



# Public Defense Backup Center REPORT

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## Defense Practice Tips

### Advocating for Conditional Sealing— CPL § 160.58

By Andy Correia, Alan Rosenthal and Patricia Warth\*

#### Introduction

Effective June 2009, Criminal Procedure Law (CPL) § 160.58 allows the sealing of drug-related convictions under certain circumstances. This is the first time that it is possible to seal convictions in New York. To date, however, only about 30 people have benefited from this new legislation. In light of the expanded use of criminal background searches and the significant barriers to successful reintegration that a person with a criminal conviction faces, it is surprising that more people have not taken advantage of the conditional sealing statute. This article provides tools and practice tips for defense counsel who seek to assist their clients in realizing the significant benefits of conditional sealing.

#### A. Is Sealing After Completing a Drug Treatment Alternative to Prison a New Concept?

No! For years, defendants have had arrests sealed after completing Drug Court programs or District Attorney sponsored Drug Treatment Alternative to Prison Programs (DTAP). This has been accomplished by dismissing the charges, resulting in a CPL § 160.50 sealing, or by reducing the charges to a violation, resulting in a CPL § 160.55 sealing.

CPL § 160.58 is different from traditional methods of sealing in that:

- 1) *Criminal convictions* are sealed;

- 2) The judge can order the sealing *over the DA's objection*;
- 3) *There is an adjudicatory process* with an opportunity for all the parties to be heard;
- 4) *Up to three prior Penal Law article 220 or 221 misdemeanor convictions may also be sealed*; and
- 5) The sealing is *conditional*, and conditionally sealed convictions are automatically unsealed upon a subsequent criminal arrest.

#### B. Why is Sealing Important?

1) The dissemination of criminal records is more widespread than ever, and a criminal conviction often creates barriers in all aspects of a person's life, including:

- Employment
- Housing
- Education
- Immigration status
- Family life

Sealing helps to limit or eliminate the negative impact of a criminal record by removing it from the public eye.

2) We know that recovery from addiction is a life long process and it is not enough to simply refrain from drug abuse. Instead, people in recovery need the tools, like stable employment and housing, to live a law-abiding and fulfilling life. Sealing criminal convictions helps put those tools within reach.

#### C. Are Enough New Yorkers Taking Advantage of Conditional Sealing?

No! Though hard to estimate, it is likely that there are many thousands of people around the State who completed Drug Court or District Attorney sponsored DTAP programs and who are eligible for conditional sealing, as well as the hundreds who complete a Judicial Diversion program each year. A Division of Criminal Justice Services (DCJS) update released in May 2011 almost two years after the June 6, 2009 effective date of CPL § 160.58, reported that there were only 33 CPL § 160.58 conditional sealing orders granted in the entire State during that time.

\**Andy Correia, Esq.* is Wayne County's First Assistant Public Defender. *Alan Rosenthal, Esq.* and *Patricia Warth, Esq.* are Co-Directors of Justice Strategies at the Center for Community Alternatives (CCA), a private, not-for-profit criminal justice agency with offices in Syracuse and New York City. CCA is pursuing the full implementation of the New York Drug Law Reforms through a grant from the Foundation to Promote Open Society.

#### D. Who is Eligible for Conditional Sealing?

CPL § 160.58(1) sets forth the following three general eligibility requirements:

1) The defendant must be convicted of any Penal Law article 220 or 221 offense (including misdemeanors) or an offense listed in CPL § 410.91(5), often referred to as the “Willard offenses.”

The non-drug Willard offenses are:

Penal Law (PL) § 140.20—Burglary 3rd

PL § 145.05—Criminal Mischief 3rd

PL § 145.10—Criminal Mischief 2nd

PL § 155.30 (sub 1,2,3,4,5,6,8,9,10)—Grand Larceny 4th

PL § 155.35—Grand Larceny 3rd

PL § 165.06—Unauthorized Use of Vehicle 2nd

PL § 165.45 (sub 1,2,3,5,6)—Criminal Possession of Stolen Property (CPSP) 4th

PL § 165.50—CPSP 3rd

PL § 170.10—Forgery 2nd

PL § 170.25—Criminal Possession Forged Instrument 2nd

PL § 170.60 Unlawful Use of Slugs 1st  
or

An attempt under PL § 110.00 for any above specified offenses.

2) The defendant must have also *completed one of the following programs*:

- A judicial diversion program under CPL article 216;
- A program “heretofore known as drug treatment alternative to prison,” which is generally interpreted to mean a Drug Court or District Attorney sponsored DTAP program; or
- A “judicially sanctioned program of similar length, duration, and level of supervision.”

What drug treatment programs does this include?

This is where advocacy becomes very important, and the following are just some of the possible programs that might fall within this last provision:

—a sentence of Willard (CPL § 410.91)

—Judicially ordered Shock (PL § 60.04[7])

—Judicially ordered CASAT (Comprehensive Alcohol and Substance Abuse Treatment Program) (PL § 60.04[6])

—sentence of probation with drug treatment ordered as a condition (An Onondaga County Court judge has granted such a conditional sealing application; a transcript of the court proceeding is available on CCA’s website at the address listed below).

3) The defendant must have also *completed the sentence imposed* for the offense or offenses to be conditionally sealed.

#### E. An Eligibility Issue: Does CPL § 160.58 Apply Retroactively?

Though most district attorneys clearly understand that the conditional sealing statute applies retroactively, some have asserted otherwise, stating that the Legislature intended only to provide conditional sealing of convictions that occurred after CPL § 160.58’s effective date of June 6, 2009. This is incorrect. If anyone encounters a court or district attorney arguing against the retroactive application of CPL § 160.58, please inform CCA (contact information below), and we can assist you in rebutting this argument. Here is an overview of why conditional sealing clearly applies retroactively:

1) The plain language of the statute contemplates retroactive application.

The language of the statute is consistent with retroactive application. CPL § 160.58(1) refers to programs “heretofore known as”—a reference to drug treatment programs in the past. In addition, the statute allows sealing for remote drug misdemeanors.

2) The legislative intent indicates sweeping, inclusive reforms.

Why would the Legislature restrict this benefit to future cases only, especially when the statute clearly authorizes retroactive misdemeanors being sealed?

3) OCA, DCJS, and commentators all agree the statute is retroactive.

**Office of Court Administration:** In a July 7, 2009 memo, Michael Colodner of the Unified Court System circulated a memo to all Supreme Court and County Court judges exercising criminal jurisdiction. That memo clearly contemplated CPL § 160.58 would apply to past graduates of judicially sanctioned drug treatment programs who had completed their sentences:

Conditional sealing is available not only to cases arising under CPL Article 216, but also to cases diverted to “one of the programs heretofore known as drug treatment alternative to prison [D-tap] or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision” (CPL 160.58(1)). Because the D-tap program started in 1990, any defendant who successfully completed a D-tap or similar program and who is otherwise eligible for condi-

tional sealing may request sealing pursuant to CPL 160.58.

Colodner memo, July 7, 2009, fn. 6.

**DCJS:** In periodic briefings regarding implementation of the 2009 DLRA, DCJS officials have made it clear that they anticipated a large number of conditional sealing applications soon after CPL § 160.58's enactment, and set aside significant resources to process the large number of anticipated sealing orders.

**Hon. Barry Kamins** stated in an article for the New York State Bar Association (NYSBA) that:

The new law permits a court, on its own motion, or upon motion of a defendant, to conditionally seal the current case and up to three prior misdemeanor convictions for offenses under Penal Law Articles 220 or 221. The sealing may be done in cases where the defendant has been *convicted* and *sentenced* after successfully completing a judicial diversion program, or a drug treatment program that was in existence prior to the judicial diversion program. Thus, this provision allows defendants who have completed drug treatment in existing drug treatment courts around the state to immediately file motions for conditional sealing.

"New 2009 Drug Crime Legislation- Drug Law Reform Act of 2009," *NYSBA New York Criminal Law Newsletter*, Fall 2009, Vol. 7, No. 4, p. 6

4) Finally, most conditional sealing orders tracked by DCJS have been retroactive.

**F. Once You Have Determined that the Defendant is Eligible, What is the Process for Applying for Conditional Sealing?**

1) The court that sentenced the defendant to a judicially sanctioned drug treatment program may "on its own motion" begin the process, but to our knowledge this has not yet happened.

2) Conditional sealing applications will most likely be "on the defendant's motion." This motion involves the following steps:

- Motion made to the sentencing court of the eligible offense, with notice to the District Attorney's office, identifying the offense to be sealed;
- If prior misdemeanors are to be sealed, the motion must identify these prior misdemeanors and notice of the application must also be given to the district attorney(s) and sentencing court(s) in

the counties where those convictions occurred; and

- The notified district attorney(s) and court(s) must be given at least 30 days to respond.

3) The court must follow the steps outlined in CPL § 160.58(a)-(d):

- The court is to order a DCJS or FBI fingerprint-based criminal history record of the defendant, including sealed or suppressed information. Also, DCJS shall include an FBI record with out-of-state convictions, if any. The parties shall be allowed to examine these records. [*Practice tip*—Counsel should obtain the client's DCJS record prior to filing the conditional sealing motion to: ensure that the client is eligible; identify prior misdemeanors that may be subject to sealing; show that the sentences have been completed for relevant convictions; and finally, ensure that this statutory condition is met so the court has one less reason to deny the motion.]

- The court must ensure that the defendant has identified the misdemeanor conviction or convictions for which relief may be granted.

- The court must ensure that there is sufficient evidence that the sentences for all convictions to be sealed have been completed. The court may rely upon a sworn affidavit that the sentences have been completed. [*Practice tip*—The statute does not specify who must be the source of this affidavit. Presumably, an affidavit from the defendant should be sufficient, particularly if it is consistent with information on the DCJS record.]

- The court has ensured that the district attorneys and courts of each jurisdiction have been notified that an eligible prior misdemeanor is being considered for conditional sealing. The district attorneys and courts notified shall have not less than 30 days in which to comment and/or submit materials to aid the court in making such determination. [*Practice tip*—Consider including, along with your motion, proof that the relevant district attorneys and courts have been notified of the conditional sealing motion to ensure that there is one less reason to deny the motion.]

**G. Is There an Opportunity for a Hearing?**

1) CPL § 160.58 states that the judge *may* order a hearing at the request of the "defendant" or the "District Attorney for any jurisdiction in which the defendant committed a crime that is the subject of the sealing application."

- Use of the word "may" suggests that the judge is not required to grant the request for a hearing.

• If there is no request for a hearing, or if the judge denies the request, the motion will be decided on the papers submitted. [*Practice tip*—Because there is no guarantee of a hearing, counsel should ensure that the moving papers are as thorough and comprehensive as possible. Where possible, counsel should attach documents that support the facts alleged in the motion, as well as supporting affidavits, letters of recommendation, and possibly a personal statement in the defendant’s own words.]

2) The court may conduct a hearing to “consider and review any relevant evidence offered by either party that would aid the court in its decision.”

[*Practice tip*—Where there is an opportunity for a hearing, counsel should consider the possible benefits of live-witness testimony over (or in addition to) letters of support or affidavits.]

#### **H. How does the Court Decide a Conditional Sealing Motion? How is the Court’s Discretion to Grant or Deny the Motion Guided?**

1) There is no burden of proof articulated in CPL § 160.58.

2) Instead, CPL § 160.58(3) provides that the court “shall consider any relevant factors, including, but not limited to” the following:

i) “the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions”

[*Practice tip*—Where appropriate, point out that the defendant’s conviction history is non-violent, did not involve the use of weapons, physical injury, or property damage, and instead involves self-injurious drug offenses.]

ii) “the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section”

[*Practice tip*—Where appropriate, discuss the defendant’s work, school, substance abuse and/or mental health treatment, family, friends, proof of sobriety, community involvement, faith community involvement—anything you can think of to show that the defendant has turned her life around and is committed to her sobriety and to being a productive community member. Here, letters of support may be very important.]

iii) “the defendant’s criminal history”

[*Practice tip*—More often than not, the defendant’s criminal history is not a product of malevolence or a “bad character,” but is instead a by-product of drug addiction and, in some cases, a

co-occurring mental health disorder. Consider using the criminal history to tell the defendant’s story about his or her addiction, treatment, and subsequent recovery.]

iv) “the impact of sealing the defendant’s records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety”

[*Practice tip*—This last factor offers you the most opportunity for effective advocacy. Make sure that you spend time with the defendant to find out if there have been times when the conviction(s) have stopped her from getting something specific—a job, a place to live, a chance at education, etc. Then tell that story to the court. You should also refer to Penal Law § 1.05(6), which specifically identifies successful reintegration as a sentencing goal in New York. Sobriety is just the first step of a person’s successful reintegration. The next steps require the defendant to put her life back together by repairing relationships, supporting herself, earning a living wage, having a stable residence, and often getting an education. The life-long stigma of a conviction prevents people from completing their recovery, which negatively impacts public safety.]

#### **I. If the Court Grants the Motion for Conditional Sealing, What is Sealed?**

1) CPL § 160.58(2) states that the court “may order all official papers relating to the arrest, prosecution and conviction which resulted in the defendant’s participation in the judicially sanctioned drug treatment program be conditionally sealed.”

The Court may also order all “arrest, prosecution and conviction records for no more than three of the defendant’s prior eligible misdemeanors” conditionally sealed.

CCA’s website (listed below) includes OCA’s form sealing order.

2) Once sealed, the records shall NOT be available to “any person or public or private agency” except for the following, as set forth in CPL § 160.58(6):

a) the defendant or the defendant’s designated agent;

b) qualified agencies [under Executive Law § 835(9)] and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties;

Executive Law § 835(9):

“Qualified agencies” means courts in the unified court system, the administrative board of the

judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of corrections and community supervision, the department of correction of any municipality, the insurance frauds bureau of the state department of insurance, the office of professional medical 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 subdivision six of section four hundred twenty-four of the social services law, 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.

c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions [33] and [34] 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 . . . shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

**J. Can the Court Grant the Motion While the Defendant has a Pending Case?**

No. CPL § 160.58(7) states: "The court shall not seal the defendant's record pursuant to this section while any charged offense is pending."

Based upon PL § 10.00(1), the use of the word "offense" could mean that sealing will not occur even if there is a violation level offense pending.

**K. Under What Circumstances will this "Conditional" Sealing be Unsealed?**

1) According to CPL § 160.58(8), if "subsequent to a sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately . . . ." The word "immediately" has been understood as meaning that the sealed conviction is

automatically unsealed upon a subsequent arrest for a criminal charge.

2) The conditionally sealed convictions will remain unsealed *unless* the new arrest charges are resolved by a disposition in favor of the accused as defined in CPL § 160.50, or by a conviction for a non-criminal offense as described in CPL § 160.55, in which case it will be conditionally sealed once again.

**L. Is Review by the Appellate Division Possible?**

CPL § 160.58 does not include any right to appeal. Thus, it is not clear if a court's conditional sealing decision is reviewable. There may be a possibility of asking for an appeal by permission pursuant to CPLR § 5701(c), or making an argument that because the court is acting in an administrative capacity, a CPLR article 78 petition might be an appropriate remedy.

**M. What Can a Job Applicant with Conditionally Sealed Convictions Say to a Prospective Employer?**

Unfortunately, there is really no good answer to this. In enacting CPL § 160.58, the Legislature also amended Executive (Human Rights) Law § 296(16) to include conditionally sealed convictions. This provision now reads as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law *or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law*, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful

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offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law. . . .

[Emphasis added.]

Section 16 means that employers should only ask job applicants to disclose *criminal convictions that have not been sealed*. But what if the employer asks: "Have you ever been convicted of a crime?" The legally safest and most conservative answer is: "I have no arrests or convictions in this state or any other state that I am required by law to disclose." Although that obviously will raise red flags to employers, it is probably the most lawful and truthful statement about sealed convictions.

This problem demonstrates that the conditional sealing statute is not intended to be an expungement statute, and that actual expungement is still needed in New York. Conditional sealing is intended to give citizens who qualify for sealing of certain records a chance for gainful employment. Hopefully employers will follow the limits of the Executive Law.

### Conclusion

Some public defender offices across the state have successfully embraced CPL § 160.58 as a regular part of

their practice. For example, the Saratoga County Public Defender's office has had several conditional sealing motions granted, leading the state in the number of conditional sealings thus far (8 of the 30 conditional sealings as of May 2011). Given the importance of helping our clients overcome the life-long consequences of a criminal conviction, it is hoped that other defender offices and defense counsel will start to utilize CPL § 160.58 as a regular part of the defense function. ♪

### Resources

Center for Community Alternatives: <http://www.communityalternatives.org/publications/drugCases.html>

Making Drug Law Reform A Reality—A CCA-powered blog on New York DLRA

<http://makingreformreality.blogspot.com/>

CCA attorneys who are supporting the "Making Drug Law Reform a Reality" Project:

Alan Rosenthal, (315) 422-5638, ext. 227,  
arosenthal@communityalternatives.org

Jeff Leibo, (315) 422-5638, ext. 260,  
jleibo@communityalternatives.org

Patricia Warth, (315) 422-5638, ext. 229,  
pwarth@communityalternatives.org