shire information to along the second | and the second s | | DI 00000 41 11 11 11 11 11 11 11 11 11 11 11 11 | |
| rease complete | dated form to the roughly person | a criminal Certificate of Dis | position for your C | PL 160.59 sealing application. You | i may either |
| ning your com | the City of New York and a fee of a | or you may man the comple | ted form to the co | urt. A fee of five (\$5) dollars is req thin the 5 boroughs of the City of N | Mired in court |
| Utan daliyaring | was city of New Tork, and a ree of t | en (210) couple is tedalled in | o courts located wi | thin the 5 baroughs of the City of N | ew York. |
| vilen denvering | your request it person, you may p | ay in casii or by cerunen che | ck of money graer, | and you must provide a valid photo il), and the form must be notarized | > ID. When |
| Hatting your rec | dest, you must have by certified circ | sek at tubusak ötdet f <u>örð tiði</u> s | ena cash in the ma | ii), and the form must be notarized | below. |
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| | Date:ef:Request: | | 200 | | 2000AV |
| | Name: | | | | |
| Requestor | Address: | | | | |
| nequestor | Phone: | | | | |
| | Email: | | | | |
| Role | O I am the Defendant | | | | |
| noie | O I am the Defendant's Agent (r | nust provide notarized autho | sization from the c | efendant) | |
| Daralla | O Please mail to the above addr | ess (must provide self-addre | ssed stamped enve | lope) | |
| Receipt | O I will pick up at court when no | tified | | | |
| | Certificate of Disposition fee | oaid O Cash O Certif | ed Check# | O Money Order # | |
| For Court | Proper ID provided (specify): | | | | |
| Use Only | -Written authorization provide | d (for Defendant's Agent ou | by) | | No. |
| | Self-addressed stamped enve | | | of Disposition by mail only) | |
| | | | | | - |
| Defendant Inf | ormation | | refe | | Black A. V. Skews |
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| Date of Birth | | | | | |
| Sex | O Male O Female | Q Unknown | | | |
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| Case identifie | s (provide as much information as | you can, but you MUST pro | wide at least one o | f the following case identifiers) | West of the Company |
| Docket, Indict | ment, SCI or IDV Number | | | | |
| Arrest Numbe | | | | | |
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| NOTE: Form 1 | AUST be notarized when submi | tting a request by mail. | | | |
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| In the Matter o | f the Applicatio | n of: | | ursuant to | CPL 16 | | | |
|--|--|---|---|-------------------------------|--|---------------------|---|--|
| Name: | | | Motor | 4 Motorist ID #: (VTL Crimes) | | | | |
| 2 AKA(s): | | | | | WANTED TO STATE OF THE STATE OF | | | |
| | | on for sealing New Y ves to seal the follo | | ns pursuan | t to Crin | ninal Procedu | ire Law | |
| 6 Docket, Indictment, or SCI Number | Court Name | B Conviction Charge | 3 Law/Section/Subsection | © Conviction Date | Sentence Date | 12 Sentence Term | B Rolease Oate from any incarceration | |
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| documents rela | tattaches the forted to reasons on, employment in Support of S | Sealing Pursuant to | uld be sealed, includes the control of the control | ding evide | | | * | |
| Affidavit in Support of Sealing Pursuant to CPL 160 Affidavit of Service on the District Attorney [see page 12] | | | | | | | | |
| Affidavit Certifica | te of Dispositio | he District Attorney in for each convictio | n for which I am re | questing s | ealing. | | | |
| 2. Affidavit 3. Certifica 4 | te of Dispositio | n for each convictio | n for which I am re | | ealing. | | | |
| 2. Affidavit 3. Certifica 4 5 7 | te of Dispositio | n for each convictio | n for which I am re | | | | | |

APPLICANT UNDERSTANDS THE FOLLOWING PROCEDURES AND REQUIREMENTS OF THIS MOTION:

If applicant is applying to seal two cases, this motion must be filed in the court where the most serious conviction was entered. If both cases involve convictions of the same class (e.g., two class A misdemeanors or two class B misdemeanors), the motion must be filed in the court where the more recent conviction was entered.

A copy of this Notice of Motion and all supporting documents must be served on the District Attorney of each county where a conviction listed above was entered.

The District Attorney has 45 days after being served with this Notice of Motion to consider whether to consent to the sealing or to oppose the sealing.

If the District Attorney opposes'the sealing, the court will conduct a hearing and consider any evidence offered by either party that would aid the court in deciding whether to seal your convictions.

Before deciding this motion, the law requires the court to have a fingerprint-based criminal history report (rap sheet), which will include any sealed or suppressed cases and any criminal history information that occurred in jurisdictions outside of New York. By filing this Notice of Motion, you are agreeing to be fingerprinted if required. When the motion is filed, the clerk of the court will provide instructions if you must be fingerprinted.

Affidavit in Support of Sealing Pursuant to CPL 160.59

The applicant states the following facts upon information and belief that they are true:

- (b) was convicted of a crime or crimes in <u>no more than two</u> criminal transactions in New York State or elsewhere, and no more than one of those criminal convictions includes a conviction for a felony offense. I do not have any open or pending criminal charges against me.
- (6) have not been convicted of any of the following offenses:
 - a. a sex offense defined in article one hundred thirty of the Penal Law;
 - b. an offense defined in article two hundred sixty-three of the Penal Law;
 - c. a felony offense defined in article one hundred twenty-five of the Penal Law;
 - d. a violent felony offense defined in section 70.02 of the Penal Law;
 - e. a class A felony offense defined in the Penal Law;
 - f. a felony offense defined in article one hundred five of the Penal Law where the underlying offense is not an eligible offense;
 - g. an attempt to commit an offense that is not an eligible offense if the attempt is a felony; or,
 - h. an offense for which registration as a sex offender is required pursuant to article six-C of the correction law.
- thas been over 10 years since I was sentenced for the most recent crime I am asking the court to seal. I did not count any jail or prison time I served after being sentenced in calculating the 10-year period.

Moreover, the applicant, having been sworn, says:

I have attached a copy of a certificate of disposition or other similar documentation for each conviction listed above, or an explanation of why such certificate or other documentation is not available.

- (B) O have O have not filed any other application to seal a conviction pursuant to either CPL 160.58 or CPL 160.59. If I did file another application, I have attached it to this motion.
- **1** Odo Odo not intend to file any other application to seal an eligible conviction pursuant to either CPL 160.58 or CPL 160.59. If I do intend to file another application, the following conviction is the one I will ask to have sealed:

| - | Docket/Indictment/SCI | Court Name | Conviction Charge | The second control of | | Conviction | THE RESERVE TO A STATE OF THE PARTY OF THE P | A PRODUCT OF THE PARTY. |
|---|-----------------------|------------|-------------------|---|--------|------------|--|-------------------------|
| | Number(s) | | | 745.00 SEX HE 1, 7-40 F | Weight | Date | | Section |
| 1 | | | | | | | | O CPL 160!98 |
| | | E. i | | | | | | CPL 160.59 |

The court, in its discretion, should grant this application for sealing pursuant to CPL 160.59 for the following reasons (you must specify your reasons, which may include information about positive steps you've taken since your conviction – add additional pages if necessary):

| | | Signature of Applicant |
|-----------------|---|------------------------|
| Sworn to before | re me this | 190 |
| lay of | , 20 | |
| | | |
| | | |
| | Notary Public | |
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Affidavit of Service

| TATE OF NEW YORK | |
|--|---|
| OUNTY OF | |
| he undersigned, being sworn, says: | |
| | , is over 18 years of age and resides at: |
| [name of person serving/mailing] | |
| joddress of person serving/maling) | |
| hat on, deponent served t | he withinNotice of Motion and Affidavit in |
| upport of Sealing Pursuant to CPL 160.59 and | the following supporting documents: |
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| | |
| pon the District Attorney(s) of the following co | nunty/counties |
| | |
| t the following address(es): | |
| | (address(e)) of their Attorney's office(18) |
| elect one: | |
| by mailing a complete copy in a properly sta | imped and addressed envelope at the post |
| office or official depository of the United Sta | ates Postal Service. |
| by personally delivering a complete copy to | the District Attorney's Office |
| o sy personany active ing a domplete copy to | and bidding ratering 5 billies. |
| | |
| | |
| | Signature of person serving/mailing |
| Sworn to before me this | |
| day of | |
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| | |
| Motary Public | |

NOTE: If service was made upon more than one District Attorney's office, and service was made on different dates or by different people, attach separate Affidavits of Service.

INSTRUCTIONS

The instruction for each number below refers to the corresponding number in the Notice of Motion and Affidavit in Support Sealing Pursuant to CPL 160.59 form. For additional help, and to find a fillable version of this form online, go to the Unified Court System's website at http://www.nycourts.gov/forms/index.shtml

- 1 Enter your full legal name.
- Enter any names you are also known as (AKA) in addition to your legal name. If you used a different name than your legal name on a case you are applying to seal, make sure you also list that name.
- Enter your New York State Identification Number (NYSID). This number can be found on the Certificate of Disposition you obtained from the court where your conviction occurred.
- If you were convicted of a crime under the Vehicle and Traffic Law (VTL), enter your Motorist ID from your diriver's license. (You will know that it is a Vehicle and Traffic Law charge if it says VTL in the conviction description on your Certificate of Disposition from the court.) If you do not have a VTL charge, you are not required to enter your Motorist ID.
- 6 Enter your date of birth.
- Enter the court's docket number if you were convicted and sentenced in a city, town or village court, or enter the indictment/SCI number if you were convicted and sentenced in a supreme or county court. The case number will be in the Certificate of Disposition you get from the court.

NOTE: If you were convicted of a charge in another case that was part of the same incident, enter the information for #6 to #13 for the related case in the same row. (e.g., You were arrested for DWI and Unauthorized Use of a Vehicle, and both crimes occurred from the same incident. You were convicted for a misdemeanor DWI in the City Court, but you were convicted for a felony Unauthorized Use of a Vehicle in the County Court.)

- Enter the name of the court where you were convicted and sentenced. The name of the court will be on the Certificate of Disposition you get from the court.
- Enter the name of the charge for which you were convicted and sentenced (e.g., Petit Larceny, or Burglary 3°, or Criminal Possession of a Controlled Substance 7°, etc.). The name of the conviction will be in the Certificate of Disposition you get from the court. If the Certificate of Disposition lists more than one charge in the same case, list the most serious charge.

For example:

- Nyou were sentenced for an A misdemeanor and a B misdemeanor, enter the A misdemeanor.
- If you were sentenced for a felony and a misdemeanor, enter the felony.
- If you were sentenced for a C felony and an E felony, enter the C felony.
- If you were sentenced for two charges of the same weight (e.g., two A misdemeanors), enter the first charge listed in the Certificate of Disposition.
- Enter the law, section and subsection, if any, of the charge for which you were convicted and sentenced. The law, section and subsection will be in the Certificate of Disposition you get from the court.

For example:

- Pt 155.30(1)
- Pt 220.03
- VTt. 1192 (2-a)
- Enter the date you were convicted. This is the date that you entered a plea or were found guilty after a trial. The conviction date will be in the Certificate of Disposition you get from the court.
- Enter the date you were sentenced. (Some people are convicted and sentenced on the same date. Others are convicted and come back to court at a later date for sentencing.) The sentence date will be in the Certificate of Disposition you get from the court.
- Enter the sentence you received. The sentence will be in the Certificate of Disposition you get from the court.

 For example:
 - Conditional discharge
 - 5 years probation
 - 60 days jail and 3 years probation
 - . 6 months jail
 - 1-3 years state prison

- If you served any time in jail or state prison after you were sentenced, enter the date you were released. If you did not serve any time in jail or state prison after you were sentenced, leave this blank.
- Documents in support of sealing:
 - Affidavit in Support of Sealing Pursuant to CPL 160.59 (page 2 of this form). The purpose of the affidavit is to provide additional information to support your motion for sealing. Make sure it is completed and attached.
 - 2. Affidavit of Service (page 3 of this form). The law requires you to provide a copy of your motion and supporting papers to the District Attorney in the county where you were convicted and sentenced before you file them with the court. If you are applying to seal two cases, and you were convicted and sentenced in different counties, you must send copies to the District Attorney in BOTH counties.
 NOTE: If you served two different District Attorneys, and they were served on different dates and/or by different people, you must complete and attach a separate Affidavit of Service (page 3) for each.
 - 3. Certificate of Disposition. You must attach a Certificate of Disposition for each conviction that you are asking the court to seal. To get a Certificate of Disposition, you must contact the court where you were convicted and sentenced. If you are applying to seal two cases, you must get a Certificate of Disposition for each case. If you cannot get a Certificate of Disposition, you must attach an explanation why a Certificate of Disposition is not available. Further information about getting a Certificate of Disposition is available on the court's website.
 - 4.-10. If you have any additional documents evidencing your rehabilitation, you should attach them. These can include documents such as a certificate of relief from civil disabilities, verification of employment, community service, volunteer or charity work; educational transcripts; letters of recommendation or commendation from employers, teachers/professors, community leaders, charitable organizations; certificates of successful completion of a drug or alcohol treatment program, etc. You are not required to submit additional supporting documents.
- You are telling the court that you have not been convicted in more than two criminal cases, and that no more than one of those cases was a conviction for a felony charge.
- If you were convicted of any of the crimes listed below, you are not eligible for sealing pursuant to CPL 160.59, (check your Certificate of Disposition to verify that it does not include any of the following conviction charges). You are telling the court that you were not convicted of any of:
 - a. Pt. 130.20 Sexual Misconduct; Pt. 130.25 Rape 3°; Pt. 130.30 Rape 2°; Pt. 130.35 Rape 1°; Pt. 130.40 Criminal Sexual Act 3°; Pt. 130.45 Criminal Sexual Act 2°; Pt. 130.50 Criminal Sexual Act 1°; Pt. 130.52 Foreible Touching; Pt. 130.53 Persistent Sexual Abuse; Pt. 130.55 Sexual Abuse 3°; Pt. 130.60 Sexual Abuse 2°; Pt. 130.65 Sexual Abuse 1°; Pt. 130.65 Aggravated Sexual Abuse 4°; Pt. 130.66 Aggravated Sexual Abuse 3°; Pt. 130.67 Aggravated Sexual Abuse 2°; Pt. 130.70 Aggravated Sexual Abuse 1°; Pt. 130.75 Course of Sexual Conduct Against a Child 1°; Pt. 130.80 Course of Sexual Conduct Against a Child 2°; Pt. 130.91 Sexually Motivated Felony; Pt. 130.95 Predatory Sexual Assault; Pt. 130.96 Predatory Sexual Assault Against a Child
 - b. PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol
 - c. Pt 125.10 Criminally Negligent Homicide; Pt 125.11 Aggravated Criminally Negligent Homicide; Pt 125.12 Vehicular Manslaughter 2"; Pt 125.13 Vehicular Manslaughter 1"; Pt 125.14 Aggravated Vehicular Homicide; Pt 125.15 Manslaughter 2"; Pt 125.20 Manslaughter 1"; Pt 125.21 Aggravated Manslaughter 2"; Pt 125.22 Aggravated Manslaughter 1"; Pt 125.25 Murder 2"; Pt 125.26 Aggravated Murder; Pt 125.27 Murder 1"; Pt 125.40 Abortion 2"; Pt 125.45 Abortion 1"; Pt 125.50 Self-Abortion 2"; Pt 125.55 Self-Abortion 1"; Pt 125.60 Issuing Abortion Articles
 - d. Class B violent felony offenses:
 - PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°; PL 265.09 Criminal Use of a Firearm 1°; PL 265.13

Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer; PL 120.07 Gang Assault 1°; PL 215.17 Intimidating a Victim or Witness 1°; PL 490.35 Hindering Prosecution of Terrorism 1°; PL 490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses:

An attempt to commit any of the Class B violent felony offenses listed above; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121.13 Strangulation 1°; PL 140.25 Burglary 2°; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor; PL 265.19 Aggravated Criminal Possession of a Weapon; PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°;

Class D violent felony offenses:

An attempt to commit any of the Class C violent felony offenses listed above; PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menading a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5), (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°; PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1°; PL 240.62 Placing a False Bomb or Hazardous Substance 1°; PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mail; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°;

Class E violent felony offenses:

PL 110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Faisely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

- e. A Class A felony offense (abbreviated on your Certificate of Disposition as "AF"),
- f. A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime you conspired to commit is one of the charges listed in this section.
- g. An attempt to commit a crime is displayed on your Certificate of Disposition as "Attempted" and will have the number 110 displayed before the section and subsection (e.g., Attempted Robbery 2°; PL 110-160.10). If it is a felony level offense, the charge weight will be BF, CF, DF or EF.
- h. A conviction that requires you to register as a sex offender.
- Your conviction and sentence must be more than ten years ago. However, if you were in jail or prison after you were sentenced, that time does not count. For example, if you were convicted 11 years ago and you served 2 years in state prison (11 2 = 9), that is only 9 years.
- If you have filed another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, attach a copy of that application regardless of whether it was granted, denied or is still pending.
- If you are going to file another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, list the cases that you intend to include in the application and indicate the sealing section for which you intend to apply.
- You must tell the court why you believe your prior convictions should be sealed. This is your opportunity to tell the court why sealing your convictions is in the interest of justice, such as participating in treatment programs, work or schooling, or participating in community service or other volunteer programs. If you need more space, continue your comments on a separate sheet of paper.

| A service of the serv | Control of the contro | Belginoce 2 | Floor | City/Town | State | State Zin Code |
|--|--|----------------------|------------|---------------|----------|----------------|
| Affany County District Attorney's Office | Albany County Indicial Center | 6 Lodge Syree: | | Albany | È | 12207-2111 |
| Allegany County District Attorney's Office | 7 Court Street | | Room 333 | Belmont | Š | 14813-1044 |
| Bronx County District Attorney's Office | 198 E. 161st Street | | 4th Flaor | Втопх | ž | 10451-3536 |
| Broome County District Attorney's Office | George Harvey Justice Building | 45 Hewley Street | 4th floor | Binghamton | NY | 13902-3722 |
| Cattaraugus County District Attorney's Office | Cattaraugus County Center | 303 Court Street | | Little Valley | ΝY | 14755-1028 |
| Cayuga County District Attorney's Office | 95 Genesoe Street | | | Auburn | Ϋ́Υ | 13021-3698 |
| Chautauqua County District Attorney's Office | 1 N Erie Struct | | | Mayville | ź | 14757-1000 |
| Chemung County District Attorney's Office | 226 Lake Street | P.O. Bex 558 | | Elmira | Š | 14902-0588 |
| Chenango County District Attorney's Office | 26 Conkey Avenue | P.O. Box 126 | 2nd Floar | Norwich | Ν¥ | 13815-0126 |
| Clinton County District Attorney's Office | Clinton County Government Center | 137 Margaret Street | Suite 201 | Plattsburgh | Ž | 12901-0059 |
| Columbia County District Attorney's Office | 325 Coun bia Street | | | Hudson | 7 | 12534-1902 |
| Corriand County District Attorney's Office | Corriand County Courthouse | 46 Greenbush Street | Suite 102 | Contland | ž | 13045-2765 |
| Delaware County District Attorney's Office | 1 Courthouse Square | | Suite 5 | Delhi | Ž | 13753-1600 |
| Dutchess County District Attorney's Office | 236 Main Street | | | Poughkeepsie | ž | 12601-3102 |
| Erie County District Attorney's Office | 25 Delaware Avenue | | | Buffalo | ž | 14202-3926 |
| Essex County District Attorney's Office | 7559 Court Streat | P.O. Box 217 | | Elizabethtown | λ | 12932-0217 |
| Franklin County District Attorney's Office | 355 West Main Street | | Suite 466 | Malone | Ž | 12953-1855 |
| Fulton County District Attorney's Office | County Office Building | 223 West Main Street | | Johnstown | ž | 12095-2309 |
| Genesee County District Attorney's Office | 1 West Main Street | | | Batavia | Š | 14020-2019 |
| Greene County District Attorney's Office | 411 Main Street | | | Catskiii | Ä | 12414-1363 |
| Hamilton County District Attorney's Office | P.O. 80x 277 | White Birch Lane | | Indian Lake | Νχ | 12842-0277 |
| Herkimer County District Attorney's Office | 301 N. Washington Street | | Suite 2401 | Herkimer | ž | 13350-1299 |
| efferson County District Attorney's Office | 175 Arsenal Street | | | Watertown | ž | 13601-2563 |
| Kings County (Brooklyn) District Attorney's Office | 350 Jay Street | | | Brooklyn | ž | 11201-2900 |
| Lewis County District Attorney's Office | 7660 North State Street | | | Lowville | × | 13367-1562 |
| L wingston County District Attorney's Office | Livingston County Courthouse | 2 Court Street | | Geneseo | 싰 | 14454-1048 |
| Madison County District Attorney's Office | Veteran's Memorial Building | P.O. 80x 578 | | Wampsville | ž | 13163-0578 |
| Monroe County District Attorney's Office | 47 S. Fitzingh Street | | | Rochester | ž | 14614-1414 |
| Montgomery County District Attorney's Office | S8 Broadway | P.O. Box 1500 | | Fonda | ž | 12068-1500 |
| Nassau County District Attorney's Office | 262 Old Country Road | | 2nd Floor | Mineola | ž | 11501-4251 |
| New York County (Manhattan) District Attorney's Office | 1 Hogan Place | | | New York | ž | 10013-4313 |
| Niagara County District Attorney's Office | Niagara County Courthouse | 175 Hawkey Street | Brd Floor | Lockpoit | ŝ | 14054-2740 |
| Oneida County District Altorney's Office | 235 Elizabeth Street | | | Utica | Ň | 13501-2201 |
| Onondaga County District Attorney's Office | 505 5. State Street | | 4th Floor | Syracuse | ž | 13202-2183 |
| Ontario County District Attorney's Office | Ontario County Courthouse | 27 N. Main Street | 3rd Floor | Canandaigue | ž | 14424-1447 |
| Orange County District Attorney's Office | 40 Matthews Street | | | Goshen | Ν× | 10924-1964 |
| Orleans County District Attorney's Office | 13925 State Route 31 | | Suite 300 | Albion | <u>}</u> | 14411-9385 |
| Oswego County District Attorney's Office | Public Safety Center | 39 Churchill Road | | Oswego | Ν¥ | 13126-6671 |
| Otsego County District Attorney's Office | 197 Main Street | | | Cooperstown | ×. | 13326-1128 |
| Putnam County District Attorney's Office | 40 Gleneida Avenue | | | Carmel | ž | 10512-1705 |
| Queens County District Attorney's Office | 125-01 Queens Boulevard | | Suite 7 | Kew Gardens | ž | 11415-1514 |
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| Office 111 Dr. Martin Luther King, Jr. Boulevard 3rd Floor firg Myoming County Courthouse 147 North Main Street | Wayne County District Attorney's Office | Hall of Justice | 54 Broad Street | | Lyons | ž | 14489-1199 |
| firg Wkyoming County Courthouse 147 North Main Street | Westchester County District Attorney's Office | | | 3rd Floor | White Plains | ž | 10501-2500 |
| The state of the s | Wyoming County District Altorney's Office | JAYyoming County Courthouse | 147 North Main Street | | Warsaw | ž | 14569:1123 |
| 413 Liberty Street | Yates County District Attorney's Office | 415 Liberty Street | | | Pëhn Yan | ž | 14527-1122 |

RICHARD D. COLLINS+ MARC C. GANN* GERARD C. McCLOSKEY DAVID J. BARRY

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Learn if you qualify to have your record sealed.

Consult with an attorney to confirm eligibility

STEP 1

Convicted of more than 1 felony?

If no, go to Step 2
If yes, ineligible



STEP 2

Convicted of more than 2 misdemeanors?

If no, go to Step 3
If yes, ineligible



STEP 4

Required to register as a sex offender?

If no, go to Step 5
If yes, ineligible



STEP 3

Convicted of a violent crime, sex offense, Class A felony, or other ineligible offenses?

If no, go to Step 4.

If yes, ineligible



STEP 5

Is it less than 10 years since the date of sentence (or release from incarceration)?

If no, go to Step 6
If yes, ineligible



STEP 6

Convicted of a crime after the conviction you're trying to seal (including out-of-state)?

If no, go to Step 7
If yes, ineligible



ELIGIBLE FOR SEALING



STEP 7

Are there any pending charges against you?

If no, eligible If yes, ineligible

| | People v N.N. |
|-----|---|
| | 2017 NY Slip Op 27414 [58 Misc 3d 610] |
| | December 18, 2017 |
| | Morris, J. |
| | Supreme Court, Queens County |
| Pul | olished by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| | As corrected through Wednesday, February 21, 2018 |

The People of the State of New York, Plaintiff,
N.N., Defendant.

Supreme Court, Queens County, December 18, 2017

APPEARANCES OF COUNSEL

Collins Gann McCloskey & Barry PLLC, New York City (Philip Nash of counsel), for defendant.

Richard A. Brown, District Attorney (Johnnette Traill of counsel), for plaintiff.

 $\{**58\ \text{Misc}\ 3d\ \text{at}\ 611\}$ OPINION OF THE COURT Gia L. Morris, J.

Pursuant to CPL 160.59, which became effective October 2017, the defendant, N.N., moves for sealing of his 2006 misdemeanor conviction of criminal possession of a weapon in the fourth degree (Penal Law § 265.01). In support of his motion for sealing, the defendant asserts that he has not been convicted of any other offenses and is eligible for sealing under the statute. In

addition, the defendant asserts that since his conviction in 2006, he has lived a law-abiding productive life where he has managed his wife's medical practice, developed a residential real estate company with his grandfather in Michigan, served on municipal boards, and received his general contracting license in Michigan, as well as a certification in land policy (aff of defendant at 2-3). He has also obtained a Master's degree in urban planning, and real estate licenses in Ohio and Vermont (id.). Further, while conceding that his criminal conviction did not prevent him from becoming licensed in his chosen profession, or even completing graduate school, he says he is embarrassed by his criminal record and is concerned that he will be at a disadvantage in seeking future employment (id.).

Conditionally, the People do not oppose the defendant's application, stating that they believe the defendant to be eligible as their records indicate that he has not had any subsequent convictions and is otherwise qualified under the statute. As a result, there is no need to hold a hearing in deciding the instant motion (CPL 160.59).

Pursuant to CPL 160.59, an individual is eligible for sealing of an offense if: (1) the defendant has been convicted of an "eligible offense," as defined in CPL 160.59 (1) (a); (2) the defendant has not previously obtained sealing of a maximum number of convictions under either CPL 160.58 or 160.59 (CPL 160.59 [3] [b], [c]); (3) at least 10 years have passed since the imposition of sentence, with time tolled for periods of incarceration (CPL 160.59 [3] [d]; [5]); (4) the defendant has no undisposed arrests or charges pending (CPL 160.59 [3] [e]); {**58 Misc 3d at 612} (5) the defendant has not been convicted of any crime after the date of the entry of judgment of the conviction for which sealing is sought (CPL 160.59 [3] [f]); and (6) the defendant has not been convicted of two or more felonies or more than two crimes (CPL 160.59 [3] [h]). CPL 160.59 (7) gives courts discretion to consider the specific facts

and circumstances surrounding an individual's personal history and conviction in determining whether sealing is appropriate.

In the instant case, it is clear that N.N. meets each of the enumerated criteria for sealing, and is an example of the type of person the legislature intended to help in enacting the sealing statute. The defendant's 2006 conviction stands as an aberration to an otherwise exemplary law-abiding life. He has no additional arrests, and this conviction stands as his only arrest. He has also achieved significant academic and professional accomplishments.

Accordingly, the defendant's motion to seal his conviction pursuant to CPL 160.59 is granted.

| Pcople v Jaime S. |
|---|
| 2018 NY Slip Op 28020 [59 Misc 3d 472] |
| January 31, 2018 |
| Pickholz, J. |
| Supreme Court, New York County |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| As corrected through Wednesday, May 9, 2018 |

[*1]

The People of the State of New York, Plaintiff, V Jaime S., Defendant.

Supreme Court, New York County, January 31, 2018

APPEARANCES OF COUNSEL

Paul D. Petrus, Jr., New York City, for defendant.

Cyrus R. Vance, Jr., District Attorney, New York City (Andrew B. Joyce of counsel), for plaintiff.

{**59 Misc 3d at 473} OPINION OF THE COURT Ruth Pickholz, J.

The defendant moves to have the record of his conviction sealed pursuant to CPL 160.59.

The defendant was employed as an information technology officer by a prominent law firm between 1997 and 2002. Toward the end of his tenure he began to access the firm's web and email servers hundreds of times without

permission. He gained access to emails of 14 employees, and perused client lists and employee salary information which he had no right to see. Whether he trolled through the files out of pique, boredom, or some more nefarious motive is not known, but it was never alleged that he utilized or attempted to profit from the information that he wrongly viewed. Nevertheless, the firm claimed that his unauthorized delving was partially responsible for the crash of the firm's computer system in February 2003. The firm estimated that the costs of returning the system to operation and the billable hours lost as a result of the crash totaled approximately \$393,000.

[*2]

The defendant was charged with numerous computer crimes. [FN1] He eventually pleaded guilty to a superior court information charging him with two class E felonies: unlawful duplication of computer related material in the first degree (Penal Law § 156.30 [2]) and criminal possession of computer related material (Penal Law § 156.35). In return for his plea, the court (Brenda Soloff, J.) sentenced him to a five-year probationary term and a \$5,000 fine, which he paid immediately. The court terminated his probation in February 2007, more than a year early.

The defendant is skilled and experienced in his field, and was able to maintain employment in a well-paid position even after his conviction. This state of affairs ended in 2010, when a larger entity purchased the company that had been employing him. He contends that this company offered him a position but rescinded its offer after conducting a background check. He states that he had approximately 15 other job interviews after being terminated, and that he often made it to the final interview only to be told that he was not being offered the position. He surmises that in most of these instances the prospective employer soured on him after conducting a background (**59 Misc 3d at 474) check which laid bare his conviction. The defendant states

that after these events he was forced to apply for unemployment insurance, and when those benefits were exhausted, he lived on his savings. He became depressed and anxious. Sometime in 2011 he obtained a position with the company which employs him to this day. Although the company pays him a substantial salary, the defendant states that he would like to advance to higher and more intellectually challenging positions. An applicant wishing to obtain such positions is required to have an unblemished record, and a candidate must undergo a rigorous background check. He fears that the record of his conviction will inevitably disqualify him from any position for which he applies. He has therefore applied under CPL 160.59 to have the record of his two felony convictions sealed. [FN2]

The People emphasize that defendant's crimes were serious ones, and caused considerable damage to his employer, however long ago. They do not dispute that he is a successful, productive and stable member of society, but they seek to turn his achievements against him. Their primary reason for opposing his application is that sealing his conviction would do him little good because, in their estimation, his "societal standing... is already at an apex." In contrast, they argue, societal utility would be greatly served by keeping the conviction unsealed. That he was convicted of two computer related crimes is precisely what a prospective employer would like to know in weighing whether to extend him a job offer in his field. They thus urge me to find that any benefit that would accrue to the defendant if his conviction were sealed is negligible, and outweighed by the great desirability of giving prospective employers [*3]access to the record of his misdeeds.

None of the People's argument is compelling. The statute lists seven nonexclusive factors for a court's consideration. Weighing in defendant's favor is that almost 15 years have passed since he was convicted of these crimes (CPL 160.59 [7] [a]), during which time he has led a stable and productive life (CPL 160.59 [7] [d]). He had no other criminal entanglements either before or

after these events (CPL 160.59 [7] [c]). The People argue that he committed serious crimes, but he was convicted of two class E felonies, both of which the legislature has classified as offenses eligible for sealing. As the People contend, prospective employers might well find it useful to (**59 Misc 3d at 475} know that the defendant was previously convicted of these crimes, but no more so than any employer would find it useful to know that a job applicant was convicted of fraud, larceny, identity theft, forgery or bribery. The legislature has classified all of these as eligible crimes, and many if not all of them are at least as serious as the crimes of which defendant was convicted. The People argue that his snooping helped cause his employer's servers to crash, thereby causing hundreds of thousands of dollars in damages and lost productivity, but the mechanism by which this occurred is open to question, and the proof of damages is poorly documented (CPL 160.59 [7] [b]). The law firm injured by the defendant has not taken any position on his application (CPL 160.59 [7] [e]). There is no evidence that the defendant committed his crimes maliciously or for personal gain. Neither is there anything in the record before me which suggests that he might be prone to engage in such conduct again.

The People's argument that the defendant would derive little benefit from sealing his criminal record is specious, if not disingenuous. If they truly believed that he has reached an apex in his professional life, there would be no reason for them to oppose his application, as he could reach no position of significantly greater influence or authority. It is only because he might advance himself further, and perhaps significantly, that there is reason to keep the record of his crimes available to employers.

The broader question then becomes, as the People implicitly argue, whether there is reason to deny him relief because the impetus and underlying rationale for the statute was the desire to help those whose criminal convictions prevented them from fully integrating into society, and not

someone in defendant's position. There has been increased discussion in recent years regarding the collateral consequences of a criminal conviction. One of the more serious of these is the limited access to the labor market which a conviction brings (Mackenzie J. Yael, Note, Expungement Law: An Extraordinary Remedy for an Extraordinary Harm, 25 Geo J on Poverty L & Pol'y 169 [2017]). The New York State Legislature enacted CPL 160.59 in conjunction with an amendment of the Penal Law which raised the age of criminal responsibility from 16 to 18. Concern about the collateral consequences of a criminal record was a core concern of the proponents of the bill (id.). The legislature made sure that a court reviewing a sealing [*4]application would{**59 Misc 3d at 476} consider its concern by requiring it to weigh "the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society" (CPL 160.59 [7] [f]). It is possible to derive from factor (7) (f), as the People do, the conclusion that if a person is already well integrated into society, there is less need to seal his or her record.

It cannot be denied that the defendant is not among those whom the bill was primarily intended to benefit. He has had no difficulty achieving meaningful employment despite his criminal record, and has reached a comfortable economic station in life. But although he seems integrated into society and economically secure at present, there is no guarantee that such will always be the case. He seemed secure after his conviction but his status was upended in 2010 when the company that he was working for was purchased by another. The new regime offered him a position but changed its mind after conducting a background check. He suffered from anxiety and depression, and was forced to live on his savings until he found a new job. Given his record, it was not a foregone conclusion that anyone would hire him. Circumstances change, and there is no way to be sure that anyone is permanently secure in life. Whether or not he ever tries to advance himself, his conviction may yet again undo him. It makes little sense to deny the defendant relief under the

statute until such time as his life takes a turn for the worse. Granting his application now may ensure that day never comes.

The defendant has made clear, however, that he is not content to maintain the status quo, but that he rather seeks to apply for more responsible positions. As his past attempts have shown, however, his background will necessarily be subject to strict scrutiny when he does, and it seems almost inevitable that the record of his criminal conviction will bar him from advancing. It is not for the court, any more than it is for the People, to decree that someone has risen far enough in life, or opine that he or she will derive little benefit from rising further. Moreover, society often benefits when people strive to achieve, regardless of the economic rung on which they happen to be at the time. Finally, whatever the intentions of the legislature may have been, the statute does not limit relief to any particular class of people.

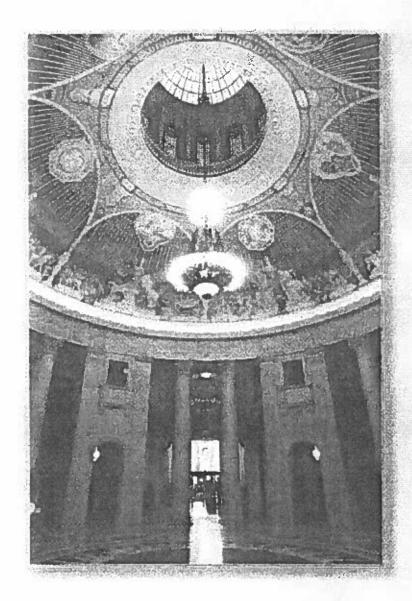
Accordingly, the defendant's application is granted.

Footnotes

Footnote 1:All are Penal Law article 156 crimes and are eligible offenses as defined in CPL 160.59 (1) (a).

Footnote 2: As permitted by CPL 160.59 (1) (a).

THE STATE OF THE JUDICIARY



VISION AND ACTION IN OUR MODERN COURTS

JONATHAN LIPPMAN
CHIEF JUDGE OF THE STATE OF NEW YORK

IV. HOPE FOR A NEW BEGINNING: EXPUNGING CRIMINAL HISTORY RECORDS

THILE WE MUST ADDRESS THE QUALITY OF LEGAL REPRESENTATION, it is also apparent that New York needs to focus more closely on the consequences of criminal convictions. The strength of our nation and of our state is largely rooted in the abundant opportunities available to our citizens. Yet for certain members of our society, those precious opportunities are severely limited. For those with a prior criminal conviction - even if stemming from a low-level, non-violent transgression committed ten or fifteen years ago or longer - the stigma of a criminal record continues long after a sentence has been served. From both a legal and practical standpoint, a criminal record can have profound negative consequences to an individual's future, whether in pursuing employment, applying for a professional license, or seeking government benefits such as housing, welfare, food stamps, or financial assistance. There is no doubt that criminal conduct should have consequences, but individual, often isolated, misrakes that result in criminal convictions for low-level, non-violent offenses should not permanently hinder a person's ability to become a productive, law-abiding member of society, particularly when he or she has gone years without being re-arrested. That is not only contrary to sound public policy, but it also frustrates the underlying goals of our justice system.

Widely accepted research has shown that the risk of recidivism drops steadily with time. Indeed, individuals convicted of crimes, even those convicted of violent crimes, are no more likely to be re-arrested after going a decade or so without an arrest than are people who have never been arrested.

Accordingly, building on the work of the New York State Bar Association and groups such as the Legal Action Center, I will shortly be submitting legislation to make New York's criminal history record policies fairer and more rational. First, the proposed legislation will expunge, by operation of law, a misdemeanor conviction of an individual who has not been re-arrested within 7 years from the date of such conviction. Second, it will permit a court, upon application and in the interest of justice, to expunge a non-violent felony conviction if the applicant has no previous felony convictions and has

not been re-arrested within 10 years of the date of the felony conviction or release from incarceration, whichever is later. This expungement will result in the sealing of all court and related law enforcement records. Sex offenses, public corruption cases, and DWI-related offenses will not be eligible for expungement.

In addition, along with the submission of the proposed legislation, the court system will be implementing a new policy regarding the sale of criminal history information. For many years, the Office of Court Administration (OCA) has conducted electronic searches of its criminal cases database to determine whether individuals have a criminal record. These searches are typically requested by background screening companies inquiring about job applicants, but they are requested by others as well. In keeping with the rationale underlying the proposed legislation, beginning this April, OCA will no longer disclose misdemeanor convictions of individuals who have no other previous criminal convictions and who have not been re-arrested within 10 years of the date of the conviction.

Pending enactment of the broader and more effective reform that the proposed legislation offers, this new judicial policy will be an important step towards ensuring that individuals who have a minor criminal record but who have demonstrated over a sufficient period of time that they can lead a law-abiding lifestyle are not permanently burdened by a single misdemeanor conviction. By breaking down barriers to rehabilitation and redemption and removing obstacles to employment and advancement, these measures will give countless New Yorkers an invaluable second chance for a promising future.

| People v Doe |
|---|
| 2018 NY Slip Op 28324 [61 Misc 3d 996] |
| October 18, 2018 |
| Zayas, J. |
| Supreme Court, Queens County |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| As corrected through Wednesday, December 26, 2018 |

[*1]

The People of the State of New York, Plaintiff,

John Doe, Defendant.

Supreme Court, Queens County, October 18, 2018

APPEARANCES OF COUNSEL

Indira Khan for defendant.

Richard A. Brown, District Attorney (Anastasia Spanakos of counsel), for plaintiff.

 $\{**61\ \mathrm{Misc}\ 3d\ at\ 997\}$ OPINION OF THE COURT Joseph A. Zayas, J.

In 1985, when he was 19 years old, defendant John Doe^[FN1] was arrested twice in the span of a month and a half for selling cocaine to undercover police officers. Defendant ultimately resolved both cases by pleading guilty to criminal sale of a controlled substance in the third degree, a class B felony, in exchange for an aggregate prison sentence of 1 to 3 years. In 1995, defendant began a two-decade career with the New York City

Department of Sanitation. In the aftermath of the September 11, 2001 terrorist attacks, he participated in the cleanup and rescue efforts at the site of the fallen World Trade Center towers. Defendant is a husband, proud father and grandfather, and active member of his church; he has had no contacts with the criminal justice system for over 30 years. He {**61 Misc 3d at 998} now moves, pursuant to CPL 160.59, to seal his convictions. He asserts, among other things, that if he seeks employment in the future, he would like to be able to do so without the stigma of a criminal record. The People oppose defendant's motion. They contend that, as a two-time convicted felon, defendant is not among the sealing statute's intended beneficiaries. The People are correct and the court, therefore, is constrained to deny defendant's motion.

On August 31, 1985, defendant was arrested for selling cocaine to an undercover police officer, in front of 109-18 Farmers Boulevard. He was charged with criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and two counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) (the first indictment). At his arraignment, defendant was released on his own recognizance. But, a few weeks later, on October 8, 1985, he was arrested again—this time with a codefendant—for selling cocaine to an undercover officer near the corner of Farmers Boulevard and 109th Avenue. Defendant was charged with third-degree criminal sale of a controlled substance and criminal facilitation in the fourth degree (Penal Law § 115.00 [1]) in connection with this second incident (the second indictment).

Several months later, on July 14, 1986, defendant pleaded guilty to criminal sale of a controlled substance in the third degree and criminal facilitation in the fourth degree to resolve the case brought under the second indictment. Four days later, he pleaded guilty to another count of third-degree criminal sale of a controlled substance in full satisfaction of the charges

contained in the first indictment. Defendant was thereafter sentenced, in connection with the first indictment, to 1 to 3 years of imprisonment. That sentence was run concurrently with a sentence of the same length that was subsequently imposed in connection with the second indictment. Defendant now moves to seal all three convictions.

[1] Section 160.59 of the Criminal Procedure Law, which took effect in October of 2017, provides a mechanism for defendants to move to seal up to two "eligible offenses" (CPL 160.59 [2] [a]; [4]). The ameliorative purpose of the statute, as Governor Cuomo indicated at the time of its enactment, is to "eliminate unnecessary barriers to opportunity and employment (**61 Misc 3-d at 999} that form[erly] incarcerated individuals face and to improve the fairness and effectiveness of the state's criminal justice system" (Governor's Press Office. Press Release: Governor Cuomo Announces Raise the Age Law that Seals Non-Violent Criminal Convictions Takes Effect October 7 [Oct. 6, 2017], https://www.governor.ny.gov/news/governor-cuomo-announces-raiseage-law-seals-non-violent-criminal-convictions-takes-effect). To this end, individuals who meet certain criteria can move to seal their convictions, as long as they do not fall within several categories of offenses—such as sex offenses defined in article 130 of the Penal Law, homicide offenses, and violent felony offenses—once 10 years have passed (excluding any periods of incarceration) since the imposition of sentence (CPL 160.59 [1] [a]; [5]). Individuals who have been "convicted of two or more felonies or more than two crimes" are not eligible for relief under the statute (CPL 160.59 [3] [h]).

In this case, defendant was convicted, under two separate indictments arising from conduct that occurred five weeks apart, of two counts of criminal sale of a controlled substance in the third degree, a class B felony offense (Penal Law § 220.39). Thus, the law makes clear that he is unable to have any of his three convictions sealed (see CPL 160.59 [3] [h]).

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[2] Defendant nevertheless contends that his two felony convictions should be treated as only one because the sentences imposed for each were run concurrently with each other. In support of this position, defendant argues that the sealing statute is unclear about how to treat multiple felony convictions for which concurrent sentences were imposed and, therefore, he suggests, it is instructive to look to the persistent felony offender statute (Penal Law § 70.10) for guidance. That statute provides that, in determining how many previous felony convictions a defendant has, multiple convictions arising from crimes "that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction" (Penal Law § 70.10 [1] [c]).

But there is a problem with this argument: the sealing statute is not silent about when multiple felony convictions can be treated as a single conviction. In fact, the sealing statute explains that doing so is permissible only when a defendant has been convicted of multiple offenses that were committed during the course of "the same criminal transaction," as that concept is defined in subdivision (2) of section 40.10 of the {**61 Misc 3d at 1000} Criminal Procedure Law (CPL 160.59 [1] [a]). [FN2] And that definition provides that a "[c]riminal transaction" can consist of multiple acts, "or a group of acts," but the conduct must be "so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or . . . [be] so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]).

That was not the case here. Defendant sold drugs on two separate dates, five weeks apart. Clearly, then, the two sales were not "so closely related and connected in point of time and circumstance of commission" as to compel the conclusion that they amounted to one criminal incident (see People v Lynch, 25 NY3d 331, 334-335 [2015] ["separate sales of drugs to the same person at the same place, separated by 48 hours," not the same criminal transaction

under CPL 40.10 (2) (a)]). Nor, on this record, is there any basis for concluding that these two seemingly discrete drug sales were the kind of "integrated, interdependent acts" that the Court of Appeals has held can sustain a finding of a "single criminal venture" (see Lynch, 25 NY3d at 334-336 [holding that CPL 40.10 (2) (b) generally only applies to "ongoing organized criminal activity, such as conspiracies, complex frauds or larcenies, or narcotics rings" (internal quotation marks omitted)]). In short, defendant's two felony drug sale convictions were separate criminal transactions and thus preclude him from seeking relief under the sealing statute.

The facts of this case, though, are not unsympathetic. Defendant has, for all that appears, led a productive, law-abiding life for at least the last two decades. He was a longtime civil servant, who did important work after the September 11th attacks that exposed him to hazardous conditions. And, according to the pastor of his church, he contributes to his community by regularly volunteering with the church's soup kitchen and food pantry and serving as a mentor for its Men's Ministry. But defendant is now retired from the Sanitation Department, due to an injury he sustained on the job, and he is concerned that, if he seeks employment in the future, his options will be limited {**61 Misc 3d at 1001} because of his criminal record. This, of course, is a valid concern, and one that the sealing statute is meant to alleviate. However, because defendant has two felony drug convictions, instead of one felony and one misdemeanor (see CPL 160.59 [2] [a]), the statute excludes him from its purview.

Defendant's criminal record is certainly not unusual. [FN3] The notion that drug dealers and drug addicts "are often the same people" (Kathryn Casteel, FiveThirtyEight, A Crackdown On Drug Dealers Is Also A Crackdown On Drug Users [Apr. 5, 2018], https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/) is now widely accepted. And one of the consequences of this is that individuals with substance abuse

problems are likely to accumulate multiple criminal convictions—for both sale and possession offenses—and do so relatively quickly, until they successfully address their underlying addiction issues.

New York law recognizes this reality by, for example, giving defendants who are charged with felony drug sale offenses the chance (subject to certain eligibility requirements) to participate in a substance abuse treatment program [FN4] and, upon successful completion of the program, the possibility of conditionally sealing not only the records related to the case that led to the diversion—which can ultimately be disposed of in several ways, including dismissal of the indictment—but three prior drug-related misdemeanor convictions as well (see CPL 160.58 [2]; 216.00 [1]; 216.05 [10]). A defendant with more than one {**61 Misc 3d at 1002} felony narcotics indictment is eligible for diversion into treatment (see People v Jordan, 28 Misc 3d 708, 713-714 [Sup Ct, Bronx County 2010, Fabrizio, J.] ["(t)he Legislature did not specifically deem an individual ineligible for consideration for judicial diversion where such person has more than one indictment"]). And a defendant who has been diverted to a treatment program once is not precluded from being diverted a second time (see CPL 216.00 [1]). So, conceivably, a defendant could have more than one felony case dismissed and then sealed under the diversion program, in addition to the three prior misdemeanor convictions.

Defendants whose cases predate the widespread use of judicial diversion programs, [FN5] but have nevertheless demonstrably extricated themselves from any involvement with drugs, are entitled to significantly less relief. CPL 160.59, as noted, only allows for the sealing of one felony and one misdemeanor conviction, and categorically bars relief to individuals with two or more felony convictions or convictions of more than two crimes. This creates an unfortunate—and, in the court's view, unintended—disparity

between those individuals who were accepted into, [FN6] and then completed, judicial diversion programs and those who did not, but who ultimately overcame their addictions to lead law-abiding lives. Indeed, it is hard to understand why defendants who have completed diversion programs should be entitled to the sealing of three misdemeanor drug offenses, while an individual with a similar criminal record—regardless of any potentially mitigating circumstances—is excluded completely from CPL 160.59 relief. Surely there are individuals who, for myriad reasons (including, most simply, the timing of the conviction), were unable to participate {**61 Misc 3d at 1003} in judicial diversion but could nevertheless establish that they are deserving of equivalent sealing benefits.

The legislature, then, should consider whether broadening the sealing statute to encompass cases like this one would further advance the statute's laudable goals without having a deleterious effect on public safety or society's respect for the law. This could be accomplished expeditiously by: amending subdivisions (2) (a) and (4) to allow for the sealing of as many as three drugrelated convictions, including up to two felony [FN7] convictions, when the offenses were committed within a two-year period (or a one-year period, if the legislature were to conclude that a shorter time period is more likely reflective of the convictions being attributable to drug abuse, as opposed to drug dealing); and amending subdivision (3) (h) so that individuals with two felony or three misdemeanor drug convictions are not barred from seeking relief under the statute. Alternatively, a more limited expansion of the statute could be achieved by doing what defendant proposed in this case: applying sequentiality principles (see People v Morse, 62 NY2d 205 [1984]) so that multiple drug convictions would be treated as a single eligible offense, when the underlying crimes were all committed prior to the defendant being sentenced for any of the cases. [FN8] Until such reform, however, the court must deny defendant's motion.

Footnotes

Footnote 1: Although the court is denying defendant's sealing motion, it has chosen to refer to him as "John Doe" in this published decision so as not to draw any further public attention to his criminal record.

Footnote 2: See William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 160.59 (noting that the statute mandates denial of a sealing application if the defendant has convictions of "two or more felonies," but observing that "[t]hat provision . . . should be subject to the subdivision (1)(a) provision which would . . . treat the conviction of two or more felonies arising out of the same criminal transaction as the conviction of one felony").

Footnote 3:In United States v Dossie (851 F Supp 2d 478 [ED NY 2012]), Judge Gleeson explained why this is so. The defendant in that case, Jamel Dossie, was "a young, small-time, street-level drug dealer's assistant." (Id. at 481.) He had a difficult upbringing in Brownsville, Brooklyn, and was already abusing drugs and alcohol in high school. Dossie had what Judge Gleeson characterized as "a typical criminal history for a young man with his background" (id. at 482), that is, "a low-level addict selling drugs on the street" (id. at 483): he had state convictions of misdemeanor marijuana and controlled substance possession offenses. And, when he was 20 years old, he sold drugs four times during a seven-month period to a confidential informant, which led to federal charges and, ultimately, a conviction of conspiracy to distribute crack cocaine (id. at 482-483). Dossie's case, in short, illustrates how individuals with substance abuse issues can accumulate multiple drug-related convictions very quickly.

Footnote 4: See People v Jordan, 28 Misc 3d 708, 713 (Sup Ct, Bronx County 2010, Fabrizio, J.) (describing CPL article 216, the judicial diversion statute, as a legislative effort "to encourage courts and prosecutors to consider placing individuals who commit certain felony narcotics possession and sale crimes in order to financially support their drug or alcohol addictions into a substance abuse program, rather than sending them to jail").

Footnote 5: Defendant's case, of course, far predates the 2009 enactment of

CPL article 216. And although convictions that predate the statute have been deemed eligible for sealing under CPL 160.58, as long as the defendant completed a qualifying drug treatment program and successfully served his sentence (see People v M.E., 121 AD3d 157, 160-161 [4th Dept 2014]), diverting defendants into drug treatment simply was not the norm in the mid-1980s. In fact, the first drug treatment court in the United States, which was established in Miami-Dade County, Florida, did not open until 1989. And New York's first drug treatment court would not open until several years later, in 1995, in Rochester (see Rockefeller Institute of Government, An Analysis of Drug Treatment Courts in New York State at 7 [May 23, 2018], https://rockinst.org/wp-content/uploads/2018/05/5-23-18-Drug-Court-Report.pdf).

Footnote 6: The decision whether to permit a defendant to participate in a diversion program is a discretionary one made by the court (see People v Pittman, 140 AD3d 989, 989 [2d Dept 2016]).

Footnote 7: The sealing statute's prohibition on sealing class A felony offenses (CPL 160.59 [1] [a]) would, of course, still apply to the most serious drug offenses.

Footnote 8: The statute already includes among the factors that should be considered in determining whether a sealing application should be granted, "any measures that the defendant has taken towards rehabilitation, such as participating in treatment programs" (CPL 160.59 [7] [d]). And that factor would be of particular relevance in these sorts of cases.

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| 2018 NY Slip Op 28390 |
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| Zayas, J. |
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Decided on December 12, 2018
Supreme Court, Queens County

The People of the State of New York, Plaintiff,
against
Jane Doe, Defendant.

Indictment No.: XXXX/1984

Defendant Jane Doe, pro se

Richard A. Brown, District Attorney of Queens County (Anastasia Spanakos, Esq., of counsel), for the People

Joseph A. Zayas, J.

In 1984, defendant Jane Doe [FN1] was arrested and indicted for a violent felony offense, robbery in the second degree, which she allegedly committed when she was a 16-year-old high school student — when, in other words, she was eligible for adjudication as a youthful offender. Defendant ultimately pleaded guilty to attempted second-degree robbery (which is also a violent felony offense), and the sentencing court denied her youthful offender treatment. Now, thirty-four years after her guilty plea, defendant moves to seal her conviction pursuant to CPL 160.59. The Court, regrettably, is constrained to deny the motion because, as the People correctly contend, defendant's conviction of a violent felony offense makes her ineligible for sealing under the statute. This unfortunate result, in the Court's view, is inconsistent with the laudable goals of the sealing statute. Accordingly, the Court again calls upon the Legislature, as it did in People v [*2] John Doe, Misc 3d , 2018 NY Slip Op 28324 (Sup Ct, Queens County 2018), to amend the statute, this time, as explained in more detail below, to allow for the sealing of violent felony offenses, when, as in this case, the defendant was eligible to be adjudicated a youthful offender at the time of his or her conviction.

BACKGROUND

On March 13, 1984, defendant was arrested in connection with a robbery that had allegedly occurred the day before at a Queens County high school. According to the criminal complaint and Bill of Particulars, the three perpetrators approached the victim in the school hallway. Defendant "twisted the complainant's arm" while one of the other two perpetrators took her pocketbook and "unicorn charm." About one month later, a Grand Jury charged defendant with one count of robbery in the second degree, a violent felony offense (Penal Law §§ 70.02 [1] [b], 160.10 [1]). [FN2]

On October 10, 1984, defendant pleaded guilty to attempted robbery in the second degree. At her sentencing a few weeks later, the court (Demakos, J.) denied her youthful offender treatment and sentenced her to five years' probation. |FN3| Defendant never appealed her conviction or sentence. |FN4|

At the request of the Department of Probation, defendant's probationary sentence was terminated early, in August 1988. Since that time, she has not been convicted of any crimes.

Defendant, who is currently over fifty years old, now moves, pro se, to seal her attempted robbery conviction. In her application, defendant states that she recently "applied for a job thinking this charge [from] [34] years ago was sealed." That job, according to defendant's [*3]NYSID sheet, was a position as a nursing home, home care, or hospice worker and required a criminal background check (see 10 NYCRR § 402.3). The People oppose defendant's motion on the ground that convictions of violent felony offenses — such as attempted second-degree robbery (see Penal Law § 70.02 [1] [c]) — are not eligible to be sealed. [FN5]

DISCUSSION

Section 160.59 of the Criminal Procedure Law, which took effect in October of 2017, provides a mechanism for defendants to move to seal up to two "eligible offenses" — only one of which can be a felony (see CPL 160.59 [2] [a]). The purpose of the statute, as Governor Cuomo indicated at the time of its enactment, is to "eliminate unnecessary barriers to opportunity and employment that form[erly] incarcerated individuals face and to improve the fairness and effectiveness of the state's criminal justice system" (see Press Release, "Governor Cuomo Announces Raise the Age Law that Seals Non-Violent Criminal Convictions Takes Effect October 7," Oct. 6, 2017 [https://tinyurl.com/y8ljq22t]). To this end, the Executive Law was amended to make it an unlawful discriminatory practice "to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to

the individual involved, any arrest or criminal accusation" that resulted in a conviction that was subsequently sealed pursuant to the new statute (Executive Law § 296 [16]). [FN6]

An individual is entitled to make a sealing application once ten years have passed since either the imposition of sentence or, if an incarceratory sentence was imposed, her release from prison, as long as she: has not been convicted of more than one felony, "or more than two crimes"; does not have an open criminal case; is not required to register as a sex offender; and has not already obtained sealing of the maximum number of convictions allowed under CPL 160.59 or CPL 160.58 (see CPL 160.59 [3], [5]). None of these bars is present in this case.

Certain categories of offenses, including violent felony offenses (see Penal Law § 70.02), [FN7] however, may not be sealed (see CPL 160.59 [1] [a]). This is so no matter how much [*4]time has passed since the defendant committed the crime and regardless of how compelling a case the applicant can make that sealing would serve the interests of justice and not compromise public safety. It is this provision that constrains the Court to deny defendant's motion, even though the attempted robbery here, a violent felony offense, occurred nearly three and a half decades ago, when defendant was what the Criminal Procedure Law now refers to as an "adolescent offender" (CPL 1.20 [44]), and even though she has not been convicted of any crimes since.

There are several reasons to question the wisdom of this categorial approach to sealing eligibility. It can, for one thing, produce seemingly inequitable outcomes. For example, the Court recently granted a sealing application in an unrelated case where another defendant and an accomplice committed a robbery during which they allegedly assaulted the victim. The defendant in that other case, who was nineteen years old at the time of the offense, was charged, just like the defendant here, with robbery in the second

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degree. But he was ultimately able to resolve the case by pleading guilty to attempted robbery in the third degree — which is not a violent felony (see Penal Law §§ 70.02, 160.05) — in exchange for a probationary sentence. Thus, an individual who committed a robbery as an adult, which was violent by any reasonable definition of the word, was eligible to have his conviction sealed. Defendant's conviction, on the other hand — which arose from conduct she engaged in when she was a sixteen-year-old high school student, and which apparently did not result in any injuries to the victim — must permanently remain on her criminal record.

A revision to the sealing statute that gave courts the discretion to seal convictions of certain violent felony offenses for defendants who were eligible to be adjudicated youthful offenders, could help eliminate such disparities, at least when it comes to young offenders. These disparities, after all, can be the product of any number of factors beyond the defendant's control, such as whether the prosecutor handling the case was willing to offer a plea bargain to a non-violent felony offense, whether defense counsel actively advocated on defendant's behalf for such a disposition, or whether the trial judge was amenable to a resolution of the case on those terms.

Potential disparities aside, this case also highlights another important, yet perhaps unanticipated, shortcoming of the new sealing statute: its failure to explicitly address criminal records of younger offenders, [FN8] even though it was enacted as part of the Raise the Age legislation. Courts and legislators have relatively recently begun to acknowledge, in a more thoughtful and forceful way, that younger offenders are often less culpable than adults who commit the same offenses and, therefore, should be treated differently by the criminal justice system. This recognition "rest[s] not only on common sense — on what any parent knows — but [*5]on science and social science as well" (Miller v Alabama, 567 US 460, 471 [2012] [internal quotation marks omitted]). What parents intuitively understand, and what neuroscience

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confirms, is that adolescents are immature and lack a well-developed sense of responsibility and, consequently, often engage in reckless, impulsive, and risky behavior (id.; see also People v Perez, 23 NY3d 89, 109 [2014] [Rivera, J., dissenting] ["(i)t is generally accepted . . . that children simply do not have the capacity to fully appreciate the world and the consequences of their actions and choices"]). Compounding these developmental deficiencies is the susceptibility of young people to negative influences and peer pressure, as well as their "[in]ability [due to their age] to extricate themselves" from situations in which criminal or anti-social behavior is likely to occur (Miller, 567 US at 471; see also Matter of Vega v Bell, 47 NY2d 543, 548 [1979] [noting that juveniles "are more easily influenced by their companions and their environment than are adults"]). These factors, taken together, make it more likely that youths will engage in criminal conduct.

But, as the Supreme Court has emphasized in a series of decisions resolving Eighth Amendment challenges to severe sentences imposed on juvenile offenders, younger offenders have the capacity to change and possess "greater prospects for reform" (Miller, 567 US at 471). In fact, "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood" (Roper v Simmons, 543 US 551, 570 [2005], quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 [2003]).

This notion — that "incorrigibility is inconsistent with youth" (*Graham v Florida*, 560 US 48, 73 [2010], quoting *Workman v Commonwealth*, 429 SW2d 374, 378 [Ky 1968]) — is one of the animating purposes of New York's recently enacted Raise the Age legislation. That statute, as of October 1, 2019, will make many, if not most, criminal cases involving offenders younger than eighteen years old eligible for removal to Family Court, including cases

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involving certain violent felonies (see CPL 722.23). In Family Court, the young person is not subject to criminal liability, but rather, adjudication as a juvenile delinquent (see Family Court Act §§ 301.2 [1]; 380.1 [1] ["(n)o adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal"]).

The distinct possibility that a younger offender will mature and reform was also a significant part of the rationale behind the Court of Appeals' decision in *People v Rudolph*, 21 NY3d 497 (2013), which held that, in every case where youthful offender treatment is a possibility, the trial court must decide whether such treatment is warranted, even when the defendant does not request it. "The judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining," or waived by inaction, the Court reasoned (*Rudolph*, 21 NY3d at 501).

Determining whether an eligible defendant is a suitable candidate for youthful offender treatment (see CPL 720.20 [1]), or whether a juvenile offender's case should be diverted to Family Court over the objection of the District Attorney's Office (see, e.g., People v Robert C., 46 Misc 3d 382 [Sup Ct, Queens County 2014]), can be challenging, because the decision rests, at least in part, on a prediction of whether the offender's criminal conduct is attributable to "unfortunate yet transient immaturity" (Montgomery v Louisiana, 577 US __, 136 S Ct 718, 734 [2016] [internal quotation marks omitted]), rather than being a manifestation of a lifelong [*6]antisocial personality. In the sealing context, though, no such prescience is needed. Since a sealing application can only be made once ten years have passed from sentencing or the defendant's release from prison, the court will generally be able to tell, based on the defendant's actual record (or lack thereof), which of those two scenarios — fleeting immaturity as opposed to "permanent incorrigibility" (id. at 734) — best explains the youthful criminal conduct.

Given that advantage, it would serve the interests of justice, and comport with our recent, more sophisticated understanding of "the relationship between youth and unlawful behavior" (Rudolph, 21 NY3d at 506 [Graffeo, J., concurring]) to expand sealing eligibility to convictions of violent felony offenses that were committed when the defendant was younger than nineteen. provided that, at the time of the conviction, the defendant was eligible to be adjudicated a youthful offender. Because sealing eligibility in New York is relatively strict, there would seem to be little risk that a truly violent, antisocial person would be eligible for relief. After all, an individual would have to show, among other things, that: the requisite ten-year waiting period has been satisfied; he or she has, at most, one additional conviction, and that the conviction was for a misdemeanor; and he or she does not have any unresolved criminal charges pending against him or her. A person who can establish all of these things would be able to make a strong case that, whatever violent behavior she engaged in as a young person was not representative of the mature adult she ultimately became, and, therefore, she should be given an opportunity to put that particular episode of her adolescent life behind her.

In essence, expanding sealing eligibility to these sorts of cases would allow a court to take a second look at a young offender, a decade or more after he or she committed a violent crime, and decide whether part of the penalty imposed — the burden of a felony record — should be lifted (at least to the extent permitted by law [FN9]). And, in this regard, it is worth emphasizing that expanding sealing eligibility means only that, i.e., the opportunity to make an application. It does not guarantee that sealing will ultimately be granted. That result ultimately turns on whether the applicant can persuade the court that sealing is appropriate in light of the circumstances presented by a particular case.

This case presents a very compelling example of an individual whose violent felony record deserves a second look. As emphasized, the attempted robbery in which defendant participated occurred when she was a high school student. Indeed, the crime itself took place inside defendant's school. And

although robbery is unquestionably a serious crime, the Court notes that legitimate concerns have been raised by experts in fields ranging from law enforcement to education to childhood development, about the effects of resolving student misconduct issues through the adult criminal justice system (see, e.g., New York City School-Justice Partnership Task Force, Keeping Kids In School And Out Of Court, May 2013 [https://tinyurl.com/ydaane9c]).

Moreover, here, there were no allegations that the victim was injured, or that defendant herself was the actual "taker" of the property. Also, two other individuals were involved, so, perhaps, the idea to commit the crime was not defendant's and she was more of a follower than a leader. But, even if that was not the case, the fact remains that decades have passed since the attempted robbery and defendant has not been convicted of, or even arrested for, any further violent offenses. Therefore, the conclusion that the crime was the result of immaturity and youthful recklessness, instead of a fully-formed violent disposition, seems inescapable.

The Court is, of course, cognizant of the fact that society is often reluctant to "give a break" to individuals who have committed violent crimes. But surely that reluctance is less entrenched, and less justified, where the crime was committed when the defendant was not yet an adult. Indeed, it would seem relatively uncontroversial to suggest that things people do as teenagers should not define them for the rest of their lives (see Rudolph, 21 NY3d at 501 [observing that youthful offender treatment gives young offenders "the opportunity for a fresh start, without a criminal record"]). For this reason, expanding sealing to this limited class of cases would not, in this Court's view, diminish "the public's confidence in and respect for the law" (CPL 160.59 [7] [g]). To the contrary, it would comport with the ideal, which is so fundamental in this country, that almost everyone should be entitled to a second chance (cf. Alan Blinder, Convicts Seeking to Clear Their Records Find More Prosecutors Willing to Help, NY Times, Oct. 8, 2018, A12

[https://tinyurl.com/y7parg6w] [quoting a former United States pardon attorney, stating that "(expungements) ought to be something that prosecutors welcome and use to their advantage to (advertise) criminal justice success stories"]).

Along the same lines, the Court also believes that expanding sealing eligibility in this way would not have any negative public safety implications (see CPL 160.59 [7] [g]), especially since, as noted, courts are always free to deny a sealing application on the merits — by weighing the various interestof-justice factors enumerated in the statute (CPL 160.59 [7]). Still, if a defendant can persuasively demonstrate, ten years or more after she committed a crime, that her conviction of a violent felony offense was the result of the many behavioral characteristics that attend youth, she would presumably be a minimal risk for reoffending. And that conclusion would be even stronger where, as in this case, the defendant has a decades-long record of not having recidivated (see United States v Johnson, 685 F3d 660, 661 [7th Cir 2012] [" [t]he propensity to engage in criminal activity declines with age"]). Furthermore, it is difficult to conceive of how sealing under CPL 160.59, given its various exceptions providing for access to sealed records (see CPL 160.59 [9], [10]; note 9, supra), could in any meaningful way impede effective enforcement of the law. And, to the limited extent that it does, the unfortunately small number of convictions that have been sealed since the statute's enactment a year ago — reportedly less than 50 in this county and less than 600 statewide (see Shayna Jacobs. Law that seals old criminal records helps New Yorkers find new work, better lives, NY Daily News, Oct. 13, 2018 [https://tinyurl.com/yacb3lr7]; see also Jan Ramson, Criminal Convictions Behind Them, Few Have Had Their Records Sealed, NY Times, Jul. 4, 2018 [https://tinyurl.com/y9zmwx64]) — would certainly minimize any adverse effect in this regard.

In sum, the Court respectfully suggests, as it has previously (see John Doe, 2018 NY Slip Op 28324), that the Legislature consider amending CPL 160.59 to allow for the sealing of convictions of violent felony offenses committed by defendants who were eligible for youthful offender treatment, but did not receive it. This could be accomplished by revising subdivision (1) (a) of the statute, which defines the offenses that are eligible for sealing, to create an exception to [*7]the general prohibition on sealing convictions of violent felony offenses, when the offender was an "eligible youth" as defined in the youthful offender statute at the time of the conviction (see CPL 720.10 [2]). This proposed revision, to be clear, would not affect the sealing statute's independent prohibitions on sealing other categories of offenses. For example, a defendant can be adjudicated a youthful offender for certain serious sex crimes (see CPL 720.10 [2] [a] [iii], [3]). But the sealing statute does not allow for the sealing of any sex offense defined in article 130 of the Penal Law or any offense that requires registration as a sex offender (CPL 160.59 [1] [a]). Likewise, a defendant can receive youthful offender treatment in connection with a manslaughter conviction (see, e.g., Shrubsall, 167 AD2d at 931). Felony homicide offenses, however, are not eligible for sealing (see CPL 160.59 [1] [a]). In short, what the Court is proposing is a discrete exception to the prohibition on sealing convictions of violent felony offenses for individuals who were youthful-offender eligible at the time of conviction, and when the offense is not otherwise ineligible for sealing.

Amending the statute in this way would reflect an acknowledgment, consistent with the legislative policy concerns underpinning the Raise the Age legislation and the reasoning contained in the Supreme Court's and the Court of Appeals' still-developing juvenile sentencing jurisprudence, that when it comes to the criminal justice system, there are myriad ways in which young people should be treated differently than adults.

It would also give this defendant the opportunity to receive substantially the same treatment that a sixteen-year-old would receive today if she were arrested under similar circumstances. Indeed, under the current statutory scheme, if an adolescent offender is charged with committing a robbery where no one was significantly injured and no gun or "deadly weapon" was used, the case will be removed to Family Court — with all of the benefits and protections that entails (see Robert C., 46 Misc 3d at 389—90) — unless the People are able to convince the court that "extraordinary circumstances" warrant keeping the case in criminal court (CPL 722.23 [1] [d], [2] [c]). The Raise the Age statute does not define "extraordinary circumstances," but routine robbery cases like this one surely would defy such characterization. At the very least, the Court is confident that, today, a defendant in a case like this, assuming it remained in criminal court, would be granted youthful offender treatment, either by the trial judge, or, if not, then on appeal (see People v Darius B., 145 AD3d 793, 794 [2d Dept 2016] [reversing denial of youthful offender treatment in first-degree robbery case]; People v David S., 78 AD3d 1205, 1206 [2d Dept 2010] [same result in attempted second-degree robbery case]; People v Nadja B., 23 AD3d 394, 394 [2d Dept 2005] [same in seconddegree burglary case]; People v Randall T., 121 AD3d 439, 439—40 [1st Dept 2014] [same in second-degree robbery case]; People v Maria M., 102 AD3d 402, 403 [1st Dept 2013] [same in second-degree assault case]; People v Kwame S., 95 AD3d 664, 664—65 [1st Dept 2012] [same in first-degree robbery case]).

If the statute were amended as proposed, the Court would grant defendant's motion without reservation. But, since the Court must, of course, decide the motion within the parameters of the current statute, it must, unfortunately, deny it.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the defendant and to the District Attorney.

Dated: December 12, 2018

JOSEPH A. ZAYAS, J.S.C.

Footnotes

Footnote 1: Although the Court is denying defendant's sealing motion, it has chosen to refer to her as "Jane Doe" in this published decision, so as not to draw any further public attention to her criminal record.

Footnote 2: One of two co-perpetrator's cases was adjudicated in Family Court; the other individual was apparently not apprehended.

Footnote 3: There is a notation in the court file suggesting that, on the day that she was sentenced in this case, defendant was adjudicated a youthful offender in another 1984 matter and sentenced to a concurrent term of probation. The Court, however, was unable to obtain the file for the other matter and thus does not know what sort of conviction was substituted for a youthful offender adjudication, or even if there was such an adjudication. But, given that the sentencing for both cases apparently occurred on the same day, defendant's adjudication as a youthful offender in another matter would not have precluded the court from giving her the same treatment in this case (see People v Ramirez, 115 AD3d 992, 993 [2d Dept 2014]; CPL 720.10 [2] [b]).

Footnote 4:Perhaps this was unfortunate, since the Departments of the Appellate Division consistently reverse denials of youthful offender treatment, even when the denial was not found to be an abuse of discretion (see, e.g., People v Ortiz, 97 AD2d 710, 710 [1st Dept 1983] [reversing denial of youthful offender treatment in knife-point robbery case]; People v Charles S.,

102 AD3d 896, 896 [2d Dept 2013] [reversing trial court's denial of youthful offender treatment in second-degree robbery case, even though "the defendant did not fully comply with the requirements imposed by the Supreme Court" for being so adjudicated]; People v Jeffrey VV, 88 AD3d 1159, 1159—60 [3d Dept 2011] [reversing youthful offender denial; no abuse of discretion found]; People v Shrubsall, 167 AD2d 929, 931 [4th Dept 1990] [same result in manslaughter case]; People v Keith B.J., 158 AD3d 1160, 1161[4th Dept 2016] [same result in second-degree criminal possession of a weapon case]), and even when the defendant has been charged in two separate indictments (see, e.g., People v Thomas R.O., 136 AD3d 1400, 1403 [4th Dept 2016]).

Footnote 5: In addition to asserting that defendant's conviction is not eligible to be sealed, the People also argue that the Court should deny her motion because she failed to provide a "sworn statement explaining the reasons why the court should grant her motion," which is a required component of a sealing application (see CPL 160.59 [2] [b] [v], [3] [g] [requiring summary denial of a sealing motion when the defendant omits "the required sworn statement of the reasons why the court should grant the relief requested"]). But defendant, a prose litigant, did provide such a statement. As mentioned above, she explained in her application that, when she recently applied for a job, she became aware that her decades-old robbery conviction was not sealed. This is exactly the sort of experience that one would expect would motivate a person to move to have a conviction sealed.

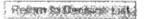
Footnote 6: This provision, naturally, does not apply to applications for gun permits or applications for employment as a police officer or other law enforcement official, among other things (Executive Law § 296 [16]).

Footnote 7: The other categories of offenses that are excluded from sealing are class A felony offenses, sex offenses defined in article 130 of the Penal Law, child pornography crimes defined in article 263 of the Penal Law, any offense that requires registration as a sex offender, and felony homicide offenses defined in article 125 of the Penal Law. In addition, a conviction of a felony conspiracy offense where the object of the conspiracy is not itself an eligible offense, as well as a conviction of an attempt to commit an ineligible offense, may not be sealed (see CPL 160.59 [1] [a]).

Footnote 8: New York has adopted an array of terms to refer to offenders who are not adults. For example, children from the ages of thirteen to fifteen, who

are charged with certain enumerated offenses, are "juvenile offenders" (CPL 1.20 [42]). The Raise the Age statute created the term "adolescent offender," which, as of October 1, 2019, will encompass any sixteen- or seventeen-year-old charged with a felony (CPL 1.20 [44]). This decision uses the term "younger offender" to refer to defendants under the age of nineteen, since those individuals are generally eligible for youthful offender treatment (see CPL 720.10 [2] [defining "eligible youth"]).

Footnote 9: There are several limitations to the sealing prescribed by CPL 160.59. For example, records sealed by the statute may be obtained by "federal and state law enforcement agencies, when acting within the scope of their law enforcement duties" (CPL 160.59 [9] [b]). Moreover, unlike CPL 160.50, which requires the sealing of "official records and papers" in the possession of a prosecutor's office when a criminal case has been terminated in favor of the accused (CPL 160.50 [1] [c]), CPL 160.59 only requires the sealing of records in the possession of a court and the Division of Criminal Justice Services (CPL 160.59 [8]).



A broken justice reform promise: Under a new law, sealing of records could help 600,000 or more New Yorkers; so why have only 1,000 come forward?

By EMMA GOODMAN
JAN 15, 2019 | 6:04 PM
PORLISHED IN NY DAILY NEWS

Jose was 16 when he was arrested in Brooklyn. He stole another kid's bike. He and his friencis were charged with robbery despite the fact that there were no weapons or injuries involved. His family dich't know anything about the criminal system and his lawyer advised him to take a plea to a lower level charge to escape Rikers Island. Not understanding the consequences, he did.

Thirty-five years later, the weight of a non-violent felony conviction still bangs over his heact.

Jose is an adult now with a wife and two children. He never went to college or applied for the jobs he wanted because he was afraid his conviction would prevent him from reaching his goals. He has been working tirelessly as a driver for his entire adult life. Finally, in 2018, he was able to get his record sealed. He is now applying for night school, and he and his family have new hope for the future.

When it comes to record sealing, Jose is one of the lucky ones. He fits the restrictive eligibility requirements of a new state record-sealing law that was passed in 2017, and he happened to read the Daily News on the day an article about the statute was published.

But the law is too limited to benefit the people who are suffering the most, and many of the few who can benefit don't know that the law was passed. These are problems we need to fix, now.

New laws mean nothing if the people who can benefit don't know they exist. The record-seading law, which seals records for a number of adult criminal convictions if certain conditions are met, could potentially benefit as many as 600,000 people statewide. But it has seen fewer than 1,000 people benefit in over a year; that's less than 1% of the people who are eligible.

There are many reasons for this disparity. The eligibility determination and judicial process are extremely complicated and difficult to do without an attorney's help. The value of sealing records is unclear to many, and misinformation is being spread by private attorneys and online companies for profit.

But the biggest reason for the low numbers is the government's failure to educate the public. Time and time again we, as legal advocates, see huge, self-congratulatory media splashes about new laws and benefits meant to help the community. But once the laws go into effect, the government goes basically silent.

At the Legal Aid Society, we've tried through a myriad of ways to spread the word to the community. With every newspaper article, television segment and public event, we reach more people like Jose. But why has this work been left just to community advocates?

Why hasn't there been more publicity? We haven't seen any billboards or subway posters, heard advertisements over the radio or seen them on television. What about more flyers at community centers and better local outreach? The numbers are low because the outreach just isn't there.

In addition to better follow-through from Albany, there is huge room for improvement in the law. In order to truly redress the systemic wrongs of broken-windows policing, we should expand it to allow people with more than two convictions to apply for sealing. We should also reduce the wait time below 10 years and make the process more accessible for people to apply on their own without the needed help from an attorney.

The law as it stands is a step in the right direction, but it does not go far enough to truly help those suffering under the weight of criminal records. I hope that the Albany of 2019 will do better.

Goodman is Case Closed project coordinator at the Legal Aid Society.