

**REPORT ON LEGISLATION BY
THE COMMITTEE ON CRIMINAL LAW**

A.4552 (M. of A. Aubry)

AN ACT to amend the Criminal Procedure Law and the Executive Law in relation to conditional sealing of drug convictions.

THIS BILL IS APPROVED

The Committee on Criminal Law of the Association of the Bar of the City of New York submits this report in support of A.4552, a bill that would amend the Criminal Procedure Law and the Executive Law to permit the conditional sealing of certain drug convictions.

In recent years it has become increasingly apparent that greater accessibility to public records has made it easier for prospective employers, landlords, institutions of higher learning and private investigators to obtain individual criminal histories. A quick search of the Internet demonstrates this trend as both public entities and private companies have made such information more readily available. While public safety is of paramount concern, this boom in information technology has also unfairly disadvantaged individuals who have committed even the most minor transgressions or who have long since satisfied any measure of a debt to society. Marijuana and drug convictions, whether felonies or misdemeanors, leave the indelible imprint of a criminal past that can forever bar a person from opportunity or from reentering society in a meaningful way. Should such an individual bear this burden for a lifetime?

The Legislature has recognized that for those individuals convicted of criminal offenses “the promotion of their successful and productive reentry and reintegration into society” is a viable goal and a legitimate public purpose of the Penal Law (PL §1.05[6]). The Association of the Bar of the City of New York agrees with this objective and believes it is time for a change in the statutory framework so that some individuals can be relieved of the onus of certain criminal convictions.¹

Assembly Bill 4552 (the “Bill”) addresses this issue. The Association supports this bill, which provides a mechanism to conditionally seal certain drug and marijuana convictions. We urge the Assembly to ratify it. Conditional sealing of the designated convictions will allow many citizens of New York State the opportunity to secure housing, employment, education and

¹ It should be noted that this position has been endorsed by the New York State Bar Association. “Re-Entry and Reintegration: The Road to Public Safety”, Report of the Special Committee on Collateral Consequences of Criminal Convictions, May 2006, later adopted by the House of Delegates of the Association, Pages 394 – 397.

vocational training that would otherwise be unavailable by virtue of convictions. This would give real meaning to the goal of “reentry and reintegration into society” mentioned above. The bill would accomplish this end with minimal danger to public safety because of the review procedures incorporated in the legislation.

SCOPE OF THE BILL

The bill, as drafted, allows for the sealing of any conviction under Articles 220 (drug offenses) and 221 (marijuana offenses) of the Penal Law. These limitations are contained in the section of the bill that describes the “eligible misdemeanors” and “eligible felonies”. In the misdemeanor category, it is without question that drug and marijuana offenses should be eligible for sealing. The stigma that attaches to an individual who has this type of conviction on his or her record can be significant and may have serious implications that can result in the denial of employment, housing, or student loans, among other penalties. Any one of these collateral consequences can have a devastating effect on an individual’s ability to become a productive member of society. The damage is often compounded by the unforeseen ripple effects on family members who are innocent secondary victims of the unemployment, homelessness, or poverty that may result.

As with any conviction, under current New York law, a misdemeanor remains on a person’s record forever, bubbling to the surface each time an assurance is required about an individual’s past. The failure to provide such assurances or the inability to satisfy a background check when seeking housing, a loan, employment or a license will likely result in repeated summary denials of the particular application and subject that person to a penalty far beyond what was originally intended, resulting in a form of permanent handicapping of that person.

The bill also allows for the sealing of felony convictions under the two enumerated articles. This is permitted where the individual has fully completed his or her sentence and has also either completed a chemical dependence treatment program or not been convicted of any crime for a specified period. In addition, no conviction may be sealed if the individual has a conviction for a violent felony offense or a sex crime.

While caution should be the watchword in this area because of the justifiable concerns for public safety, such concerns must be balanced with social policy goals of reentry and reintegration. Where a marijuana or drug felony offense can safely be sealed from public view with minimal consequence, the opportunity this affords a member of a growing peripheral underclass to re-enter the mainstream can have significant long term benefits.

SEALING PROCEDURE

Sections 3 and 4 of the Bill detail the procedures and criteria for seeking sealing. The petition is submitted to the state Board of Parole. The District Attorney of the jurisdiction of any of the convictions is to be notified and may submit materials in support of or opposition to the petition. The Board will obtain the petitioner’s current criminal record from the Division of Criminal Justice Services.

The burden of proof before the Board is on the petitioner to prove by a preponderance of the evidence that it would be in the interest of justice to grant the sealing. The Board is required

to consider several factors. These include: (1) the nature and seriousness of the offense, (2) the character of the petitioner, including any drug program completion, (3) the petitioner's criminal history, (4) the impact of the sealing on the petitioner's rehabilitation and public safety, and (5) "any other relevant factor".

If the sealing is granted, the sealing is to be a complete one as provided under Section 160.50 of the Criminal Procedure Law.

After a decision by the Board, either party, the petitioner or the District Attorney, may file a motion in the original sentencing court to reverse or modify the decision. The court that hears the motion must decide if the Parole Board's decision was "reasonable according to the factors" set forth above.

This procedure establishes safeguards and a standard of review that will effectively screen out unwarranted applications. The standards allow the Board and any reviewing court to weigh public safety concerns against the stated goals of rehabilitation and reentry.

AVAILABILITY OF CONDITIONALLY SEALED RECORDS

Sections 5, 6, and 7 of the Bill deal with the effect of the sealing and the circumstances under which the sealed conviction may be used. If the petitioner is arrested for a subsequent crime, the sealing will be opened for the pendency of that case. If the new case results in a termination in favor of the accused or a non-criminal offense, then the sealing remains in effect. If the accused is convicted, the sealing is vacated.

The only persons or agencies allowed access to the conditionally sealed record are: (1) the defendant or his agent, (2) a prosecutor, police officer or court which has responsibility for criminally investigating, prosecuting or adjudicating the petitioner, (3) gun licensing agencies, (4) prospective police employers, (5) agencies mandated by law to fingerprint individuals as part of a background check, (6) childcare employers, and (7) the defendant in a criminal trial against whom the petitioner is being called as a witness.

RECOMMENDED MODIFICATIONS

1. The Association feels that there should be a change to the Bill that would permit the disclosure of the sealed record to Family Court or any other court that may be dealing with any issues regarding the care, custody, or visitation of children where the petitioner is involved. With these additional provisions the Bill would permit the sealed convictions to be used for legitimate law enforcement purposes.

2. The bill provides that an individual who has a conviction that has been conditionally sealed is not required to divulge its existence to prospective employers, except for certain mandated fingerprint agencies and care giving employers. It accomplishes this by requiring that employers only ask about convictions not conditionally sealed and, where there is a violation of this prohibition by the employer, the individual need only reveal those convictions that have not been conditionally sealed. In fact, the committee recommends that the statute add the language contained in Section 7 of A.4958 – the "Second Chance bill" - which allows a person to reply in the negative to the question "Have you ever been convicted of a felony or

misdemeanor?” where the only convictions on the person’s record have been conditionally sealed.

CONCLUSION

At a time when the devastating effects of the collateral consequences of criminal convictions have been recognized by many, including the Chief Justice of the Court of Appeals, the Association fully supports the intent and purpose of Assembly A4552. Consistent with public safety, it is imperative that individuals be given the opportunity to shed the stigma of certain criminal convictions in order to successfully reintegrate into society. To date, seventeen states permit the sealing of misdemeanors or felonies to some degree. In the northeast, Massachusetts, Rhode Island, and New Hampshire permit the sealing of both first offense felonies and misdemeanors.² These sealing options will allow more individuals to more readily re-enter productive society, support their families, pay taxes, and thereby avoid further entanglements with the criminal justice system.

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² “AFTER PRISON: Roadblocks to Reentry: A report on State Legal Barriers facing people with criminal records”, Legal Action Center, available at: <http://lac.org/lac/index.php>.