

# OUTLINE

## Access to Justice for People Post-Sentence and During Reentry<sup>1</sup>

Prepared by: Alan Rosenthal

### Introduction

In this era of mass incarceration we have left almost 100 million people in the U.S. disadvantaged by a criminal record. On two occasions the New York State Bar Association has documented the ways in which the criminal justice system has created barriers for those who pass through it, or as Michelle Alexander has suggested to us, ways in which our laws and practices have created the New Jim Crow. We suffer not only from mass incarceration but mass reentry. In 2006 The NYSBA Special Committee on Collateral Consequences of Criminal Proceedings issued its Report and Recommendations, "*Re-Entry and Reintegration: The Road to Public Safety.*" In 2015 the NYSBA Special Committee on Re-entry issued its report. Little has changed since the barriers to reintegration for people with criminal records was documented by these reports.

Enormous challenges face the bar if we are to take up the challenge of fulfilling the promise to provide legal assistance to individuals who are marginalized by criminal convictions, whether they are coming home from the courthouse or from prison. During this short presentation I will highlight what I see as the challenges, how these challenges can be met, and what practice concerns need to be addressed.

In Part One I will give an overview of some of the practice areas where the bar has underperformed. I will highlight several barriers and issues that present hurdles to reentry and reintegration for people with criminal records. I will make some suggestions as to possible solutions and reforms. I will address some of the lessons learned from New York's foray into conditional sealing of criminal convictions starting in 2009.

In Part Two, because of time limitations, I will give an overview of New York's newest attempt at restoration of rights through the recently enacted sealing statute – CPL 160.59. I suggest that a full blown CLE should be presented across the state if the bar is to prepare itself to step up and truly provided people with criminal records access to this new sealing statute.

### **I. An Overview of Some Underserved Areas of Representation**

The above referenced NYSBA reports document the barriers that people with criminal records face to employment, housing, education, voting and equality in general. If people do not have access to justice to help overcome these barriers their reintegration into society and the hope for the opportunity at a fulfilling life will be placed beyond their reach. Some of the issues that need to be address by the legal community are:

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<sup>1</sup> I want to give special acknowledgement to Robert Newman and The Legal Aid Society for their substantial contribution to the analysis and narrative of New York's new sealing statute – CPL §160.59 – from which I have liberally borrowed.

- Restoration of rights – sealing, certificates of rehabilitation, pardons and correcting errors in criminal records
- Discrimination in employment, housing and education
- SORA modifications
- Enforcing “ban the box” legislation
- Felony disenfranchisement

The Reentry Clinic model provides us with an approach that is worth considering. These clinics have provided assistance to individuals in several of these practice areas. Unfortunately, such models are generally under-resourced and under-staffed. It is simply unacceptable and bad public policy to expect, as some have suggested, that access to justice can and should be met by pro bono efforts.

There is much to be learned from New York first attempt at sealing of criminal conviction in the 2009 legislation for conditional sealing (CPL §160.58). Among the problems were:

- Judicial resistance
- An unprepared and unknowledgeable defense bar
- A cost-prohibitive process
- An ill-conceived statutory procedure requiring litigation and judicial discretion instead of a self-executing administrative process

Although there are many case examples, I have included just one in the materials that captures a number of the problems encountered with conditional sealing. *See People v. Jihan QQ*, 2017 NY Slip Op 04524. Standing as a testament to the abysmal failure of conditional sealing is that fact that since its inception in 2009 through 2015 there have been only 410 conditional sealing orders granted statewide. Although DCJS was prepared for the flood of conditional sealing motions with this heralded reform expected to produce thousands of such sealing motions each year, what DCJS data shows is a mere trickle. I have included in the materials a DCJS chart that documents the number of conditional sealing orders granted per year by county. We can and must do better. People who are suffering marginalization as a result of their criminal history records deserve better.

## **II. The New Sealing Statute – CPL § 160.59**

As part of the “Raise the Age” package, the Legislature has adopted, and the Governor has signed, new C.P.L. § 160.59, “Sealing of Certain Convictions.” The legislation was signed by the Governor on April 10, 2017. Because there was a need for several corrective amendments, that corrective legislation (A08493) was signed on June 29, 2017. The legislation becomes effective 180 days for its initial signing. Since the effective date fall on a Saturday, and

the following Monday is Columbus Da, the first application can be filed on October 10, 2017, although the actual effective date is October 7, 2017.

This new law will help people avoid negative civil consequences of old convictions. It will be especially useful in helping to prevent employment, housin and educational discrimination based on these old convictions. The relief afforded by the law is more robust than the relief afforded by a Certificate of Relief from Disabilities. The preconditions for obtaining sealing are less strict than under the existing Conditional Sealing law, CPL § 160.58, which requires completion of a rigorous drug treatment program prior to an application for sealing.

### **ELIGIBILITY**

An application for sealing an “eligible offense” may be made by a defendant who has been convicted of one or two misdemeanors, or has been convicted of one felony, or has been convicted of one felony and one misdemeanor. (See list of “ineligible” offenses below.) A person with a more substantial criminal record may not utilize the new statute.

The following offenses are not eligible for sealing:

- sex offenses
- “sexual performance by a child” offenses (P.L. Article 263)
- any other offense that requires SORA registration
- homicides
- violent felony offenses
- other class A felonies
- felony conspiracies to commit an ineligible offense
- felony attempts to commit an ineligible offense

A conviction may only be sealed after ten years have passed since the date of sentence, or, if the defendant was sentenced to jail or prison, after ten years have passed since the date of release from incarceration. The ten-year period is tolled by any time during which the defendant was incarcerated.

A person may not get a conviction sealed if he has been convicted of any crime subsequent to the conviction he seeks to get sealed. However, a prior conviction of a single “ineligible” offense does not bar sealing of a more recent “eligible” offense.

### **THE APPLICATION PROCESS**

The application is to be made to the sentencing judge, but if the sentencing judge is no longer available, the application can be heard by any judge of the sentencing court. If there are two offenses of differing seriousness, the application is to be made to the court in which the most serious conviction occurred. If there are two offenses of equal classification, the application is to be made to the court in which the most recent conviction occurred.

Although the statute contemplates two applications, the subsequent amendment of the statute made it clear that two separate offenses may be included in one application.

The application must contain a copy of the certificate(s) of disposition, or an explanation of why the certificate(s) are unavailable; a sworn statement of the defendant saying whether he or she has filed or intends to file an additional application for sealing; a copy of any additional application that has been filed; and most importantly, “a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.”

The statute requires the Office of Court Administration is to promulgate application forms. OCA anticipates that those forms will be available on their website by October 1, 2017. The OCA form is not exclusive and the statute specifically directs that a defendant is not required to use the OCA form. The statute clearly sets forth the information that must be included in the application but counsel may find it helpful to either use the OCA form, or follow its format. There is no provision for appointment of counsel to assist the defendant. Once the bill takes effect, applications can be made to seal any conviction that is eligible for sealing, including convictions that pre-date the new law.

The application must be served on the D.A. of each county in which any of the convictions in question occurred. The D.A. is given 45 days to respond to the application.

### **THE COURT REVIEW**

Once the application is filed, the court is to obtain the defendant’s criminal history, including “any sealed or suppressed records” and including any out-of-state or Federal criminal history.

The application will be summarily denied if the defendant is a registered sex offender; has previously had the maximum number of allowable convictions sealed under the new provision or C.P.L. § 160.58; has a pending charge, has been convicted of “any crime” after the date of the most recent conviction for which sealing is sought, the requisite ten years has not elapsed, the defendant has failed to provide the court with the required sworn statements of reasons the application should be granted, or the defendant has been convicted of two or more felonies or more than two crimes.

If there is no basis for summary denial, and the D.A. does not oppose the application, it may be granted without a hearing. If the D.A. does oppose, there is to be a hearing at which the court may consider “any evidence offered by either party.” The court is then to exercise its discretion based on factors including but not limited to:

- any relevant factors;
- the amount of time that has elapsed since the defendant’s last conviction;
- the circumstances and seriousness of the offense, including “whether the arrest charge [as opposed to the conviction charge] was not an eligible offense;”
- the circumstances and seriousness of any other offenses for which the applicant stands convicted;

- the character of the defendant, including “any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work or schooling, and participating in community service or other volunteer programs;”
- statements made by the victim, if any;
- the impact of sealing upon the defendant’s record and his or her successful and productive reentry and reintegration into society; and
- the impact of sealing on public safety and the public’s confidence in and respect for the law.

### **THE IMPACT OF SEALING**

When an application is granted, records on file “with the Division of Criminal Justice Services” (i.e., fingerprints) or “any court” shall be sealed. This is the same scope of sealing as exists under C.P.L. § 160.58. Unlike C.P.L. §§ 160.50 and 160.55, there is no provision for sealing of Police or prosecution records. Sealed records shall be made available to the defendant or his or her designated agent; to courts, prosecutors and law enforcement agencies when acting within the scope of their duties; to prospective employers of police or peace officers; and to agencies conducting background checks on prospective gun buyers. Fingerprints and photographs are retained by DCJS and are not destroyed, as is the case in conditional sealing, and as is not the case with sealing under CPL § 160.50.

A conviction which is sealed pursuant to this section “is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.” Although there is no explicit provision making the sealing “conditional,” subject to unsealing in the event of a future arrest, such a provision is unnecessary for law enforcement purposes, as courts and prosecutors are among the agencies entitled to see sealed records.

It will be illegal for the prosecutor to require, as part of a plea bargain, that the defendant waive eligibility for sealing pursuant to this section.

The Human Rights Law, Executive Law § 296(16) (included in the materials), was amended as part of the bill, to require that convictions sealed under this provision be treated in the same way as records sealed under other provisions, in connection with “licensing, employment or providing of credit or insurance.” It will thus be illegal in those contexts “to make any inquiry about” a sealed conviction, “whether in any form of application or otherwise,” or to “act adversely” against the individual, based on a sealed conviction, and no person who receives a CPL § 160.59 sealing may be required to divulge information pertaining to that arrest or criminal accusation.

### **OTHER CONSIDERATIONS**

A client may seek out your assistance for sealing who qualifies for either conditional sealing or this new sealing or for both. In order to assist you in analyzing which to pursue, or which sealing statute to follow a comparison chart is included in the materials that compares the features of both CPL § 160.58 and CPL § 160.59.

STATE OF NEW YORK  
COUNTY OF ALBANY COUNTY COURT

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER  
SCI #08-244

JIHAN [REDACTED]  
Defendant.

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APPEARANCES

For the People

HONORABLE P. DAVID SOARES  
Albany County District Attorney  
Albany County Judicial Center  
Albany, New York 12207

For the Defendant

MARK MISHLER, ESQ.  
750 Broadway  
Albany, New York 12207

ALB CO CLERK JAN11 11:16PM 1:59

HERRICK, J. Defendant moves for a conditional order sealing her records, pursuant to Criminal Procedure Law, section 160.58. Defendant further moves for a hearing to present evidence in support of her motion.

The record reveals that on July 17, 2008, defendant entered a plea of guilty to Criminal Possession of a Controlled Substance in the Fifth Degree, in violation of Penal Law, section 220.06(5), a class E felony.

The defendant entered the Drug Treatment Court and on July 8, 2010, having successfully completed the program, she graduated from Drug Court. She was, thereafter, allowed to withdraw her prior felony plea and enter a plea of guilty to the A misdemeanor, Criminal Possession of a Controlled Substance in the Seventh Degree.

At no time during the foregoing was the conditional sealing of defendant's records discussed or promised.

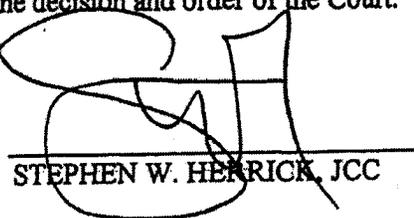
The decision whether to conditionally seal records and to conduct a hearing regarding same is discretionary with the Court. Criminal Procedure Law, section 160.58. In the present matter, the Court declines to exercise its discretion and denies the motion for a conditional sealing order and further denies the motion for a hearing.

It is the matter for which defendant was convicted that he seeks the present sealing order.

Based upon the foregoing, defendant's motion is, in all respects, denied.

This memorandum shall constitute the decision and order of the Court.

DATED: December 15, 2015  
Albany, New York

  
STEPHEN W. HERRICK, JCC

*To be Submitted:*

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**NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION – THIRD DEPARTMENT**

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**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent,*

*-against-*

**JIHAN [REDACTED]**

*Defendant-Appellant.*

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**RESPONDENT'S BRIEF**

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**P. DAVID SOARES  
ALBANY COUNTY DISTRICT  
ATTORNEY  
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6 LODGE STREET  
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**P. DAVID SOARES  
ALBANY COUNTY  
DISTRICT ATTORNEY**

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**POINT I**

**THE PEOPLE JOIN THE DEFENDANT'S REQUEST FOR CONDITIONAL SEALING**

After a careful review of the record on appeal, the People join the defendant's request for conditional sealing in the interests of justice.

Eight years ago, the defendant was arrested on charges of Criminal Possession of a Controlled Substance in the 2nd and 3rd Degrees. Recognizing that the defendant's criminal behavior was due to her abuse of cocaine and heroin, she was allowed to enter Drug Court. She successfully completed drug court in less than two years. The record reflects that since that time she has taken accountability for her actions and turned her life around. She has refrained from using drugs or alcohol, aided others to overcome their addiction as a sponsor through Narcotics Anonymous, earned her Bachelor's degree from SUNY Albany, held full-time employment at State agencies, and purchased a home. In all respects, she has been a model citizen.

Despite this, she still faces barriers in her life and career as a result of her conviction. Research suggests that ex-convicts have a 15-30% higher unemployment rate than non-convicts and that only 40% of employers are likely to hire an applicant with a criminal conviction (John Schmitt & Kris Warner, Ctr. for Econ. & Policy Research, *Ex-offenders and the Labor Market* 9 [2010]). She has done all society has asked of her, yet her punishment continues.

A District Attorney's paramount duty "is to seek justice, not merely to convict" (Model Code of Prof'l Responsibility Canon 7 EC 7-13 [1982]; see *People v Dowdell*, 88 AD2d 239, 43 [1st Dept 1982]). We believe strongly that this duty extends to advocating for conditional sealing in this case, a result we believe accords with legislative intent and statutory mandate. The defendant's request was compelling, was well-supported by the record, and was eminently reasonable; it should be granted now. Justice requires no less.

**CONCLUSION**

**THE DEFENDANT'S CONVICTION SHOULD BE CONDITIONALLY SEALED.**

RESPECTFULLY SUBMITTED,

P. DAVID SOARES  
ALBANY COUNTY DISTRICT ATTORNEY  
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(518) 487-5460

Dated: February 17, 2017

By: 

P. DAVID SOARES

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 8, 2017

523860

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THE PEOPLE OF THE STATE OF  
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JIHAN QQ.,

Appellant.

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Calendar Date: May 4, 2017

Before: Peters, P.J., McCarthy, Egan Jr., Devine and Mulvey, JJ.

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Law Office of Mark Mishler, PC, Albany (Mark S. Mishler of counsel), for appellant.

P. David Soares, District Attorney, Albany, for respondent.

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Egan Jr., J.

Appeal from an order of the County Court of Albany County (Herrick, J.), entered January 11, 2016, which denied defendant's motion for a conditional order pursuant to CPL 160.58 sealing her criminal record, without a hearing.

In 2008, defendant pleaded guilty to attempted criminal possession of a controlled substance in the fifth degree, a class E felony, in satisfaction of accusatory instruments charging her with multiple drug-related crimes. Under the terms of the plea agreement, defendant agreed to participate in the Albany County Drug Treatment Court program and, if successful, would be permitted to withdraw her felony guilty plea and plead guilty to a misdemeanor. Defendant successfully completed the program and, in 2010, withdrew her original plea and entered a plea of guilty

to criminal possession of a controlled substance in the seventh degree, a class A misdemeanor. In 2015, defendant moved for a conditional order pursuant to CPL 160.58 sealing the record pertaining to her conviction. The People did not oppose the motion, but County Court denied it without conducting a hearing. Defendant now appeals.<sup>1</sup>

CPL 160.58, which was enacted as part of the Drug Law Reform Act of 2009 (L 2009, ch 56, part AAA, § 3), provides that criminal defendants who have been convicted of specified offenses, have successfully completed certain drug treatment programs and have served the sentences imposed for such offenses are eligible to have the record of their offenses conditionally sealed (see CPL 160.58 [1]; Peter Preiser, 2009 Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 160.58, 2017 Supp Pamph at 177-178). The decision of whether to grant an application to conditionally seal a criminal record is within the discretion of the sentencing court (see Peter Preiser, 2009 Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 160.58, 2017 Supp Pamph at 178). Notably, CPL 160.58 (3) provides that, in making such determinations, "the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of [a] judicially sanctioned treatment program . . . ; (iii) the defendant's criminal history; and (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety" (emphasis added).

In denying defendant's motion, County Court relied upon the absence of a provision in the plea agreement indicating that defendant's criminal record would be conditionally sealed. However, given that defendant's plea agreement was entered into

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<sup>1</sup> We note that, inasmuch as a motion to conditionally seal a criminal record is a civil matter, this appeal is properly before us pursuant to CPLR 5701 (a) (2) (v) (see People v M.E., 121 AD3d 157, 159 [2014]).

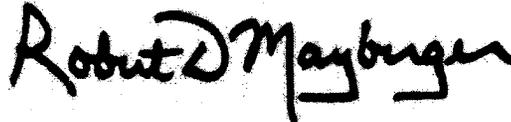
prior to the enactment of the statute, it could not have included a provision addressing the conditional sealing of her criminal record, and the absence of such a provision is not dispositive. Significantly, CPL 160.58 has been held to be applicable to convictions preceding its enactment (see People v M.E., 121 AD3d 157, 160-161 [2014]). Therefore, County Court should have reviewed defendant's motion in light of the factors set forth in CPL 160.58 (3).

That said, under the particular circumstances presented and given that the record in this matter is complete, we shall consider the motion applying the relevant statutory criteria, rather than remitting this matter to County Court for that purpose. The record establishes that defendant's misdemeanor conviction is her sole criminal offense, she has not been arrested since 2008, she has successfully completed the drug court program (thereby avoiding incarceration), she has obtained a college degree and maintained gainful employment and she continues to participate in Narcotics Anonymous. Further, although defendant has received a certificate of relief from civil disabilities, her criminal record is likely to be an impediment to both the furtherance of her career and her future employment prospects. In view of the foregoing, and given that the People now concur with the relief requested by defendant, her motion should be granted and the record of her criminal conviction conditionally sealed pursuant to CPL 160.58.

Peters, P.J., McCarthy, Devine and Mulvey, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, defendant's motion to conditionally seal the record of her criminal conviction granted, and matter remitted to the County Court of Albany County for compliance with CPL 160.58 (5).

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert D. Mayberger  
Clerk of the Court

**Appendix I: Conditional Seals Granted Statewide (2009-2015)**

**Conditional Seals (CPL 160.58) Granted Statewide, by County and Year Sealed**

	Year Sealed							Total
	2009	2010	2011	2012	2013	2014	2015	
ALBANY	0	1	2	1	0	0	1	5
BRONX	0	0	0	3	0	2	0	5
BROOME	0	1	0	0	1	0	0	2
CATTARAUGUS	0	0	0	1	0	0	0	1
CHAUTAUQUA	0	0	0	0	0	0	1	1
CLINTON	0	0	0	0	0	0	8	8
CORTLAND	0	0	1	0	0	0	0	1
ERIE	0	0	0	0	0	1	3	4
FULTON	0	0	0	3	2	0	1	6
GENESEE	0	0	0	0	1	0	0	1
JEFFERSON	0	4	0	1	1	1	2	9
KINGS	1	0	1	0	1	2	0	5
LEWIS	0	0	0	1	0	0	0	1
MADISON	0	0	2	0	0	0	0	2
MONROE	0	1	2	9	3	2	1	18
NASSAU	0	0	5	28	45	36	30	142
NEW YORK	0	1	1	8	6	5	1	22
NIAGARA	0	0	3	0	2	1	1	7
ONEIDA	0	0	0	1	0	0	0	1
ONONDAGA	0	1	0	0	0	0	0	1
ONTARIO	0	0	1	0	0	0	0	1
ORANGE	0	0	0	0	0	0	1	1
OSWEGO	0	0	1	0	0	1	1	3
PUTNAM	0	0	0	0	0	1	0	1
QUEENS	0	0	0	5	3	4	2	14
RENSSELAER	4	4	7	13	10	12	7	57
RICHMOND	0	1	0	0	3	0	0	4
ROCKLAND	0	0	0	3	0	4	5	12
SARATOGA	0	9	4	1	7	2	0	23
SCHENECTADY	1	4	0	3	2	5	2	17
SCHOHARIE	0	0	0	0	1	1	0	2
STEBEN	1	0	0	0	0	0	0	1
SUFFOLK	1	1	0	1	3	0	6	12
SULLIVAN	0	0	0	0	0	1	1	2
TOMPKINS	0	1	1	0	1	0	0	3
ULSTER	0	0	1	0	0	1	1	3
WARREN	0	1	3	1	0	3	0	8
WESTCHESTER	0	1	0	0	0	1	1	3
WYOMING	0	0	0	0	1	0	0	1
Total	8	31	35	81	93	86	76	410

Includes cases sealed under CPL Article 160.58

Source: DCJS, CCH as of June 2016

# Making Drug Law Reform A Reality

Understanding and Implementing Drug Law Reform in New York -- Powered by the Center For Community Alternatives



**About CCA**

Center for  
Community  
Alternatives

The Center for Community Alternatives (CCA) promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services and public policy in pursuit of civil and human rights. CCA is pursuing the full implementation of the New York Drug Law Reforms through a grant from the Foundation to Promote Open Society.

[View my complete profile](#)

Tuesday, June 14, 2011

## Preparing for a Successful Conditional Sealing Motion

Perhaps the most underutilized portion of the 2009 Rockefeller Drug Law reform, CPL § 160.58 allows for the conditional sealing of felony and misdemeanor offenses defined in Articles 220 and 221 of the Penal Law and specified offenses defined in §410.91(5). In addition, a maximum of three prior misdemeanor PL §§ 220 and 221 convictions may be sealed. Conditional Sealing provides a meaningful second chance for individuals who have proven commitment to their rehabilitation. The process of Conditional Sealing under this section may be initiated *sua sponte* by the court, or much more likely, by the defendant's motion.

Before preparing a sealing motion, counsel should first determine whether the defendant is eligible for such relief. CPL § 160.58 lists the following three types of programs that, upon completion, can render a defendant eligible for conditional sealing:

- (i) a judicial diversion program under article 216 of the Criminal Procedure Law;
- (ii) one of the programs heretofore known as drug treatment alternative to prison; or
- (iii) another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision" as (i) and (ii).

The first category is self explanatory, and defendants are clearly eligible if they have completed a Judicial Diversion program under CPL article § 216. With regard to the second category, though the Legislature did not specifically define "programs heretofore known as drug treatment alternative to prison," this phrase is generally understood as meaning traditional drug courts and District Attorney sponsored diversion programs, commonly called DTAP programs. See e.g. Barry Kamins, *NYSBA Criminal Law Newsletter*, Fall 2009, at 6; Office of Court Administration, July 7, 2009 Memorandum to All Supreme Court Justices and County Court Judges Exercising Criminal Jurisdiction, at 3-4. With the third category, it is clear that the Legislature intended to expand the reach of conditional sealing beyond traditional judicial diversion and drug courts, and in so doing, opened the door to argue for sealing cases where defendants have completed treatment as a court-ordered condition of probation or where they have completed Shock Incarceration and the Willard Drug Treatment Program. All of these programs can be judicially ordered, constitute alternatives to a lengthy period of incarceration, and include substance abuse treatment and supervision. The Onondaga County Court has already ruled that court-ordered treatment as a condition of probation constitutes "another judicially sanctioned drug treatment program."

Finally, a defendant is not eligible for Conditional Sealing until he or she has also completed any imposed sentence.

Upon determining that the defendant is eligible for conditional sealing, the next steps require counsel to gather information and prepare the motion. When collecting information and writing a Conditional Sealing motion, counsel should keep in mind the factors the statute requires the judge to consider in making a decision regarding an eligible defendant. Specifically, CPL § 160.58(3) states that the judge "shall consider any relevant factor, including but not limited to" the following:

- (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions;
- (ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of the section;

**CCA JUSTICE STRATEGIES Co-Directors**

Alan Rosenthal, Esq.  
Patricia Warth, Esq.

Senior Project Manager  
Jeffrey G. Leibo, Esq.

**ALL DECISIONS WANTED!**

Please let us know about ANY decisions, whether reported or unreported, oral or written, by ANY judge in ANY New York jurisdiction regarding *Drug Law Reform* issues. No *DLRA* decision is insignificant to us.

**Blog Archive**

- 2012 (12)
- 2011 (21)
  - August (4)
  - July (2)
  - June (3)
    - In Two Brief But Strongly Worded Decisions, Court ...
  - SUPPORT FOR TREATMENT ALTERNATIVE S TO INCARCERATI O...
  - Preparing for a Successful Conditional Sealing Mot...
- April (2)
- March (2)
- February (4)
- January (4)
- 2010 (1)

**Useful Links**

- Center for Community Alternatives
- New York State Association of Criminal Defense Lawyers

- (iii) the defendant's criminal history; and
- (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety."

We encourage counsel to obtain the defendant's official criminal history. This will confirm that the primary offense is an eligible offense, and will also allow counsel to identify prior misdemeanor offenses that may also qualify for conditional sealing. Counsel should also obtain information evidencing the defendant's successful completion of the sentence(s) for each conviction to be sealed. If this information is not "reasonably available," a sworn affidavit is an acceptable alternative. It would seem that the affidavit may be sworn by the defendant, although this is not explicitly stated in the statute. Additionally, counsel should consider informing the court of any legal barriers to the job or occupation that the defendant wishes to pursue. But even more importantly, as a general matter, counsel should inform the court of recent research showing that 90-93% of employers now screen job applicants for criminal records. See e.g. Society for Human Resource Managers, *Background Checking: Conducting Criminal Background Checks* (Jan. 2010) (survey of its human resource manager members found that 92% regularly conduct criminal background checks on job applicants); National Employment Law Project (NELP), *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*, (March 2011) (survey of postings on Craig's list and found that most employers regularly include in their on-line job postings a warning that people with a criminal record "need not apply."). This information is useful in convincing the court that Conditional Sealing can go a long way in helping the defendant obtain stable, living-wage employment. Furthermore, proof of any counseling programs completed by the defendant should be included. Finally, any information showing the defendant in a positive light is helpful (e.g. character references, proof of community service, letters from counselors, evidence of job training).

The motion itself should specifically explain why the defendant is eligible for conditional sealing and why the defendant is a good candidate for this relief. If the defendant has completed a judicial diversion program under CPL § 216, or a drug court program, convincing the judge of your client's eligibility should not be difficult. On the other hand, if your client has completed another "judicially sanctioned drug treatment program," this task may be more challenging. This language is rendered meaningless if courts limit Conditional Sealing eligibility to completion of only Judicial Diversion, drug court, or DTAP; clearly the Legislature included this language to expand the reach of Conditional Sealing. CCA is happy to partner with lawyers who are willing to push for full implementation of this statute to include those who have completed judicially sanctioned programs such as judicially ordered Shock, Willard or judicially ordered treatment under the supervision of probation. A positive bench decision and a memo of law regarding this issue can be found on CCA's website, or by clicking on the links below:

[Minutes from Bench Decision Granting Conditional Sealing Where Treatment Completed as a Condition of Probation](#)

[Memo of Law in Support of Conditional Sealing: Treatment as a Condition of Probation](#)

Finally, in this area of law that is still new, it is important that the early cases generated on the topic are positive. Counsel should be careful in the selection of cases in which conditional sealing is requested. Attorneys can learn from cases such as *People v. Modesto*, 32 Misc3d 287. In *Modesto*, the Court denied the defendant's motion for conditional sealing. Although the defendant completed Shock as well as an inpatient treatment program while under parole supervision, neither of these programs were court ordered, and as such, not judicially sanctioned as § 160.58 requires. This alone would have been reason enough to deny the application. But the Court went further, and in what is nothing more than dicta, pointed out many perceived flaws with the application including the defendant's failure to provide his criminal history, any specific proof of adverse effect upon employment opportunities, or the defendant's failure to include a copy of the Certificate of Relief from Disabilities he claimed he had obtained. None of this information is required by the statute, but it does impose a heavy burden on applicants. We can only hope that other courts do not adopt the increased burden placed on Conditional Sealing applicants by the Judge in this decision. Additionally, the court complained that no character evidence was submitted on behalf of the defendant other than proof that he had completed business training. It is important to remember that CPL § 160.58(3) requires that the Judge consider the defendant's character in making a conditional sealing decision. As such, letters of recommendation may be important. Overall, this case illustrates the importance of adequate preparation and of carefully analyzing a case before filing a motion for Conditional Sealing to determine whether defendant is or is not an eligible and appropriate candidate.

- New York State Defenders Association
- New York Criminal Defense
- Open Society Institute
- The Correctional Association of New York

## **Criminal Procedure Law**

\* § 160.59 Sealing of certain convictions.

1. Definitions: As used in this section, the following terms shall have the following meanings:

(a) "Eligible offense" shall mean any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article six-C of the correction law. For the purposes of this section, where the defendant is convicted of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.

(b) "Sentencing judge" shall mean the judge who pronounced sentence upon the conviction under consideration, or if that judge is no longer sitting in a court in the jurisdiction in which the conviction was obtained, any other judge who is sitting in the criminal court where the judgment of conviction was entered.

1-a. The chief administrator of the courts shall, pursuant to section 10.40 of this chapter, prescribe a form application which may be used by a defendant to apply for sealing pursuant to this section. Such form application shall include all the essential elements required by this section to be included in an application for sealing. Nothing in this subdivision shall be read to require a defendant to use such form application to apply for sealing.

2. (a) A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or convictions sealed. If all offenses are offenses with the same classification, the application shall be made to the court in which the defendant was last convicted.

(b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the defendant has been convicted, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the defendant as to whether he or she has filed, or then intends to file, any application for sealing of any other eligible offense; (iii) a copy of any other such application that has been filed; (iv) a sworn statement as to the conviction or convictions for which relief is being sought; and (v) a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.

(c) A copy of any application for such sealing shall be served upon the district attorney of the county in which the conviction, or, if more than one, the convictions, was or were obtained. The district attorney shall notify the court within forty-five days if he or she objects to the application for sealing.

(d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is

filed in which case the application shall be assigned to the county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the defendant, including any sealed or suppressed records. The division of criminal justice services also shall include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the defendant.

3. The sentencing judge, or county or supreme court shall summarily deny the defendant's application when:

(a) the defendant is required to register as a sex offender pursuant to article six-C of the correction law; or

(b) the defendant has previously obtained sealing of the maximum number of convictions allowable under section 160.58 of the criminal procedure law; or

(c) the defendant has previously obtained sealing of the maximum number of convictions allowable under subdivision four of this section; or

(d) the time period specified in subdivision five of this section has not yet been satisfied; or

(e) the defendant has an undisposed arrest or charge pending; or

(f) the defendant was convicted of any crime after the date of the entry of judgement of the last conviction for which sealing is sought; or

(g) the defendant has failed to provide the court with the required sworn statement of the reasons why the court should grant the relief requested; or

(h) the defendant has been convicted of two or more felonies or more than two crimes.

4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, a defendant who stands convicted of up to two eligible offenses, may obtain sealing of no more than two eligible offenses but not more than one felony offense.

5. Any eligible offense may be sealed only after at least ten years have passed since the imposition of the sentence on the defendant's latest conviction or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the conviction for which the application for sealing is sought, shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.

6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the district attorney, the sentencing judge or county or supreme court shall conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application.

7. In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not

limited to:

(a) the amount of time that has elapsed since the defendant's last conviction;

(b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense;

(c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;

(d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs;

(e) any statements made by the victim of the offense for which the defendant is seeking relief;

(f) the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society; and

(g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law.

8. When a sentencing judge or county or supreme court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.

9. Records sealed pursuant to this section shall be made available to:

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

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

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

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

(e) the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 USC 921 (a) (3).

10. A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal

proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.

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

\* NB Effective October 7, 2017

## EXECUTIVE LAW § 296

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and

other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 **or 160.59** of the criminal procedure law.

## Comparison of Conditional Sealing and New Sealing Statute

<b><u>CPL § 160.58 (Conditional Sealing)</u></b>	<b><u>CPL § 160.59 (New Sealing Statute)</u></b>
<p><b>Eligible Offenses</b> Drug convictions and Willard eligible offenses. One felony and up to 3 prior eligible drug misdemeanor convictions.</p>	<p><b>Eligible Offenses</b> Any crime, but with a long list of exceptions:</p> <ul style="list-style-type: none"> <li>● Sex offenses</li> <li>● Art. 263 offenses</li> <li>● Class A felony</li> <li>● Conspiracy and attempt of offenses above</li> <li>● SORA registerable offenses</li> <li>● Homicides</li> <li>● Violent felony</li> </ul> <p>Limited to two offenses, only one of which can be a felony. Conviction of more than one eligible offense committed as part of the same transaction as defined in Penal Law § 40.10 (2) shall be considered one eligible offense.</p>
<p><b>Defendant Eligibility Criteria</b> “Successfully completed judicial diversion, DTAP, or judicially sanctioned drug treatment program of similar duration, requirements and level of supervision. Sentence completed. No arrest or charged offense pending.</p>	<p><b>Defendant Eligibility Criteria</b> Not eligible if convicted of two felonies or more than two crimes. No arrest or charged offense pending. Only after 10 years have passed since latest conviction. 10 years measured from date of latest release from incarceration. Any time incarcerated after conviction for which sealing is sought extends the 10 years.</p>
<p><b>Scope of Sealing</b> Current conviction plus up to 3 prior eligible drug misdemeanors in one motion. Sealing is conditional and unsealed upon new arrest.</p>	<p><b>Scope of Sealing</b> Maximum two offenses and only one felony. Separate application for each offense may be required. Sealing is not conditional and remains sealed upon new arrest.</p>
<p><b>Nature of Application</b> Motion made by defendant or court on its own motion.</p>	<p><b>Nature of Application</b> Chief administrator shall prescribe a form application, but defendant not required to use such form to apply for sealing.</p>

<p><b>To What Court</b> Motion made to court that sentenced the defendant to judicially sanctioned drug treatment.</p>	<p><b>To What Court</b> Application to sentencing judge. If two applications filed the applications shall be assigned to the county or supreme court of the county in which the criminal court is located. Can use one application for two separate convictions.</p>
<p><b>DA's Response</b> Statute requires court to give notice to DA, but best practice would seem to warrant service of defendant's motion on DA. The DA shall have reasonable opportunity to respond, which shall be not less than 30 days.</p>	<p><b>DA's Response</b> Application must be served on the DA. DA has 45 days to notify the court of objections to application for sealing.</p>
<p><b>Hearing</b> The court may conduct a hearing if requested by the defendant or the DA.</p>	<p><b>Hearing</b> If application is not summarily denied based upon the statutory criteria, and the application is opposed by the DA, the judge is required to hold a hearing. No hearing is required if the DA does not oppose the application.</p>
<p><b>Standard for Granting</b> Factors that must be considered by the court in making its determination whether to conditionally seal the defendant's records:</p> <ul style="list-style-type: none"> <li>● any relevant factors</li> <li>● the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions</li> <li>● the character of the defendant, including his or her completion of the judicially sanctioned treatment program</li> <li>● the defendant's criminal history</li> <li>● 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</li> </ul>	<p><b>Standard for Granting</b> Factors that must be considered by the court in considering a sealing application:</p> <ul style="list-style-type: none"> <li>● any relevant factors</li> <li>● the amount of time that has elapsed since the defendant's conviction</li> <li>● the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was an eligible offense</li> <li>● the circumstances and seriousness of any other offenses for which the applicant stands convicted</li> <li>● the character of the defendant, including any measures that defendant has taken toward rehabilitation, such as treatment programs, work, or schooling, and participating in community service or other volunteer programs</li> <li>● any statements by victim of the offense for which defendant is seeking relief</li> <li>● impact of sealing on rehabilitation and successful and productive reentry and reintegration into society</li> <li>● impact of sealing on public safety, public's confidence in and respect for the law</li> </ul>

<p><b>Sealed Records Available to:</b></p> <ul style="list-style-type: none"> <li>● the defendant or the defendant's designated agent</li> <li>● qualified agencies</li> <li>● any state or local officer or agency with the responsibility for the issuance of licenses to possess guns, when the person has made application for such a license</li> <li>● any prospective employer in relation to an application for employment as a police officer or peace officer</li> </ul>	<p><b>Sealed Records Available to:</b></p> <ul style="list-style-type: none"> <li>● the defendant or the defendant's designated agent</li> <li>● qualified agencies</li> <li>● any state or local officer or agency with the responsibility for the issuance of licenses to possess guns, when the person has made application for such a license</li> <li>● any prospective employer in relation to an application for employment as a police officer or peace officer</li> <li>● the criminal justice information services of the FBI, for purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or possess firearms as defined in 18 USC 921 (a) (3)</li> </ul>
<p><b>Sealing and Subsequent New Arrest</b> Any subsequent arrest or formal charge for a misdemeanor or felony shall cause the conditionally sealed record to be unsealed.</p>	<p><b>Sealing and Subsequent New Arrest</b> The record sealing is not conditional and is therefore not unsealed if arrested, however, the conviction may be considered for the purpose of any criminal proceeding in which the fact of a prior conviction would enhance the penalty or is an element of the offense charged.</p>
<p><b>Waiver of Sealing</b> There is no statutory prohibition against the defendant waiving conditional sealing as part of the plea agreement.</p>	<p><b>Waiver of Sealing</b> The statute prohibits the defendant from waiving eligibility for sealing as part of a plea agreement and such waiver is void and (un)enforceable.</p>
<p><b>Effect of Recent Conviction</b> A conviction for any offense after the last conviction for which sealing is sought does not statutorily make the applicant ineligible for conditional sealing.</p>	<p><b>Effect of Recent Conviction</b> The applicant is statutorily ineligible for sealing if convicted of any crime after the last conviction for which sealing is sought. (CPL § 160.59 (3)(f).</p>

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