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REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE, THE CRIMINAL JUSTICE OPERATIONS COMMITTEE, THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE AND THE CRIMINAL ADVOCACY COMMITTEE

A.7030 **M. of A. Lentol**
S.5169 **Sen. Nozzolio**

AN ACT to amend the correction law, the criminal procedure law and the executive law, in relation to the sealing of records following conviction for certain offenses

THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS

INTRODUCTION

This report is respectfully submitted by the Criminal Courts Committee, the Criminal Justice Operations Committee, the Corrections and Community Reentry Committee and the Criminal Advocacy Committee of the New York City Bar Association. The Association is an organization of over 24,000 lawyers, law students and judges dedicated to improving the administration of justice. Members of the above committees include individuals who work in a variety of capacities in the criminal justice system, including prosecutors and criminal defense attorneys.

The committees generally support A.7030/S.5169, which amends New York's sealing laws to provide sealing opportunities for people with misdemeanor and felony records. This report outlines our support and proposes several modifications to the bill. Below is a summary:

- **Part I** addresses the current obstacles that individuals with prior conviction face and describes the current protections available to those people. Generally, our current system bans employment discrimination based on the stigma of a prior conviction and bars a data-collection company from disclosing a conviction when (1) the conviction is older than 7 years and (2) the job's salary is below $25,000.

- **Part II** explains the proposed sealing bill, which would seal most misdemeanors and non-violent felonies. For misdemeanors, the sealing "grace period"[1] is 7 years; for

[1] The "grace period" refers to the amount of time, post-conviction, that the offender must not commit a crime.

non-violent felonies, the grace period is 10 years. Under the bill, after a person obtains sealing, he can honestly answer "No" when asked if he has a prior conviction.

- **Part III** lays out the policy justifications for the sealing bill, contending that it promotes fairness, preserves public safety, and undermines recidivism.

- **Part IV** proposes modifications to the bill, including lowering the misdemeanor "grace period" from 7 to no more than 3 years.

- **Part V argues** that sealing legislation should also bar data-collections companies from disclosing sealed convictions already in their possession. We propose that New York law define sealed convictions as a "nullity." This modification would render a data-collection company's disclosure of a sealed conviction illegal under the New York Fair Credit Reporting Act.

- **Part VI** proposes procedural modifications to the bill's sealing hearing procedures, including the appointment of counsel in contested felony sealing cases.

I. OVERVIEW

Since 1970, over 2.2 million individuals have been convicted of felonies and misdemeanors in New York state courts.[2] Using recent data, we can approximate that 90% of these individuals committed misdemeanors or non-violent felonies.[3] For this large segment of our population, employment would provide dignity, financial stability, and structure. Unfortunately, a prior conviction undermines the right to earn a living. About 80% of employers run background checks, often through private data-collection companies who collect records from state agencies and courts.[4] A majority of these employers will not consider hiring someone with a criminal record[5] and an applicant's chances of receiving a "call back" drop about 50% when s/he discloses a misdemeanor or felony conviction.[6] The stigma of a prior conviction—no matter its age or severity—is strong. One mistake can land an individual in the unemployment "penalty box" forever.[7]

[2] These statistics are based on data provided by the New York Department of Criminal Justice Services. The data were received through e-mail communication and are on file with the Committee.

[3] From 2009 through 2013, 93% of the State's 2.69 million convictions were for misdemeanors or non-violent felonies (*see* New York State Division of Criminal Justice Services, "2009-2013 Dispositions of Adult Arrests") (collecting statistics online).

[4] Society for Human Resource Management, *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* (2012).

[5] Susan K Gauvey and Tom Webb, *A New Look at Job Applicants with Criminal Records* (2013).

[6] National Institute of Justice, *Research on Reentry and Employment* (2013).

[7] Alison Wilkey, Director of Policy and Legal Services, Youth Represent, Letter to the NY Times Editor (June 3, 2014).

Thousands of individuals have suffered under the current system. Take, for instance, a young 25-year-old woman, residing in Brooklyn, who pled guilty to a loitering for prostitution charge when she was 19.[8] After struggling to find work, this young woman was finally hired for a job selling tickets at a tourist attraction.[9] But one day after being hired, she received an e-mail from her new employer: "We must withdraw our offer due to the background check."[10] To combat the stigma of her prior prostitution conviction, this young woman formed a new "game plan": only apply to jobs that did not run background checks.[11] She finally found work at a grocery chain making about $175/week, a salary that helps her provide for her 19-year-old brother and 2-year-old daughter.[12]

Workers who have been on the job for years have also been fired after their employers learn of the prior conviction.[13] In one case, an employee for a national courier service was fired because of a 12-year-old drug sale conviction, even though he had been successfully performing the job for 8 years.[14]

While current laws aim to shore up the right to work for those with prior convictions, those laws are largely ineffective. Below is a summary of current law:

- **Sealing of "Favorable Dispositions."** If a charge does not result in a conviction, the charge becomes a "nullity" and all records are sealed.[15]

- **Sealing for Violations.** All records of a violation conviction (except court records) are sealed.[16] If a violation is sealed, an employer cannot ask about the sealed violation.[17]

- **Anti-Discrimination Law (Felonies, Misdemeanors and Violations).** Employers cannot reject an applicant based on a criminal record *per se*; instead there must be "a direct relationship between . . . the previous criminal offenses and the specific license or employment sought . . . or the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[18]

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[8] Stan Alcorn, *'Check Yes Or No': The Hurdles of Job Hunting with a Criminal Past*, NPR, Jan. 31, 2013.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Legal Action Center, *Legal Action Center's Leading Cases* (2013).

[14] *Id.*

[15] CPL 160.50, 160.60.

[16] CPL 160.55.

[17] Executive Law § 296(16).

[18] Corrections Law § 752(1)-(2). In addition, on June 29, 2015, Mayor Bill de Blasio signed into law Int. 318-A, which prohibits discrimination based on one's arrest record or criminal conviction.

- **Background-Check Limitations (Felonies, Misdemeanors, and Violations).** Under the federal Fair Credit Reporting Act and the New York Fair Credit Reporting Act (1977), ("FCRA" and "NY FCRA," respectively) employers who request a background check must first receive written authorization to run a background check from the applicant.[19] Before rejecting an applicant based in whole or in part on a background check, FCRA mandates that the employer provide the applicant a copy of the background check and time to review it.[20] If the conviction is older than 7 years and the job's salary is below $25,000, NY FCRA bars background-check companies from disclosing the conviction.[21]

While the FCRA and Anti-Discrimination Law provide some protection to those with felony and misdemeanor records, those statutes fail to ensure that people who have successfully completed their sentences can secure employment. The FCRA's 7-year and $25,000 standards are too restrictive. Hundreds of thousands of New Yorkers have misdemeanor records and have never served prison time. Subjecting these individuals to a 7-year employment handicap is a disproportionate punishment. The $25,000 threshold is also too low and has not been adjusted for inflation since 1977; if it were, that threshold would be $98,000 today. But even if the FCRA's salary and time requirements are met (thus barring data-collection companies from disclosing the conviction on a background check), applicants must still *personally* disclose those prior convictions when asked about them on a job application. Those disclosures will often trigger an automatic rejection.

The Anti-Discrimination Law's ban on prior-conviction-based discrimination is also too easily circumvented.[22] Employers can easily invent a pretext to justify a stigma-based employment denial. Most job applicants also do not have the resources or the time to challenge pretextual denials.

To fill in the gaps left by the current laws, the Legislature should (1) enhance protections against background check disclosures by removing the $25,000 bar and reducing the 7-year misdemeanor grace-period and (2) allow people to apply for work without the burden of personal disclosure. The bill is a big step towards these twin goals. With the modifications proposed below, the bill will achieve these goals and give thousands of New Yorkers an opportunity to obtain meaningful employment.

II. THE BILL

The proposed legislation would expand current sealing law to cover misdemeanors and felonies. Here's how the bill works:

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[19] 15 U.S.C. § 1681b(b)(2); General Business Law § 380-c(a)(2).

[20] 15 U.S.C. § 1681b(b)(3)(A).

[21] General Business Law § 380-j(f)(1)(v), (f)(2)(iii)

[22] Michael H. Jagunic, *The Unified Sealed Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century Record-Sealing Statute for the Twenty-First Century*, 59 Cleveland State L Rev 161, 174 (2011).

- If someone has 1 or 2 (but not 3) misdemeanor convictions, s/he can apply for sealing if s/he has not been convicted of a crime during the 7-year period following the conviction(s) (excluding incarceration time).[23] For misdemeanor applicants, courts *must* grant the application if these criteria are met.[24]

- If someone has 1 (but not 2) felony conviction, that person can petition for sealing if s/he has not been convicted of a crime within 10 years (excluding incarceration time).[25] The court has discretion to deny the application if the "interests of justice" support denial.[26] There is a $95.00 filing fee which can be waived if the petitioner shows financial hardship.[27]

The bill has numerous categorical eligibility bars:

- Violent felony offenses[28]

- Sex offenses[29]

- Intoxicated driving offenses under VTL § 1192.[30]

After sealing, criminal records cannot be released by government agencies to data-collection/background-check agencies.[31] Also, successful sealing petitioners can legally answer "No" when asked if they have a criminal record on a "licensing, employment, [] credit or insurance" application.[32]

The bill makes sealed records available to government agencies, including:

- "Qualified agencies" (as defined in Executive Law § 835[9])[33] and "federal and state law enforcement agencies" acting "within the scope of their law enforcement duties."[34]

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[23] Proposed Bill § 3, adding CPL 160.65(1)(B) ("Bill").

[24] Bill § 3, adding CPL 160.65(1)(B).

[25] Bill § 3, adding CPL 160.65(1)(A).

[26] Bill § 3, adding CPL 160.65(2)(C)(1).

[27] Bill § 3, adding CPL 160.65(2)(A).

[28] Bill § 3, adding CPL 160.65(1)(A).

[29] Bill § 3, adding CPL 160.65(1)(A),(B).

[30] Bill § 3, adding CPL 160.65(1)(A),(B).

[31] Bill § 3, adding CPL 160.65(2)(C)(5).

[32] Bill § 5.

[33] The definition of "qualified agencies" under § 835(9) is very broad: "Courts in the unified court system, the administrative board of the judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of correctional services, the state division of probation, the department of correction of any municipality, the insurance frauds bureau of the state department of insurance, the office of professional medical

- Any state or local office or agency with responsibility for the issuance of firearm licenses.[35]

- Employers that hire people who will "have regular contact with children or other vulnerable persons as the chief administrator of the courts may designate, including all officers, individuals, institutions and agencies subject to operation, licensure or certification by a state oversight agency as defined in [Social Services Law § 488(4)] or otherwise subject to oversight or regulation by the justice center for the protection of people with special needs."

If a person is charged with a crime after sealing, the bill "un-seals" the record, thus permitting use of that prior conviction for enhanced charging and sentencing.[36]

The bill is consistent with a national trend of passing state laws that expunge and seal misdemeanor and felony convictions, usually following a requisite waiting period. By way of example, the chart below summarizes three state approaches:[37]

Arkansas	Misdemeanors can be sealed within 60 days of the sentence's completion[38] and felonies can be sealed after a 5-year grace period.[39]
Ohio	One felony and up to 2 misdemeanors can be sealed after a 1-3 year grace-period and upon a rehabilitation showing.[40]
Wisconsin	Misdemeanors and felonies may be sealed by the trial court at time of the sentence if the crime was committed before the age of 25.[41]

conduct of the state department of health for the purposes of section two hundred thirty of the public health law, the child protective services unit of a local social services district when conducting an investigation pursuant to SSL § 424(6), the office of Medicaid inspector general, the temporary state commission of investigation, the criminal investigations bureau of the banking department, police forces and departments having responsibility for enforcement of the general criminal laws of the state and the Onondaga County Center for Forensic Sciences Laboratory when acting within the scope of its law enforcement duties.**"**

[34] Bill § 2, adding CPL 160.65(2)(C)(6).

[35] *Id.*

[36] *Id.*

[37] Margaret Colgate Love, National Association of Criminal Defense Lawyers, Restoration of Rights Resource, *Laws Enacted in 2013-2014 Dealing With Relief From the Collateral Consequences of a Criminal Conviction*.

[38] Ark. Code § 16-90-1405(a)-(b)

[39] Ark. Code § 16-90-1406, 1408.

[40] Ohio Rev. Code § 2953.32(A)(1), C(1)(C); *id.*, § 2953.36.

[41] Wis. Stat. § 973.015.

III. POLICY ANALYSIS

A. The Bill Has No Impact on Law Enforcement or Sentencing

The bill prevents employers from accessing sealed records, thus preventing employers from penalizing applicants based on sealed convictions. On the other hand, law enforcement agencies and courts need to access sealed records as those records facilitate investigations, prosecutions, and sentencing. The bill recognizes the crucial distinction between government and employer access as it allows government agents to access sealed records when pursuing a "law enforcement function."

> Records sealed . . . shall be made available to . . . (ii) qualified agencies [under [executive law § 835(9)] and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties . . . . Nothing in this section shall prohibit use of the conviction of an offense, the records of which have been sealed hereunder, in any sentencing proceeding, or as an element of an offense in any subsequent criminal proceeding or regulatory action commenced against the petitioner by the state or any political subdivision thereof.

B. Permanent Employment Disability Is a Disproportionate Punishment

It is unfair to sentence rehabilitated offenders to a lifetime of employment barriers. Millions of New Yorkers have made mistakes that led to convictions; those mistakes should not follow them for the rest of their lives, especially if the individual has led a law-abiding life after the conviction. This approach is consistent with longstanding state policy of "encourag[ing] the licensure and employment of persons previously convicted of one or more criminal offenses."[42] This policy recognizes that the denial of employment opportunities is simply not part of a criminal sentence. If we want those who have completed their sentences to improve their lives and provide for their families, we should give them the chance to do so, not prevent them from moving forward with their lives.

The bill's greatest beneficiaries will be the hundreds of thousands of New Yorkers who, over the last several decades, have been convicted of misdemeanors and non-violent felonies. Consider the statistics from 2013 alone (based on the top count of conviction):

- **26,000** petit larceny convictions (most common New York criminal conviction)
- **21,000** 7th-degree misdemeanor drug possession convictions (2nd highest frequency)
- **6,856** theft of services convictions (5th highest frequency—a substantial number involve New York City subway fare evasion)

[42] Corrections Law § 753(1)(a) ("CL") (1977).

- **3,812** B-misdemeanor marijuana possession convictions (possession of less than 25 grams outside the "public view") (8th highest frequency)[43]

A vast majority of these misdemeanor offenders did not serve jail time, instead receiving a fine or probationary sentence. If a judge and a prosecutor concluded that the person did not deserve even a minute of jail time, it is unreasonable to punish that person with a life-time employment handicap.

Current policy not only disproportionately harms rehabilitated offenders; it also harms their families. Spouses and children often rely on individuals who, at some point in their life, may have been convicted of a non-violent felony or misdemeanor. But by depriving individuals with a criminal record of employment, we ultimately punish children and other family members who have never been convicted of a crime.

C. The Bill Will Reduce Recidivism

Sealing is "tough on crime" because it promotes economic opportunities, which in turn minimizes recidivism. Poverty drives crimes such as petit larceny and drug sales—two of the most common offenses in New York.[44] Employment also provides dignity, which allows an individual with a prior record to view him/herself as a valuable member of society, and not a hopeless person with a criminal record. This confidence can inspire a law-abiding life. As former New York City Probation Commissioner Rossi has recognized, "Either they go to work or they go back to jail."[45] Former Nassau County District Attorney, and now Congresswoman, Kathleen Rice shares that sentiment: "Taking steps to remove unnecessary barriers to employment for worthy ex-offenders" will help "curb recidivism and reduce crime."[46]

D. Workplace Safety

The bill addresses concerns about workplace safety because it seals only misdemeanors and non-violent felonies while precluding sealing of violent felonies and sex offenses. There is no evidence, for instance, that a person who committed petit larceny or drug possession 5 years in the past is a safety concern. Nor is there evidence that even those convicted of violent felony offenses pose safety concerns years after their conviction. Indeed, a field study of 88,000 individuals convicted of violent felony offenses indicates that those arrested for *violent* felonies who then stay clean for 5-8 years are as likely as the average citizen to commit an offense.[47]

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[43] Department of Criminal Justice Services, Computerized Criminal History System, "New York State Misdemeanor Convictions by Top Charge" (on file with committee).

[44] Richard H. McAdams, *Economic Costs of Inequality*, 2010 U Chi Legal F 23, 27-36 (2010).

[45] Walter Shapiro, *Prison Nation Turns Its Back on Released Convicts*, USA Today (May 30, 2001).

[46] Letter from Kathleen Rice to Sealing Committee of the New York State Bar Association (January 17, 2012).

[47] Alfred Blumstein and Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks* (2009).

IV. SUGGESTED MODIFICATIONS TO THE SEALING REMEDY

While the bill improves the status quo, a few additional modifications, summarized below, could further enhance the bill.

A. Reducing the 7-Year Grace-Period for Misdemeanors

The bill should reduce the misdemeanor grace-period to no more than 3 years. That modification will allow the thousands of young New Yorkers who are annually convicted of petit larceny, marijuana misdemeanors, and turnstile-jumping (misdemeanor theft of services), to secure work and move forward with their lives.

B. Expanding Relief for Those with More Than Two Misdemeanors

The Legislation currently bars relief to those with more than two misdemeanors. While relevant, the number of misdemeanor convictions should not be dispositive of an individual's eligibility for sealing. Instead of a categorical bar, the Legislature should give judges discretion, as with felony sealing, to grant sealing to those with more than 2 misdemeanor convictions.

C. Applying Sealing to Education Applications

While the bill allows successful sealing applicants to refrain from disclosing a sealed conviction when they apply for "licensing," "employment," "credit," or insurance,[48] it does not cover education applications. The Legislature should amend the bill to ensure that rehabilitated people don't lose the very educational opportunities that could help them become productive members of society.

D. Sealing Driving-While-Intoxicated Misdemeanors

The bill automatically precludes driving-while-intoxicated misdemeanor convictions from sealing. This provision should be modified to permit discretionary sealing. Misdemeanor driving while intoxicated is the third most common offense in New York; there have been about 100,000 convictions for that offense during the last 5 years.[49] Many driving-while-intoxicated offenders are young and unlikely to reoffend. If a judge determines that a person with a prior driving-while-intoxicated conviction has rehabilitated, sealing should be available. On the other hand, if the job at issue primarily involves driving (beyond mere travel to and from work), sealing should be unavailable.

E. Clarifying Government Access to Sealed Records

Under the bill, prosecutors and police can access sealed records when pursuing a law-enforcement function. Under this sealing exception, it appears that police and prosecutors can maintain databases which contain sealed records, as long as those databases are not made

[48] Bill § 5.

[49] Department of Criminal Justice Services, "New York State Misdemeanor Convictions by Top Charge."

publically available. To ensure that there is no ambiguity on this issue, the bill should expressly authorize the maintenance of independent law enforcement databases that are immune from sealing.

Additionally, the bill does not clearly bar *all* government actors/agencies from releasing sealed records. Instead, the bill identifies several law enforcement agencies that cannot access records, but omits others (such as the Department of Corrections). To address these omissions, we propose a technical modification:

> When a court orders the sealing of the record of a petitioner's conviction or convictions, the clerk of such court shall immediately notify the commissioner of the division of criminal justice services, the heads of all appropriate police departments and all other law enforcement agencies, **state and local correctional departments,** and any court that sentenced the petitioner following conviction of an offense the record of which must be sealed, of such order. Thereupon, all official records and papers relating to the petitioner's arrests, prosecutions and convictions, including all duplicates and copies thereof, on file with **any state agency, local agency,** the division or any court shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palmprints, photographs or digital images of the same.[50]

F. Removing Automatic Licensure Disabilities

Certain felony and misdemeanor convictions render a person categorically ineligible for numerous state-issued licenses (*e.g.*, real estate broker licenses).[51] Under the proposed bill, even if a petitioner obtains sealing, these automatic license bars still apply unless the applicant secures a separate "certificate of relief from disabilities."[52] An individual can obtain a "certificate of relief from disabilities" if that relief is "consistent with the rehabilitation of the eligible offender" and "public interest."[53] The current bill should be modified to provide that sealing *per se* lifts automatic licensure bars and allows applicants to demonstrate fitness for a license despite a prior conviction, whereupon the licensing agency may grant the license in its discretion. If the crime is old enough to justify sealing, it is also old enough to allow an individual to show that he/she is worthy of a work license despite a prior offense.

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[50] Bill § 2, Proposed CPL 160.65(2)(C)(5).

[51] *E.g.*, General Business Law § 74(2) (security guards and private investigators are ineligible for licensure if they have been convicted of a felony or certain specified offenses); Alcohol & Beverage Control Law § 102(2) (certain liquor store employees are ineligible for employment if convicted of a felony or certain specified misdemeanors); Executive Law § 130 (persons convicted of a felony or certain specified offenses are ineligible for licensure as a Notary Public); Real Property Law § 440-a (felons are ineligible for license as real estate brokers or salesperson).

[52] Bill § 3, adding CPL 160.65(4).

[53] Corrections Law §§ 700, 702, 703.

A subsequent "certificate of relief" application after felony sealing is also redundant. To secure that certificate, an individual must show that such relief is consistent "with the rehabilitation of the eligible offender" and "the public interest." This is the same test as the discretionary, felony sealing test. Thus, requiring an independent, post-sealing application for a certificate of relief is a waste of resources and raises the risk of inconsistent determinations.

G. The "Vulnerable Population" Provision

Under proposed § 160.65(6), a sealed record is accessible by "employers of persons whose employees have regular contact with children or **other vulnerable persons** as designated by the chief administrator of the courts." This section does not define "vulnerable persons," but incorporates by reference the Social Service Law's definition of a "vulnerable person": "A person who, due to physical or cognitive disabilities, or the need for services or placement, is receiving services from a facility or provider agency."[54] This broad definition could apply to virtually any health-care facility, since all health-care facilities provide "services" to people in "need."

The Legislature should limit the "vulnerable persons" exclusion to employers whose "typical patient is above the age of 70 or mentally or physically disabled." Additionally, this provision should only apply to jobs that "involve frequent, unsupervised access to patients." These minor amendments would ensure that rehabilitated offenders do not lose access to a large swath of jobs, while simultaneously protecting vulnerable patients.

H. *Brady* and Trial Preparation Problems

Defendants have the right to cross-examine witnesses with sealed records.[55] But the bill does not address how prosecutors should confront their obligation to disclose those records under *Brady v Maryland*[56] nor how a court should address a sealed conviction proffer during a trial.

To address these problems, the bill should not seal "testimony regarding prior convictions or litigation-related discussions of prior convictions." This change will preserve a prosecutor's capacity to comply with *Brady* and the litigants' ability to inquire about prior convictions. Also, to ensure that the bill's goals are not undermined when a sealed conviction is disclosed during a trial, the bill should expressly prohibit an employer from taking adverse action against the employer if it learns of a prior conviction that was revealed during testimony.

I. Indigent Applicants and Mandatory Surcharges

Section 1(b) of the bill currently requires that a sealing applicant have paid "all fines and *surcharges* assessed, including those that were deferred and made subject to collection in the

[54] Social Services Law § 488(4).

[55] *Davis v Alaska*, 415 US 308, 319 (1974).

[56] *Brady v Maryland*, 373 US 83 (1963).

same manner as a civil judgment .. . .”[57] While it is reasonable to require applicants to have paid the fines that comprise their sentence, it is unfair to require indigent individuals to pay mandatory surcharges if they are too poor do to so. Therefore, the Bill should be amended to exempt those individuals whose income is at or below 200% of the federal poverty level[58] from payment of surcharges as a requirement for “complet[ing] a sentence.”

V. PREVENTING DATA-COLLECTION COMPANIES FROM RELEASING SEALED CONVICTIONS BY DEFINING A SEALED CONVICTION AS A “NULLITY”

Under the bill, sealing is unavailable until years after data-collection companies have already obtained public, unsealed records. As employers regularly obtain background checks from data-collection companies, sealing will benefit rehabilitated offenders only if these private companies remove sealed convictions from their reports. Absent that measure, sealing is virtually useless.[59] Unfortunately, the bill fails to regulate disclosure of sealed records after their release to data-collection companies. The bill provides:

> Nothing in this act shall bar any person from freely speaking or writing about, or publishing by any other means, any information in his or her possession concerning another person’s past criminal conviction or convictions, notwithstanding that such conviction or convictions may have been sealed pursuant to this act.[60]

The bill should ban disclosure by data-collection companies after the record has been sealed. Additionally, if the employer uses internal “in-house” background checks and does not outsource that function, the employer should be required to ensure that sealed records are removed from those internal databases once the record has been sealed.

To ensure that sealed convictions are not disclosed to employers, the Legislature could amend the FCRA’s $25,000 threshold by either raising it or eliminating it. This would ensure that background check companies cannot disclose any conviction older than 7 years. Additionally, the Legislature could lower the 7-year rule for misdemeanors to 3 years, consistent with the grace-period recommended above.

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[57] Emphasis added.

[58] In New York, a person whose annual income is twice the federal poverty standard is eligible for state food stamps. For a single person, the federal poverty standard is $11,770. *See* U.S. Dept. of Health and Human Services, 2015 Poverty Guidelines.

[59] Michael H. Jagunic, *The Unified Sealed Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century Record-Sealing Statute for the Twenty-First Century*, 59 Cleveland State L Rev 161, 178-187 (2011).

[60] Bill, § 6.

Federal law, however, preempts any state legislation governing the content of background checks, including criminal conviction information.[61] To avoid a preemption problem, New York should, as Arkansas has done, define "sealed" records as a *non-conviction*:

> [Arkansas Law:] Upon the entry of the uniform order, the person's underlying conduct shall be deemed as a matter of law never to have occurred, and the person may state that the underlying conduct did not occur and that a record of the person that was sealed does not exist.[62]

While federal law preempts state law regarding what a data-collection company can discuss on a background check, it does not preempt New York's power to *define* whether a conviction "exists."[63] Under the Arkansas "nullity" approach, even if the FCRA does not bar disclosure on staleness or salary level grounds, disclosure of a "non-conviction" will constitute an *inaccurate* disclosure and would thus violate state law banning misrepresentations in credit reports.[64]

To re-define sealed convictions as non-convictions, we recommend the following text, based largely on CPL 160.60 (which governs the sealing of favorable dispositions):

> Upon the sealing of a misdemeanor or felony record, 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. This provision shall have no effect on the use of sealed records for sentencing purposes or for any other law enforcement purposes.[65]

VI. SEALING HEARING PROCEDURES

A. Right to Counsel

The bill does not provide the right to appointed counsel during the sealing hearing. As for misdemeanor sealing, which is automatic and not subject to "interest of justice" litigation, the Committee does not object to the bill's omission of the right to counsel. To streamline the misdemeanor sealing process, however, the bill should mandate the creation of a standardized sealing form.

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[61] *See* 15 USC § 1681t(b)(1)(E) ("No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under [§ 1681c, which covers the disclosure of criminal records], relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law *in effect* on the date of enactment of the Consumer Credit Reporting Reform Act of 1996").

[62] Ark. Code § 16-90-1417(b)(1).

[63] *Id.*

[64] General Business Law § 380-j(a)(3) ("No consumer reporting agency shall report or maintain in the file on a consumer, information . . . which it has reason to know is inaccurate").

[65] To ensure consistency and fairness, the Legislature should extend this "nullity" rule to sealed violations under CPL 160.55.

As for felony sealing, we recommend that the Legislature consider providing appointed counsel to the poor if the District Attorney opposes the application on "interests of justice" grounds. Adversarial hearings will entail substantial arguments and may involve the introduction of documentary evidence or the examination of witnesses. The "guiding hand of counsel"[66] will ensure fairness and prevent inefficient *pro se* litigation.

B. Successive Petitions

The bill requires that if a petition is denied, the petitioner cannot file a revised petition for another two years. This successive-petition bar applies even if the individual mistakenly files his petition several days before the relevant "grace period" ends. In our view, the bill should require a 2-year refiling period only when a denial is based on an "interests of justice" determination but not when it is based on the application's being "premature." To promote efficiency, the Legislature should direct that all "premature" applications be automatically adjourned until the grace-period expires.

C. Right to Appeal

The Legislature should provide petitioners with the right to appeal an adverse determination if that determination is not an "interest of justice" determination. That procedure will ensure that appellate courts can review statutory construction questions arising from sealing hearings.

CONCLUSION

With the modifications recommended above, the Committees endorse the bill.

July 2015

[66] *See Hurrell-Harring v. State*, 15 N.Y.3d 8, 20 (2010).