



## Memorandum in Support

Senate PPGG, Part UU (S.4005-B)

March 23, 2023

AN ACT to amend the criminal procedure law, the executive law and the correction law, in relation to automatic sealing of certain convictions.

**LAW AND SECTIONS REFERRED TO:** Section 160.57 of Criminal Procedure Law; Section 845d, 837 & 296 of Executive Law and Section 9 of Correction Law

**The New York State Bar Association (NYSBA) supports the automatic sealing of certain criminal records as proposed in the Senate One-House budget, S.4005-B, Part UU.** The Senate proposal would allow people with conviction histories to meaningfully rejoin their communities after criminal legal system involvement. Specifically, the proposal would automatically seal convictions for most civil purposes after a 3-year waiting period for misdemeanors and traffic offenses and a 7-year period for felonies. The waiting period clock begins running at the end of incarceration, but individuals are not eligible for sealing until the waiting period has run and after completion of community supervision. People convicted of sex offenses are not eligible for sealing under this law.

The legislation carefully balances the harm of perpetual punishment for people with criminal records against society's legitimate interest in allowing access to prior records where absolutely necessary. Sealed records will only be made available to specified court actors and law enforcement agencies in limited circumstances, such as when the person with the sealed record is subject to a pending criminal action or where they are a witness in a criminal or civil proceeding, among others. Sealed records will also be made available to entities that are required by state or federal law to request a fingerprint-based check of criminal history information, to agencies that issue gun licenses, and to prospective employers of a police officer.

**The issue is one of justice, particularly racial justice.**

NYSBA membership addresses issues that confront people unable to afford counsel in family and criminal courts. Public defense clients are, often, people of color. As the Bar has previously noted, as attorneys we "have an obligation to confront the pervasive problem of racial injustice head on, and to identify effective measures to eradicate it." Attorneys and their clients confront racism and disparate outcomes at every level of the criminal justice system; that, in turn, is reflected in criminal records and the consequences of those records, which may affect jobs, housing, and all other aspects of a person's life, including Family Court matters, as observed by lawyers providing mandated representation there.

**Sealing and/or expungement are critical tools to protect poor people and people of color from a lifetime of collateral consequences.**

The devastating effects of a criminal record are well established,<sup>1</sup> and the collateral consequences of a criminal record are seemingly endless. According to the National Reentry Resource Center,

New York law imposes more than 1,200 consequences for people with criminal convictions, creating barriers to employment, housing, public assistance, accessing financial aid, serving on a jury, and professional licensing, among others.<sup>2</sup>

By virtue of New York's ongoing and historical policing and prosecution practices, these collateral consequences are more often imposed on people of color. In New York City, for example, 48 percent of those arrested for marijuana possession in 2017 were Black, 38 percent were Latinx, and only 9 percent were white. When policing and prosecution are skewed towards enforcement in Black and brown communities, and not white communities, it is those communities who bear the brunt of lifelong collateral consequences.

A record provides often-insurmountable barriers to becoming and remaining a self-sufficient, productive member of society after the sentence is served. The State Bar's Task Force on Release Planning has observed:

that decisions about sealing and expungement laws and other rights restoration processes should be informed by research clearly showing that people with convictions that are remote in time are no more likely than people without convictions to engage in criminal activity. With the passage of time, a conviction is no longer indicative of risk of offending and thus is not relevant to decisions about employment, housing, higher education, volunteer work, etc. This is true of all types of convictions, including violent felony and sex offense convictions. This research challenges all of us to ask whether it makes sense to require people to endure the lifetime of stigma associated with a criminal record, and thus forever be denied the essential features of a law-abiding and dignified life.

Without some end-date for the myriad consequences of a criminal conviction, even a short sentence becomes a form of life sentence. And for people already living with the challenges of systemic racism and poverty that, too often, underlie their involvement in the criminal system, the devastating burden of perpetual criminal records can be a final blow.

### **Additional Considerations**

#### *a. Sealing and Expungement Should Be Automatic*

When CPL 160.59 passed in 2017, legislators and advocates expected tens of thousands of people to benefit from the legislation. Sadly, as noted above, fewer than 3,000 people have benefited from

CPL 160.59. One of the major barriers to success is the statute's complicated application process. Attempting to clear our clients' records via CPL 160.59 has shown NYSBA members that for sealing and expungement to be meaningful, it must be automatic. That means that the state must create an algorithm to ensure that people who qualify for sealing or expungement have their records sealed without filing an application or paying a fee or appearing before a judge.

<sup>1</sup>See, e.g., U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* (2019), available at <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf?eType=EmailBlastContent&eld=d37030a2-bfe6-4784-866a-7db61d64f357>. Website visited on December 15, 2021.

<sup>2</sup>National Reentry Resource Center, *National Inventory of Collateral Consequence of Conviction*, available at <https://niccc.nationalreentryresourcecenter.org/consequences>. Website visited on December 15, 2021.

*b. Town and Village Justice Courts*

Legislation governing sealing and expungement should consider these local courts and ensure that any protections for accused or convicted people are extended to people who may appear before them. Similarly, people who work in these courts, including judges, prosecutors, and defenders, should have the same access (or lack of access) to sealed records that people who work in other courts across the state have.

*c. Protecting people whose cases are already sealed.*

There are many kinds of records that already should be sealed under existing law; yet, state agencies fail to properly update the sealed status in their records, and clients suffer as a result. For example, criminal history (RAP sheet) errors are exceedingly common. According to an examination of 3,499 RAP sheets by the Legal Action Center from 2008 to 2011, at least 30 percent of records contained at least one error, and some contained as many as ten or more.<sup>3</sup> RAP sheets often list dismissed cases that should have been sealed pursuant to CPL 160.50, convictions sealed pursuant to CPL 160.58 or 160.59, or youthful offender adjudications. When sealed cases are improperly listed on a person's RAP sheet, such cases can unduly influence the judge or prosecutor in critical decisions such as setting bail, deciding whether to let a person participate in diversion, or plea negotiations. It is critical that legislation related to sealing and expungement address New York's ongoing failure to properly seal and update records across multiple state and local agencies.

Based on the foregoing, NYSBA strongly **SUPPORTS** the Senate's budget proposal to allow the automatic sealing of criminal records.

<sup>3</sup> Legal Action Center, "The Problem of RAP Sheet Errors: An Analysis by the Legal Action Center," (2011), available at [https://www.lac.org/assets/files/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf).