CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

SAMPLE MEMO OF LAW IN SUPPORT OD CONDITIONAL SELAING: TREATMENT AS A CONDITION OF PROBATION

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

Memorandum in Support of Motion for Conditional Sealing Pursuant to CPL ' 160.58

VINCENT DOE,

Defendant.

MEMORANDUM OF LAW

Mr. Doe submits this Memorandum of Law in support of his Motion for Conditional Sealing Pursuant to CPL § 160.58.

I. CONDITIONAL SEALING IS A NARROWLY TAILORED PROCEDURE ENACTED TO PROVIDE A MEANINGFUL SECOND CHANCE FOR INDIVIDUALS WHO HAVE A PROVEN COMMITMENT TO THEIR REHABILITATION.

Over the past two decades, as we have adopted many "tough on crime" policies, our State has enacted a myriad of obstacles to full reintegration for people who have a criminal conviction. Referred to as "collateral consequences," these legal and social barriers often have life-long consequences. In 2006, a Special Committee of the New York State Bar Association (NYSBA) defined "collateral consequences" as follows:

> *The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system [that] often erect formidable barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.*

Special Committee of the New York State Bar Association, "Re-Entry and Reintegration: The Road to Public Safety," (available at the "publications" section of the New York State Bar Association at www.nysba.org), at 7. The NYSBA's Special Committee devoted more than a year to examining the impact a criminal conviction has on a person's life, focusing on the following areas: employment, education, benefits, financial stability, housing, and family relationships. The end result was a comprehensive report that concluded as follows:

> *New York has unwittingly constructed formidable barriers to those attempting to re-enter society following interaction with the criminal justice system... As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life - family, shelter, work, civic participation, and financial stability. These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price.*

Id. at 443.

Sealing conviction information is one means by which to overcome the barriers identified in this report. It is neither a new nor unproven means by which to provide people who have been arrested for a non-violent crime a better chance at reintegrating into the community. Other states have been sealing conviction information for years. Even in New York, prosecutors and judges have sealed criminal history records by dismissing the charges against those individuals who successfully complete court or prosecutor-mandated substance abuse treatment, such as drug court or the King County District Attorney=s Drug Treatment Alternative-to-Prison (DTAP) program.

In 2009, New York enacted significant reforms to the Rockefeller Drug Laws. A key component of this legislation is Criminal Procedure Law (CPL) § 160.58, which allows for the conditional sealing of non-violent, addiction-driven criminal convictions for those individuals who have objectively proven their commitment to their rehabilitation by completing required treatment and successfully completing their sentences. This provision acknowledges what district attorneys and judges have recognized for years - sealing arrest information gives people a genuine second chance, thereby decreasing recidivism rates and enhancing public safety. CPL § 160.58, however, includes safeguards that are not present in the case of an outright dismissal. First, the statute gives clear guidance as to when conditional sealing is appropriate, requiring judges to consider four factors when making a conditional sealing decision. See CPL § 160.58(3). Second, the sealing is *conditional* only, meaning that if an individual is re-arrested or otherwise charged with a new crime, the case is *automatically* unsealed. See CPL § 160.58(8).

At its core, conditional sealing recognizes the efficacy of what judges and district attorneys have been doing for the past two decades and formalizes the process, adding built-in safeguards. It is a narrowly-tailored procedure by which to ensure that people who have objectively demonstrated their commitment to their rehabilitation do not face needless hurdles to furthering their reintegration. Conditional sealing recognizes that obtaining stable housing, education, and living-wage employment is a critical part of one=s rehabilitation.

People whose criminal conduct has been fueled by their addiction, but who have successfully completed substance abuse treatment and court-imposed sentences have not only paid the price for their criminal conduct; they have also proven themselves ready and willing to become good tenants, students, and employees. Continuing to stigmatize such individuals by

denying them opportunities for housing and jobs adversely impacts all of us by making it impossible for such individuals to successfully further their rehabilitation and meaningful reintegration into the community, thereby increasing the likelihood that they will re-offend - diminishing public safety as whole.

II. ELIGBILITY FOR CONDITIONAL SEALING IS NOT LIMITED TO INDIVIDUALS WHO HAVE SUCCESSFULLY COMPLETED JUDICIAL DIVERSION OR DRUG COURT, BUT ALSO INCLUDES INDIVIDUALS WHO HAVE SUCCESSFULLY COMPLETED OTHER JUDICIALLY SANCTIONED DRUG TREATMENT PROGRAMS, INCLUDING THOSE COMPLETED AS A CONDITION OF PROBATION.

In an attempt to limit the reach of conditional sealing, prosecutors have argued that conditional sealing is available only to individuals who completed drug treatment as part of CPL Article 216 Judicial Diversion or traditional drug treatment court. Prosecutors have asserted, without any basis, that the Legislature never intended conditional sealing to apply to other drug treatment programs, including those completed as a condition of probation.

Because CPL § 160.58 was part of the 2009 Drug Law Reform Act (2009 DLRA), which was included in the 2009 budget bill, there are no bill jackets accompanying the conditional sealing statute and no direct legislative statements regarding the intended scope of conditional sealing eligibility. See People v. Danton, et.al, __ N.Y.S.2d __, 2010 WL 424920 (N.Y.Slip.), at *2. Well-established rules of statutory construction, however, provide guidance in discerning legislative intent. Application of these rules in this case lead ineluctably to one conclusion - the Legislature did not intend a restrictive reading of CPL § 160.58 that would bar eligibility for people who completed a judicially sanctioned drug treatment program as part of a probationary sentence. Rather, by including the language "or another judicially sanctioned drug treatment program of similar duration, requirements, and level of supervision," the Legislature specifically

expanded eligibility for conditional sealing beyond completion of Judicial Diversion and drug court programs to include completion of other drug treatment programs.

A. **The Plain Language of CPL § 160.58 Contemplates Eligibility for Judicially Sanctioned Drug Treatment Programs That Were Completed During a Probationary Sentence.**

It is well-established that when interpreting a statute, the starting point must always be the plain language of the statute itself. See Pultz v. Economakis, 10 N.Y.3d 542, 547 (2008) ("The starting point is always to look to the language itself, and where the language of a statute is clear and unambiguous, courts must give effect to the plain language.") (quoting State of New York v. Patricia II., 6 N.Y.3d 160, 162 (2006)). Adherence to the plain meaning rule prevents courts from legislating under the guise of interpretation. People v. Finnegan, 85 N.Y.2d 53 (1995).

The plain language of CPL § 160.58(1) clearly contemplates eligibility not just for drug treatment programs that were completed as part of a Judicial Diversion or drug court program, but for other judicially sanctioned drug treatment programs. CPL § 160.58(1) provides as follows:

> A defendant convicted of an offense defined in article two hundred twenty or two hundred twenty-one of the penal law or a specified offense defined in subdivision five of section 410.91 of this chapter who has successfully completed a judicial diversion program under article two hundred sixteen of this chapter, or one of the programs heretofore known as drug treatment alternative to prison *or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision, and has completed the sentence imposed for the offense or offenses, is eligible to have such offense or offenses sealed pursuant to this section.*

(Emphasis added).

When it enacted this statute, the Legislature knew that drug courts and district attorney sponsored diversion programs ("DTAP" programs) have traditionally been the best-known drug treatment alternatives to prison, and clearly this is what the Legislature meant by "one of the programs heretofore known as a drug treatment alternative to prison." By then adding the italicized phrase, "*or another judicially sanctioned drug treatment program of similar duration, requirements, and level of supervision*," the Legislature indicated its intent that eligibility for CPL § 160.58 conditional sealing includes judicially sanctioned programs *in addition to* drug courts and DTAP programs.

In other words, CPL § 160.58(1) contemplates completion of one of three different programs as rendering a person eligible for conditional sealing: 1) Judicial Diversion; 2) drug court or DTAP; or 3) another "judicially sanctioned drug treatment program" that is similar to drug court and DTAP in "duration, requirements, and level of supervision." Not every drug treatment program will meet the requirements of the third type of program. Rather, the program must be explicitly sanctioned by a judge and must be similar (in terms of duration, requirements and level of supervision) to drug court and DTAP programs. Noticeably absent is any requirement that the program be completed *prior* to imposition of a sentence; nor is there any indication whatsoever that a person is not eligible for conditional sealing upon completion of a drug treatment program that was a condition of a sentence of probation. A drug treatment program that is completed as part of a probationary sentence meets this criteria as long as the judge was directly involved in ordering treatment as a condition of probation, and as long as the substance abuse treatment program itself is of similar duration, requirements, and level of supervision as drug court or DTAP programs.

To read CPL § 160.58 as applying only to programs that were completed as part of a drug treatment court would directly contravene the plain meaning of the statute. Moreover, doing so would render the phrase "or another judicially sanctioned drug treatment program of similar duration, requirements, and level of supervision" meaningless, thereby violating the well-established rule of statutory construction requiring that a statute be read in manner that gives meaning and effect to all its words and phrases. See Freidman v. Connecticut General Life Ins. Co., 9 N.Y.3d 105, 114 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and where possible, should 'harmonize all parts of a statute with each other and give effect and meaning to the entire statute *and every part or word thereof.'*") (quoting McKinney=s Statutes § 98) (emphasis added). See also McKinney=s Statutes § 97 ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine legislative intent.")

In an unwritten bench decision in People v. Doe, (Onondaga Co. Ct., March 1, 2010), Onondaga County Court Judge Anthony F. Aloi held that the plain language of CPL § 160.58 reveals that the Legislature specifically intended for conditional sealing to apply not only to those individuals who complete a Judicial Diversion or drug court program, but also to individuals who complete other judicially sanctioned drug treatment programs, including those that are part of a probationary sentence. See March 1, 2010 Minutes, attached as Exhibit A, at 16-17 (holding that the court would "have to completely disregard" the language of CPL § 160.58 (1) that includes eligibility upon successful completion of "another judicially sanctioned program of similar duration, level of supervision, and requirements" to hold the defendant ineligible for conditional sealing when the defendant had completed a court-ordered drug

treatment program as part of a sentence of probation). This Court is urged to follow the plain language of the statute and the court=s decision in People v. Doe.

B. The General Purpose of the 2009 DLRA and the Specific Purpose of CPL § 160.58 Support the Notion that Judicially Sanctioned Drug Treatment Programs Completed During a Probationary Sentence Render a Person Eligible for Conditional Sealing.

"A central construct in the interpretation of an ambiguous statute is consideration of the 'general spirit and purpose underlying its enactment.'" People v. Danton, 2010 WL 424920 at *3 (quoting McKinney=s Statutes § 96). Like the previous Drug Law Reform Acts of 2004 and 2005, the 2009 DLRA is intended to ameliorate the harsh and overly punitive sentences mandated by the Rockefeller Drug Laws. Id. The 2009 DLRA accomplishes this by expanding the scope of non-incarcerative sentences for non-violent drug offenses, ultimately designing "a more lenient, more therapeutic, judicial response to all but the most serious drug crimes." Id., at *4.

Conditional sealing is an integral part of this therapeutic approach to drug offenses. With the enactment of CPL § 160.58, the Legislature recognized that drug treatment is the first step toward living a law-abiding life. The next step is full community reintegration through stable housing, employment, and educational opportunities. Yet, as stated above, because our State has enacted a myriad of obstacles to full reintegration for people who have a criminal conviction, it is very difficult for such people to successfully reintegrate into the community unless their convictions are sealed. CPL § 160.58 allows for the sealing of conviction information for people who have proven their commitment to their rehabilitation by completing a judicially sanctioned drug treatment program and complying with supervision, whether the supervision is conducted by a court, by a district attorney's office, or by probation. See People v. Doe, Exhibit A, at 12-

13 (noting that the Legislature has recognized that rehabilitation from drug-driven criminal behavior has two steps - drug treatment and community assimilation; the second step must include meaningful opportunities for employment).

In the Legislature's view, completion of a judicially sanctioned drug treatment program and compliance with conditions of supervision are among the best ways to objectively measure a person's commitment to living a law-abiding life. Thus, with CPL § 160.58, the Legislature recognized that people who have completed Judicial Diversion or a drug court program, or another judicially sanctioned program of similar "duration, requirements, and level of supervision" should be eligible for conditional sealing. To read CPL § 160.58 as restrictively as the prosecution proposes would undermine its therapeutic and ameliorative purpose.

A restrictive reading would also undermine another important purpose of the 2009 DLRA - increasing judicial discretion in cases involving non-violent drug offenses. "[T]he Legislature, in crafting the 2009 DLRA, wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both the prosecution and criminal defendants." People v. Figueroa, 2010 WL 454919 at *19. Like most 2009 DLRA provisions, CPL § 160.58 was carefully designed to ensure that both the prosecution and defendant have a role in the adjudicatory process, but ultimately the statute leaves to the judge's discretion the decision about whether an eligible applicant should have a conviction sealed. See CPL § 160.58(3). To go beyond the statue's plain language to craft eligibility exclusions which limit judicial discretion would fly in the face of the Legislature's efforts to expand, not contract, the use of judicial discretion in non-violent drug offenses. People v. Figueroa, 2010 WL 454919 at *19 ("Given this carefully considered legislative design, it is

difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create.").

Finally, with regard to interpreting the re-sentencing provisions of the 2009 DLRA, other courts have recognized that giving the Act an overly restrictive interpretation would undermine its ameliorative and therapeutic intent. See e.g., People v. Danton, 2010 WL 424920 at *2-3; People v. Roman, Indict. Nos. 4931/96, 6894/96 (Sup. Ct. Bronx Co., Mogulescu, J.), at 1; People v. Williams, Indict. Nos. 9280/99, 5364/04 (Sup. Ct. N.Y. Co., Pickholz, J.), at 10, People v. Jones, Indict. No. 3981/04, Supt. Ct., N.Y. Co., Conviser, J.), at 6. See also People v. Figueroa, 2010 WL 454919 at *14 (noting that the 2009 DLRA is a "remedial statute" and that "'remedial statutes ... are liberally construed, to spread their beneficial result as widely as possible.'") (quoting McKinney=s Statutes § 321). The same principle applies here, and a needlessly restrictive reading of CPL § 160.58 that allows conditional sealing only upon completion of a judicial diversion or drug court program would undermine the overall therapeutic intent of the 2009 DLRA. See People v. Doe, Exhibit A, at 12-13. In contrast, reading CPL § 160.58 so as to encompass judicially sanctioned drug treatment programs in addition to Judicial Diversion and drug court, including programs completed as part of a probationary sentence, is the only way to ensure that people benefit from the 2009 DLRA's therapeutic intent and the continuum of rehabilitation contemplated in CPL § 160.58. It is also consistent with this nation's emerging realization that giving people a genuine "second chance" is the surest way to reduce crime and enhance public safety.[1]

[1] This emerging realization was signaled by then-President Bush=s 2004 State of the Union Address, during which he talked about "second chances" for people returning from prison, as well as the 2008 enactment of the Federal Second Chance Act, which has received increased

C Completing a Judicially Sanctioned Drug Treatment Program as Part of a Sentence of Probation is Substantively Similar to Completing Judicial Diversion and Drug Court Programs.

There is nothing about the nature of a probationary sentence that suggests treating completion of a drug program as a condition of probation substantively different than completion of a Judicial Diversion or drug court program. Indeed, the nature of probation supervision itself is quite similar to the level and nature of supervision involved in Judicial Diversion and drug courts. The Legislature has recognized as much, and when it enacted CPL Article 216 the Legislature anticipated that courts might want to turn to county probation departments to provide the requisite supervision, and therefore expanded the possible time period for interim probation from one to two years. See L. 2009, c. 56, pt. AAA, § 5; CPL § 390.30(6).

The fact that a program completed as part of a probationary sentence occurs post-conviction rather than pre-conviction also does not render the program dissimilar to Judicial Diversion or drug court programs. While some drug court participants have not been convicted of the charged offense, most participants are required to plead guilty as a prerequisite of their participation.[2] Moreover, in enacting Judicial Diversion, the Legislature concluded that participants generally must plead guilty prior to participating. See CPL § 216.05(4). Thus, rather than differentiating his program from Judicial Diversion or drug court, the fact that Mr. Doe completed his judicially sanctioned substance abuse program after pleading guilty to the

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budget appropriations in each subsequent budget year.

[2] Drug courts across New York State and across the nation have varying requirements in this regard, though most require a participant to plead guilty prior to participating. See National Association of Criminal Defense Lawyers (NACDL), "America=s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform," (2009), Executive Summary, at 11.

charged offense renders his situation identical to that of those who completed Judicial Diversion or drug court.

Finally, the fact that a judicially sanctioned substance abuse program is completed as part of a sentence rather than prior to imposition of a sentence is not a relevant distinction. Judicial Diversion and drug court programs are premised on the concept that the threat of imprisonment motivates participants to fully engage in and complete drug treatment. See e.g., NACDL, "America=s Problem-Solving Courts," at 17 ("Drug courts leverage the authority of the court to reduce crime by changing defendants= drug using activity."). Because probation is a revocable sentence, see Penal Law § 60.01(2), the same threat of incarceration serves as a powerful motivator for a person who is to complete a judicially sanctioned drug treatment program as part of probationary sentence.

In all substantive respects, the program Mr. Doe completed is identical to Judicial Diversion and drug court programs. Like all Judicial Diversion and drug court participants, Mr. Doe knew that he was being offered an opportunity to avoid prison and address the addiction that had led to his criminal involvement. The Judge was directly involved in Mr. Doe's participation in this program, ordering that Mr. Doe successfully engage in and complete treatment in exchange for being sentenced to probation supervision instead of being sent to prison. Mr. Doe was required to complete a drug treatment program through an accredited treatment provider and, upon completion of this program, engage in a reputable aftercare program. Like many Judicial Diversion and drug court participants, he seized the opportunity to engage in treatment rather than go to prison, and he successfully turned his life around.

Given the similarity between the program he completed and Judicial Diversion and drug court programs, there is no reason to treat Mr. Doe differently and deny him conditional sealing.

D. Limiting Eligibility for Conditional Sealing to Only Those Who Complete Judicial Diversion and Drug Court Would Lead to Absurd and Fundamentally Unfair Results.

It is well-established that a statute should not be interpreted in such a way as to create "absurd consequences." Long v. State, 7 N.Y.3d 269 (2006). Yet, the restricted interpretation of CPL ' 160.58 endorsed by the prosecution would result in absurd and unfair results, and would make conditional sealing a function of chronology and geography rather than a substantive assessment of individual merits. This is because drug courts are a recent phenomenon - it was not until 1989 that the first drug court was established in Miami, Florida. See NACDL, "America=s Problem-Solving Courts," at 16. In New York, drug courts emerged throughout the 1990s in a piecemeal fashion, depending on the available resources and political climate of individual communities. It was not until 2000 that Chief Justice Judith Kaye formally recognized the value of drug courts by convening an independent commission to examine the impact of drug courts and, in late 2000, establishing the Office of Court Drug Treatment Programs. Many counties in New York did not establish drug courts until after 2000. Finally, just recently, in 2009, the New York State Legislature codified use of judicially sanctioned treatment-based alternatives to incarceration with the enactment of CPL Article 216.

Adoption of limited eligibility criteria would mean that a person who was lucky enough to live in an area of the state that had a drug court in 1995 would be eligible for conditional sealing, while a person like Mr. Doe, who completed a substantively identical program, would not be eligible because he happened to live in an area of the state that did not have drug court at

the time of his arrest. Clearly the Legislature did not intend such an absurd and fundamentally unfair result, and for that very reason included language in CPL § 160.58(1) explicitly designed to expand eligibility for conditional sealing beyond completion of a drug court program. Giving true meaning to the phrase "or another judicially sanctioned program of similar duration, requirements and level of supervision" is the only way to fully enforce the therapeutic and reintegrative purpose of CPL § 160.58 and to guarantee that *all* individuals like Mr. Doe, who have demonstrated their commitment to a law-abiding life by completing judicially sanctioned treatment and complying with supervision, have a meaningful second chance.

CONCLUSION

For the reasons set forth above, I request an order pursuant to CPL § 160.58 conditionally sealing Mr. Doe's conviction, and any further relief this Court deems just and proper.

Dated:

To: