NEW YORK STATE
BAR ASSOCIATION

REPORT AND RECOMMENDATIONS
OF THE
CRIMINAL JUSTICE SECTION
SEALING/EXPUNGEMENT COMMITTEE
REGARDING SEALING OF
CERTAIN CRIMES IN
NEW YORK STATE

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Purpose

We recognize that to err is human. All of us from time to time make mistakes. Some mistakes, those involving the violation of a criminal statute, can have life changing impact, not merely upon the offender, but the offender's family and the community at large. "Expungement of record" or "sealing of record," as it may also be called, refers to the act or practice of officially preventing access to particular criminal records, in the absence of a court order. While the terms "expungement" and "sealing" may sometimes refer to different protective mechanisms, for our purposes the terms are synonymous. We will generally track the language in the two pending New York State bills (examined below) by using the term "sealing."

Sealing a person's criminal record requires balancing competing interests. On the one hand, a person with a criminal record has, after a suitable period of lawful living and rehabilitation, an interest in pursuing employment, licensing, housing, education, and other benefits without the stigma of a prior arrest or conviction. On the other hand, society has an interest in having access to people's criminal records for future crime investigations and in order to make hiring, rental, and other decisions about individuals.

Two bills have been introduced to provide ex-offenders with a second chance (see Appendix 1 & 2). This committee was formed for the purpose of analyzing the pending

bills to offer recommendations to the Executive Committee of the Criminal Justice Section as to what position, if any, the Bar Association should take with respect to the bills. This Report examines the components or "elements" of the two bills, along with New Jersey's corresponding statute for guidance (Appendix 3), and presents the suggestions and recommendations of the committee members and the overall conclusion of the committee.

Background

Currently, New York State has no expungement or sealing law. A conviction follows an ex-offender to the grave. The pending bills are an effort to create a balance between the interests of ex-offenders and the interests of law enforcement and other members of the public. An expungement or sealing law will be based on views on a variety of factors. This committee has identified the following elements of such a statute:

1. Grade of Crime
2. Type of crime
3. Time limitation until application can be made
4. Standards for the court in the law
5. Procedure, including when a hearing is ordered
6. Fee/surcharge
7. Number of applications that can be made
8. Community service option
9. Definition of sealing
10. Burden
11. DNA/fingerprints

Analysis of Bill A6664

This Bill (hereinafter called the O'Donnell Bill) would establish a procedure for an individual with a criminal record, who has completed his or her sentence and has been free for a specified waiting period, to apply to the sentencing court, on notice to the

prosecutor, for an order sealing the record of conviction. The expressed purpose of the O'Donnell Bill is to help currently law-abiding individuals keep, regain or gain employment by strengthening mechanisms intended to prevent employment discrimination against ex-offenders. The elements of the O'Donnell Bill are as follows.

1. Grade of Crime

The O'Donnell Bill would seal both misdemeanors and felonies.

2. Type of Crime

The O'Donnell Bill would seal both violent and non-violent felonies.

3. Time Limitation

An application can be made in six months for a non-criminal offense; one year for two or more non-criminal offenses; one year for a misdemeanor; three years for more than one misdemeanor; five years for a non-violent felony; ten years for two or more non-violent felonies; ten years for a violent felony; and twenty years for more than one violent felony. The Court may shorten the waiting period for good cause.

4. Factors the Court Should Consider

The O'Donnell Bill does not expressly state which factors the court should take into consideration when making a determination. However, the O'Donnell Bill requires that an application include: (a) a list of each of the petitioner's convictions in New York state, any conviction in any other state or in federal court, the sentence for each such conviction and the date of the sentence, (b) a statement as to the termination of each aspect of the sentence for each of the above-listed convictions, including the dates of termination from probation, parole or other supervisory sentences, a statement as to the existence of any orders of protection and the end date of such, and a statement as to the

completion of any conditional sentences or any other conditions of sentence imposed by the court or by law, (c) a description of the nature and circumstances of each crime listed in section (a), and (d) a description of the nature of the petitioner's personal circumstances since the conviction, which shall establish that the petitioner is entitled to relief.

5. Procedure

The application is to be made to the sentencing court, and applications may be referred to magistrates, who may grant applications for misdemeanors and non-criminal offenses, and make recommendations to the judge regarding felonies. The application must be served on the original prosecuting agency on 21 days notice, with an opportunity for the prosecutor to answer seven days prior to the return date. The court may conduct a hearing as to any issue of fact or law and must issue a written decision stating reasons for the decision, unless the application is granted without objection. Either party may appeal.

6. Upfront Fee/Back-end surcharge

There is an upfront fee of $95.00.

7. Number of applications that can be made if turned down, and how often?

The O'Donnell Bill does not expressly state whether or not a petitioner can reapply after the initial application is denied.

8. Community service option

The O'Donnell Bill does not expressly mention a community service option.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

The conviction and the arrest are rendered a nullity. However, the Division of Criminal Justice Services, the Department of Correctional Services, and all local jail or

prison agencies shall maintain a sealed record in their databases that will not be accessible except to law enforcement agents or prosecution agencies in the course of a criminal investigation or prosecution, or upon a court order or court-ordered subpoena ordering release of the information. In the event the applicant is arrested subsequent to the sealing of the records, the unsealed record shall be included in the Division of Criminal Justice Services "NYSID" (New York State Identification Number) sheet that is printed out based on the applicant's fingerprints. A court, upon determining it is in the interests of justice to unseal a record, shall order its unsealing, which shall allow the prosecutor and the court to access the records of their agency pertaining to that arrest. Any such unsealed files shall be made available to the defendant and his or her attorney.

10. Burden

For violations (non-criminal offenses), misdemeanors and nonviolent felony convictions, there is a rebuttable presumption that the application will be granted unless sealing will harm public safety or would not serve the interests of justice. For violent felony convictions, there is a rebuttable presumption that the application will not be granted, unless the applicant establishes multiple factors, including complete rehabilitation that the crime was an aberration and is not likely to recur.

11. DNA/fingerprints

Fingerprints will be kept on file.

Analysis of Bill A1139

1. Grade of Crime

This Bill (hereinafter called the Lentol Bill) would permit the sealing of certain non-violent misdemeanor or non-sexual misdemeanor criminal offenses. It does NOT include felonies of any kind.

2. Type of Crime

The Lentol Bill excludes from sealing crimes under Penal Law articles 120, 130, 135, 150, 235, 245, 260, 263, 265, and 400. It also excludes: killing or injuring a police animal as defined in section 195.06, harming an animal trained to aid a person with a disability in the first degree as defined in section 195.12, promoting prostitution in the fourth degree as defined in section 230.20, riot in the second degree as defined in section 240.05, inciting to riot as defined in section 240.08, aggravated harassment in the second degree as defined in subdivision three of section 240.30, criminal interference with health care services or religious worship in the second degree as defined by section 240.70, harming a service animal in the second degree as defined in section 242.10, dissemination of an unlawful surveillance image in the second degree as defined in section 250.55, or any specified offense subject to the provision relation to hate crimes as defined in section 485.05 of the penal law. Additionally, an eligible misdemeanor shall not include criminal solicitation, conspiracy, attempt, or criminal facilitation to commit any violent felony offense as defined in section 70.02 of the penal law, or any sex offense as defined under subsection two of section 168(a) of the correction law.

3. Time Limitation

An application can be made five years after the completion of a sentence provided the person has not been convicted of an offense during the last five years and is not the subject of an undisposed arrest.

4. Factors for the court to consider

When reviewing an application, the court may consider any relevant factors, including but not limited to: (a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions, (b) the character of the defendant including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, or other personal history that demonstrates rehabilitation, (c) the defendants criminal history, (d) 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, and (e) any statement made by the victim of the offense where there is in fact a victim of the crime.

5. Procedure, including when a hearing is ordered (is no hearing the default?)

After the petitioner applies, the court will notify 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. When the court notifies a district attorney of a sealing application, the district attorney shall provide notice to the victim, if any, of the sealing application by mailing written notice to the victim's last-known address. 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.

6. Upfront Fee/Back-end surcharge

There is an upfront mandatory fee of $80.00, which shall be waived for indigent defendants.

7. Number of applications that can be made if turned down, and how often?

The Lentol Bill does not specify how many applications can be made or how often.

8. Community service option

The Lentol Bill does not specify whether there is a community service option.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

When a court orders sealing, all official convictions, including all duplicates and copies on file with the Division of Criminal Justice Services or any court shall be sealed and not made available to any person or public of private agency. Sealed records shall be made available to the defendant or the defendant's agent, qualified agencies when acting within the scope of their law enforcement duties. An agency responsible for issuing a gun license, or any prospective employer of a police office or peace officer. If, subsequent to the sealing of records a person is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed unless the arrest results in a termination in favor of the accused.

10. Burden (on petitioner)

The Lentol Bill does not specify who has the burden of persuasion.

11. DNA/fingerprints

The Division of Criminal Justice Services shall retain any fingerprints, palm prints,

photographs or digital images.

Analysis of New Jersey's Sealing Statute

1. Grade of Crime

New Jersey will seal the record of certain misdemeanors and felonies.

2. Type of Crime

Serious felonies (murder, manslaughter, treason, anarchy, kidnapping, rape, forcible sodomy, arson, perjury, false swearing, robbery, embracery, or a conspiracy or any attempt to commit any of the foregoing, or aiding, assisting or concealing persons accused of the foregoing crimes) shall not be sealed, nor will large quantity drug crimes of cases involving public officials abusing their duties.

3. Waiting period before application can be made

A person is eligible after ten years (5 years for petty disorderly offenses) if no subsequent or prior convictions.

4. Standards for the court for review (factors to consider)

In coming to a determination, the court must balance the need for the availability of the records against the desirability of having a person's records sealed.

5. Procedure, including when is a hearing ordered (is no hearing the default?)

Upon the filing of a petition for relief pursuant to this chapter, the court shall, by order, fix a time not less than 35 nor more than 60 days thereafter for hearing of the matter. If, prior to the hearing, there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served, and no reason, as provided in section 2C:52-14, appears to the contrary, the court may, without a

hearing, grant an order directing the clerk of the court and all relevant criminal justice and law enforcement agencies to seal records of said disposition including evidence of arrest, detention, conviction and proceedings related thereto.

6. Upfront Fee/Back-end surcharge

Upfront fee of $95.00.

7. Number of applications that can be made if turned down, and how often?

The New Jersey statute does not specify how may applications can be made if a petitioner is turned down.

8. Community service option

The New Jersey statute does not specify whether or not there is a community service option.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly. However, agencies possessing sealed information can consult the information to ascertain if applicants for sealing have had offenses sealed before, and for purposes of sentencing, parole, corrections classification, and hiring for criminal justice agencies.

10. Burden (on petitioner)

There is a rebuttable presumption in favor of sealing.

11. DNA/fingerprints

Sealed records include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, “rap sheets” and judicial docket records.

Feedback Regarding Proposed Legislation

An analysis of the New Jersey, Lentol, and O'Donnell Bills resulted in the recognition of eleven elements of a statute of this type. The committee evaluated these elements and the committee's input is reported below.

1. Grade of Crime

Of the seven members who provided feedback, the majority felt that is was best to include all misdemeanors and D and E felonies. However, two members also want to include B and C felonies. One member stated that he would be opposed to expunging A or B felonies; but would be okay with C, D, and E non-violent felonies. Another member suggested that in addition to all grades of non-violent felonies, D and E violent felonies should also be sealed. The justification for including violent felonies was that not all violent felonies are actually violent, and the legislative rationale to label them as such (potential for violence etc.), does not hold true later on in life where no further transgressions have occurred. Most members stated that there were strategic advantages for starting out with misdemeanors first, then adding amendments that would include felonies. The Committee believes that the statute should apply to Penal Law and non-penal law offenses that are within the defined classes of crimes (be they misdemeanors or felonies).

2. Type of Crime

The members unanimously stated that sex crimes should not be sealed. However, one member believes an argument can be made for giving the courts discretion to look at the age based sex crimes, such as situations that were consensual in fact, if not in law. A

majority of the members also excluded violent crimes, two of whom specified crimes of violence where a weapon was used. One member suggested the exclusion of any sex crimes or violent crimes, and discretionary exclusion of any crime where the basis for the arrest was a sex crime, where the defendant pled to a non-sex crime. That member further suggested discretionary exclusion of any crime with a weapon and any crime where the basis for the arrest was a weapon crime, where the defendant pled to a non-weapon crime.

3. Waiting period before application can be made

The members unanimously agreed that the waiting period should be three years for the first misdemeanor conviction. One member suggested that the waiting period be five years for a second misdemeanor conviction or a felony conviction. Another member also agreed with a five-year waiting period for two or more misdemeanors, but suggested an eight-year waiting period for a felony. A different member suggested that the waiting period for a felony be ten years. But, if there is a "spring back" provision (see below) when the defendant commits a new felony, the waiting period should be shortened to five years. Another member suggested that the waiting periods should be ten years for felonies, three years for misdemeanors, and no waiting period for violations contingent upon completion of any conditions. Another person stated that while waiting periods are politically attractive they have the effect of exacerbating the collateral consequences of a conviction because they extend the period during which the petitioner may be denied employment, licensing, housing, education, and other benefits. That member also suggested that the waiting periods be kept as short as politically possible.

The statute will apply to judgments of conviction (covered by the statute) that predate the effective date.

4. Factors the Court Should Consider

Most members agreed that the factors should be kept vague and open-ended and include a catchall provision such as "and any other factor that should be considered in the interest of justice." The members stated these factors should be suggested as examples to courts, not hard and fast rules and not exclusive. One member stated that too many factors and specificity might appear overly burdensome. Two members included lists of factors for the court to consider. The first list included: circumstances of the initial crime, defendant's age, defendant's role in crime, motive for crime, and activities since conviction. The factors to be considered under the rubric of activities since conviction are: community service, re-arrests including without convictions, letters of reference educational efforts and employment activities. The other list of factors included: circumstances of the crime, petitioner's conduct during prison/parole/probation, any prior bad acts, attempts at rehabilitation, activities after committing crime, and public safety.

5. Procedure, including when a hearing should be ordered (is no hearing the default?)

The members were split about what the procedure should be. One member stated that the default should be no hearing and if there is opposition and/or the court sua sponte finds a substantial basis, to support denial, the court can order a non-evidentiary hearing. Another member suggested that the defendant should apply and notice should be given to the DA, and whether or not the DA responds, the court should make the final decision. One person stated that the default should be no hearing until the DA puts a material fact in issue. That member went on to say that if "hearing" is expressly defined to include any

airing of the issue, and not an evidentiary hearing, the hearing requirement would be unimportant. Another person suggested that the default should be no hearing and the application should be granted; then if the court finds a substantial basis which might support denial of the request, then a non-evidentiary hearing should be held. Another member suggested that the default is to have a hearing unless the prosecution consents. One member suggested that once the petitioner files, the court has an opportunity to review all submissions, including hearsay documentation. If the parties agree to the facts, no hearing should be required. If the facts are contested, a hearing should be held.

6. Upfront Fee/Back-end surcharge

One member was in favor of an initial application free ranging from $100-$250, primarily to make the bill more attractive to the Legislature. Two members suggested that there be an upfront non-refundable fee. One member did not think that there should be a surcharge, and another suggested a nominal fee. Another member suggested that there be a back-end surcharge, but did not specify an amount. All of the members agree that the fee should be waived for demonstrable indigence.

7. Number of applications that can be made if turned down, and how often

The members were split on the number of applications that can be made and how often they can be made. One member stated that a petitioner who is tuned down should be able to file a new application every other year, but the application must contain new information. Two of the members believed a petitioner should be able to reapply once a year with renewal as often as requested but only on a showing of changed circumstances. One member agreed with one application per year, but did not require a showing of changed circumstances. Another member also agreed with the once a year application

with a showing new evidence, changed circumstances, or actual prejudice. One member suggested that a petitioner who is denied should be able to reapply an unlimited amount of times, but no more than once every two years. Another member suggested that a petitioner be able to reapply three to five years after the denial of the first application on a showing of good cause. One person also suggested a ban on any person who already had a prior misdemeanor or felony sealed and then was later convicted of committing any other crime, and a ban on any person with two separate felonies so that the sealing would still leave a felony conviction on the record.

8. Community service option

The members were split about whether or not there should be a public service requirement. One member said there should not be a community service option. Two other members said that it is not important. Another member said that if it is considered, it should be evaluated under the same factors as suggested the court use to review in section four (see above). One member believes the option is unnecessary unless it will help in getting the bill passed. However, three members suggested that the court should be able to impose community service as a discretionary condition.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

Most members stated that the language of CPL 160.00 should apply and that the conviction and arrest should be treated as if they never occurred. Six of the seven members who answered believed there should be a "spring back" provision so that if a new arrest for a felony occurred within the mandated time period it would trigger an enhanced sentence for a repeat offender (predicate felony status). One member stated that ideally, a person who manages to get a prior conviction sealed should never have it

"spring back." He went on to say that if it is a first misdemeanor conviction that gets sealed it should never serve as a predicate for a later elevation of charges. The issue of whether or not it is a crime that may serve as a basis for a later elevation can be considered by the judge upon deciding whether or not to grant the sealing application but once it is granted it should be final. He stated that he would agree to a felony "springing back" for predicate status as a "bone" or compromise to those who feel it is necessary in order to get the bill passed but felt very strongly that the committee should not leave out all contentious issues up front and risk having no bargaining power. Another member suggested that there should be an automatic temporary unsealing upon a new arrest, which could generate a permanent conviction.

The Committee recommends that the legal effect of a successful motion pursuant to this section be spelled out in the statute, just as it is in the New Jersey statute.

10. Burden

Most members stated that the burden should be the petitioner's by a preponderance of the evidence. One member suggested that the burden be clear and convincing evidence and that the judge should be required to specify in the decision the reasons why the court is granting the request. That member further suggested that for misdemeanors there should be a rebuttable presumption of rehabilitation and non-danger to public safety, after the waiting period has elapsed.

11. DNA/fingerprints

A majority of members stated that DNA and fingerprints should be kept in a database, available only for law enforcement and criminal court purposes, or special

cases such as law enforcement positions and bar admissions. One member believed that DNA and fingerprints should be destroyed if the application is granted.

Recommendations to the Committee

Based upon the co-chairs' review of the responses received from the committee members, as well as, the discussions that were held concerning the proposed legislation, the committee recommends that the Executive Committee support either of the proposed bills with the following additions/modifications:

- The sealing bill should include misdemeanors and D and E felonies, but sex crimes and crimes of violence should be excluded.
- There should be a three-year waiting period from a judgment of the first misdemeanor conviction before an application is made and that a longer period be utilized for felony convictions to be the subject of a sealing application.
- Courts should have broad discretion in determining whether sealing is appropriate, but the statute should describe types of factors that are relevant to the decision. General guidance is preferred to a set number of considerations.
- A hearing should be held in the event that the prosecution makes the request or a court determines sua sponte to hold one.
- Although there should be a fee, it can be waived if the court makes a finding of indigency. In no way should the failure to pay an up front fee be the basis for an application not to go forward.
- There should be a limitation on renewed applications in terms of how frequently they can be made. While the committee would recommend no more than one

application per year, even repeat applications should demonstrate changed circumstances.

- Community service as an option should be left to the court's discretion.
- When sealing is granted, the arrest and conviction become a nullity. However, a "spring back" provision should be triggered in the event of a subsequent arrest and conviction.
- The burden of persuasion is on the petitioner.
- DNA and fingerprint records should remain in law enforcement databases.

Conclusion

The Committee appreciates that there are many variables that could be subject to discussion and debate, both by the Executive Committee, the Section and the Association. Nevertheless, difficult questions should not be a reason not to proceed to a solution to a problem. The benefits of a sealing bill to those who deserve such treatment warrant this remedy.

Appendix 1

BILL TEXT:

STATE OF NEW YORK

2011-2012 Regular Sessions

IN ASSEMBLY

March 24, 2011

Introduced by M. of A. O'DONNELL -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to applications for sealing a record of conviction

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

Section 1. The criminal procedure law is amended by adding a new section 160.65 to read as follows:

§ 160.65 Sealing record of conviction; application for.

1. A person is eligible to apply to seal a record of conviction, subject to the provisions contained in this section, by application on a form specifically designated, sworn to under penalty of perjury and accompanied by a fee of ninety-five dollars.

2. An applicant must be duly terminated and discharged from every aspect of the sentence, including incarceration, probation, parole, conditional release, post-release supervision, conditional discharge, sex offender registration and/or any order of protection on this or any other matter against the applicant must have expired. The following waiting periods apply to applications under this section, however, for good

cause shown, the court may shorten a waiting period. Attendance at a diversion program which delayed the imposition of the sentence may 16 constitute good cause, in the court's discretion.

(a) For a person who has been convicted of one non-criminal offense, the waiting period shall be six months from the date of conviction of such offense.

(b) For a person who has been convicted of more than one non-criminal offense arising from separate incidences, the waiting period shall be one year from the date of conviction of the last such offense.

(c) For a person who has been convicted of a misdemeanor, the waiting period shall be one year from the date of conviction of such misdemeanor.

(d) For a person who has been convicted of more than one misdemeanor arising from separate incidences, the waiting period shall be three years from the date of conviction of last such misdemeanor.

(e) For a person who has been convicted of one non-violent felony, the waiting period shall be five years from the date of conviction of such non-violent felony.

f) For a person who has been convicted of more than one non-violent felony arising from separate incidences, the waiting period shall be ten years from the date of conviction of the last non-violent felony.

(g) For a person who has been convicted of a violent felony, the waiting period shall be ten years from the date of the conviction of such violent felony.

(h) For a person convicted of more than one violent felony arising from separate incidences, the waiting period shall be twenty years from the date of conviction of the last violent felony.

3. An application for sealing a record of conviction shall be made to the judge who originally sentenced the applicant. In the event such judge is unavailable, the application shall be made to a sitting judge in the court in which the conviction was ordered, as designated by the supervising or administrative judge of that court. The judge may refer an application under this section to a magistrate, who shall have the authority to grant such an application in the case of a misdemeanor conviction or a conviction to a non-criminal offense. In the event the magistrate recommends denial of an application relating to a misdemeanor or non-criminal offense, such recommendation shall be made to a judge as designated in this section, who shall, upon reviewing the record and hearing the applicant, rule on the application. In the case of a felony matter, the magistrate must make a recommendation to the judge regarding such application, stating in writing the reasons for the recommendation. The judge shall review the record and such recommendation and afford the applicant an opportunity to be heard prior to ruling on the application.

4. An application pursuant to this section shall be sworn to under penalty of perjury and shall include:

(a) A list of each of the petitioner's convictions in New York State, any convictions in any other state or in federal court, the sentence for each such conviction and the date of the sentence. Non-criminal convictions outside New York state need not be included.

(b) A statement as to the termination of each aspect of the sentence for each of the above-listed convictions, include the dates of termination from probation, parole or other supervisory sentences, a state as to the existence of order or orders of protection and the end date of such, and a statement as to the completion of any conditional sentences or any other conditions of sentence imposed by the court or by law, although this shall not be construed to require a person to have restored driving or other privileges that have been lost, suspended or revoked due to the conviction.

(c) A description of the nature and circumstances of each crime listed in paragraph (a) of this subdivision.

(d) A description of the nature of the petitioner's personal circumstances since the conviction, which shall establish that the petitioner is entitled to the relief provided in this section.

5. The application for sealing a record of conviction shall be served upon the agency that originally prosecuted the case on twenty-one days notice. The prosecuting agency may file an answer to the application seven days prior to the return date of the motion. The court may grant an application on submissions if the prosecuting agency does not file an opposition. If there is objection, the court must review the issues of fact and law and determine the merits of the application.

6. In the case of non-criminal convictions, misdemeanor convictions and non-violent felony convictions, the court shall grant the application unless sealing the records will harm public safety or would not serve the interests of justice. In the case of a violent felony conviction or a conviction for a sex offense, the court shall not grant the application unless the applicant has established that he or she has been entirely rehabilitated, that the crime was an aberration in the applicant's life, that it is not likely to recur and that it is not against public policy and the interests of justice to grant such application.

7. If the court deems it necessary, the court may order a report as to the applicant's background and circumstances from an independent consultant, expert or agency deemed qualified by the court to prepare such a report.

8. Upon the request of either party or sua sponte, the court shall conduct a hearing as to any issue of fact or law or in the court's discretion, may hear testimony or accept written submissions relating the merits of the application or any matter deemed appropriate by the court in furtherance of determining the motion. In any such hearing, the court shall not be bound by the rules of evidence and may admit hearsay testimony which the court believes will shed light on the applicant's character and eligibility to receive relief under this section. However, a decision to grant or deny an application may not be based solely on hearsay or otherwise traditionally inadmissible evidence.

9. A decision granting or denying an application under this section shall be in writing and shall state the reasons for the court's ruling, unless the court grants the application without objection or written response by the prosecutor, in which case the court may issue an order 31 without a written decision.

10. The court's sealing order shall be effective on the thirtieth day after issuance of the order, except that a court may shorten that period upon good cause show.

11. Upon the effective date of a sealing order by the court, all state, county and local government and law enforcement agencies and their agents and contractors must seal any record relating to the sealed conviction, including any and all records relating to the arrest and/or detention of the applicant. Each agency shall designate a method of safekeeping documents and computer records in a manner which will not indicate that there ever was a record as to the arrest, detention or conviction of the individual. Records shall be unsealed only pursuant to court order except that the following agencies may maintain records in 44 the following manner:

(a) The department of criminal justice services shall maintain a sealed record in its database in a manner that will not be accessible to anyone other than law enforcement agents or prosecution agencies in the course of a criminal investigation or prosecution, or upon a court order or court-ordered subpoena ordering release of the information. In the event the applicant is arrested subsequent to the sealing of the records, the unsealed record shall be included in the department of criminal justice services "nysid" sheet that is printed out based on the applicant's fingerprints. A court, upon determining it is in the interests of justice to unseal such a record, shall order its unsealing, which shall allow the prosecutor and the court to unseal the records of their agency pertaining to that arrest. Any such unsealed files shall be made available to the defendant and his or her attorney.

(b) The department of correctional services and all local jail or prison agencies shall maintain sealed records in a manner that precludes the public from obtaining information relating to the arrest, detention or conviction of the individual whose record has been sealed, including but not limited to removal from all publicly available databases on the internet and otherwise. However, such agencies shall maintain a record of individuals who have been in custody which shall be kept by a custodian of those records within the agency. In the event the inmate shall be readmitted to the facility, the custodian is authorized to re-open such files, to be used solely for the agency's official purposes.

12. Nothing in this section shall change the sentencing provisions in the penal law. A sealed record, unsealed at the time of a re-arrest, shall continue to qualify as a conviction for sentencing purposes and may be used to establish an element of a crime as provided in the penal law.

13. It shall be a class A misdemeanor to publish information, other than as delineated in paragraphs (a) and (b) of subdivision eleven of this section, regarding the arrest, detention or conviction of an individual whose record has been sealed. A person aggrieved by a violation of this section shall have the right to institute a civil proceeding, regardless of whether a criminal action was commenced. A plaintiff is entitled to five hundred dollars for each occurrence along with the actual damages caused by the disclosure of such sealed record. Law enforcement, prosecution officials and employees of the office of court administration shall have a defense to a criminal or civil action under this section if they believed, in good faith, that they were permitted or

required by law to disclose a sealed conviction. There shall be no prosecutorial or law enforcement immunity under this section for any government official who knowingly and intentionally publishes a sealed record which such official knows to have been sealed under this section. If a conviction is unsealed pursuant to a new arrest, the provisions of this subdivision shall not apply.

14. An application to unseal a record, which has been sealed pursuant to this section, may be granted by the court if it is determined that, in the interests of justice, the information regarding the underlying conviction should be disclosed. There shall be a presumption in favor of unsealing a record if the person who is subject to the sealed record is a witness in a criminal case. An application under this subdivision may be made either to the court that originally sentenced the defendant in he sealed case or may be made to the court which has jurisdiction over any case in New York in which the sealed record may be relevant, including the case where the defendant on the sealed case is a witness in a civil, criminal or other court proceeding.

15. A sealed conviction shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling unless so ordered by the court. Except where specifically required or permitted by statute or upon specified authorization of a superior court, no such person shall be required to divulge information pertaining to the sealed record. Such person shall be permitted to respond in the negative to the question "have you ever been convicted of a crime or violation?" or to any question with the same substantive content.

16. Non-governmental employers are hereinafter not permitted to ask prospective applicants if they have been arrested or if they have been convicted of a crime or violation. Private citizens and employers are authorized to search official government records for criminal convictions in a manner consistent with the law. In the event an employer searches the criminal record of an individual, such individual shall be put on notice, orally or in writing, that such search will occur.

17. Any business, agency or individual who purchases individual criminal records or databases of criminal records shall not disclose any information as to a record which has been sealed subsequent to the time the data was obtained. Any agency providing data to the public or to private businesses shall develop a system whereby any record which is to be re-disclosed can be easily and quickly checked by the person, business or entity which had obtained the record before it was sealed to determine if the record has been subsequently sealed. No governmental agency shall sell any records without developing such a system. Any record sold or provided to an individual, business or entity shall contain the following warning:

> YOU ARE NOT PERMITTED TO DISCLOSE THIS INFORMATION TO ANYONE WITHOUT FIRST CHECKING TO SEE IF THIS RECORD WAS SEALED AFTER YOU RECEIVED IT. IT IS UNLAWFUL TO DISCLOSE SEALED RECORDS. TO DETERMINE IF THIS RECORD HAS BEEN SEALED, CONTACT (INCLUDE AGENCY CONTACT INFORMATION HERE).

18. Either party may appeal as of right from the court's order. The appealing party must serve notice of appeal upon the court and the opposing party within thirty days of the issuance of the court order. If the order is appealed by the prosecutor, such notice of appeal shall be deemed a stay of the order to seal the records. The prosecutor shall perfect the appeal within sixty days, or the sealing order shall immediately take effect unless the court grants an extension of the time to perfect the appeal upon good cause shown by the prosecutor. The appeal shall be taken to the same court to which the appeal of the original conviction could have been brought. The standard of review at the intermediary appellate court shall be abuse of discretion. The decision of an intermediary appellate court shall be appealable to the court of appeal upon leave of the court.

19. The right to make an application under this section may not be waived at the time a guilty plea is entered on any case in New York state.

§ 2. Subdivision 16 of section 296 of the executive law, as separately amended by section 3 of part N and section 14 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, 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 of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the

criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the criminal procedure law.

§ 3. This act shall take effect on the sixtieth day after it shall 28 have become a law.

Appendix 2

BILL TEXT:

STATE OF NEW YORK

1139

2011-2012 Regular Sessions

IN ASSEMBLY

(Prefiled)

January 5, 2011 _____ Introduced by M. of A. LENTOL -- Multi-Sponsored by -- M. of A.

FARRELL, GOTTFRIED, HEVESI, HOOPER, JEFFRIES, LAVINE, MAISEL, O'DONNELL, ORTIZ, PEOPLES-STOKES, PERRY, PRETLOW, ROBINSON, SCARBOROUGH, SCHIMEL, TITUS, WRIGHT -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to permitting the sealing of records of certain nonviolent misdemeanor or non-sexual misdemeanor offenses

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

Section 1. This act shall be known and may be cited as the “second chance for ex-offenders act".

§ 2. The criminal procedure law is amended by adding a new section 160.65 to read as follows:

§ 160.65 Conditional sealing of certain misdemeanor offenses.

1. For the purposes of this section, the term "eligible misdemeanor" shall be a misdemeanor offense defined in the penal law, provided that an eligible misdemeanor shall not mean a misdemeanor offense defined in article one hundred twenty, one hundred thirty, one hundred thirty-five, one hundred fifty, two hundred thirty-five, two hundred forty-five, two hundred sixty, two hundred sixty-three, two hundred sixty-five or article four hundred of the penal law. An eligible misdemeanor shall not include any one or more of the following: killing or injuring a police animal as defined in section 195.06, harming an animal trained to aid a person with a disability in the second degree as defined in section 195.11, harming an animal trained to aid a person with a disability in the first degree as defined in section 195.12, promoting prostitution in the fourth degree as defined in section 230.20, riot in the second degree as defined in section 240.05, inciting to riot as defined in section 240.08, aggravated harassment in the second degree as defined in subdivision three of section 240.30, criminal interference with healthcare services or religious worship in the second degree as defined in section 240.70, harming a service animal in the second degree as defined in section 242.10, dissemination of an unlawful surveillance image in the second degree as defined in section 250.55, or any specified offense subject to the provision relating to hate crimes as defined in section 485.05 of the penal law. Additionally, an eligible misdemeanor shall not include criminal solicitation, conspiracy, attempt, or criminal facilitation to commit any violent felony offense as defined in section 70.02 of the penal law, or any sex offense as defined under subsection two of section one hundred sixty-eight-a of the correction law.

2. A person having a conviction for no more than three misdemeanors, who does not stand convicted of any felony, or who is not required to maintain registration under article six-C of the correction law, may petition the court to conditionally seal up to three eligible misdemeanors when:

(a) at least five years have past since the completion of a sentence on an eligible misdemeanor; and

(b) such person has not been convicted of an offense during the last five years and is not the subject of an undisposed arrest.

3. The petition authorized by this section shall be filed in the court of record that last imposed a sentence upon petitioner for an eligible misdemeanor. On the defendant's motion, the court may order that all official records and papers relating to the arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors be conditionally sealed. 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. When the court notifies a district attorney of a sealing application, the district attorney shall provide notice to the victim, if any, of the sealing application by mailing written notice to the victim's last-known address. For purposes of this section "victim" means any person who has sustained physical or financial injury to person or to property as a direct result of the misdemeanor crime or misdemeanor crimes for which sealing is applied.

4. 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:

(a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions;

(b) the character of the defendant, including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, or other personal history that demonstrates rehabilitation;

(c) the defendant's criminal history;

(d) 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; and

(e) any statements made by the victim of the offense where there is in fact a victim of the crime.

5. After a court declares its willingness to grant the defendant's request for conditional sealing pursuant to this section, but before the court orders sealing pursuant to this section, the defendant shall pay a mandatory conditional sealing fee. The mandatory conditional sealing fee will be a fee of eighty dollars, however, such filing fee shall be waived in cases of indigence. The mandatory filing fee shall be paid to the clerk of the court or administrative tribunal that rendered the conviction. Within the first ten days of the month following collection of the mandatory filing fee, the collecting authority if it is an administrative tribunal, or a town or village justice court, shall then pay such money to the state comptroller who shall deposit such money in the state treasury pursuant to section one hundred twenty-one of the state finance law to the credit of the indigent legal services fund. If such collecting authority is any other court of the unified court system, it shall, within such period, pay such money attributable to the mandatory filing fee to the state commissioner of taxation and finance to the credit of the indigent legal services fund established by section ninety-eight-b of the state finance law.

6. 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, palm prints, photographs, or digital images of the same.

7. 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.

8. 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 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;

(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 subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer 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.

9. The court shall not seal the defendant's record pursuant to this section while any charged offense is pending.

10. 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 § 3. Subdivision 16 of section 296 of the executive law, as separately amended by section 3 of part N and section 14 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, 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 of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law**, or by a conviction which is sealed pursuant to section 160.65 of the criminal procedure law**.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all convictions occurring prior to, on, and after such date.

Appendix 3

New Jersey Statutes Annotated
➡Chapter 52. Expungement of Records (Refs & Annos)

2C:52-1. Definition of expungement

a. Except as otherwise provided in this chapter, expungement shall mean the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.

b. Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets" and judicial docket records.

2C:52-2. Indictable offenses

a. In all cases, except as herein provided, wherein a person has been convicted of a crime under the laws of this State and who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of 10 years from the date of his conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later, present a duly verified petition as provided in section 2C:52-7 to the Superior Court in the county in which the conviction was entered praying that such conviction and all records and information pertaining thereto be expunged.

Notwithstanding the provisions of the preceding paragraph, a petition may be filed and presented, and the court may grant an expungement pursuant to this section, although less than 10 years has expired in accordance with the requirements of the preceding paragraph where the court finds:

(1) less than 10 years has expired from the satisfaction of a fine, but the 10-year time requirement is otherwise satisfied, and the court finds that the person substantially complied with any payment plan ordered pursuant to N.J.S.2C:46-1 et seq., or could not do so due to compelling circumstances affecting his ability to satisfy the fine; or

(2) at least five years has expired from the date of his conviction, payment of fine,

satisfactory completion of probation or parole, or release from incarceration, whichever is later; the person has not been convicted of a crime, disorderly persons offense, or petty disorderly persons offense since the time of the conviction; and the court finds in its discretion that expungement is in the public interest, giving due consideration to the nature of the offense, and the applicant's character and conduct since conviction.

In determining whether compelling circumstances exist for the purposes of paragraph (1) of this subsection, a court may consider the amount of the fine or fines imposed, the person's age at the time of the offense, the person's financial condition and other relevant circumstances regarding the person's ability to pay.

Although subsequent convictions for no more than two disorderly or petty disorderly offenses shall not be an absolute bar to relief, the nature of those conviction or convictions and the circumstances surrounding them shall be considered by the court and may be a basis for denial of relief if they or either of them constitute a continuation of the type of unlawful activity embodied in the criminal conviction for which expungement is sought.

b. Records of conviction pursuant to statutes repealed by this Code for the crimes of murder, manslaughter, treason, anarchy, kidnapping, rape, forcible sodomy, arson, perjury, false swearing, robbery, embracery, or a conspiracy or any attempt to commit any of the foregoing, or aiding, assisting or concealing persons accused of the foregoing crimes, shall not be expunged.

Records of conviction for the following crimes specified in the New Jersey Code of Criminal Justice shall not be subject to expungement: Section 2C:11-1 et seq. (Criminal Homicide), except death by auto as specified in section 2C:11-5; section 2C:13-1 (Kidnapping); section 2C:13-6 (Luring or Enticing); section 1 of P.L.2005, c. 77 (C.2C:13-8) (Human Trafficking); section 2C:14-2 (Aggravated Sexual Assault); section 2C:14-3a (Aggravated Criminal Sexual Contact); if the victim is a minor, section 2C:14-3b (Criminal Sexual Contact); if the victim is a minor and the offender is not the parent of the victim, section 2C:13-2 (Criminal Restraint) or section 2C:13-3 (False Imprisonment); section 2C:15-1 (Robbery); section 2C:17-1 (Arson and Related Offenses); section 2C:24-4a. (Endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child); section 2C:24-4b(4) (Endangering the welfare of a child); section 2C:24-4b. (3) (Causing or permitting a child to engage in a prohibited sexual act); section 2C:24-4 b.(5)(a) (Selling or manufacturing child pornography); section 2C:28-1 (Perjury); section 2C:28-2 (False Swearing); section 2C:34-1b.(4) (Knowingly promoting the prostitution of the actor's child); section 2 of P.L.2002, c. 26 (C.2C:38-2) (Terrorism); subsection a. of section 3 of P.L.2002, c. 26 (C.2C:38-3) (Producing or Possessing Chemical Weapons, Biological Agents or Nuclear or Radiological Devices); and conspiracies or attempts to commit such crimes.

Records of conviction for any crime committed by a person holding any public office, position or employment, elective or appointive, under the government of this State or

any agency or political subdivision thereof and any conspiracy or attempt to commit such a crime shall not be subject to expungement if the crime involved or touched such office, position or employment.

c. In the case of conviction for the sale or distribution of a controlled dangerous substance or possession thereof with intent to sell, expungement shall be denied except where the crimes involve:

(1) Marijuana, where the total quantity sold, distributed or possessed with intent to sell was 25 grams or less;

(2) Hashish, where the total quantity sold, distributed or possessed with intent to sell was five grams or less; or

(3) Any controlled dangerous substance provided that the conviction is of the third or fourth degree, where the court finds that expungement is consistent with the public interest, giving due consideration to the nature of the offense and the petitioner's character and conduct since conviction.

d. In the case of a State licensed physician or podiatrist convicted of an offense involving drugs or alcohol or pursuant to section 14 or 15 of P.L. 1989, c. 300 (C.2C:21-20 or 2C:21-4.1), the court shall notify the State Board of Medical Examiners upon receipt of a petition for expungement of the conviction and records and information pertaining thereto.

2C:52-3. Disorderly persons offenses and petty disorderly persons offenses

Any person convicted of a disorderly persons offense or petty disorderly persons offense under the laws of this State who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, or of another three disorderly persons or petty disorderly persons offenses, may, after the expiration of a period of 5 years from the date of his conviction, payment of fine, satisfactory completion of probation or release from incarceration, whichever is later, present a duly verified petition as provided in section 2C:52-7 hereof to the Superior Court in the county in which the conviction was entered praying that such conviction and all records and information pertaining thereto be expunged.

2C:52-4. Ordinances

In all cases wherein a person has been found guilty of violating a municipal ordinance of any governmental entity of this State and who has not been convicted of any prior or subsequent crime, whether within this State or any other jurisdiction, and who has not been adjudged a disorderly person or petty disorderly person on more than two occasions, may, after the expiration of a period of 2 years from the date of his conviction, payment of fine, satisfactory completion of probation or release from incarceration, whichever is later, present a duly verified petition as provided in section

2C:52-7 herein to the Superior Court in the county in which the violation occurred praying that such conviction and all records and information pertaining thereto be expunged.

2C:52-4.1. Juvenile delinquent; expungement of adjudications and charges

a. Any person adjudged a juvenile delinquent may have such adjudication expunged as follows:

(1) Pursuant to N.J.S.2C:52-2, if the act committed by the juvenile would have constituted a crime if committed by an adult;

(2) Pursuant to N.J.S.2C:52-3, if the act committed by the juvenile would have constituted a disorderly or petty disorderly persons offense if committed by an adult; or

(3) Pursuant to N.J.S.2C:52-4, if the act committed by the juvenile would have constituted an ordinance violation if committed by an adult.

For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.

b. Additionally, any person who has been adjudged a juvenile delinquent may have his entire record of delinquency adjudications expunged if:

(1) Five years have elapsed since the final discharge of the person from legal custody or supervision or 5 years have elapsed after the entry of any other court order not involving custody or supervision, except that periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five-year period for purposes of this paragraph;

(2) He has not been convicted of a crime, or a disorderly or petty disorderly persons offense, or adjudged a delinquent, or in need of supervision, during the 5 years prior to the filing of the petition, and no proceeding or complaint is pending seeking such a conviction or adjudication, except that periods of post-incarceration supervision pursuant to section 25 of P.L.1982, c. 77 (C.2A:4A-44), shall not be considered in calculating the five-year period for purposes of this paragraph;

(3) He was never adjudged a juvenile delinquent on the basis of an act which if committed by an adult would constitute a crime not subject to expungement under N.J.S.2C:52-2;

(4) He has never had an adult conviction expunged; and

(5) He has never had adult criminal charges dismissed following completion of a supervisory treatment or other diversion program.

c. Any person who has been charged with an act of delinquency and against whom proceedings were dismissed may have the filing of those charges expunged pursuant to the provisions of N.J.S.2C:52-6.

2C:52-5. Expungement of records of young drug offenders

Notwithstanding the provisions of sections 2C:52-2 and 2C:52-3, after a period of not less than one year following conviction, termination of probation or parole or discharge from custody, whichever is later, any person convicted of an offense under chapters 35 or 36 of this title for the possession or use of a controlled dangerous substance, convicted of violating P.L.1955, c. 277, § 3 (C. 2A:170-77.5), [FN1] or convicted of violating P.L.1962, c. 113, § 1 (C. 2A:170-77.8), and who at the time of the offense was 21 years of age or younger, may apply to the Superior Court in the county wherein the matter was disposed of for the expungement of such person's conviction and all records pertaining thereto. The relief of expungement under this section shall be granted only if said person has not, prior to the time of hearing, violated any of the conditions of his probation or parole, albeit subsequent to discharge from probation or parole, has not been convicted of any previous or subsequent criminal act or any subsequent or previous violation of chapters 35 or 36 of this title or of P.L.1955, c. 277, § 3 (C. 2A:170-77.5) or of P.L.1962, c. 113, § 1 (C. 2A:170-77.8), or who has not had a prior or subsequent criminal matter dismissed because of acceptance into a supervisory treatment or other diversion program.

This section shall not apply to any person who has been convicted of the sale or distribution of a controlled dangerous substance or possession with the intent to sell any controlled dangerous substance except:

(1) Marihuana, where the total sold, distributed or possessed with intent to sell was 25 grams or less, or

(2) Hashish, where the total amount sold, distributed or possessed with intent to sell was 5 grams or less.

[FN1] Repealed; see, now, N.J.S.A. § 24:21-51.

2C:52-6. Arrests not resulting in conviction

a. In all cases, except as herein provided, wherein a person has been arrested or held to answer for a crime, disorderly persons offense, petty disorderly persons offense or municipal ordinance violation under the laws of this State or of any governmental entity thereof and against whom proceedings were dismissed, or who was acquitted, or who was discharged without a conviction or finding of guilt, may at any time following the disposition of proceedings, present a duly verified petition as provided in section 2C:52-7 to the Superior Court in the county in which the disposition occurred praying that records of such arrest and all records and information pertaining thereto be

expunged.

b. Any person who has had charges dismissed against him pursuant to P.L.1970, c. 226, § 27 (C. 24:21-27) [FN1] or pursuant to a program of supervisory treatment, shall be barred from the relief provided in this section until 6 months after the entry of the order of dismissal.

c. Any person who has been arrested or held to answer for a crime shall be barred from the relief provided in this section where the dismissal, discharge, or acquittal resulted from a determination that the person was insane or lacked the mental capacity to commit the crime charged.

[FN1] Repealed; see, now, N.J.S.A. § 2C:36A-1.

2C:52-7. Petition for expungement

Every petition for expungement filed pursuant to this chapter shall be verified and include:

a. Petitioner's date of birth.

b. Petitioner's date of arrest.

c. The statute or statutes and offense or offenses for which petitioner was arrested and of which petitioner was convicted.

d. The original indictment, summons or complaint number.

e. Petitioner's date of conviction, or date of disposition of the matter if no conviction resulted.

f. The court's disposition of the matter and the punishment imposed, if any.

2C:52-8. Statements to accompany petition

There shall be attached to a petition for expungement:

a. A statement with the affidavit or verification that there are no disorderly persons, petty disorderly persons or criminal charges pending against the petitioner at the time of filing of the petition for expungement.

b. In those instances where the petitioner is seeking the expungement of a criminal conviction, a statement with affidavit or verification that he has never been granted expungement, sealing or similar relief regarding a criminal conviction by any court in this State or other state or by any Federal court. “Sealing” refers to the relief previously granted pursuant to P.L.1973, c. 191 (C. 2A:85-15 et seq.) [FN1].

c. In those instances where a person has received a dismissal of a criminal charge because of acceptance into a supervisory treatment or any other diversion program, a statement with affidavit or verification setting forth the nature of the original charge, the court of disposition and date of disposition.

[FN1] Repealed; see, now, N.J.S.A. § 2C:52-1 et seq.

2C:52-9. Order fixing time for hearing

Upon the filing of a petition for relief pursuant to this chapter, the court shall, by order, fix a time not less than 35 nor more than 60 days thereafter for hearing of the matter.

2C:52-10. Service of petition and documents

A copy of each petition, together with a copy of all supporting documents, shall be served pursuant to the rules of court upon the Superintendent of State Police; the Attorney General; the county prosecutor of the county wherein the court is located; the chief of police or other executive head of the police department of the municipality wherein the offense was committed; the chief law enforcement officer of any other law enforcement agency of this State which participated in the arrest of the individual; the superintendent or warden of any institution in which the petitioner was confined; and, if a disposition was made by a municipal court, upon the magistrate of that court. Service shall be made within 5 days from the date of the order setting the date for the hearing upon the matter.

2C:52-11. Order directing expungement where no objection prior to hearing

If, prior to the hearing, there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served under 2C:52-10, and no reason, as provided in section 2C:52-14, appears to the contrary, the court may, without a hearing, grant an order directing the clerk of the court and all relevant criminal justice and law enforcement agencies to expunge records of said disposition including evidence of arrest, detention, conviction and proceedings related thereto.

2C:52-12. Denial of relief although no objection entered

In the event that none of the persons or agencies required to be noticed under 2C:52-10 has entered any objection to the relief being sought, the court may nevertheless deny the relief sought if it concludes that petitioner is not entitled to relief for the reasons provided in section 2C:52-14.

2C:52-13. When hearing on petition for expungement shall not be held

No petition for relief made pursuant to this section shall be heard by any court if the petitioner, at the time of filing or date of hearing, has a charge or charges pending

against him which allege the commission of a crime, disorderly persons offense or petty disorderly persons offense. Such petition shall not be heard until such times as all pending criminal and or disorderly persons charges are adjudicated to finality.

2C:52-14. Grounds for denial of relief

A petition for expungement filed pursuant to this chapter shall be denied when:

a. Any statutory prerequisite, including any provision of this chapter, is not fulfilled or there is any other statutory basis for denying relief.

b. The need for the availability of the records outweighs the desirability of having a person freed from any disabilities as otherwise provided in this chapter. An application may be denied under this subsection only following objection of a party given notice pursuant to 2C:52-10 and the burden of asserting such grounds shall be on the objector, except that in regard to expungement sought for third or fourth degree drug offenses pursuant to paragraph (3) of subsection c. of N.J.S. 2C:52-2, the court shall consider whether this factor applies regardless of whether any party objects on this basis.

c. In connection with a petition under section 2C:52-6, the acquittal, discharge or dismissal of charges resulted from a plea bargaining agreement involving the conviction of other charges. This bar, however, shall not apply once the conviction is itself expunged.

d. The arrest or conviction sought to be expunged is, at the time of hearing, the subject matter of civil litigation between the petitioner or his legal representative and the State, any governmental entity thereof or any State agency and the representatives or employees of any such body.

e. A person has had a previous criminal conviction expunged regardless of the lapse of time between the prior expungement, or sealing under prior law, and the present petition. This provision shall not apply:

(1) When the person is seeking the expungement of a municipal ordinance violation or,

(2) When the person is seeking the expungement of records pursuant to section 2C:52-6.

f. The person seeking the relief of expungement of a conviction for a disorderly persons, petty disorderly persons, or criminal offense has prior to or subsequent to said conviction been granted the dismissal of criminal charges following completion of a supervisory treatment or other diversion program.

2C:52-15. Records to be removed; control

If an order of expungement of records of arrest or conviction under this chapter is

granted by the court, all the records specified in said order shall be removed from the files of the agencies which have been noticed of the pendency of petitioner's motion and which are, by the provisions of this chapter, entitled to notice, and shall be placed in the control of a person who has been designated by the head of each such agency which, at the time of the hearing, possesses said records. That designated person shall, except as otherwise provided in this chapter, insure that such records or the information contained therein are not released for any reason and are not utilized or referred to for any purpose. In response to requests for information or records of the person who was arrested or convicted, all noticed officers, departments and agencies shall reply, with respect to the arrest, conviction or related proceedings which are the subject of the order, that there is no record information.

2C:52-16. Expunged record including names of persons other than petitioner

Any record or file which is maintained by a judicial or law enforcement agency, or agency in the criminal justice system, which is the subject of an order of expungement which includes the name or names of persons other than that of the petitioner need not be isolated from the general files of the agency retaining same if the other persons named in said record or file have not been granted an order of expungement of said record, provided that a copy of the record shall be given to the person designated in 2C:52-15 and the original shall remain in the agency's general files with the petitioner's name and other personal identifiers obliterated and deleted.

2C:52-17. Use of expunged records by agencies on pending petition for expungement

Expunged records may be used by the agencies that possess same to ascertain whether a person has had prior conviction expunged, or sealed under prior law, when the agency possessing the record is noticed of a pending petition for the expungement of a conviction. Any such agency may supply information to the court wherein the motion is pending and to the other parties who are entitled to notice pursuant to 2C:52-10.

2C:52-18. Supplying information to violent crimes compensation board

Information contained in expunged records may be supplied to the Violent Crimes Compensation Board, in conjunction with any claim which has been filed with said board.

2C:52-19. Order of superior court permitting inspection of records or release of information; limitations

Inspection of the files and records, or release of the information contained therein, which are the subject of an order of expungement, or sealing under prior law, may be permitted by the Superior Court upon motion for good cause shown and compelling need based on specific facts. The motion or any order granted pursuant thereto shall specify the person or persons to whom the records and information are to be shown and the purpose for which they are to be utilized. Leave to inspect shall be granted by the

court only in those instances where the subject matter of the records of arrest or conviction is the object of litigation or judicial proceedings. Such records may not be inspected or utilized in any subsequent civil or criminal proceeding for the purposes of impeachment or otherwise but may be used for purposes of sentencing on a subsequent offense after guilt has been established.

2C:52-20. Use of expunged records in conjunction with supervisory treatment or diversion programs

Expunged records may be used by any judge in determining whether to grant or deny the person's application for acceptance into a supervisory treatment or diversion program for subsequent charges. Any expunged records which are possessed by any law enforcement agency may be supplied to the Attorney General, any county prosecutor or judge of this State when same are requested and are to be used for the purpose of determining whether or not to accept a person into a supervisory treatment or diversion program for subsequent charges.

2C:52-21. Use of expunged records in conjunction with setting bail, presentence report or sentencing

Expunged records, or sealed records under prior law, of prior arrests or convictions shall be provided to any judge, county prosecutor, probation department or the Attorney General when same are requested for use in conjunction with a bail hearing or for the preparation of a presentence report or for purpose of sentencing.

2C:52-22. Use of expunged records by parole board

Expunged records, or sealed records under prior law, of prior disorderly persons, petty disorderly persons and criminal convictions shall be provided to the Parole Board when same are requested for the purpose of evaluating the granting of parole to the person who is the subject of said records. Such sealed or expunged records may be used by the Parole Board in the same manner and given the same weight in its considerations as if the records had not been expunged or sealed.

2C:52-23. Use of expunged records by department of corrections

Expunged records, and records sealed under prior law, shall be provided to the Department of Corrections for its use solely in the classification, evaluation and assignment to correctional and penal institutions of persons placed in its custody.

2C:52-24. County prosecutor's obligation to ascertain propriety of petition

Notwithstanding the notice requirements provided herein, it shall be the obligation of the county prosecutor of the county wherein any petition for expungement is filed to verify the accuracy of the allegations contained in the petition for expungement and to bring to the court's attention any facts which may be a bar to, or which may make

inappropriate the granting of, such relief. If no disabling, adverse or relevant information is ascertained other than that as included in the petitioner's affidavit, such facts shall be communicated by the prosecutor to the hearing judge.

2C:52-25. Retroactive application

This chapter shall apply to arrests and convictions which occurred prior to, and which occur subsequent to, the effective date of this act.

2C:52-26. Vacating of orders of sealing; time; basis

If, within 5 years of the entry of an expungement order, any party to whom notice is required to be given pursuant to section 2C:52-10 notifies the court which issued the order that at the time of the petition or hearing there were criminal, disorderly persons or petty disorderly persons charges pending against the person to whom the court granted such order, which charges were not revealed to the court at the time of hearing of the original motion or that there was some other statutory disqualification, said court shall vacate the expungement order in question and reconsider the original motion in conjunction with the previously undisclosed information.

2C:52-27. Effect of expungement

Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly, except as follows:

a. The fact of an expungement, sealing or similar relief shall be disclosed as provided in section 2C:52-8b.

b. The fact of an expungement of prior charges which were dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program shall be disclosed by said person to any judge who is determining the propriety of accepting said person into a supervisory treatment or other diversion program for subsequent criminal charges; and

c. Information divulged on expunged records shall be revealed by a petitioner seeking employment within the judicial branch or with a law enforcement or corrections agency and such information shall continue to provide a disability as otherwise provided by law.

2C:52-27.1. Practitioners convicted of health care claims fraud; rescission of debarment order

a. If an order of expungement of records of conviction under the provisions of chapter 52 of Title 2C of the New Jersey Statutes is granted by the court to a person convicted

of health care claims fraud in which the court had ordered the offender's professional license or certificate be forfeited and the person be forever barred from the practice of the profession, occupation, trade, vocation or business pursuant to subsection a. of section 4 of P.L.1997, c. 353 (C.2C:51-5), the person may petition the court for an order to rescind the court's order of debarment if the person can demonstrate that the person is sufficiently rehabilitated.

b. If an order to rescind the court's order of debarment is granted, the person granted the order may apply to be licensed or certified to practice the profession, occupation, trade, vocation or business from which the offender was barred.

2C:52-28. Motor vehicle offenses

Nothing contained in this chapter shall apply to arrests or conviction for motor vehicle offenses contained in Title 39.

2C:52-29. Fee

Any person who files an application pursuant to this chapter shall pay to the State Treasurer a fee of $30.00 to defer administrative costs in processing an application hereunder.

2C:52-30. Disclosure of expungement order

Except as otherwise provided in this chapter, any person who reveals to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records and information pertaining thereto have been expunged or sealed is a disorderly person. Notwithstanding the provisions of section 2C:43-3, the maximum fine which can be imposed for violation of this section is $200.00.

2C:52-31. Limitation

Nothing provided in this chapter shall be interpreted to permit the expungement of records contained in the Controlled Dangerous Substances Registry created pursuant to P.L.1970, c. 227 (C. 26:2G-17 et seq.), [FN1] or the registry created by the Administrative Office of the Courts pursuant to section 2C:43-21.

[FN1] Repealed by L.1984, c. 91, § 4.

2C:52-32. Construction

This chapter shall be construed with the primary objective of providing relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby periodic violators of the law or those who associate themselves with criminal activity have a regular means of expunging their police and criminal records.