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SIGNED, SEALED AND DELIVERED: SEALING AND EXPUNGING CRIMINAL RECORDS

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Introduction:

Criminal defendants sometimes experience the lingering adverse effects that an arrest can have on their reputations (and employment prospects) even when their case is resolved in their favor with an acquittal or a dismissal of the charge(s) filed against them. There is something about a formal accusation of criminal wrongdoing (and the negative attention that it can bring), that may well cause the accused to feel that others will always look at (and treat) him/her a little differently, if not suspiciously, even though he or she may have been exonerated (or at least guilt was never proven or acknowledged) in a court of law.

Recognizing that the cloud of criminality can hang over an individual even though an accusation has not been sustained (Hynes v Karassik 47 NY2d 659 (1979), the Criminal Procedure Law provides for sealing and, in some instances (e.g. Marijuana violations), expungement of criminal records (including destruction or return of photographs and fingerprints) where the case has been terminated in the accused's favor, whether by dismissal (including an ACD upon actual dismissal), acquittal, trial order of dismissal, an order setting aside a guilty verdict or vacating a judgment of conviction, an order invalidating a conviction under CPLR Article 70, a decision by the arresting police agency not to proceed with charges or a declination of prosecution by the District Attorney before an accusatory instrument has been filed with the court. (CPL160.50[3]).

It is important to note that to be considered favorable for purposes of sealing, a disposition need NOT be on the merits and can be based on grounds unrelated to the issue of guilt or innocence (e.g dismissal in the interest of justice or due to a defect in the grand jury proceedings without leave to re-present the case). (see People v Wiltshire 23 AD3d 86 [1st dep't 2005]).

The effect of a termination of a criminal action in the accused's favor per CPL 160.50(2) is to NULLIFY the arrest and any prosecution and to return the erstwhile defendant, in the eyes of law (if not in the court of public or private opinion), to the status that he/she enjoyed before being subject to the criminal process. As noted in Harper v Angiolillo 89 NY2d 761 (1991), the breadth of the sealing requirement is BROAD so that the defendant may pursue employment, education, professional licensing and insurance applications UNTAINTED by the STIGMA of criminal prosecution. (see also People v Gallina 110 AD2d 847 [2d dep't 1985]).

And, except as otherwise may be required by statute (e.g. MHL 10.08[c] in an Article 10 proceeding/ Matter of State on NY v John S. 23 NY3d 326 [2014]), or by an order of a superior court upon a proper showing of necessity by an agency (e.g. Attorney Grievance Committee), pursuant to an investigative mandate (e.g. to investigate attorney misconduct following an acquittal in a criminal case/Matter of Dondi 63 NY2d 331 [1984]), records may not be unsealed and the individual need not disclose information about the arrest and prosecution.

BACK TO THE WAY IT WAS: CPL 160.60

CPL 160.60 expressly states that upon termination of a criminal action/proceeding in the ACCUSED'S favor per CPL 160.50(2), the arrest and prosecution SHALL BE DEEMED A NULLITY AND THE ACCUSED SHALL BE RESTORED, IN CONTEMPLATION OF LAW, TO THE STATUS HE OCCUPIED BEFORE THE ARREST AND PROSECUTION.

MUM'S THE WORD;

The arrest and prosecution SHALL NOT OPERATE AS A DISQUALIFICATION of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.

In the same vein, when an criminal action terminates in the accused's favor, Executive Law 296(16) states that it is an UNLAWFUL DISCRIMINATORY PRACTICE (barring some exclusions and statutory provisions), for any person, agency, bureau, corporation or association, including the state, to inquire in any capacity about a non-pending criminal case, arrest or accusation THAT ENDED IN THE APPLICANT'S FAVOR. This pertains to matters of employment, licensing, or obtaining credit or insurance.

The law applies whether any such inquiry is formal (e.g. on an application), or informal (during the course of an interview). If asked, the individual is within his/her rights to speak as if the matter never happened.

Other dispositions deemed to be favorable to the accused (or otherwise supporting the sealing of records) include: convictions for LOW-LEVEL MARIJUANA OFFENSES (PL 221.05, 221.10 per CPL 160.50[3][k]), NON-CRIMINAL OFFENSES (CPL 160.55), certain CONTROLLED SUBSTANCE /DESIGNATED OFFENSES disposed of by JUDICIAL DIVERSION (or other judicially sanctioned rehabilitation program) and completed sentence (CPL 160.58), convictions for which sentence was imposed (or defendant released from prison) 10 years earlier (CPL 160.59), a Youthful Offender (YO) adjudication (CPL 720.35) and proceedings involving JUVENILE OFFENDERS that are TRANSFERRED TO FAMILY COURT. (CPL 725.05).

Criminal records are AUTOMATICALLY SEALED when the defendant obtains a favorable disposition per CPL 160.50. That means that the accusatory instrument and official documents and records created in furtherance of or as part of the criminal prosecution (People v McGurk 229 AD2d 895 [3d dep't 1996]), (including judgments and orders but excluding published decisions/opinions), are SEALED (including printable and non-printable offenses).

The COURT CLERK must then send SEALING NOTIFICATIONS to: the the District Attorney, all pertinent POLICE DEPARTMENTS/AGENCIES and to the DCJS (if a finger-printable offense).

Save for certain Marijuana offenses (PL 221.05 and 221.10), the records are SEALED BUT NOT EXPUNGED (CPL1.20[5]: marked as such and destroyed upon written request of the defendant). As such, they are kept from public view and the fingerprint, palm prints and photographs are DESTROYED or returned to the accused. If DCJS or police agencies have forwarded the defendants record to the FBI or to out-of state agencies, they must notify such agencies to destroy or return such records to DCJS to take appropriate action.

It should be noted that if DCJS is already in possession of an unsealed record (i.e. record of arrests and prosecution i.e. RAP SHEET) of the accused person (arising from a different matter), it may retain a single set of digital images of the individual's finger/palm prints on file in order to avoid having to create a new set of such prints every time he/she is arrested and fingerprinted.

Unlike DCJS record searches which require fingerprints, a search of court-house records only require the defendant's correct name and date of birth. They should not disclose information on pending YO eligible cases, cases removed to Family Court, and sealed cases (though violations may well appear in a court-record file).

If a record search turns up a record that was or should have been sealed, counsel should obtain a CERTIFICATE OF DISPOSITION from the COURT CLERK and send it with a letter to DCJS. If the file lacks a SEALED stamp, the clerk should mark it so (if an oversight), and if the case was not sealed (and it is sealing eligible), counsel should move the court to have it sealed.

THE STATUTES:

CPL 160.50 ORDER UPON TERMINATION OF CRIMINAL ACTION IN ACCUSED'S FAVOR:

3. For purposes of subdivision 1 (pertaining to sealing of records and destruction or return of photographs and finger prints), a criminal action or proceeding against a person shall be CONSIDERED TERMINATED IN FAVOR OF SUCH PERSON where:

a. an order DISMISSING THE ENTIRE ACCUSATORY INSTRUMENT (AI) per CPL 470 was entered;

b. an order to dismiss the AI per CPL 170.30 (local court AI'S), 170.50 (motion to dismiss prosecutor's information [PI] in Superior Court, 170.55 (per an ACD), 170.56 (marijuana-based ACD), 180.70 (upon felony complaint), 210.20 (motion to dismiss or reduce indictment), 210.46 (marijuana-based ACD in superior court) or 210.47 (ACD in superior court), was entered or deemed entered, or an order terminating the prosecution was entered to CPL 180.85 (upon a felony complaint not presented to a grand jury), and the People have not appealed from such order or the People have obtained an adverse determination of an appeal from such order; or

c. a VERDICT OF COMPLETE ACQUITTAL WAS OBTAINED per CPL 330.10; or

d. a TRIAL ORDER OF DISMISSAL (TOD), per CPL 290.10 or 360.40 was entered and the People have not appealed from such order, or have obtained an adverse determination of an appeal from such order; or

e. an ORDER SETTING ASIDE A VERDICT per CPL 330.30 or 370.10 was entered and the People have not appealed from such order or have obtained an adverse determination of an appeal from such order, and NO NEW TRIAL HAS BEEN ORDERED; or

f. an ORDER VACATING THE JUDGMENT per CPL 440.10 was entered and the People have not appealed from such order or have obtained an adverse determination of an appeal from such order, and NO NEW TRIAL HAS BEEN ORDERED; or

g. an ORDER OF DISCHARGE per CPLR ART. 70 was entered on a ground which INVALIDATES THE CONVICTION, and the People have not appealed from such order or have obtained an adverse determination of an appeal from such order; or

h. where all charges have been dismissed for LEGAL INSUFFICIENCY before the GRAND JURY (per CPL 190.75). In such case, the clerk of the court that empaneled the grand jury shall SERVE A CERTIFICATE OF SUCH DISPOSITION upon DCJS and the appropriate police department/law enforcement agencies which, upon receipt, shall comply with CPL 160.50[1]-[d] pertaining to destruction and/or return of photos and prints. Note that a dismissal upon the grand jury minutes granted with LEAVE TO RE-PRESENT the case to a grand jury, and where a felony complaint had been filed to commence the case, the dismissal does not yet qualify as a termination of the matter in the accused's favor. (People v Wiltshire supra); or

i. where the PROSECUTOR elects NOT TO PROSECUTE PRIOR TO THE FILING OF AN ACCUSATORY INSTRUMENT IN THE LOCAL COURT. In such case, the DA shall serve a CERTIFICATE OF SUCH DISPOSITION upon DCJS and the appropriate PD/Law Enforcement Agency which, upon receipt, shall comply with the destruction/return of photos and prints provisions of CPL 160.50(1)(a-d).

j. where the ARRESTING POLICE AGENCY, following arrest (and after the forwarding of the defendant's finger prints to DCJS) but BEFORE an AI is filed in the local criminal court, the police agency ELECTS NOT TO PROCEED FURTHER. In such case, the HEAD of the arresting agency shall SERVE A CERTIFICATE OF SUCH DISPOSITION upon DCJS which, upon receipt, shall comply with CPL 160.50(1)(a-d).

K. SEALING AND EXPUNGEMENT OF LOW LEVEL MARIJUANA OFFENSES: 🌿🚬⚖️

In August of 2019, as a 43-year follow-up to 1977 legislation which decriminalized small amounts of marijuana, CPL 160.50(3)(k) was amended to re-designate and reduce PL 220.10 (Criminal Possession of Marijuana 5th degree) from a Class B misdemeanor (for possession of a burning joint in public or over grams), to a violation (now Unlawful Possession of Marijuana 1st degree) for possession of between one and two ounces of marijuana. The penalty is a fine up to $200.00.

Possession of up to one ounce qualifies as the violation Unlawful Possession 2d degree (PL 221.05) with a fine of up to $50.00. BOTH VIOLATIONS ARE SUBJECT TO SEALING AND EXPUNGEMENT per CPL 160.50(3)(k) and 5 respectively.

CPL 160.50(3)(k) states that the following matters will be deemed favorably terminated (and subject to sealing and expungement:

i. where the conviction was for PL Art. 220 or PL 240.36 (Loitering with others in a public place for purpose of possessing or using a controlled substance) PRIOR to the effective date of PL Art 221 (7/29/77), and the SOLE CONTROLLED SUBSTANCE INVOLVED WAS MARIJUANA , AND THE CONVICTION WAS FOR A VIOLATION; OR

ii. the conviction is for an OFFENSE DEFINED IN PL 221.05 0R 221.10 PRIOR TO THE EFFECTIVE DATE OF THIS AMENDMENT (8/28/10); or

iii. the conviction is for an OFFENSE DEFINED IN PL 221.05 AND 221.10 (since 8/28/19).

This section also states that : NO DEFENDANT SHALL BE REQUIRED OR PERMITTED TO WAIVE ELIGIBILITY FOR SEALING OR EXPUNGEMENT AS PART OF ANY PLEA AND/OR SENTENCE AGREEMENT RELATED TO CONVICTIONS FOR PL 221.05 0RV221.10. (ANY SUCH WAIVER IS VOID AND WHOLLY UNENFORCEABLE).

l. an order dismissing an action per CPL 215.40 (dismissal upon expiration of ACD period).

EXPUNGEMENT CPL 160.50(5):

When records of an arrest, prosecution and disposition of charges set forth in CPL 160.50(3)(k)(i-iii) above are EXPUNGED, the prosecution is deemed a NULLITY and the defendant is restored in status quo ante (to his/her pre-arrest status). As previously noted, neither the arrest nor prosecution can serve to disqualify the individual from pursuing any lawful activity, occupation or profession, and, except where a statute or a superior court court directs otherwise, the individual cannot be compelled to divulge information pertaining to such matter.

Pursuant to subdivision 5(a), the conviction SHALL BE VACATED AND DISMISSED, and all related records shall be EXPUNGED. All such records for an offense that predates the effective date of the 2019 amendment SHALL BE PROMPTLY EXPUNGED and, in any event, no later than ONE YEAR after the effective date. (8/28/19).

(b). i. The chief administrator of the courts shall PROMPTLY NOTIFY DCJS and the HEADS OF ALL APPROPRIATE PD'S/LAW ENFORCEMENT AGENCIES, DA'S OFFICE of ALL CONVICTIONS THAT HAVE BEEN VACATED AND DISMISSED per paragraph a above, and that ALL RECORDS RELATED TO SUCH CONVICTION SHALL BE EXPUNGED AND THE MATTER SHALL BE CONSIDERED TERMINATED IN THE DEFENDANT'S FAVOR AND DEEMED A NULLITY, HAVING BEEN RENDERED LEGALLY INVALID.

Upon receipt of such notice of vacatur, dismissal and expungement, all records relating to such conviction or the criminal action/proceeding shall be MARKED AS EXPUNGED BY CONSPICUOUSLY INDICATING ON THE FACE OF THE RECORD that the record has been so designated.

UPON WRITTEN REQUEST OF THE DEFENDANT OR HIS/HER DESIGNATED AGENT, SUCH RECORDS SHALL BE DESTROYED. SUCH RECORDS AND PAPERS SHALL NOT BE MADE AVAILABLE TO ANY PERSON OTHER THAN THE DEFENDANT OR HIS/HER DESIGNATED AGENT.

ii. Where automatic vacatur, dismissal and expungement (INCLUDING RECORD DESTRUCTION, IF REQUESTED), is required by this subdivision BUT any record of the NYS court system HAS NOT YET BEEN UPDATED to reflect same, (A) notwithstanding any other provision of law (except CPL 160.50[1][d] and EL 837[4][e]:

1. when DCJS searches its criminal history records (maintained per EL837[6]), and returns a report thereon, ALL REFERENCES TO A CONVICTION REFERENCED IN CPL 160.50(3)(k)(i-iii) (pertaining to marijuana violations), SHALL BE EXCLUDED FROM SUCH REPORT; AND
2. the CHIEF ADMINISTRATOR OF THE COURTS SHALL DEVELOP AND PROMULGATE RULES TO ENSURE THAT NO WRITTEN OR ELECTRONIC REPORT OF A CRIMINAL HISTORY RECORD SEARCH CONDUCTED BY OCA CONTAINS INFORMATION RELATING TO SUCH CONVICTION(S); and

B. Where court records relevant to such matter cannot be located or have been destroyed, and a person or his/her attorney presents to an appropriate court employee a FINGER PRINT

RECORD OF DCJS, OR A COPY OF A COURT DISPOSITION RECORD or other relevant court record, indicating that a criminal action/proceeding against him/her was terminated by a conviction of an offense referenced in CPL 160.50(3)(k), then, PROMPTLY (and, in any event, WITHIN 30 DAYS OF SUCH NOTICE TO THE COURT EMPLOYEE), the chief court administrator or his/her designee SHALL ASSURE THAT SUCH VACATUR, DISMISSAL AND EXPUNGEMENT (INCLUDING RECORD DESTRUCTION, IF REQUESTED), HAVE BEEN COMPLETED PER SUB-PARAGRAPH i ABOVE.

c. Vacatur, dismissal and expungement is WITHOUT PREJUDICE to a person (or his/her attorney) seeking further relief (if necessary) under CPL Article 440. (This section does not diminish or abrogate any right or remedy otherwise available).

d. OCA and DCJS SHALL DEVELOP AN AFFIRMATIVE INFORMATION CAMPAIGN AND WIDELY DISSEMINATE TO THE PUBLIC, THROUGH ITS WEBSITE, PSA'S AND OTHER MEANS (in multiple languages and through multiple outlets), INFORMATION CONCERNING THE EXPUNGEMENT, VACATUR AND RE-SENTENCING OF MARIJUANA CONVICTIONS, INCLUDING BUT NOT LIMITED TO THE AUTOMATIC EXPUNGEMENT OF CERTAIN PAST CONVICTIONS, THE MEANS BY WHICH AN INDIVIDUAL MAY FILE A MOTION FOR VACATUR, DISMISSAL AND EXPUNGEMENT OF CERTAIN PAST CONVICTIONS, AND THE IMPACT OF SUCH CHANGES ON SUCH PERSON'S CRIMINAL HISTORY RECORDS.

TWO OUNCES ARE THE LIMIT FOR SEALABLE AND EXPUNGEABLE MARIJUANA VIOLATIONS UNDER PL 221.05 AND 221.10:

PL 221.05 (2d degree possession), proscribes (but does not criminalize) the knowing and unlawful possession of marijuana, and PL 221.10 states that a person is guilty of Unlawful Possession 1st degree (also a violation), when he/she knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances having an AGGREGATE WEIGHT of more than ONE OUNCE of marijuana.

Possession of Marijuana becomes CRIMINAL (i.e. a class A misdemeanor) when a person knowingly and unlawfully possesses MORE THAN 2 OUNCES (in the aggregate) of Marijuana.

ORDER UPON TERMINATION OF CRIMINAL ACTION IN FAVOR OF THE ACCUSED CPL 160.50 (TERMINATION AND SEALING):

1. Upon such order per subdivision 3 (set forth above), UNLESS THE DA, UPON MOTION WITH NOT LESS THAN FIVE (5) NOTICE TO THE DEFENDANT (or his/her attorney), CONVINCES THE COURT THAT THE INTERESTS OF JUSTICE REQUIRE OTHERWISE (OR THE COURT UPON AT LEAST FIVE DAYS NOTICE, SO DETERMINES AND STATES ITS REASONS [FOR NOT SEALING] ON THE RECORD), the record of such proceeding SHALL BE SEALED,

   and the CLERK of the court (where the case was terminated), SHALL IMMEDIATELY NOTIFY DCJS AND ALL HEADS OF APPROPRIATE PD'S AND LAW ENFORCEMENT AGENCIES THAT THE ACTION HAS BEEN TERMINATED IN THE ACCUSED'S FAVOR and, unless the court determines otherwise, that the record of such action/proceeding SHALL BE SEALED.

DESTRUCTION OR RETURN OF PHOTOGRAPHS AND FINGER PRINTS ETC:

Upon receipt of such notification of TERMINATION AND SEALING:

a. every photograph of such person (and photo plates or proofs), and all finger/palm prints taken or made of such person pursuant to this article in regard to the action/proceeding terminated, (EXCEPT A DISMISSAL PER CPL 170.56 [MARIJUANA ACD] or CPL 210.46 [MARIJUANA ACD IN SUPERIOR COURT], and all duplicate copies thereof, EXCEPT A DIGITAL FINGERPRINT IMAGE WHERE AUTHORIZED PER SUBDIVISION E (finger print card already on file at DCJS on a matter unsealed per CPL 160.50 or 160.55), SHALL FORTHWITH BE (at the discretion of the recipient agency), EITHER DESTROYED OR RETURNED TO SUCH PERSON (or to the attorney who represented such person when the action/proceeding was terminated) at the address provided by such person or his/her attorney during such action/proceeding, by DCJS, and by ANY PD/LAW ENFORCEMENT AGENCY HAVING ANY SUCH PHOTOGRAPH, PLATE OR PROOF, PALM OR FINGERPRINTS UNDER IN ITS POSSESSION OR UNDER ITS CONTROL.

b. any PD or law enforcement agency, (including DCJS), which forwarded copies of any such photographs, plates, proofs or prints (including those relating to cases dismissed per CPL 170.56 or 210.46) to any US agency (e.g. FBI) or any other state or other outside jurisdiction SHALL FORTHWITH FORMALLY REQUEST IN WRITING THAT ALL SUCH COPIES BE DESTROYED OR RETURNED TO THE PD/LAW ENFORCEMENT AGENCY WHICH FORWARDED THEM AND, IF RETURNED, SUCH PD/AGENCY SHALL, AT ITS DISCRETION, EITHER DESTROY OR RETURN THEM, EXCEPT THAT THOSE RELATING TO DISMISSALS PER CPL 170.56 OR 210.46 SHALL NOT BE DESTROYED OR RETURNED BY SUCH DEPARTMENT/AGENCY.

c. all OFFICIAL RECORDS AND PAPERS, INCLUDING JUDGMENTS AND ORDERS OF A COURT (excluding published court decisions/opinions or records and briefs on appeal, relating to the arrest or prosecution, (including duplicates and copies), on file with DCJS, ANY COURT, POLICE AGENCY OR DA'S OFFICE SHALL BE SEALED AND NOT MADE AVAILABLE TO ANY PERSON OR PUBLIC/PRIVATE AGENCY;

ACCESS TO SEALED RECORDS:

d. such records SHALL BE MADE AVAILABLE TO THE ACCUSED OR HIS/HER DESIGNATED AGENT, AND SHALL BE MADE AVAILABLE TO:

i. A PROSECUTOR IN ANY PROCEEDING IN WHICH THE ACCUSED HAS MOVED PER CPL 170.56 OR 210.46 (MARIJUANA ACD'S). (Such access is required to help the DA determine whether the defendant is DISQUALIFIED from obtaining such relief because of a he/she was previously granted an ACD. DA access to sealed records of the defendant is limited. In Matter of Kathleen B v Cataldo 5 NY3d 196 [2005], the Court held that the People should not be permitted to unseal a defendant's prior records in order to provide the court with information about the defendant at sentencing).

ii. A LAW ENFORCEMENT AGENCY (NOT INCLUDING THE DA'S OFFICE), UPON EX PARTE MOTION IN ANY SUPERIOR COURT, OR IN A CITY COURT WHICH SEALED SUCH RECORD, IF SUCH AGENCY SATISFIES THE COURT THAT JUSTICE REQUIRES THAT SUCH RECORDS BE MADE AVAILABLE TO IT. (An application to unseal a record sealed by a TOWN OR VILLAGE COURT MUST BE MADE IN SUPERIOR COURT); or

iii. any STATE OR LOCAL OFFICER/AGENCY responsible for the ISSUANCE OF LICENSES TO POSSESS GUNS (when the accused has applied for such license); or

iv. NYS DOCCS when the accused is ON PAROLE SUPERVISION (per conditional release or parole board release), and THE ARREST WHICH IS THE SUBJECT IF THE INQUIRY OCCURRED WHILE HE/SHE WAS ON PAROLE; or

v. any PROSPECTIVE EMPLOYER OF A POLICE/PEACE OFFICER WHERE THE ACCUSED HAS APPLIED FOR SUCH POSITION. (The applicant is also entitled to receive a copy of ALL RECORDS OBTAINED PER THIS SECTION AND AFFORDED AN OPPORTUNITY TO PROVIDE AN EXPLANATION); or

vi. the PROBATION DEPARTMENT RESPONSIBLE FOR SUPERVISING THE ACCUSED, AND THE ARREST WHICH IS THE SUBJECT OF THE INQUIRY OCCURRED WHILE THE ACCUSED WAS UNDER SUCH SUPERVISION; and

e. where fingerprints subject to this section have been received by DCJS and FILED AS A DIGITAL IMAGE, SUCH IMAGES MAY BE RETAINED (BY DCJS) IF A FINGERPRINT CARD OF THE INDIVIDUAL (which was NOT SEALED per CPL 160.50 or 160.55), IS ALREADY ON FILE WITH DCJS.

2. A REPORT of the TERMINATION of the action/proceeding (submitted by the CLERK OF THE COURT) SHALL BE SUFFICIENT NOTICE OF SEALING TO DCJS UNLESS THE REPORT ALSO INDICATES THAT THE COURT ORDERED NON-SEALING OF THE RECORD IN THE INTEREST OF JUSTICE. WHERE THE COURT DETERMINES PER CPL 160.50(1) THAT SEALING IS NOT IN THE INTEREST OF JUSTICE, THE CLERK SHALL INCLUDE NOTIFICATION OF THAT DETERMINATION IN ANY REPORT TO DCJS OF THE DISPOSITION OF THE ACTION/PROCEEDING.

4. A person in whose favor a criminal/action proceeding was terminated per CPL 160.50(3)(a-h) PRIOR TO 8/28/19 (effective date), MAY, UPON MOTION, APPLY TO THE COURT WHERE THE TERMINATION OCCURRED UPON NOT LESS THAN 20 DAYS NOTICE TO THE DA, FOR AN ORDER GRANTING RELIEF TO THE ACCUSED PER CPL 160.50(1), and such order SHALL BE GRANTED UNLESS THE DA SATISFIES THE COURT THAT THE INTERESTS OF JUSTICE REQUIRE OTHERWISE.

A person in whose favor an action/proceeding was terminated per CPL 160.50(3)(i) (DA DECIDES NOT TO PROSECUTE) or j (POLICE DECIDE NOT TO PROCEED), PRIOR TO 8/28/19, MAY APPLY TO THE APPROPRIATE PROSECUTOR OR POLICE AGENCY FOR A CERTIFICATION (as described in i or j), GRANTING TO SUCH PERSON THE RELIEF SOUGHT THEREIN, AND SUCH CERTIFICATION SHALL BE GRANTED.

It should be noted that the CPL does NOT provide for an appeal from a determination per CPL 160.50. Although it relates to a criminal matter, the sealing of records is deemed to be a CIVIL PROCEEDING, (Hynes v Karassik supra 47 NY2d at 661), and as such, it is appealable per the CPLR. (People v McLaughlin 65 NY2d 687 [1985]).

ORDER UPON TERMINATION OF CRIMINAL ACTION BY CONVICTION FOR A NON-CRIMINAL OFFENSE. CPL 160.55.

The sealing provisions of this statute apply to a defendant who has been CONVICTED OF A TRAFFIC INFRACTION or VIOLATION (e.g. Disorderly Conduct [PL240.20], Trespass [PL140.05]), no matter what level offense he/she was charged with in the first place. Two exceptions are Loitering for Purposes of Prostitution (PL 240.37) and DWAI (VTL 1192-1).

Like CPL 160.50, sealing applies to photos, prints etc and the agencies in possession of them (e.g. DCJS, PD'S), must either DESTROY OR RETURN THEM, not because of a favorable termination as with CPL 160.50, but because the defendant has now been convicted of a non-printable offense. It should be noted, however, that that the "'sealing of all official records and papers" on file with DCJS, the PD and the DA'S OFFICE DOES NOT (UNLIKE CPL 160.50), include RECORDS OF A COURT. (CPL 160.55[1][c]). (See William C. Donnino Practice Commentary to CPL 160.55, McKinney's Vol 11A, pg. 459).

CPL 160.55(1)(d)(v) permits access to sealed records where the defendant was convicted of a Harassment 2d degree violation involving a family member (PL 240.26/CPL 530.11), but does NOT permit access to prospective employers (PD) where the defendant applies for a position as a police/peace officer. (People v FB 155 AD3d 1 [1st dep't 2017]). And as with CPL 160.50, the DA does NOT qualify as a law enforcement officer for purposes of access to sealed records.

Subdivision 2 provides the same mechanism for notification by the court clerk to the appropriate agencies, and since 2019, DCJS must seal any records pertaining to violations (excluding loitering for prostitution and DWAI), or traffic infractions which pre-date 11/1/91.

Subdivision 3 provides retroactive sealing relief to those convicted before the enactment of this section (as with CPL 160.50[4]), and CPL 160.55 (4) EXCLUDES MARIJUANA CONVICTIONS which are covered by CPL 160.50(3)(k).

Subdivision 5 pertains to persons under 21 who operate a motor vehicle (or vessel) after consuming alcohol. (VTL 1192-a and NAV. LAW 49[b]). The purpose of this section is to spare young offenders any criminal conviction if they accept responsibility and agree (with the DA'S consent if the action was commenced in criminal court), to be subject to the civil administrative process and penalties of the DMV.

The court clerk then notifies the appropriate agencies to SEAL THE CASE (as per CPL 160.50[1][a-c]) which occurs when the defendant turns 21 (or three years from the offense date whichever is later).

Where the case begins as an administrative proceeding and there is a finding in the ACCUSED'S favor, the DMV (per CPL 160.55[5][c], MUST NOTIFY the appropriate agencies to seal the case at the appropriate time. Such notice should be given ASAP (but, in any case, no later than three years after the offense or when the defendant turns 21, whichever is later).

As with sealings per CPL 160.50, Executive Law 296(6) is incorporated to make it unlawful to discriminate (in connection with licensing, employment, obtaining credit or insurance) by inquiring about a violation that was sealed under this statute.

THE STATUTE CPL 160.55;

The language of CPL 160.55 is, in many respects, identical to CPL 160.50. In substance it states that:

1. Regardless of the level of initial offense, upon termination of the action by conviction of a traffic offense or violation (other than loitering for prostitution or DWAI), UNLESS the DA persuades the court, on 5 days notice, or the COURT, on its own motion upon 5 days notice, determines that the INTERESTS OF JUSTICE require otherwise, the CLERK SHALL IMMEDIATELY NOTIFY DCJS and all appropriate PD/POLICE AGENCY HEADS THAT THE ACTION HAS BEEN TERMINATED BY SUCH CONVICTION. UPON RECEIPT OF SUCH NOTIFICATION:

a. every photograph and finger/palm print of such person and copies thereof (excluding a digital fingerprint image where there is already an unsealed print card on record), EXCEPT FOR PRINT CARDS RELATING TO A CONVICTION FOR HARASSMENT 2d DEGREE INVOLVING A FAMILY/SAME HOUSEHOLD MEMBER AS VICTIM, (AND DETERMINED TO BE A FAMILY OFFENSE UPON NOTICE PER CPL 170.10[8-a]), SHALL FORTHWITH BE, AT THE DISCRETION OF THE RECIPIENT AGENCY, EITHER DESTROYED OR RETURNED TO SUCH PERSON AT THE TIME OF TERMINATION OF THE ACTION, (at the address provided by the defendant or his/her attorney during the action), BY DCJS and by any PD/AGENCY having such photographs and prints in its possession;

b. any PD/AGENCY including DCJS which forwarded photos/prints (or copies) to any US AGENCY (e.g. FBI), or of any other state outside NYS, SHALL FORTHWITH FORMALLY REQUEST IN WRITING that all such copies be DESTROYED OR RETURNED TO THE PD/AGENCY which forwarded them, and upon receipt, such agency shall either destroy or return them;

c. ALL OFFICIAL RECORDS AND PAPERS RELATING TO THE ARREST OR PROSECUTION ON FILE WITH DCJS, POLICE AGENCY OR DA'S OFFICE SHALL BE SEALED AND NOT MADE AVAILABLE TO ANY PERSON OR PUBLIC/PRIVATE AGENCY;

PARTIES WITH ACCESS TO SEALED RECORDS:

d. the records referred to in paragraph c above SHALL BE MADE AVAILABLE TO:
ACCUSED OR HIS/HER DESIGNATED AGENT;
i. PROSECUTOR in any proceeding where the accused has moved for an ACD per CPL 170.56 or 210.46; or
ii. a LAW ENFORCEMENT agency upon ex parte motion in superior court (or in a city court which granted sealing) upon proof that JUSTICE REQUIRES such disclosure;
iii. STATE/LOCAL OFFICER/AGENCY THAT ISSUES LICENSES TO POSSESS GUNS AND THE ACCUSED HAS APPLIED FOR SUCH LICENSE; or
iv. NYS DOCCS and the defendant is on parole and the arrest which is the subject of the inquiry occurred occurred while he/she is on parole supervision; or

v. the probation department supervising the defendant and the arrest occurred while he/she was under supervision; or

vi. a POLICE AGENCY, PROBATION DEPARTMENT, SHERIFF'S OFFICE, DA'S OFFICE CORRECTIONS DEPARTMENT OF ANY MUNICIPALITY AND PAROLE DEPARTMENT, FOR LAW ENFORCEMENT PURPOSES, UPON ARREST IN INSTANCES WHERE THE DEFENDANT

STANDS CONVICTED OF HARASSMENT 2D DEGREE COMMITTED AGAINST A FAMILY/ HOUSEHOLD MEMBER AND DETERMINED PER CPL 170.10(8-a); and

e. where fingerprints subject to this section have been received and filed by DCJS as DIGITAL IMAGES, such images may be RETAINED as long as a fingerprint card of such individual is on file with DCJS which was NOT SEALED per CPL 160.50.

2. A REPORT of the termination of the action by conviction of a traffic infraction or violation (excluding loitering for prosecution and DWAI), SHALL BE SUFFICIENT NOTICE OF SEALING to DCJS UNLESS the court, as set forth in such report, directed that the record NOT BE SEALED in the interests of justice. Where the court so determines, the clerk SHALL INCLUDE NOTIFICATION OF THAT DETERMINATION in any report of the disposition to DCJS.

When the defendant has been FOUND GUILTY OF HARASSMENT 2d DEGREE (and it was determined per CPL 170.10 that such violation was COMMITTED AGAINST A FAMILY/SAME HOUSEHOLD MEMBER), the clerk SHALL INCLUDE NOTIFICATION OF THAT DETERMINATION IN ANY REPORT TO DCJS OF THE DISPOSITION FOR PURPOSES OF CPL 160.55(1)(a) and (d)(vi) above.

3. A person whose case was terminated by a conviction for a violation or traffic infraction (NOT LOITERING FOR PROSTITUTION OR DWAI), PRIOR TO THE EFFECTIVE DATE OF THIS SECTION, MAY, BY MOTION (made in the court where the case was terminated), upon at LEAST 20 DAYS NOTICE TO THE DA, APPLY FOR AN ORDER FOR SEALING PER SUBDIVISION 1, AND SUCH ORDER SHALL BE GRANTED UNLESS THE DA SATISFIES THE COURT THAT THE INTERESTS OF JUSTICE REQUIRE OTHERWISE.

4. This section does NOT apply to MARIJUANA violations which are covered by CPL 160.50(3)(k).

5. a. When a criminal action is terminated against a person by ENTRY OF A WAIVER OF A HEARING PER VTL 1192(10)(c) or NAV. LAW 49-b, the record of the criminal action SHALL BE SEALED per this subdivision.

Upon entry of such waiver, the court or clerk SHALL IMMEDIATELY NOTIFY DCJS AND ALL APPROPRIATE PD/AGENCY HEADS THAT A WAIVER HAS BEEN ENTERED AND THAT THE RECORD OF THE ACTION SHALL BE SEALED WHEN THE PERSON REACHES 21 OR THREE YEARS FROM THE DATE OF THE OFFENSE (whichever is longer).

At the expiration of such period, DCJS and the appropriate PD heads shall take appropriate action per CPL 160.50 (1)(a-c) (with respect to sealing of records and returning or destroying photos, prints etc).

SUCH ORDER SHALL BE GRANTED UNLESS THE DA SATISFIES THE COURT THAT THE INTERESTS OF JUSTICE REQUIRE OTHERWISE.

b. Where a PERSON UNDER 21 is REFERRED BY THE POLICE TO THE DMV FOR ACTION PER VTL 1192-a or 1194-a or NAV. LAW 49-b and a FINDING IN FAVOR OF THE MOTORIST/ OPERATOR IS RENDERED, THE DMV COMMISSIONER SHALL, ASAP (BUT NOT LATER THAN THREE YEARS FROM THE OFFENSE OR WHEN SUCH PERSON REACHES 21, WHICHEVER IS LONGER), NOTIFY DCJS AND ALL APPROPRIATE PD HEADS THAT SUCH FAVORABLE FINDING WAS ENTERED.

Upon receipt of such notification, DCJS and the appropriate PD heads shall take the steps required by CPL 160.50(1)(a-c) with respect to sealing of records and destruction or return of photos and prints.

c. Where a person under 21 is referred to the DMV as per subdivision b above, AND NO NOTIFICATION IS RECEIVED BY DCJS OR POLICE HEADS, THE DCJS AND POLICE HEADS SHALL, AFTER THREE YEARS FROM THE OFFENSE OR WHEN THE PERSON TURNS 21 (whichever is later), TAKE THE ACTIONS REQUIRED BY CPL 160.50(1)(a-c).

CONDITIONAL SEALING OF CERTAIN CONTROLLED SUBSTANCE, MARIJUANA OR SPECIFIED OFFENSE CONVICTIONS. CPL 160.58, CPL 410.91(5):

A defendant who successfully completes the JUDICIAL DIVERSION PROGRAM (JDP) per CPL ARTICLE 216 can avoid a felony conviction (or, occasionally, any conviction at all -see 11/24/20 monograph on Judicial Diversion), but the import of CPL 160.58 is to help defendants who have successfully demonstrated their commitment to sobriety and drug-free living to re-enter the community without the albatross of a criminal record hovering overhead. (see People v Parker 160 AD3d 761 [2d dep't 2018]).

Subdivision 1 of CPL 160.58 states that a defendant convicted of any offense defined in PL Art. 220 (Controlled Substance Offenses) or 221 (Marijuana Offenses) and included in CPL 410.91 (5) (i.e. offenses eligible for parole supervision in lieu of state prison including: Class B, C, D, E felonies, Criminal Diversion of Medical Marijuana (PL 179), Burglary 3d degree, Criminal Mischief 3rd and 4th degrees, Grand Larceny 3rd and 4th degrees [excluding guns], UUV 2d degree, CPSP 3rd and 4th degrees [excluding guns], Forgery 2d degree, CPFI 2d degree, Unlawful Use of a Slug [🐌:]) WHO HAS SUCCESSFULLY COMPLETED THE JDP OR ANOTHER JUDICIALLY SANCTIONED DRUG TREATMENT PROGRAM OF SIMILAR DURATION, REQUIREMENTS AND LEVEL OF SUPERVISION, (or a program formerly known as a DRUG TREATMENT ALTERNATIVE TO PRISON), AND HAS SUCCESSFULLY COMPLETED HIS/HER SENTENCE FOR THE OFFENSE(S), is ELIGIBLE TO HAVE SUCH OFFENSE(S) SEALED.

2. The COURT that SENTENCED the defendant to such programs may, ON ITS OWN MOTION, or on the DEFENDANT'S MOTION, ORDER THAT ALL OFFICIAL RECORDS AND PAPERS RELATING TO THE ARREST, PROSECUTION AND CONVICTION WHICH RESULTED IN HIS/HER PARTICIPATION IN SUCH PROGRAM(S) BE CONDITIONALLY SEALED.

(CONDITIONAL SEALING means that if the defendant is, after sealing, arrested for or formally charged with a crime, such records SHALL BE UNSEALED RIGHT AWAY AND STAY THAT WAY UNLESS AND UNTIL THE MATTER RESULTS IN A FAVORABLE CONCLUSION PER CPL 160.50[3] or BY WAY OF A CONVICTION FOR A NON-CRIMINAL OFFENSE (CPL 160.58[8]), in which case, the records can be RE-SEALED).

Despite such sealing, however, CPL 160.58 provides wide-ranging and automatic access to such records by law enforcement. (see subdivision 6[b]).

THREE MISDEMEANOR BONUS SEALING:

2. The court may also CONDITIONALLY SEAL the arrest, prosecution and conviction records for NO MORE THAN THREE PRIOR ELIGIBLE MISDEMEANORS, (LIMITED TO THOSE DEFINED IN PL 220 OR 221).

SUCH RECORDS MAY ONLY BE SEALED WHEN:

a. the sentencing court has received from DCJS or the FBI a FINGERPRINT BASED CRIMINAL HISTORY RECORD OF THE DEFENDANT (including any sealed/suppressed information and criminal history from other jurisdictions). The parties must be allowed to examine these records;
b. the defendant has identified the misdemeanor convictions that he/she seeks to have sealed;
c. the court has received documentation (or a sworn affidavit) that the sentence(s) imposed on the prior conviction(s) has/have been completed;
d. the court has NOTIFIED the DA and the courts of record where such misdemeanor convictions were entered that it is considering sealing such records of conviction. The DA and courts of record must be given at least 30 days to comment or submit materials that might help the court in its determination.

HEARING:

3. At the request of the defendant or the DA (of the county where the defendant committed a crime that is the subject of a sealing application), the court may conduct a HEARING to consider and review ANY RELEVANT EVIDENCE from either party that will aid the court in its determination whether to seal the records of the defendant's prior arrests, prosecutions and convictions.

In making such determination, the court shall consider ALL RELEVANT FACTORS including, inter alia:
i. the CIRCUMSTANCES AND SERIOUSNESS of the OFFENSE resulting in the conviction;
ii. the defendant's CHARACTER (including completion of a judicially-sanctioned treatment program per subdivision 1;
iii. the defendant's CRIMINAL HISTORY;
iv. the IMPACT of sealing upon the defendant's REHABILITATION and SUCCESSFUL, PRODUCTIVE RE-INTEGRATION TO SOCIETY AND UPON PUBLIC SAFETY.

4. When the court orders sealing, all official records and papers relating to the arrest, prosecution and conviction (including copies), on file with DCJS OR ANY COURT SHALL BE SEALED and NOT MADE AVAILABLE TO ANY PERSON OR PUBLIC/PRIVATE ENTITY, but DCJS SHALL RETAIN ANY FINGER/PALM PRINTS AND PHOTOGRAPHS OR DIGITAL IMAGES THEREOF.

5. When the court orders sealing, the CLERK OF THE COURT SHALL IMMEDIATELY NOTIFY DCJS AND ANY COURT THAT SENTENCED THE DEFENDANT FOR AN OFFENSE THAT HAS BEEN CONDITIONALLY SEALED regarding the records that shall be sealed per this section.

ACCESSIBILITY TO SEALED RECORDS:

6. Records sealed per this subdivision SHALL BE MADE AVAILABLE to:

a. the defendant or his/her designated agent; or
b. qualified AGENCIES per EXEC. LAW 835(9)(courts in unified court system, admin. bd. of Judicial Conference, probation departments, sheriff's offices, DA'S offices, NYS DOCCS, Municipal DOC'S, Consumer Protection Unit/Financial Frauds Bureau of State Dep't of Financial Services, State Dep't of MH/Office of Professional Medical Conduct [PHL 230], CPS unit of local social services district, when conducting an investigation per SSL 424(6), Medicaid IG'S office, Temporary State Commission of Investigation, police forces responsible for enforcing general laws of the state, Onondaga Forensic Lab acting per its law enforcement duties, Nassau County ME'S Office/Forensic sciences Lab when acting per law enforcement duties) and federal and state law enforcement agencies acting in the scope of such duties; or
c. any state or local officer/AGENCY responsible for the issuance of LICENSES TO POSSESS GUNS when the person has applied for such license; or
d. any PROSPECTIVE EMPLOYER of a POLICE/PEACE OFFICER (CPL 1.20[33],[34]), in connection with an APPLICATION FOR EMPLOYMENT as a PO, BUT every such applicant SHALL BE PROVIDED WITH A COPY OF ALL RECORDS OBTAINED PER THIS PARAGRAPH AND SHALL BE AFFORDED AN OPPORTUNITY TO PROVIDE AN EXPLANATION THERETO.

7. The court SHALL NOT SEAL a record per this section WHILE ANY CHARGED OFFENSE (sought to be sealed) IS PENDING.

UNSEALING:

8. If, post sealing, the defendant is ARRESTED OR FORMALLY CHARGED WITH ANY MISDEMEANOR OR FELONY, SUCH RECORDS SHALL BE UNSEALED IMMEDIATELY AND SHALL REMAIN SO BUT, if such new crime results in a TERMINATION IN THE ACCUSED'S FAVOR (CPL 160.50[3]) or by CONVICTION OF A NON-CRIMINAL OFFENSE (CPL 160.55), SUCH RECORDS SHALL BE CONDITIONALLY SEALED.

TEN YEARS AFTER: SEALING OF CERTAIN CONVICTIONS CPL 160.59

As noted in the Practice Commentary to CPL 160.59 (SEALING OF CERTAIN CONVICTIONS) (William C. Donnino Practice Commentary McKinney's Vol. 11A pgs 479-482), the purpose of the statute is to enable a convicted defendant to obtain sealing of certain criminal convictions (two eligible offenses including ONLY ONE ELIGIBLE FELONY), after 10 YEARS HAVE PASSED FROM HIS/HER MOST RECENT SENTENCE OR RELEASE FROM INCARCERATION (whichever is later).

The upshot of sealing is to prevent access to the records (with several exceptions), by any person or public/private agency and to prevent discrimination by improper inquiry (e.g. by prospective employers, lenders, licensing entities) into sealed matters. (EXEC. LAW 296[16]).

Some crimes (e.g. sex offenses, sexual performance by a child, register able sexual offenses, homicide, violent felonies, class A felonies [and attempts/conspiracies to commit these offenses] are EXCLUDED from sealing consideration.

Although sealing is limited to TWO ELIGIBLE OFFENSES (but not more than one felony), if multiple crimes were committed as part of a SINGLE CRIMINAL TRANSACTION (CPL 40.10[2]), they will count as a SINGLE OFFENSE for sealing purposes. (People v Lynch 25 NY3d 331 [2015]).

As noted above, at least 10 years must have elapsed since the imposition of SENTENCE on the defendant's latest conviction. If the sentence included a period of incarceration, then the time would be calculated from the time of the defendant's release from prison/jail. The defendant CANNOT have any PENDING UNDISPOSED CASES, and if he/she is convicted of a crime after the last conviction for which sealing is sought, he/she will be unable to obtain sealing.

Sealing must also be DENIED if the defendant has previously obtained sealing of the maximum number of permissible convictions (i.e. two), or the defendant has failed to PROVIDE A SWORN STATEMENT OF REASONS JUSTIFYING THE RELIEF SOUGHT.

Even if the defendant meets the requirements for sealing, it can STILL BE DENIED within the court's exercise of discretion. If the DA opposes the application, the court will conduct a HEARING (summary proceeding or with testimony), where the court can consider ANY RELEVANT FACTORS (upon relaxed evidentiary standards), including those relating to the DEFENDANT'S CHARACTER AND REHABILITATION.

While a sealing order, if granted, covers all official records and papers relating to the conviction, DCJS WILL STILL RETAIN ANY FINGER/PALM PRINTS, PHOTOGRAPHS AND DIGITAL IMAGES. The records are also available to many STATE, FEDERAL AND LOCAL GOVERNMENT AGENCIES (e.g. courts, probation departments, DA, state/local corrections agencies, PD'S).

A sealed record can also be used to ENHANCE A SENTENCE for a subsequent offense (e.g. predicate felony offender) or to elevate a crime to a higher level based on the prior conviction (i.e. the prior conviction constitutes an element of the new offense).

THE STATUTE CPL 160.59

1.DEFINITIONS;

a. ELIGIBLE OFFENSE: means any NYS Law-defined crime OTHER THAN a sex offense (PL Art. 130), Sexual Performance by a Child (PL Art. 263), Homicide (PL Art. 125), a VFO (PL 70.02), a Class A PL Felony Offense, Conspiracy to Commit a non-eligible offense (PL 105), an ATTEMPT to commit a non-eligible offense (PL 110) if the attempt is a felony, or an offense for which SEX OFFENDER REGISTRATION is required (CORR. LAW Art. 6-C).

   Where the defendant is convicted of multiple eligible offenses committed as part of the SAME CRIMINAL TRANSACTION (CPL 40.10[2]), those offenses shall be considered ONE ELIGIBLE OFFENSE.

b. SENTENCING JUDGE is the one who PRONOUNCED SENTENCE upon the conviction under consideration, (or, if he/she is no longer sitting in the jurisdiction where 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 COURT ADMINISTRATOR shall, per CPL 10.40, PRESCRIBE A FORM APPLICATION which a defendant may use to apply for sealing. Such form shall include all the essential elements required for sealing. (The form is NOT REQUIRED, however).

2. a. A defendant convicted of UP TO TWO ELIGIBLE OFFENSES (BUT NOT MORE THAN ONE FELONY OFFENSE), may apply to the court of conviction of THE MOST SERIOUS to have such conviction(s) sealed. If all offenses are of the SAME CLASSIFICATION, the application shall be made to the court where the defendant was LAST CONVICTED.

CONTENTS OF THE APPLICATION:

b. An application SHALL CONTAIN:

i. a copy of the CERTIFICATE OF DISPOSITION (or other similar documentation) for any offense for which the defendant has been convicted, or an explanation as to why such certificate/documentation is unavailable;

ii. a SWORN STATEMENT of the defendant whether he/she has filed 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(S) for which relief is sought;

v. a SWORN STATEMENT OF THE REASON(S) WHY THE COURT SHOULD GRANT SUCH SEALING, ALONG WITH ANY SUPPORTING DOCUMENTATION.

c. A copy of the sealing application SHALL BE SERVED ON THE DA (of the county of conviction). The DA SHALL NOTIFY THE COURT WITHIN 45 DAYS IF HE/SHE OBJECTS TO THE SEALING APPLICATION.

d. When such application is filed with the court, it shall be ASSIGNED TO SENTENCING JUDGE, (unless more than one application is filed, in which case, the matter will be assigned to the COUNTY OR SUPREME COURT of the county where the criminal court is located), who SHALL REQUEST AND RECEIVE FROM DCJS A FINGERPRINT-BASED CRIMINAL HISTORY RECORD OF THE DEFENDANT, INCLUDING ANY SEALED OR SUPPRESSED RECORDS.

DCJS SHALL ALSO INCLUDE A CRIMINAL HISTORY REPORT, IF ANY, FROM THE FBI regarding any such information that OCCURRED IN OTHER JURISDICTIONS. The court, in turn, may make such information available to the DA and the DEFENDANT.

SUMMARY DENIAL:

3. The sentencing judge SHALL SUMMARILY DENY the application when:

a. the defendant must REGISTER AS A SEX OFFENDER (CL ART. 6c); or
b. the defendant has PREVIOUSLY OBTAINED SEALING OF THE MAXIMUM NUMBER OF CONVICTIONS ALLOWABLE UNDER CPL 160.58; or
c. the defendant has PREVIOUSLY OBTAINED SEALING OF THE MAXIMUM NUMBER OF CONVICTIONS ALLOWABLE UNDER CPL 160.59(4); or
d. the TIME PERIOD of subdivision 5 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 JUDGMENT 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.

TWO ELIGIBLE OFFENSES/ONE FELONY:

4. If the application is not summarily denied, a defendant convicted of up to TWO ELIGIBLE OFFENSES, MAY OBTAIN SEALING OF NO MORE THAN TWO ELIGIBLE OFFENSES BUT NOT MORE THAN ONE FELONY.

TEN YEAR RULE:

5. Any eligible offense may be sealed ONLY AFTER AT LEAST 10 YEARS HAVE PASSED SINCE SENTENCE WAS IMPOSED ON THE DEFENDANT'S LATEST CONVICTION (OR, IF THE DEFENDANT WAS SENTENCED TO INCARCERATION [including a split sentence]), THE DEFENDANT'S LATEST RELEASE FROM INCARCERATION.

TOLLING BY TIME SPENT IN JAIL:

In calculating the ten-year period, any period of time the defendant spent INCARCERATED AFTER THE CONVICTION FOR WHICH SEALING IS SOUGHT, SHALL BE EXCLUDED AND THE TEN-YEAR PERIOD SHALL BE EXTENDED BY A PERIOD(S) EQUAL TO THE TIME SERVED UNDER SUCH INCARCERATION.

6. If the application is not subject to mandatory summary denial, and the DA OPPOSES it, the sentencing judge SHALL CONDUCT A HEARING and consider ANY EVIDENCE FROM EITHER SIDE THAT WILL AID THE COURT IN ITS DETERMINATION WHETHER TO SEAL THE RECORDS OF THE DEFENDANT'S CONVICTION(S).

NO HEARING IS REQUIRED WHERE THE DA DOES NOT OPPOSE THE APPLICATION.

RELEVANT FACTORS:

7. In considering the application, the judge SHALL CONSIDER ANY RELEVANT FACTOR(S) Including:

a. the AMOUNT OF TIME 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 OFFENSE for which the defendant stands convicted;
d. the CHARACTER OF THE DEFENDANT (including any steps taken towards REHABILITATION including treatment programs, work, schooling, community service or volunteer programs);
e. any STATEMENTS OF THE VICTIMS of the offense(s) for which the defendant is seeking relief;
f. the IMPACT of sealing upon the defendant's REHABILITATION and SUCCESSFUL AND PRODUCTIVE RE- ENTRY AND RE-INTEGRATION INTO SOCIETY; and
g. the IMPACT of sealing on PUBLIC SAFETY and PUBLIC CONFIDENCE IN AND RESPECT FOR THE LAW.

8. When a judge orders sealing, ALL OFFICIAL RECORDS AND PAPERS relating to the arrests, prosecutions and convictions (including duplicates/copies), on file with DCJS OR ANY COURT SHALL BE SEALED AND NOT MADE AVAILABLE TO ANY PERSON OR PRIVATE/ PUBLIC AGENCY (EXCEPT as per subdivision NINE below); BUT DCJS SHALL RETAIN ANY FINGER/PALM PRINTS AND PHOTOGRAPH OR DIGITAL IMAGES THEREOF.

The CLERK OF THE COURT SHALL IMMEDIATELY NOTIFY DCJS regarding the RECORDS THAT SHALL BE SEALED PER THIS SECTION. The clerk shall also NOTIFY ANY COURT in which the defendant has stated (per paragraph 2[b]), that he HAS OR INTENDS TO FILE AN APPLICATION FOR SEALING OF ANY OTHER ELIGIBLE OFFENSE.

ACCESS TO SEALED RECORDS:

9. Records sealed per this section SHALL BE MADE AVAILABLE TO:

a. the DEFENDANT or his/her designated agent;
b. QUALIFIED AGENCIES (per EXEC. LAW 835[9]), and FEDERAL/STATE LAW ENFORCEMENT AGENCIES acting in the SCOPE OF LAW ENFORCEMENT DUTIES;
c. any STATE/LOCAL OFFICER/AGENCY that issues LICENSES TO POSSESS GUNS (and the defendant has applied for such license); or

d. any PROSPECTIVE EMPLOYER OF A POLICE/PEACE OFFICER (CPL 1.20[33]and [34]) in relation to an EMPLOYMENT APPLICATION. (The applicant is entitled to a copy of such records with an opportunity to make an explanation); or

e. Criminal Justice Information Services Division of the FBI to respond to inquiries to the National Instant Criminal Background Check system regarding attempts to purchase or take possession of FIREARMS per 18 USC 921(a)(3).

10 A conviction sealed per this section is INCLUDED WITHIN THE DEFINITION OF A CONVICTION for 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.

NO SEALING WAIVER AS CONDITION OF A PLEA BARGAIN:

11. NO DEFENDANT SHALL BE REQUIRED/PERMITTED TO WAIVE SEALING ELIGIBILITY AS PART OF A GUILTY PLEA, SENTENCE OR ANY AGREEMENT RELATED TO A CONVICTION FOR AN ELIGIBLE OFFENSE, AND ANY SUCH WAIVER SHALL BE DEEMED VOID AND WHOLLY UNENFORCEABLE.

FINAL COMMENT:

As is apparent, sealing (and in cases of Marijuana offenses, expunging) of criminal records can provide a welcome opportunity for defendants who have either obtained favorable dispositions, pled guilty to non-criminal violations, successfully completed the JDP (or other similar judicially sanctioned rehabilitation programs) or bided their time for ten years (and taken positive steps toward rehabilitation), to bury their demons and move on with their lives in a productive way.

Even though sealing is, in some instances, AUTOMATIC, counsel and client are well advised to make sure that the records have, in fact, been sealed, and if not, to take steps to ensure that the “dead stay buried” and not be exhumed to haunt the accused and impede his/her steps back into the land of the living.