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**REPORT ON LEGISLATION BY THE**
**CRIMINAL JUSTICE OPERATIONS COMMITTEE**

**A.7624** **M. of A. O'Donnell**
**S.4841** **Sen. Saland**

AN ACT to amend the criminal procedure law, in relation to sealing court records involving cases dismissed at arraignment or earlier.

**THIS BILL IS APPROVED**

## INTRODUCTION

This report is respectfully submitted by the Committee on Criminal Justice Operations (the "Committee") of the New York City Bar Association. The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Committee on Criminal Justice Operations include prosecutors and criminal defense attorneys who analyze the legal, social and public policy aspects of criminal justice issues facing New Yorkers today. This report passed by unanimous vote of the Committee.

Mere records of arrest and charges, even for violations and petty offenses, can have significant consequences for defendants. These records can limit defendants in their efforts to obtain some of the most vital tools to subsistence and advancement, for example. As the New York City Police Department continues to utilize quality of life arrests as a tactic to prevent more serious crimes, more people are coming into contact with law enforcement and, therefore, the criminal justice system. In light of these collateral but highly significant consequences, the Criminal Justice Operations Committee supports A.7624/S.4841, which would allow for complete sealing for a defendant whose case was dismissed at arraignment (or earlier) pursuant to Criminal Procedure Law §§ 140.45 and 150.50 where the accusatory instrument was legally insufficient.

## COMPLETE SEALING FOR DISMISSALS PURSUANT TO CPL §§ 140.45 AND 150.50

Section 160.50 of the Criminal Procedure Law allows for complete sealing of criminal records (within the court, police department and the district attorney's office) upon a successful written motion to dismiss the accusatory instrument for facial insufficiency. However, this section does not allow for complete sealing when a defendant moves successfully for dismissal at arraignment either for a warrantless arrest (per CPL § 140.45) or for when a desk appearance ticket was utilized (per CPL § 150.50). This oversight would be remedied by the amendments

proposed in A.7624/S.4841 to section 160.50(3)(b) of the Criminal Procedure Law, as follows:

> 3. For the purposes of subdivision one of this section, a criminal action or proceeding against a person shall be considered terminated in favor of such person where:…
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> (b) an order to dismiss the entire accusatory instrument against such person pursuant to section 140.45, 150.50, 170.30, 170.50, 170.55, 170.56, 180.70, 210.20 210.46 or 210.47 of this chapter was entered or deemed entered, or an order terminating the prosecution against such person was entered pursuant to section 180.85 of this chapter, and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people; or…

Section 160.50 allows for the sealing of a defendant's records upon the favorable termination of a criminal action against him or her. The definition of a favorable termination of an action is set forth in subsection (3) of section 160.50 and includes a dismissal upon the granting of a written motion pursuant to CPL §§ 170.30(1)(a) and 170.35(1)(a) to dismiss an accusatory instrument that fails to satisfy CPL § 100.40's facial sufficiency requirements.

In addition to moving in writing pursuant to CPL §§ 170.30(1)(a) and 170.35(1)(a), a defendant may also obtain dismissal of a facially insufficient accusatory instrument at arraignment if "the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face." CPL § 140.45. Section 150.50, which applies to appearance tickets, is to the same effect. Dismissals under sections 140.45 and 150.50 do not require written motions.

Dismissals at arraignment pursuant to these sections are not, however, subject to sealing under section 160.50, despite the fact that they are based on the same reason as dismissals on motions pursuant to sections 170.30 and 170.35 - the prosecution's failure to file a facially sufficient accusatory instrument. Indeed, dismissals at arraignment are more difficult to obtain than dismissals upon motion because they require a court to conclude not only that CPL section 100.40's facial sufficiency requirements have been violated but also that it would be "impossible" for the prosecution to correct its drafting flaw. As a result, the sealing statute allows for the sealing of records in cases that have survived dismissal at arraignment but not those that have succumbed to dismissal at arraignment.

Adding to this anomaly is that the police may issue appearance tickets only in a limited subset of cases and when they make a discretionary determination that a defendant does not require pre-arraignment detention, so that section 150.50 dismissals necessarily occur only in the least serious cases.

Thus, because dismissals under sections 140.45 and 150.50 occur when the prosecution's inability to draft a facially sufficient accusatory instrument is most apparent and often when the case is least serious, the sealing statute's omission of such dismissals is without any evident rationale. The omission is particularly untenable given that a facially sufficient accusatory instrument is a prerequisite to Criminal Court's jurisdiction. See People v. Alejandro, 70 N.Y.2d 133 (1987).

An additional incongruity that arises from the current sealing statute is that section 160.50 requires sealing not only upon a dismissal for facial insufficiency but also upon a dismissal after an adjournment in contemplation of dismissal pursuant to CPL sections 170.55, 170.56, 210.46 and 210.47 - that is, the sealing statute protects from public exposure prosecutions that have terminated as a result of a court's discretionary grant of a favorable disposition but not those that have terminated because of jurisdictional insufficiency.

Surely there is a detriment to those people whose cases are dismissed at arraignment but not sealed. A public record remains of their arrest and prosecution even though the prosecution was so flawed as to be immediately terminated. Given the adverse consequences that can inure to an individual from public disclosure of such information, there is no basis in policy to exempt dismissals pursuant to sections 140.45 and 150.50 from the purview of section 160.50, just as there is no basis in logic.

**CONCLUSION**

For these reasons, the Committee urges passage of A.7624/S.4841.

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## APPENDIX A
## The Current State of the Sealing Laws

The sealing of official records generated during criminal cases is governed by three statutes:

A. Criminal Procedure Law § 160.50 regulates the sealing of records in cases that have "terminated in favor of the accused" such as acquittals, dismissals after appeal, no true bills from a grand jury, or dismissals after an Adjournment in Contemplation of Dismissal;

B. Criminal Procedure Law § 160.55 regulates the sealing of records in cases that resulted in convictions to petty offenses[1], such as Disorderly Conduct and Trespass; and

C. Criminal Procedure Law § 720.35 regulates the sealing of records in cases where a defendant's conviction has been replaced by a youthful offender adjudication.

The sealing of records under both CPL §§ 160.50 and 720.35 result in what most people would commonly refer to as a case being truly "sealed".[2] No one but the defendant and a very limited number of entities are allowed access to the records generated during the case. "The records" that are sealed include the files of the police department, the District Attorney's Office, the fingerprint records on file with the Division of Criminal Justice Services, and all official records and papers on file with any court.

The sealing of records under CPL § 160.55, however, is different. [In fact, the term "sealing" is a bit of a misnomer under this statute because the entire record of the conviction is never completely "sealed".] The fundamental difference between CPL §160.55 and the provisions of both CPL §§ 160.50 and 720.35 is that the court record is not sealed under CPL 160.55. Thus, while a person convicted of a petty offense will have all related records of the NYPD sealed, the records in the respective District Attorney's Office sealed, and their fingerprint records from that arrest sealed, the official court record will remain an open public record.

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[1] There are three petty offenses that are excepted out of the CPL § 160.55 sealing of petty offenses: Loitering (under Penal Law § 240.35(3)), Loitering for the Purpose of Engaging in Prostitution (under Penal Law § 240.37(2)), and Driving While Ability Impaired (under Vehicle and Traffic Law § 1192(1)).

[2] To put these two types of statutory sealing into context, the Criminal Procedure Law states that "[u]pon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section 160.50 of this chapter, 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. The arrest or 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." CPL 160.60.

Furthermore, "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for the purposes of transfer of supervision and custody pursuant to section two hundred fifty-nine-m of the executive law." CPL 720.35(1).

There is no corresponding contextual statute for cases sealed pursuant to CPL 160.55.