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REPORT OF THE CRIMINAL JUSTICE OPERATIONS COMMITTEE PROPOSING LEGISLATION THAT WOULD ALLOW FOR THE SEALING OF RECORDS CONTAINING CERTAIN ARREST, PETTY OFFENSE, AND YOUTHFUL OFFENDER INFORMATION

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 both law enforcement and, therefore, the criminal justice system. In light of these collateral but highly significant consequences, the Criminal Justice Operations Committee has re-examined the existing statutory framework for the sealing of court records and, as set forth below, sees the need for balanced legislative change in three areas:

- The first change 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.

- The second change applies to youths ages 16 to 18 and permits a youthful offender adjudication for those convicted of a petty offense (i.e. a violation or a traffic infraction) and which permits an automatic, complete sealing of such adjudications upon the defendant's 19th birthday, as is currently the case for youths convicted of misdemeanors.

- The third change applies to defendants convicted of a petty offense (presumably someone who is 19 years old or older), and would allow for a defendant to apply to the sentencing court, upon notice to the District Attorney's Office, for complete sealing of such petty offense conviction following two years from the date of sentence.

Proposed statutory language for the changes is provided below along with supporting "Discussions." Proposed bills are included in the Appendix. Although the bills are proposed individually, the Committee is open to supporting a combined bill as well.

I. 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 - that is, within the court, police department and the district attorney's office - upon a successful written motion to dismiss the accusatory instrument for facial insufficiency. This section does not, however, allow for the 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 apparent legislative oversight should be remedied by the following amendments to section 160.50(3)(b) of the Criminal Procedure Law:

> 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:…
>
> (b) an order to dismiss the entire accusatory instrument against such person pursuant to section <u>140.45, 150.50</u>, 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…

Discussion: 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 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.

II. Expanded Youthful Offender Treatment for 16-18 Year Olds Convicted of a Violation or Petty Offense and Complete Sealing of Records Related Thereto Upon the Youth's 19th Birthday

Presently, youths 16-18 years old who are convicted of a petty offense (which is defined by statute as a conviction to a violation or a traffic infraction) are not, unlike similarly situated misdemeanants, eligible for a youthful offender adjudication. This legislative oversight should be corrected and youthful offender treatment should be mandatory for an eligible youth's first petty offense conviction (as it currently is for an eligible youth's first misdemeanor conviction.) In addition, a youthful offender adjudication should be available, in the discretion of the court, for subsequent petty offense convictions of 16-18 year olds (as it currently is for an eligible youth's second and subsequent misdemeanor convictions.) Finally, all youthful offender adjudications that were substituted for petty offense convictions should be completely sealed pursuant to section 160.50 of the Criminal Procedure Law upon the defendant's 19th birthday.

The Committee proposes the following amendment to Section 720.10 of the Criminal Procedure Law:

> 1. "Youth" means a person charged with **[**a crime**]** <u>an offense</u> alleged to have been committed when he was at least sixteen years old and less than nineteen

years old or a person charged with being a juvenile offender as defined in subdivision forty-two of section 1.20 of this chapter. This shall include a person charged or convicted of a petty offense as defined in subdivision thirty-nine of section 1.20 of this chapter.

The Committee also proposes the following amendments to Section 720.20 of the Criminal Procedure Law:

1. Upon conviction of an eligible youth, the court must order a pre-sentence investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender. Such determination shall be in accordance with the following criteria:

(a) If in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible youth is a youthful offender; and

(b) Where the conviction is had in a local criminal court and the eligible youth had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a youthful offender in substitution of a conviction to a misdemeanor or a felony, the court must find he is a youthful offender.

(c)(i) Where the conviction is had in a local criminal court to a traffic infraction or a violation other than a violation of loitering as described in paragraph (d) or (e) of subdivision one of section 160.10 of this title or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, and the eligible youth had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a youthful offender, the court must find he is a youthful offender; and

(ii) Where the conviction is had in a local criminal court to a traffic infraction or a violation other than a violation of loitering as described in paragraph (d) or (e) of subdivision one of section 160.10 of this title or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, and if in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of an open and public court record pursuant to section 160.55 of this chapter, the court may, in its discretion, find the eligible youth is a youthful offender; and

2. Where an eligible youth is convicted of two or more **[**crimes**]** offenses set forth in separate counts of an accusatory instrument or set forth in two or more accusatory instruments consolidated for trial purposes, the court must not find him a youthful offender with respect to any such conviction pursuant to

subdivision one of this section unless it finds him a youthful offender with respect to all such convictions.

3. (a) Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; and the court must sentence the defendant pursuant to section 60.02 of the penal law.

(b) Upon determining that an eligible youth is a youthful offender pursuant to section 720.20(1)(c) of this section the clerk of the court, the commissioner of the division of criminal justice services and such heads of police departments and other law enforcement agencies involved in the youth's arrest and prosecution shall, when the person reaches the age of nineteen, take the actions required by paragraphs (a), (b) and (c) of subdivision one of section 160.50 of this chapter.

Finally, the Committee recommends a conforming amendment be made to subdivision three of section 160.50 of the Criminal Procedure Law by adding a new paragraph (m) as follows:

(m) A youthful offender adjudication was substituted for a petty offense conviction pursuant to 720.20(1)(c) of this chapter and the eligible youth has reached the age of nineteen.

Discussion: The collateral consequences that result from convictions are common knowledge to those in the criminal justice system. From immigration to housing to professional licensing, the resulting consequences of a criminal conviction can frequently be more severe than the sentence meted out in the actual criminal case. These consequences have risen exponentially as the public access to these records of such convictions has grown. "Background checks have become more commonplace in the years after the Sept. 11 terrorist attacks, and cheaper. More than 80% of companies performed such checks in 2006, compared with fewer than 50% in 1998, according to the Society for Human Resource Management, an association of HR professionals." More Job Seekers Scramble to Erase Their Criminal Past, *The Wall Street Journal*, 11/11/09, p A1. Now, more than ever, there is an "availability to all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans. See, e.g., Bureau of Justice Statistics, Report of the National Task Force on Privacy, Technology, and Criminal Justice Information (Aug. 2001, NCJ 187669). Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is cheap, easy and routine. Corinne A. Carey, No Second Chance: People With Criminal Records Denied Access To Public Housing, 36 U. TOLEDO L. REV. 545, 553 (2005); see generally James B. Jacobs, Mass Incarceration and the Proliferation of Criminal Records, 3 ST. THOMAS L. REV.387 (2006)." Uniform Collateral Consequences of Conviction Act of 2009, National Conference of Commissioners on Uniform State Laws, Prefatory Note p 6-7 (2009).

The availability of these records must also be considered in light of the "get tough" policies of law enforcement. As the New York City Police Department continues to utilize

quality of life arrests as a tactic to prevent more serious crimes from occurring, more and more people are coming into contact with both law enforcement and, therefore, the criminal justice system. A predictable by-product of such policies is that more New Yorkers than ever have discoverable criminal justice records that could come up during a background check. For example "[a]s of December 31, 2003, 5.976 million New Yorkers have a criminal history maintained by the NYS Division of Criminal Justice Services. See Bureau of Justice Statistics NCJ 210297, *Survey of State Criminal History Information Systems, 2003*, at 15 (Feb. 2006). The population of New York in 2003 was 19,228,031. *See* U.S. Census Bureau, *Table 1: Annual Estimates of the Population for Counties of New York: April 1, 2000 to July 1, 2005*. This former number represents an increase of 656,000 people with criminal histories in New York from 2001 to 2003. . ." Re-Entry and Reintegration: The Road to Public Safety, New York State Bar Association, Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings (2006), p 1, footnote 1.

The intersection of law enforcement policies and accessibility to the records that follow the implementation of such policies is also having a disparate impact upon minorities. "Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males. Bonczar, *supra*, at 5. A recent study has shown that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics," and that "the negative effect of a criminal conviction is substantially larger for blacks than for whites." Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men 4* (Oct. 2009, NCJ 228584) (http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf)." Uniform Collateral Consequences of Conviction Act of 2009, National Conference of Commissioners on Uniform State Laws, Prefatory Note p 6-7.

This proposal and the one that follows represent a modest attempt at addressing some of these problems by providing procedural mechanisms for people with convictions to non-criminal offenses. The goal is relatively simple: permit those individuals a second chance at a completely clean record. This proposed change in the youthful offender laws would fix a gap in the current statutory structure by permitting a youthful offender adjudication to be substituted for a non-criminal petty offense conviction (as is already permitted for both a misdemeanor and a felony conviction). The most important part of both of these proposals is that they would each trigger sealing under CPL § 160.50, which is commonly referred to as "complete sealing." The reason this is important is that it is only through CPL § 160.50 sealing that an individual can receive the relief necessary to have a second chance at a clean record:

> [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. (Emphasis added.)

An important issue to keep in mind when evaluating the instant proposal is the anomaly that exists regarding youthful offender adjudications. Consider the situation of a defendant who is between the ages of sixteen and eighteen years old, who statutorily qualifies to receive a youthful offender adjudication, and who is charged with an A misdemeanor as the most serious level of offense. Under the current state of the law, if that defendant is convicted of an A misdemeanor after trial and is sentenced to the maximum amount of jail time, his conviction must - as a matter of law - be replaced with a youthful offender adjudication which would be completely sealed from the public (and, most importantly, future employers.) However, if that same defendant has their attorney negotiate a plea bargain down to a non-criminal, petty offense - let's say, to the violation of Disorderly Conduct - he would have a conviction to an offense, and the court record for that case would remain open forever. No matter how exemplary a life he would lead in the future, the current state of the law[1] does not permit any chance of a petty offense conviction to receive even the same treatment - a youthful offender adjudication - that is available upon conviction to a misdemeanor (and which is even available upon conviction to a felony.)

These proposed amendments to the youthful offender statutes simply provide a procedure for petty offenses that already exists for more serious offenses (i.e. misdemeanors and felonies). For any request that a sixteen to eighteen year-old defendant receive a youthful offender adjudication on a second or subsequent petty offense conviction, the District Attorney's Office would be a full participant before the Court as it considers whether or not a particular defendant is appropriate to receive such a benefit. Also, procedurally, this proposal would track the processes that already exist for misdemeanor youthful offender adjudications. The Department of Probation would conduct an eligibility review, and the first adjudication would exist as a matter of right, while subsequent adjudications would be within the discretion of the sentencing court. These adjudications would then appear on future rap sheets of these defendants in order to let both the court and the Department of Probation know whether or not the defendant had previously received a youthful offender adjudication for a petty offense. However, upon turning nineteen that adjudication would fall off of the defendant's rap sheet and become a legal nullity pursuant to CPL § 160.50.

III. Discretionary and Complete Sealing for Non-Criminal, Petty Offense Convictions Pursuant to a New Statute: CPL § 160.57

By this legislation, defendants convicted of non-criminal violations and traffic infractions will be able to move the sentencing court, on notice to the District Attorney's Office, for complete sealing of their convictions two years after they are sentenced. If the People consent, complete sealing pursuant to section 160.50 of the Criminal Procedure Law shall be granted. If the District Attorney's Office opposes such sealing, the Court will conduct a brief, summary proceeding where it will determine whether or not the interests of justice require a public record of the conviction in question.

[1] For an overview of the current state of the sealing laws in New York, please refer to Appendix A.

The Committee believes there should be an amendment to the Criminal Procedure Law adding a new section 160.57 as follows:

> § 160.57 Application for Sealing of Court Record Following Termination of Criminal Action by Conviction for Noncriminal Offense.
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> 1. A person convicted of a traffic infraction or a violation, other than a violation of loitering as described in paragraph (d) or (e) of subdivision one of section 160.10 of this chapter or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, and whose case was sealed pursuant to section 160.55 of this article, may move in accordance with the provisions of this section for an order sealing the court record of such action or proceeding.
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> 2. Such motion shall be filed in writing with the local criminal court or superior court in which the conviction and sentence occurred not earlier than twenty four months following the date of sentence. Such motion must be made upon not less than twenty days notice to the district attorney.
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> 3. Where, upon motion to seal the court record pursuant to this section, both parties consent to such sealing, the court shall enter an order sealing the court record unless the interests of justice require otherwise. For purposes of this subdivision, a party that is given written notice of a motion to seal pursuant to this section shall be deemed to consent to such termination unless, prior to the return date of such motion, such party files a notice of opposition thereto with the court.
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> 4. Where the people file a notice of opposition prior to the return date, the court shall conduct a summary hearing on the return date in which it may receive any relevant evidence. Upon request, the court must grant a reasonable adjournment to either party to enable them to prepare for the hearing. Following such hearing, an order to seal pursuant to this section shall be granted unless the district attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise. Where the court has determined that sealing pursuant to this section is not in the interests of justice, the court shall put forth its reasons on the record.
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> 5. Upon the entering of an order to seal, the court record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action shall be sealed as if it had been terminated in favor of the accused and that the record of such action or proceeding shall be sealed.
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> 6. Upon the entering of an order to seal, all official records and papers,

including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with any court shall be sealed and not made available to any person or public or private agency.

7. Upon the granting of a motion to seal pursuant to this section, such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state division of parole when the accused is on parole supervision as a result of conditional release or a parole release granted by the New York state board of parole, and the arrest which is the subject of the inquiry is one which occurred while the accused was under supervision or (v) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer of peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto, or (vi) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision.

8. The chief administrator of the courts, in consultation with the director of the division of criminal justice services and representatives of appropriate prosecutorial and criminal defense organizations in the state, shall adopt forms for the motion to seal, the notice of opposition to sealing, and the order granting sealing pursuant to this section.

As in the second proposal of this report, a conforming amendment should be made to subdivision three of section 160.50 of the Criminal Procedure Law by adding a new paragraph (m) to read as follows:

(m) A sealing order pursuant to section 160.57 of this chapter was entered.

The above language largely tracks S.5958 (2009/10 Session), which was introduced by Senator Schneiderman in June 2009 at the request of the Chief Administrative Judge upon recommendation of her Advisory Committee. The bill did not pass in the 2009-2010 term and it is unclear whether it will be reintroduced. The Committee's proposal differs from S.5958 in two significant respects: first, S.5958 contained an automatic sealing provision after 36 months.

This proposal does not contain any automatic sealing provision. The Committee believes that permitting automatic sealing in this context fails to take into account the legitimate law enforcement interest that a prosecutor may have regarding a particular defendant or a particular petty offense. Second, S.5958 allowed for a sealing motion to be made 12 months after sentence whereas this proposal recommends a 24-month waiting period. The Committee believes that a 24-month cooling-off period is more appropriate because it will prevent an onslaught of applications and allow the time necessary to determine whether a defendant has fully complied with the terms of his or her sentence.

Discussion: The purpose of this amendment is to address the problems surrounding the collateral consequences which arise from non-criminal convictions to petty offenses. The creation of the proposed Criminal Procedure Law § 160.57 would provide an avenue of relief to those who have been convicted of a non-criminal petty offense. The proposal would allow an individual to obtain a complete sealing of such records when a two year period has passed from the date of sentence and where the sentencing court, upon notice to the District Attorney's Office, determines that such sealing is appropriate. Also, as previously discussed with the proposed youthful offender amendments, the most important part of this proposal is that it would trigger sealing under CPL § 160.50, the "complete sealing" provision. It is only through CPL § 160.50 sealing that an individual can receive the relief necessary to have a second chance at a clean record:

> [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.**
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> CPL §160.60. (Emphasis added.)

By giving individuals a chance to have a prior arrest and prosecution deemed a nullity in cases where they were convicted of a non-criminal petty offense and where both judicial and prosecutorial checks and balances have been cleared, these proposals would go a long way towards eliminating some of the unintended consequences that have resulted from the increasing arrests and convictions to relatively minor offenses.

Practically speaking, the proposed CPL § 160.57 procedure would be relatively simple. After two years from the date that sentence was imposed a defendant may apply to the Court, upon notice to the District Attorney's Office, for sealing of the official Court record on their non-criminal, petty offense conviction. [The three exceptions to CPL § 160.55 sealing (see Footnote 1) would not be eligible for such sealing.] With a vision of the Office of Court Administration developing a one-page form in mind, a defendant would serve the District Attorney's Office, and file with the Court, a copy of the application. The clerk of the court would then calendar the matter for at least twenty days later, depending upon the needs of the Court. The District

Attorney's Office could then choose to consent to the sealing application or challenge it. If consented to, the Court would then grant the application and take the appropriate steps. If challenged, the Court would then conduct a summary hearing (where sworn testimony need not be taken). [This would be similar to a bail argument at an arraignment or sentencing arguments following a trial.]

The sealing opportunities set forth in the proposed amendment are not unprecedented. Criminal Procedure Law § 160.50(3)(k) authorizes a conviction for Unlawful Possession of Marihuana [Penal Law § 221.05] to be treated as a termination in favor of the defendant where (a.) the accusatory instrument only alleges violations of Article 221 [Offenses Involving Marihuana], (b.) the sole controlled substance involved is marihuana, (c.) the conviction was only to a violation or violations, and (d.) at least three years have passed since the offense occurred. CPL §§ 160.50(3)(k)(i) - (iv). This then leaves in place a procedure that allows for the fullest possible sealing (under CPL § 160.50) following a conviction to a non-criminal, petty offense - PL § 221.05 - which happens automatically after three years without any realistic input from either the District Attorney's Office or the Court.[2]

This proposal does not expand the types of petty offenses that would be automatically sealed under CPL 160.50. Rather, by allowing the District Attorney's Office an opportunity to oppose the application for sealing, this proposal strikes a middle ground through a meaningful debate over whether the sealing of a particular petty offense should occur while still providing the public with a procedural avenue for relief.

Finally, there are concerns that some have raised about altering the current sealing structure. From prosecutors, the concern is that particular defendants and/or anyone convicted of a particular petty offense should not benefit from having their non-criminal conviction fully sealed. From the court, the concern is that this change in procedure would open a floodgate of applications that would choke an already overwhelmed court system. This proposal takes both of these concerns into consideration.

First, the proposed CPL § 160.57 will only allow the sealing procedure to commence upon notice to the District Attorney's Office. Once notified, the District Attorney's Office then has an opportunity to evaluate both the defendant and the petty offense that may be sealed. If the defendant is the type of individual that the District Attorney's Office would strongly oppose benefitting from this procedure, then they would have a mechanism by which to meaningfully oppose the sealing. Also, if the conviction is of a type that the District Attorney feels strongly should not be sealed, they have the same procedural ability to oppose it. [Again, considering the high volume and quick pace of an arraignment courtroom, where the majority of sealed terminations occur, this proposal gives the District Attorney a realistic opportunity to evaluate the particulars of a defendant and of a particular case in a way that is simply not realistic during an arraignment shift.]

Second, the twenty-four month "cooling off" period that is built into the CPL § 160.57

[2] Considering the high volume and quick pace of an arraignment courtroom, where the majority of pleas to this charge occur, it is unrealistic that either the District Attorney or the Court would actually avail itself of the opportunity to argue that the interests of justice required that the Court order an Unlawful Possession of Marihuana conviction to remain unsealed (as CPL § 160.50(1) allows).

proposal would prevent an onslaught of applications that would otherwise be made were they allowed at the time of sentence. This should keep the procedure from overwhelming an already strained local criminal court structure. Waiting for 24 months will also allow both the District Attorney and the Court the time necessary to determine whether or not the defendant has fully complied with the terms of his/her sentence (e.g. law abiding life during conditional discharge, payment in full of fines/restitution, completion of any program or community service obligations).

Third, the Legislature has carved out three exceptions from the CPL 160.55 sealing construct (see Footnote 1). The proposed CPL § 160.57 does not alter the Legislature's original intent because those three exceptions would not be eligible for sealing under this proposal. Thus, the original carve outs from the existing sealing structure would remain untouched.

CONCLUSION

In the crushing volume of cases in local criminal courts in highly populated areas, plea bargaining is a necessary way of life. The most common results of this reality are pleas to violations and traffic infractions. To those in the criminal justice system, these are non-criminal, petty offenses. To the individual with such a conviction, it can be a substantial hurdle in real life that presents a far harsher consequence than anything that occurred during the original criminal action. For the individual who is applying for that job, or trying to get into that co-op, and who has led an admirably law-abiding life with one exception that resulted in a plea to Disorderly Conduct, it seems reasonable that a procedural avenue should exist so that an otherwise lifetime blemish can be removed. The current state of the law does not allow such an individual any avenue of relief. Both the amendment to the youthful offender statutes as well as the proposed Criminal Procedure Law §160.57 would be a reasoned step towards addressing the indisputable problems of collateral consequences. The proposals create a procedural avenue of relief that also takes into consideration both the public safety concerns of prosecutors and the operational concerns of the courts. At its essence, all three of these proposals are meant to curtail the increasingly widespread and harmful effects of arrest, court and prosecutions records.

Each of these proposals is certainly a compromise. They are attempts to stake out middle ground as we make some effort to deal with the troubling issue of the collateral consequences of non-criminal convictions. For those with a stake in this issue, there is no doubt that these proposals either go too far or not far enough. Defense advocates will want more sweeping and automatic changes, while prosecutors will hope to avoid any changes that may result in a one-way benefit to defendants. We hope that such advocacy desires from the opposite sides of this issue will not prevent this moderate step forward.

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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[3], 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".[4] 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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[3] 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)).

[4] 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.