



# Sealing Records of Conviction Regarding Certain Crimes

# NYSBA

**Final Report and Recommendations  
of the Criminal Justice Section  
Sealing Committee**

**Amended, January 2012**

This report was adopted by the NYSBA House of Delegates  
Friday, January 27, 2012



NEW YORK STATE BAR ASSOCIATION

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SEALING RECORDS OF CONVICTION  
REGARDING CERTAIN CRIMES

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**Sealing/Expungement Committee Members**

**Richard D. Collins, Esq.**

Co-Chair  
Collins, McDonald, & Gann, P.C.  
138 Mineola Blvd.  
Mineola, NY 11501  
Phone: (516) 294-0300  
Fax: (516) 294-0477  
Email: rcollins@cmgesq.com

**Jay Shapiro, Esq.**

Co-Chair  
White & Williams LLP  
One Penn Plaza  
250 W. 34<sup>th</sup> Street  
New York, NY 10119  
Fax: (212) 631-1240  
Email: mailto:shapiroj@whitewilliams.com

**Roger B. Adler, Esq.**

233 Broadway  
Suite 1800  
New York, NY 10279  
Phone: (212) 406-0181  
Fax: (212) 406-2313  
Email: rba1946@aol.com

**Marvin E. Schechter, Esq.**

Marvin E. Schechter Law Firm  
1790 Broadway  
Suite 710  
New York, NY 10019  
Phone: (212) 307-1405  
Fax: (212) 307-1413  
Email: marvin@schelaw.com

**Kevin D. O'Connell, Esq.**

NY County Defender Services  
225 Broadway, Suite 1100  
New York, NY 10007  
Phone: (212) 803-5100  
Fax: (212) 571-6035  
Email: koconnell@nycds.org

**Lawrence S. Goldman, Esq.**

Law Offices of Lawrence S. Goldman  
500 5<sup>th</sup> Avenue  
Suite 1400  
New York, NY 10110  
Phone: (212) 997-7499  
Fax: (212) 997 - 7707

**James H. Mellion, Esq.**

First Assistant District Attorney  
Office of the Rockland County District Attorney  
1 South Main Street, Suite 500  
New City, NY 10956  
Phone: (845) 638-5001  
Fax: (845) 638-5057  
E-mail: mellionj@co.rockland.ny.us

## **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" are legal mechanisms which refer to the act or practice of officially preventing public access to particular criminal records in the absence of a court order.

At the outset, after much reflection, we have opted to use the term "sealing" rather than "expungement" for a "second chance" mechanism. This decision was reached after much deliberation and debate. By definition, the term "expungement" refers to a permanent destruction of records, so it will only be used in this report as it is used in the New Jersey statute. The word "sealing" for our mechanism is more appropriate and accurate for many reasons. It is the word currently used in CPL Article 160 to refer to the protective mechanism for those who are acquitted of crimes or have their cases dismissed; why then, would a different or arguably stronger term be used for those who admit their guilt? Moreover, as will be explained, under the Association's proposal the records would not be permanently destroyed ("expunged") but rather rendered inaccessible and protected unless and until an act of recidivism (in which case they would "spring back" into full effect). 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. In other words, the “second chance” described above. 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.

In May 2006, the State Bar’s Special Committee on Collateral Consequences of Criminal Proceedings issued a Report and Recommendations to the House of Delegates entitled “Re-entry and Reintegration: The Road to Public Safety.” It was adopted by the House of Delegates. The Special Committee set forth in its mission statement:

The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system often erect formidable societal barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.

The Special Committee noted that without employment, ex-offenders cannot meet their own or their families’ basic needs, and that a criminal conviction can be an insurmountable hurdle to employment:

The most common issue many people face is filling out the job application itself. Preliminary questions such as “Have you ever been convicted of a crime?” or “Have you ever been arrested?” pose a major obstacle to gaining employment. The decision whether to answer honestly can determine whether the previously arrested or incarcerated individual even gets a chance to interview for a job, much less be hired. Under New York Human Rights Law § 296, it is an “unlawful discriminatory practice ... to make any inquiry about ... 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.” Although it is permissible under Corrections Law § 752 to inquire into criminal convictions, an employer may not refuse to hire an applicant based on the prior conviction, absent a “direct relationship” between the offense and the employment, or unless employment would involve an “unreasonable risk” to property or safety. If an individual who has been convicted of a crime lies when asked whether he has ever been convicted to avoid the social stigma associated with a conviction, his or her employment may be legally terminated for lying on an employment application. [at page 17]

People with past criminal convictions face other obstacles in the quest for employment. The Special Committee noted that “[o]ver 100 occupations in New York State require some type of license, registration, or certification by a state agency. . . . For example, an individual with a criminal conviction cannot obtain a license to work as a barber because ‘a criminal history indicates a lack of good moral character and trustworthiness required for licensure.’ Similarly, people are often barred from gaining employment, or often lose employment, with a government employer if ever convicted of a crime.” [at page 18 – 19]

The Special Committee notes that “some of the most draconian consequences follow from misdemeanors and non-criminal violations”:

- A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for three years.
  - Two convictions for turnstile jumping make a lawful permanent resident noncitizen deportable.
  - A conviction for any crime bars a person from being a barber, boxer, or bingo operator.
  - Simple possession of a marijuana cigarette cuts off federal student loans for a year.
- [at page 381, citations omitted]

The Special Committee noted that in recent decades, “seemingly cost-free ‘tough on crime’ policies” have proliferated. Contemporaneously, technology has dramatically increased the availability of criminal history data. The Committee characterized the “steady accretion of collateral sanctions and the exponential increase in criminal history data availability” as a “perfect storm.” Criminal history background checks have become so widespread that “in 2002, for the first time, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations” [at page 384].

“Despite various sealing regimes for certain criminal prosecutions in New York, employers, landlords, and the public routinely gain access to these records,” the Committee notes. [at page 385].

For example, defense attorneys and judges routinely advise hundreds of defendants each day in New York courts that their guilty plea to a violation – a non-criminal offense – will be sealed and not available to anyone. This advice is patently false. Under CPL § 160.55, the prosecutor, police, and DCJS records are sealed, but the court records remain public. Because OCA sells access to its records in a statewide Criminal History Record Search based on name and date of birth, the records of all violations convictions – and the original charges – are readily available to anyone with \$52 and the desire to find out about their neighbor, employee, or tenant.

[at page 385]<sup>1</sup>

The Committee also noted that “hundreds of private, commercial background screening businesses access these data sources and create their own repositories” offering their services to the private sector and “80% of large corporations perform background checks on job applicants, and 69% of small businesses do.” [at page 385]. These percentages have likely further increased in the last 5 years, and landlords and credit report companies also now routinely run criminal history background checks.

The Committee concludes in its Recommendations that as the “public access to records has increased, the importance of sealing criminal history records has skyrocketed.” [at page 394] The Report references Section 160.50 of the Criminal Procedure Law (CPL), which protects persons who are acquitted or whose cases are dismissed, and Section 160.55 of the CPL, which extends protection to those whose prosecution terminates with a conviction of a non-criminal “violation” (petty offense),

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<sup>1</sup> OCA has changed its policy and is no longer providing information about violation convictions. Of course, there is nothing to stop OCA from changing its position in the future. And of course, because the old policy was in place for a long time, there are plenty of these records floating around, especially with the criminal record search services.

and Section 720.35 CPL, which seals the records in “Youthful Offender” adjudications. However, the Committee pointed out that technology and legal amendments have eroded the protections afforded by sealing. In discussing petty offenses, the Committee stressed the distinction between the use of records by law enforcement and by those outside law enforcement for collateral purposes. “In our view, the only legitimate use would arise in the context of a new criminal case where the individual is charged with a new crime. If law enforcement retains access to a sealed court record for use in any new criminal proceeding, then there is no legitimate law enforcement purpose in keeping the record unsealed for use by the public.” [at page 396] Most significantly, in conclusion based on all the findings it made, the Special Committee stated that “The Legislature should create a new sealing provision to seal, automatically or upon application, certain felony and misdemeanor convictions after a certain period.” [at page 397]

We follow upon the Special Committee’s findings, report, and recommendations, and also acknowledge the efforts of a past working group, the Subcommittee on Misdemeanor Sealing of the Criminal Justice Section. The need for a mechanism to allow ex-offenders to move beyond their past convictions has been recognized by the State Bar’s adoption of the Special Committee’s Report. In addition, the New York City Bar in January 2011 issued a “Report of the Criminal Justice Operations Committee Proposing Legislation that Would Allow for the Sealing of Records Containing Certain Arrest, Petty Offense, and Youthful Offender Information.” The report detailed the insufficiency of the current sealing mechanisms in the context of Youthful Offender adjudications and petty offenses.

More recently, members of the Legislature have proposed bills to address the situation. Two bills have been introduced to provide ex-offenders with a second chance. Our Committee was initially formed for the purpose of analyzing the two pending bills and 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, and presents the suggestions and recommendations of the committee members and the overall conclusion of the committee. Some of the content of this report has been amended since its original presentation to the Executive Committee and House of Delegates in order to address the feedback received and in order to support a more specific proposal for legislation. However, the fundamental principles remain intact.

### **Background**

Currently, New York State has no expungement or sealing law applicable to adults who are convicted of felonies or misdemeanors (other than defendants convicted of a drug offense or a specified offense defined in subdivision five of CPL 410.91, who are eligible for a conditional sealing of the conviction and up to three prior drug misdemeanor convictions pursuant to CPL 160.58 provided that they have completed a judicial diversion program, DTAP program, or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision.). Other than these exceptions, 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. A 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 arrest-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, but not sex crimes.

#### **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 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 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 or 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 officer 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 Expungement Statute**

#### 1. Grade of Crime

New Jersey will expunge 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 expunged, 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 expunged.

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 expunge 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 many 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 expungement (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 expungement have had offenses expunged 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 expungement.

#### 11. DNA/fingerprints

Expunged 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. This Committee evaluated these elements, and also received feedback and input from other groups, both shortly before and after the presentation of the original Report to the Executive Committee and House of Delegates. The Criminal Justice Section of the New York County Lawyers’ Association provided suggestions, and did various members of the NYSBA Executive

Committee and House of Delegates. Feedback was also sought from the judiciary and from prosecutors (by the Section Chair to the New York District Attorney's Association) and the New York State Association of Criminal Defense Lawyers. The Executive Committee of the Criminal Justice Section, in accepting this amended report, voted to change the number of misdemeanor convictions which can be sealed pursuant to this sealing provision from one (1) to three (3) but to retain the limit of a single felony conviction.

### 1. Grade of Crime

Of the seven members of the Sealing Committee who provided feedback, the majority felt that it 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 crimes (felony or misdemeanors) and non-penal law petty offenses that are within the defined classes.

Feedback from NYCLA and other sources has raised the issue of petty offenses (non-criminal violations) and Youthful Offender (Y.O.) adjudications. While, sealing

provisions do exist for these situations, as noted by the Special Committee, the protection afforded is quite limited. It has been suggested that those convicted of only petty offenses or adjudicated Y.O. should have the same protections as those convicted of crimes, and we agree.

## 2. Type of Crime

The Sealing Committee 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. It has further been suggested that crimes involving children as victims should be excluded as well.

There was debate over whether Vehicle and Traffic Law crimes such as drunk driving should be eligible for sealing. This report does not recommend that such crimes be eligible. At the suggestion of Nassau County District Attorney Kathleen Rice, it was agreed that certain public corruption crimes and crimes against the elderly, would be excluded from eligibility for sealing.

### 3. Waiting period before application can be made

In the original Sealing Committee Report, 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.

Much input was received subsequent to the submission of this Committee’s original Report. The State Bar President suggested that there be a specific waiting period recommended for felonies. There were also suggestions that the waiting period for misdemeanors was too short. It should be noted that in New Jersey, the waiting period begins at the time of the expiration of sentence, not the date of the imposition of sentence. So, for example, for a class “A” misdemeanor committed in 2011 upon which a sentence of probation was imposed in 2012, the waiting period would begin at the completion of

the 3 years probation in 2015. A 3 year waiting period would mean that eligibility for relief might not vest until 2018 – seven years after the crime. If a 5 year waiting period were imposed for A misdemeanors with probation, the actual term between the crime and the application for relief could be as long as nine years. The approach to the waiting period seems to improperly penalize those who receive probationary sentences over those who are incarcerated for similar charges. The better approach would seem to be to tie the waiting term to the date of the conviction (sentence or resentence) itself. All in all, we advocate a 5 year waiting period for misdemeanors and petty offenses and an eight year waiting period for felonies.

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

#### 4. Factors the Court Should Consider

Most Sealing Committee 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.

Subsequent feedback has confirmed that while the factors should not be hard and fast rules, legislation should contain some specific guidance for the courts. Adapting language from the Lentol bill: 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, community service, 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 statement made by the victim of the offense where there is in fact a victim of the crime. The court shall grant the application unless sealing the records will harm public safety or would not serve the interests of justice. 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.

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

The Sealing Committee 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.

It should be noted that the system in place in New Jersey places much of the administrative burden on the applicant, who must provide notice of his application to numerous interested parties besides the District Attorney, including Probation and Corrections (if applicable). The application itself is quite extensive.

There should also be a provision for appeals by either party.

#### 6. Upfront Fee/Back-end surcharge

One member of the Sealing Committee 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 of the Sealing Committee 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 turned 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 of the Sealing Committee 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.

There was debate within the Criminal Justice Section Executive Committee as to whether the imposition of a community service condition constituted ex post facto punishment. The majority appeared to believe that it could be construed as a condition of the relief application rather than an additional punishment or component of sentence, but others expressed the concern that it could be challenged and that it simply wasn't worth including it.

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

Most Sealing Committee members stated that the language of CPL 160.50 should apply and that the conviction and arrest should be treated as if they never occurred – a nullity, so to speak. 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. In this way, there will be no confusion about what a successful petitioner may say or write concerning a sealed offense.

Subsequent feedback to this Committee has revealed the “spring back” provision to be in need of much further clarification. NYCLA expressed the following:

There was concern that the report did not sufficiently detail the "spring-back" provisions contained in the O'Donnell legislation, which clearly specifies that sealed offenses would count towards predicate felony status and toward penal law offenses that are enhanced based on a prior conviction. The report also does not mention that the Lentol Bill is silent on this piece. Although the report is clear that the Committee members believe that effects should be spelled out in the statute, it may be useful to highlight that the O'Donnell Bill is very specific on this issue, since this could be an important element to opponents of sealing.

We have addressed concerns by making the “spring back” provision much more specific in our Recommendations below.

NYCLA also questioned whether there should be a reciprocal spring-back provision that would allow defense attorneys to get access to sealed records of a prosecution witness. As victims and witnesses are not charged with new crimes, such a provision would not conform to the anti-recidivist purposes of a spring-back provision; in fact, it would defy the overall spirit of the initiative.

Another issue not addressed was what sort of sanction should exist for intentionally disclosing sealed records. Without some sanctions, the law would have no teeth. A misdemeanor seems the appropriate grade of offense.

To effectuate the new provision, a change to the Executive Law is also required, adding the new sealing section into the existing law making it a discriminatory practice, unless otherwise authorized, to inquire about or act adversely to an individual whose case was sealed.

Lastly, the ability to apply for sealing should not be subject to waiver at the time of plea.

#### 10. Burden

Most Sealing Committee 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.

The New Jersey system places the burden of moving forward on the applicant, who must submit that all requirements for expungement are met. The practical effect is a rebuttable presumption in favor of the relief if the requirements are met. The New Jersey system requires very little court time or resources, while providing a source of revenue (application fees).

## 11. DNA/fingerprints

A majority of Sealing Committee 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.

DNA information is kept on file in order to solve future crimes. It is not usable by landlords or employers, and thus is not relevant to concerns of collateral consequences. The general consensus of the Committee is that destroying DNA evidence would hinder law enforcement objectives to the benefit of recidivists, while adding no protection to the rehabilitated ex-offender.

As to fingerprints, it will be necessary for them to remain on file in order to implement a “spring back” provision for recidivists.

### **Recommendations of the Sealing 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 and House of Delegates vote in favor of the following proposal:

The Criminal Justice Section recommends that the New York State Bar Association adopt the following proposal to amend the Criminal Procedure Law and the Executive Law, in relation to applications for sealing a record of conviction.

The Criminal Procedure Law should be amended by adding a new section 160.65 to read as follows:

**§ 160.65 Sealing record of conviction or adjudication.**

1. **Eligible Applicants.** A person is eligible to apply to seal a record of conviction, or in the case of Youthful Offenders, an adjudication, subject to the provisions contained in this section. The record sought to be sealed must be the person's only felony criminal conviction or adjudication. In the case of misdemeanors, no more than three (3) misdemeanor convictions or adjudications are subject to sealing pursuant to this section. Further, a person must be duly terminated and discharged from every aspect of the sentence, including incarceration, probation, parole, conditional release, post-release supervision, conditional discharge, and/or any order of protection on this or any other matter against the person must have expired. There can be no undisposed arrests at the time of application.

2. **Grade of Crime.** A person must have been convicted of a Penal Law crime(s) or a non-criminal petty offense(s) (violations), or adjudicated a Youthful Offender (Y.O.) under Section 720.35 CPL.

3. **Type of Crime.** For the purposes of this section, no records involving sex crimes, crimes with victims who were children, crimes against the elderly, or crimes involving public corruption are eligible for sealing. Among felonies, only class "D" and "E" non-violent felonies are eligible.

4. **Waiting Period.** A person cannot apply until a "waiting period" (beginning on the date that the most recent sentence or resentencing is imposed) elapses. During this period there can be no convictions for a crime. The following waiting periods shall apply under this section:

(a) For a person who has been convicted of an eligible petty offense, the waiting period shall be two (2) years from the date of the most recent conviction.

(b) For a person who has been convicted of an eligible misdemeanor(s), adjudicated Y.O. on a misdemeanor, or convicted of a non-criminal offense(s), the waiting period shall be five (5) years from the date of the most recent conviction or adjudication.

(c) For a person who has been convicted of an eligible non-violent "D" or "E" felony, or adjudicated Y.O. on a felony, the waiting period shall be eight (8) years from the date of conviction or adjudication.

5. **The Motion.** A motion under this section shall be sworn to under penalty of perjury and shall include:

(a) A list of each of the person'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 statement 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 person's personal circumstances since the conviction, which shall establish that the petitioner is entitled to the relief provided in this section.

6. **Filing Fee.** Motions under this section shall be accompanied by a fee of ninety-five (95.00) dollars. The filing fee shall be waived only upon a finding of a person's indigence. When imposed, the filing fee shall be paid to the clerk of the court or administrative tribunal that rendered the conviction.

7. **The Motion.** The motion for sealing a record of conviction shall be served upon the prosecuting agency that originally prosecuted the case. The prosecuting agency may file an answer to the motion prior to the return date of the motion. If the person was on probation, the applicable Probation Department shall be served. The motion for sealing a record of conviction shall be made to the judge who originally sentenced the person. In the event such judge is unavailable, or in the discretion of the supervising or administrative judge of that court, motion shall be made to a sitting judge in the court in which the conviction was ordered. The court may grant the motion 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 motion.

8. **Factors to Consider.** When reviewing the motion, 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 person including what steps the person has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, community service, or other personal history that demonstrates rehabilitation, (c) the person's criminal history, (d) the impact of sealing the person'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. The court shall grant the motion unless sealing the records will harm public safety

or would not serve the interests of justice. If the court deems it necessary, the court may order a report as to the applicant's background and circumstances from a local probation department, or agency deemed qualified by the court to prepare such a report.

**9. Hearings.** Upon the request of either party or sua sponte, the court may 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 motion or any matter deemed appropriate by the court in furtherance of determining the motion. When the court orders a hearing and the person is financially unable to afford counsel, the court must assign counsel.

**10. Decision on an Application.** A decision granting or denying a motion under this section shall be in writing and shall state the reasons for the court's ruling, unless the court grants the motion without objection or written response by the prosecutor, in which case the court may issue an order without a written decision. If sealing is denied, the person can reapply after one year.

**11. Effect of Sealing.** 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. The protection is the same as CPL section 160.50: a nullity. Under existing law, non-governmental employers are not permitted to ask prospective applicants if they have been "arrested."

**12. Sealing Process.** When a court orders sealing pursuant to this section, all official records and papers relating to the arrests, detentions, 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. Sealing will not have any impact on DNA evidence or information on file. Records shall be unsealed only pursuant to court order except that the following agencies may maintain records in 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 person 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 person'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 person 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 person 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 persons who have been in custody which shall be kept by a custodian of those records within the agency. In the event the person 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.

**13. Unsealing for Cause.** If, subsequent to the sealing of misdemeanor records, felony records, or youthful offender adjudication records that have substituted for a misdemeanor or felony conviction 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 “spring back” and be unsealed immediately and remain unsealed; provided, however, that if such new misdemeanor or felony arrest results in a termination in favor of the person 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 re-sealed pursuant to this section. 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.

**14. Publishing Sealed Information.** It shall be a class A misdemeanor to publish information regarding the arrest, detention or conviction of a person 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 person 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.

**15. Appeals.** 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 service of the court order. If the order is appealed by the prosecuting agency, such notice of appeal shall be deemed a stay of the order to seal the records. The prosecuting agency 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 intermediate appellate court shall be abuse of discretion. The decision of an intermediate appellate court shall be appealable to the Court of Appeals upon the issuance of a certificate granting leave pursuant to CPL 460.20.

**16. Waiver of Right Impermissible.** The waiver of the right to make an application under this section may not be a condition of a guilty plea entered in any case in New York State.

**17. Executive Law.** 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, should be amended to include the new section 160.65, making it 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 under the new sealing provision.

### **Conclusion**

Complicated and difficult questions should never justify a retreat from a problem that deserves resolution. That principle guided the Sealing Committee and the Section's Executive Committee as they approached the issues discussed in this report. The Section's Executive Committee appreciates that there are many variables that could be subject to discussion and debate by 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

# STATE OF NEW YORK

6664

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 Assem-  
bly, do enact as follows:

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

3 § 160.65 Sealing record of conviction; application for.

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

8 2. An applicant must be duly terminated and discharged from every  
9 aspect of the sentence, including incarceration, probation, parole,  
10 conditional release, post-release supervision, conditional discharge,  
11 sex offender registration and/or any order of protection on this or any  
12 other matter against the applicant must have expired. The following  
13 waiting periods apply to applications under this section, however, for  
14 good cause shown, the court may shorten a waiting period. Attendance at  
15 a diversion program which delayed the imposition of the sentence may  
16 constitute good cause, in the court's discretion.

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

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

23 (c) For a person who has been convicted of a misdemeanor, the waiting  
24 period shall be one year from the date of conviction of such misdemea-  
25 nor.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

LBD10285-01-1

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

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

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

10 (g) For a person who has been convicted of a violent felony, the wait-  
11 ing period shall be ten years from the date of the conviction of such  
12 violent felony.

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

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

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

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

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

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

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

52 5. The application for sealing a record of conviction shall be served  
53 upon the agency that originally prosecuted the case on twenty-one days  
54 notice. The prosecuting agency may file an answer to the application  
55 seven days prior to the return date of the motion. The court may grant  
56 an application on submissions if the prosecuting agency does not file an

1 opposition. If there is objection, the court must review the issues of  
2 fact and law and determine the merits of the application.

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

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

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

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

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

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

45 (a) The department of criminal justice services shall maintain a  
46 sealed record in its database in a manner that will not be accessible to  
47 anyone other than law enforcement agents or prosecution agencies in the  
48 course of a criminal investigation or prosecution, or upon a court order  
49 or court-ordered subpoena ordering release of the information. In the  
50 event the applicant is arrested subsequent to the sealing of the  
51 records, the unsealed record shall be included in the department of  
52 criminal justice services "nysid" sheet that is printed out based on the  
53 applicant's fingerprints. A court, upon determining it is in the inter-  
54 ests of justice to unseal such a record, shall order its unsealing,  
55 which shall allow the prosecutor and the court to unseal the records of

1 their agency pertaining to that arrest. Any such unsealed files shall be  
2 made available to the defendant and his or her attorney.

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

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

18 13. It shall be a class A misdemeanor to publish information, other  
19 than as delineated in paragraphs (a) and (b) of subdivision eleven of  
20 this section, regarding the arrest, detention or conviction of an indi-  
21 vidual whose record has been sealed. A person aggrieved by a violation  
22 of this section shall have the right to institute a civil proceeding,  
23 regardless of whether a criminal action was commenced. A plaintiff is  
24 entitled to five hundred dollars for each occurrence along with the  
25 actual damages caused by the disclosure of such sealed record. Law  
26 enforcement, prosecution officials and employees of the office of court  
27 administration shall have a defense to a criminal or civil action under  
28 this section if they believed, in good faith, that they were permitted or  
29 required by law to disclose a sealed conviction. There shall be no  
30 prosecutorial or law enforcement immunity under this section for any  
31 government official who knowingly and intentionally publishes a sealed  
32 record which such official knows to have been sealed under this section.  
33 If a conviction is unsealed pursuant to a new arrest, the provisions of  
34 this subdivision shall not apply.

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

46 15. A sealed conviction shall not operate as a disqualification of any  
47 person to pursue or engage in any lawful activity, occupation, profes-  
48 sion or calling unless so ordered by the court. Except where specif-  
49 ically required or permitted by statute or upon specified authorization  
50 of a superior court, no such person shall be required to divulge infor-  
51 mation pertaining to the sealed record. Such person shall be permitted  
52 to respond in the negative to the question "have you ever been convicted  
53 of a crime or violation?" or to any question with the same substantive  
54 content.

55 16. Non-governmental employers are hereinafter not permitted to ask  
56 prospective applicants if they have been arrested or if they have been

1 convicted of a crime or violation. Private citizens and employers are  
2 authorized to search official government records for criminal  
3 convictions in a manner consistent with the law. In the event an employ-  
4 er searches the criminal record of an individual, such individual shall  
5 be put on notice, orally or in writing, that such search will occur.

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

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

21 18. Either party may appeal as of right from the court's order. The  
22 appealing party must serve notice of appeal upon the court and the  
23 opposing party within thirty days of the issuance of the court order. If  
24 the order is appealed by the prosecutor, such notice of appeal shall be  
25 deemed a stay of the order to seal the records. The prosecutor shall  
26 perfect the appeal within sixty days, or the sealing order shall imme-  
27 diately take effect unless the court grants an extension of the time to  
28 perfect the appeal upon good cause shown by the prosecutor. The appeal  
29 shall be taken to the same court to which the appeal of the original  
30 conviction could have been brought. The standard of review at the inter-  
31 mediary appellate court shall be abuse of discretion. The decision of an  
32 intermediary appellate court shall be appealable to the court of appeals  
33 upon leave of the court.

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

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

40 16. It shall be an unlawful discriminatory practice, unless specif-  
41 ically required or permitted by statute, for any person, agency, bureau,  
42 corporation or association, including the state and any political subdi-  
43 vision thereof, to make any inquiry about, whether in any form of appli-  
44 cation or otherwise, or to act upon adversely to the individual  
45 involved, any arrest or criminal accusation of such individual not then  
46 pending against that individual which was followed by a termination of  
47 that criminal action or proceeding in favor of such individual, as  
48 defined in subdivision two of section 160.50 of the criminal procedure  
49 law, or by a youthful offender adjudication, as defined in subdivision  
50 one of section 720.35 of the criminal procedure law, or by a conviction  
51 for a violation sealed pursuant to section 160.55 of the criminal proce-  
52 dure law or by a conviction which is sealed pursuant to section 160.58  
53 of the criminal procedure law, or by a conviction for a criminal or  
54 non-criminal offense which is sealed pursuant to section 160.65 of the  
55 criminal procedure law, in connection with the licensing, employment or  
56 providing of credit or insurance to such individual; provided, further,

1 that no person shall be required to divulge information pertaining to  
2 any arrest or criminal accusation of such individual not then pending  
3 against that individual which was followed by a termination of that  
4 criminal action or proceeding in favor of such individual, as defined in  
5 subdivision two of section 160.50 of the criminal procedure law, or by a  
6 youthful offender adjudication, as defined in subdivision one of section  
7 720.35 of the criminal procedure law, or by a conviction for a violation  
8 sealed pursuant to section 160.55 of the criminal procedure law, or by a  
9 conviction which is sealed pursuant to section 160.58 of the criminal  
10 procedure law, or by a conviction for a criminal or non-criminal offense  
11 which is sealed pursuant to section 160.65 of the criminal procedure  
12 law. The provisions of this subdivision shall not apply to the licensing  
13 activities of governmental bodies in relation to the regulation of guns,  
14 firearms and other deadly weapons or in relation to an application for  
15 employment as a police officer or peace officer as those terms are  
16 defined in subdivisions thirty-three and thirty-four of section 1.20 of  
17 the criminal procedure law; provided further that the provisions of this  
18 subdivision shall not apply to an application for employment or member-  
19 ship in any law enforcement agency with respect to any arrest or crimi-  
20 nal accusation which was followed by a youthful offender adjudication,  
21 as defined in subdivision one of section 720.35 of the criminal proce-  
22 dure law, or by a conviction for a violation sealed pursuant to section  
23 160.55 of the criminal procedure law, or by a conviction which is sealed  
24 pursuant to section 160.58 of the criminal procedure law, or by a  
25 conviction for a criminal or non-criminal offense which is sealed pursu-  
26 ant to section 160.65 of the criminal procedure law.  
27 § 3. This act shall take effect on the sixtieth day after it shall  
28 have become a law.

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**NEW YORK STATE ASSEMBLY**  
**MEMORANDUM IN SUPPORT OF LEGISLATION**  
**submitted in accordance with Assembly Rule III, Sec 1(f)**

**BILL NUMBER:** A6664

**SPONSOR:** O'Donnell| | | | | | | | | | | | | | | | | |

**TITLE OF BILL:** An act to amend the criminal procedure law and the executive law, in relation to applications for sealing a record of conviction

**PURPOSE OR GENERAL IDEA OF BILL:** This bill would establish a procedure for an individual with a criminal record, who has completed his or her sentence and has been crime-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 bill's purpose is to help currently law-abiding individuals keep, regain or gain employment by strengthening mechanisms intended to prevent employment discrimination against ex-offenders.

**SUMMARY OF SPECIFIC PROVISIONS:** Section one of the bill adds a new section 160.55 to the Criminal Procedure Law ("CPL"), setting out the criteria and procedures for sealing a record of conviction. Section two makes conforming changes to Executive Law section 296, to effectuate the bill's nondiscrimination purposes. Section three is the effective date.

New CPL 160.55's provisions include the following. The application must be sworn to and accompanied by a 95 dollar application fee (subdivision 1). An applicant must have served the full sentence, including any supervision component, sex offender registration requirement or order of protection, and must have completed a waiting period which varies depending on the classification and number of prior convictions (subdivision 2; waiting periods set out in paragraphs a to h). 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 (subdivision 3). An application must be sworn to under penalties of perjury and must include specific information about all of the applicant/petitioner's prior convictions, including any convictions in other states or federal court (subdivision 4). The application must be served on the original prosecuting agency on 21 days notice, with an opportunity for the prosecutor to answer 7 days prior to the return date (subdivision 5). 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 (subdivision 6). The court may order a report on the applicant's background and circumstances (subdivision 7), may conduct a hearing as to any issue of fact or law (subdivision 8), and must issue a written decision stating reasons for the decision unless the application is granted without objection (subdivision 9). Either party may appeal (subdivision 18).

Subdivision 10 of new CPL 160.55 governs a sealing order's effective date. Subdivision 11 sets out the actions to be taken to seal records pursuant to such an order, and also provides for access to sealed records by law enforcement and prosecution agencies and for the

conviction to spring back upon a new arrest. Subdivision 12 explicitly states that nothing contained in new CPL 160.55 changes the sentencing provisions of the Penal Law. Subdivision '13 sets out sanctions and remedies for unauthorized publication of information regarding sealed records. Subdivision 14 deals with applications to unseal a previously sealed record. Subdivisions 15 and 16 relate to employment; private employers may search government records, but may not ask job applicants if they have been arrested or convicted. Subdivision 17 limits re-disclosure by purchasers of criminal records or databases of such records and requires sellers of such records databases to develop systems for validating the accuracy of records and to give written notice to purchasers about the limits on re-disclosure.

**JUSTIFICATION:** New York's public policy of assisting ex-offenders by prohibiting employment discrimination based on criminal history (see Correction Law Article 23-A) is compromised by increasingly easy access to various databases and other information available over the internet that provide criminal history information about individuals, especially when that information may be incomplete or outdated, and even when it is accurate, may reflect a conviction that occurred long ago and that may hinder employment opportunities for someone who has been a law abiding citizen for many years. Current law does not provide a mechanism for addressing the employment discrimination problems created by technological advances. This bill provides such a mechanism.

Many individuals who made mistakes in the past and have led law abiding lives since their convictions have either lost jobs due to the economic downturn, have lost jobs because employers began checking criminal records, or afraid to apply for new and better jobs because they fear they will be asked about criminal records. Job applicants are routinely asked about criminal records and eliminated from consideration for crimes that occurred years, or even decades, ago.

Twenty, or even ten, years ago it was relatively difficult for employers to get criminal record information for job applicants as a routine matter. Over the last ten years, the free flow of information over the Internet, live data feeds, sales of databases, etc. have made it easy for employers to obtain criminal record information. Even applicants for low paying jobs are subject to criminal records questions on applications and/or criminal records checks. It is critical that the Legislature act now to establish a mechanism for sealing records before so much information is so available that it becomes impossible to seal records in a meaningful way.

**PRIOR LEGISLATIVE HISTORY:** New bill.

**FISCAL IMPLICATIONS:** To be determined, but note that any workload driven costs should be offset by the \$95 application fee, and it is possible that net revenue could be generated by this bill.

**EFFECTIVE DATE:** This act shall take effect 60 days after having become a law.

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# APPENDIX 2

# 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:

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

3 § 2. The criminal procedure law is amended by adding a new section  
4 160.65 to read as follows:

5 § 160.65 Conditional sealing of certain misdemeanor offenses.

6 1. For the purposes of this section, the term "eligible misdemeanor"  
7 shall be a misdemeanor offense defined in the penal law, provided that  
8 an eligible misdemeanor shall not mean a misdemeanor offense defined in  
9 article one hundred twenty, one hundred thirty, one hundred thirty-five,  
10 one hundred fifty, two hundred thirty-five, two hundred forty-five, two  
11 hundred sixty, two hundred sixty-three, two hundred sixty-five or arti-  
12 cle four hundred of the penal law. An eligible misdemeanor shall not  
13 include any one or more of the following: killing or injuring a police  
14 animal as defined in section 195.06, harming an animal trained to aid a  
15 person with a disability in the second degree as defined in section  
16 195.11, harming an animal trained to aid a person with a disability in  
17 the first degree as defined in section 195.12, promoting prostitution in  
18 the fourth degree as defined in section 230.20, riot in the second  
19 degree as defined in section 240.05, inciting to riot as defined in  
20 section 240.08, aggravated harassment in the second degree as defined in  
21 subdivision three of section 240.30, criminal interference with health

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

LBD03673-01-1

1 care services or religious worship in the second degree as defined in  
2 section 240.70, harming a service animal in the second degree as defined  
3 in section 242.10, dissemination of an unlawful surveillance image in  
4 the second degree as defined in section 250.55, or any specified offense  
5 subject to the provision relating to hate crimes as defined in section  
6 485.05 of the penal law. Additionally, an eligible misdemeanor shall not  
7 include criminal solicitation, conspiracy, attempt, or criminal facili-  
8 tation to commit any violent felony offense as defined in section 70.02  
9 of the penal law, or any sex offense as defined under subsection two of  
10 section one hundred sixty-eight-a of the correction law.

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

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

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

20 3. The petition authorized by this section shall be filed in the court  
21 of record that last imposed a sentence upon petitioner for an eligible  
22 misdemeanor. On the defendant's motion, the court may order that all  
23 official records and papers relating to the arrest, prosecution and  
24 conviction records for no more than three of the defendant's prior  
25 eligible misdemeanors be conditionally sealed. The court may only seal  
26 the records of the defendant's arrests, prosecutions and convictions  
27 when:

28 (a) the sentencing court has requested and received from the division  
29 of criminal justice services or the federal bureau of investigation a  
30 fingerprint based criminal history record of the defendant, including  
31 any sealed or suppressed information. The division of criminal justice  
32 services shall also include a criminal history report, if any, from the  
33 federal bureau of investigation regarding any criminal history informa-  
34 tion that occurred in other jurisdictions. The division is hereby  
35 authorized to receive such information from the federal bureau of inves-  
36 tigation for this purpose. The parties shall be permitted to examine  
37 these records;

38 (b) the defendant or court has identified the misdemeanor conviction  
39 or convictions for which relief may be granted;

40 (c) the court has received documentation that the sentences imposed on  
41 the eligible misdemeanor convictions have been completed, or if no such  
42 documentation is reasonably available, a sworn affidavit that the  
43 sentences imposed on the prior misdemeanors have been completed; and

44 (d) the court has notified the district attorney of each jurisdiction  
45 in which the defendant has been convicted of an offense with respect to  
46 which sealing is sought, and the court or courts of record for such  
47 offenses, that the court is considering sealing the records of the  
48 defendant's eligible misdemeanor convictions. Both the district attorney  
49 and the court shall be given a reasonable opportunity, which shall not  
50 be less than thirty days, in which to comment and submit materials to  
51 aid the court in making such a determination. When the court notifies a  
52 district attorney of a sealing application, the district attorney shall  
53 provide notice to the victim, if any, of the sealing application by  
54 mailing written notice to the victim's last-known address. For purposes  
55 of this section "victim" means any person who has sustained physical or

1 financial injury to person or to property as a direct result of the  
2 misdeemeanor crime or misdemeanor crimes for which sealing is applied.

3 4. At the request of the defendant or the district attorney of a coun-  
4 ty in which the defendant committed a crime that is the subject of the  
5 sealing application, the court may conduct a hearing to consider and  
6 review any relevant evidence offered by either party that would aid the  
7 court in its decision whether to seal the records of the defendant's  
8 arrests, prosecutions and convictions. In making such a determination,  
9 the court shall consider any relevant factors, including but not limited  
10 to:

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

13 (b) the character of the defendant, including what steps the petition-  
14 er has taken since the time of the offense toward personal rehabili-  
15 tation, including treatment, work, school, or other personal history  
16 that demonstrates rehabilitation;

17 (c) the defendant's criminal history;

18 (d) the impact of sealing the defendant's records upon his or her  
19 rehabilitation and his or her successful and productive reentry and  
20 reintegration into society, and on public safety; and

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

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

41 6. When a court orders sealing pursuant to this section, all official  
42 records and papers relating to the arrests, prosecutions, and  
43 convictions, including all duplicates and copies thereof, on file with  
44 the division of criminal justice services or any court shall be sealed  
45 and not made available to any person or public or private agency;  
46 provided, however, the division shall retain any fingerprints, palm-  
47 prints, photographs, or digital images of the same.

48 7. When the court orders sealing pursuant to this section, the clerk  
49 of such court shall immediately notify the commissioner of the division  
50 of criminal justice services, and any court that sentenced the defendant  
51 for an offense which has been conditionally sealed, regarding the  
52 records that shall be sealed pursuant to this section.

53 8. Records sealed pursuant to this subdivision shall be made available  
54 to:

55 (a) the defendant or the defendant's designated agent;

1 (b) qualified agencies, as defined in subdivision nine of section  
2 eight hundred thirty-five of the executive law, and federal and state  
3 law enforcement agencies, when acting within the scope of their law  
4 enforcement duties;

5 (c) any state or local officer or agency with responsibility for the  
6 issuance of licenses to possess guns, when the person has made applica-  
7 tion for such a license; or

8 (d) any prospective employer of a police officer or peace officer as  
9 those terms are defined in subdivisions thirty-three and thirty-four of  
10 section 1.20 of this chapter, in relation to an application for employ-  
11 ment as a police officer or peace officer; provided, however, that every  
12 person who is an applicant for the position of police officer or peace  
13 officer shall be furnished with a copy of all records obtained under  
14 this paragraph and afforded an opportunity to make an explanation there-  
15 to.

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

18 10. If, subsequent to the sealing of records pursuant to this subdivi-  
19 sion, the person who is the subject of such records is arrested for or  
20 formally charged with any misdemeanor or felony offense, such records  
21 shall be unsealed immediately and remain unsealed; provided, however,  
22 that if such new misdemeanor or felony arrest results in a termination  
23 in favor of the accused as defined in subdivision three of section  
24 160.50 of this article or by conviction for a non-criminal offense as  
25 described in section 160.55 of this article, such unsealed records shall  
26 be conditionally sealed pursuant to this section.

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

30 16. It shall be an unlawful discriminatory practice, unless specif-  
31 ically required or permitted by statute, for any person, agency, bureau,  
32 corporation or association, including the state and any political subdivi-  
33 sion thereof, to make any inquiry about, whether in any form of appli-  
34 cation or otherwise, or to act upon adversely to the individual  
35 involved, any arrest or criminal accusation of such individual not then  
36 pending against that individual which was followed by a termination of  
37 that criminal action or proceeding in favor of such individual, as  
38 defined in subdivision two of section 160.50 of the criminal procedure  
39 law, or by a youthful offender adjudication, as defined in subdivision  
40 one of section 720.35 of the criminal procedure law, or by a conviction  
41 for a violation sealed pursuant to section 160.55 of the criminal proce-  
42 dure law or by a conviction which is sealed pursuant to section 160.58  
43 of the criminal procedure law, or by a conviction which is sealed pursu-  
44 ant to section 160.65 of the criminal procedure law, in connection with  
45 the licensing, employment or providing of credit or insurance to such  
46 individual; provided, further, that no person shall be required to  
47 divulge information pertaining to any arrest or criminal accusation of  
48 such individual not then pending against that individual which was  
49 followed by a termination of that criminal action or proceeding in favor  
50 of such individual, as defined in subdivision two of section 160.50 of  
51 the criminal procedure law, or by a youthful offender adjudication, as  
52 defined in subdivision one of section 720.35 of the criminal procedure  
53 law, or by a conviction for a violation sealed pursuant to section  
54 160.55 of the criminal procedure law, or by a conviction which is sealed  
55 pursuant to section 160.58 of the criminal procedure law, or by a  
56 conviction which is sealed pursuant to section 160.65 of the criminal

1 procedure law. The provisions of this subdivision shall not apply to the  
2 licensing activities of governmental bodies in relation to the regu-  
3 lation of guns, firearms and other deadly weapons or in relation to an  
4 application for employment as a police officer or peace officer as those  
5 terms are defined in subdivisions thirty-three and thirty-four of  
6 section 1.20 of the criminal procedure law; provided further that the  
7 provisions of this subdivision shall not apply to an application for  
8 employment or membership in any law enforcement agency with respect to  
9 any arrest or criminal accusation which was followed by a youthful  
10 offender adjudication, as defined in subdivision one of section 720.35  
11 of the criminal procedure law, or by a conviction for a violation sealed  
12 pursuant to section 160.55 of the criminal procedure law, or by a  
13 conviction which is sealed pursuant to section 160.58 of the criminal  
14 procedure law, or by a conviction which is sealed pursuant to section  
15 160.65 of the criminal procedure law.

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

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**NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(f)**

**BILL NUMBER:** A1139

**SPONSOR:** Lentol|(MS)| | | | | | | | | |

**TITLE OF BILL:** 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

**PURPOSE:**  
To allow the sealing of certain misdemeanor offenses,

**SUMMARY OF PROVISIONS:**  
Section 1 of the bill titles the new provision, the Second Chance for Ex-Offenders Act.

Section 2 of the bill: excludes certain misdemeanor offenses as eligible misdemeanors for the purposes of conditional sealing; lists certain sealing eligibility requirements; describes the court's sealing process; and lists the agencies and individuals which will have access to the sealed misdemeanor records.

Section 3 of the bill amends the executive law to include as an unlawful discriminatory practice, making an inquiry about any arrest or criminal accusation which is sealed under the Second Chance for Ex-Offenders Act.

**JUSTIFICATION:**  
A misdemeanor offense can follow a person for the rest of his or her life. Even if he or she has fully reformed and committed no further criminal acts the record still exists and often forms the basis for discrimination in employment or other areas. This bill would allow a person who has been convicted of certain misdemeanor offenses to apply to the Court to have their record sealed. The bill also authorizes unsealing the sealed record if the individual is later convicted of a subsequent offense.

**EXISTING LAW:**  
While there is currently a process in place to seal controlled substance felonies and misdemeanors, there exists no process for the sealing of non-controlled substance misdemeanors.

**LEGISLATIVE HISTORY:**  
A.6065 of 2009-10

**FISCAL IMPLICATIONS:**  
The state can anticipate additional revenue if this bill becomes law.

**EFFECTIVE DATE:**  
This act shall take effect one hundred eightieth day after it shall have become a law and shall apply to all convictions occurring prior to, on, and after the effective date.

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# 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.