

# STATE OF NEW YORK

6183

2019-2020 Regular Sessions

## IN SENATE

May 21, 2019

Introduced by Sen. MYRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to eligibility for conviction sealing for certain applicants

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 160.59 of the criminal procedure law, as added by  
2 section 48 of part WWW of chapter 59 of the laws of 2017 and paragraph  
3 (a) of subdivision 2 and subdivision 11 as amended by chapter 60 of the  
4 laws of 2017, is amended to read as follows:

5 § 160.59 Sealing of certain convictions.

6 1. Definitions: As used in this section, the following terms shall  
7 have the following meanings:

8 (a) "Eligible offense" shall mean a violation of subdivision one of  
9 section eleven hundred ninety-two of the vehicle and traffic law or a  
10 violation of subdivision two of section 240.37 of the penal law or any  
11 crime defined in the laws of this state other than a sex offense defined  
12 in article one hundred thirty of the penal law, an offense defined in  
13 article two hundred sixty-three of the penal law, a felony offense  
14 defined in article one hundred twenty-five of the penal law, a violent  
15 felony offense defined in section 70.02 of the penal law, a class A  
16 felony offense defined in the penal law, a felony offense defined in  
17 article one hundred five of the penal law where the underlying offense  
18 is not an eligible offense, an attempt to commit an offense that is not  
19 an eligible offense if the attempt is a felony, or an offense for which  
20 registration as a sex offender is required pursuant to article six-C of  
21 the correction law. For the purposes of this section, where the  
22 [~~defendant~~] applicant is convicted of more than one eligible offense,  
23 [~~committed as part of the same criminal transaction as defined in subdivi-~~  
24 ~~vision two of section 40.10 of this chapter, those offenses shall be~~  
25 ~~considered one eligible offense~~] for which they were charged in separate

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 counts of one indictment, information or complaint, or for which they  
2 were charged in two or more indictments, informations or complaints,  
3 filed in the same court prior to entry of judgment under any of them,  
4 those offenses shall be considered one eligible offense.

5 (b) "Sentencing judge" shall mean the judge who pronounced sentence  
6 upon the conviction under consideration, or if that judge is no longer  
7 sitting in a court in the jurisdiction in which the conviction was  
8 obtained, any other judge who is sitting in the criminal court where the  
9 judgment of conviction was entered.

10 (c) "Prosecutor" shall mean the prosecutor's office that prosecuted  
11 the eligible offense.

12 1-a. The chief administrator of the courts shall, pursuant to section  
13 10.40 of this chapter, prescribe a form application which may be used by  
14 a defendant to apply for sealing pursuant to this section. Such form  
15 application shall include all the essential elements required by this  
16 section to be included in an application for sealing. Nothing in this  
17 subdivision shall be read to require a defendant to use such form appli-  
18 cation to apply for sealing.

19 2. (a) [~~A defendant~~] An individual who has been convicted of up to  
20 [~~two~~] five eligible criminal offenses but not more than [~~one~~] two felony  
21 [~~offense~~] offenses may apply to the court in which [~~he or she was~~] they  
22 were convicted of [~~the~~] their most serious eligible offense to have such  
23 conviction or convictions sealed. If all offenses are offenses with the  
24 same classification, the application shall be made to the court in which  
25 the [~~defendant~~] applicant was last convicted.

26 (b) An application shall contain (i) a copy of a certificate of dispo-  
27 sition or other similar documentation for any offense for which the  
28 [~~defendant~~] applicant has been convicted, or an explanation of why such  
29 certificate or other documentation is not available; (ii) a sworn state-  
30 ment of the [~~defendant~~] applicant as to whether [~~he or she has~~] they  
31 have filed, or then intends to file, any application for sealing of any  
32 other eligible offense; (iii) a copy of any other such application that  
33 has been filed; and (iv) a sworn statement as to the conviction or  
34 convictions for which relief is being sought[~~;- and (v)~~]. Applicants may  
35 submit a sworn statement of the reason or reasons why the court should,  
36 in its discretion, grant such sealing, along with any supporting  
37 documentation.

38 (c) A copy of any application for such sealing shall be served upon  
39 the [~~district attorney of the county in which the conviction, or, if~~  
40 ~~more than one, the convictions, was or were obtained~~] prosecutor which  
41 prosecuted the eligible offense for which a conviction was obtained.  
42 The [~~district attorney~~] prosecutor shall notify the court within forty-  
43 five days if [~~he or she objects~~] they object to the application for  
44 sealing. Failure to object within this period shall indicate consent to  
45 the application.

46 (d) When such application is filed with the court, it shall be  
47 assigned to the sentencing judge unless more than one application is  
48 filed in which case the application shall be assigned to the local  
49 court, county court or the supreme court of the county in which the  
50 criminal court is located, who shall request and receive from the divi-  
51 sion of criminal justice services a fingerprint based criminal history  
52 record of the [~~defendant~~] applicant, including any sealed or suppressed  
53 records. The division of criminal justice services also shall include a  
54 criminal history report, if any, from the federal bureau of investi-  
55 gation regarding any criminal history information that occurred in other  
56 jurisdictions. The division is hereby authorized to receive such infor-

1 mation from the federal bureau of investigation for this purpose, and to  
2 make such information available to the court, which may make this infor-  
3 mation available to the district attorney and the ~~[defendant]~~ applicant.

4 3. The sentencing judge, or local, county or supreme court shall  
5 summarily deny the ~~[defendant's]~~ applicant's application when:

6 (a) the ~~[defendant]~~ applicant is required to register as a sex offen-  
7 der pursuant to article six-C of the correction law; or

8 (b) the ~~[defendant]~~ applicant has previously obtained sealing of the  
9 maximum number of convictions allowable under section 160.58 of ~~[the~~  
10 ~~criminal procedure law]~~ this article; or

11 (c) the ~~[defendant]~~ applicant has previously obtained sealing of the  
12 maximum number of convictions allowable under subdivision four of this  
13 section; or

14 (d) the time period specified in subdivision five of this section has  
15 not yet been satisfied; or

16 (e) the ~~[defendant]~~ applicant has an undisposed arrest or charge pend-  
17 ing; or

18 (f) the ~~[defendant]~~ applicant was convicted of any crime that is not  
19 eligible for sealing under this section after the date of the entry of  
20 ~~[judgement]~~ judgment of the last conviction for which sealing is sought;  
21 or

22 (g) ~~[the defendant has failed to provide the court with the required~~  
23 ~~sworn statement of the reasons why the court should grant the relief~~  
24 ~~requested; or~~

25 ~~(h)~~ the ~~[defendant]~~ applicant has been convicted of ~~[two]~~ three or  
26 more felonies or more than ~~[two]~~ five crimes.

27 4. Provided that the application is not summarily denied for the  
28 reasons set forth in subdivision three of this section, ~~[a defendant]~~ an  
29 applicant who stands convicted of up to ~~[two]~~ five eligible criminal  
30 offenses~~[,]~~ may obtain sealing of violations of subdivision one of  
31 section eleven hundred ninety-two of the vehicle and traffic law and  
32 subdivision two of section 240.37 of the penal law, and no more than  
33 ~~[two]~~ five eligible offenses but not more than ~~[one]~~ two felony  
34 ~~[offense]~~ offenses.

35 5. Any eligible offense may be sealed only after ~~[at least ten years~~  
36 ~~have passed since the imposition of the sentence on the defendant's~~  
37 ~~latest conviction or, if the defendant was sentenced to a period of~~  
38 ~~incarceration, including a period of incarceration imposed in conjunc-~~  
39 ~~tion with a sentence of probation, the defendant's latest release from~~  
40 ~~incarceration. In calculating the ten year period under this subdivi-~~  
41 ~~sion, any period of time the defendant spent incarcerated after the~~  
42 ~~conviction for which the application for sealing is sought, shall be~~  
43 ~~excluded and such ten year period shall be extended by a period or peri-~~  
44 ~~ods equal to the time served under such incarceration.]:~~

45 (a) at least one year has passed since the date of applicant's latest  
46 conviction if the applicant was last convicted of a misdemeanor or  
47 violation offense. In calculating this period, any period of time the  
48 applicant spent incarcerated for this conviction, including a period of  
49 incarceration imposed in conjunction with a sentence of probation, shall  
50 be excluded and such one year period shall be extended by a period equal  
51 to the time served under such incarceration; or

52 (b) at least three years have passed since the date of applicant's  
53 latest conviction if the applicant was last convicted of a felony  
54 offense. In calculating this period, any period of time the applicant  
55 spent incarcerated for this conviction, including a period of carcera-  
56 tion imposed in conjunction with a sentence of probation, shall be

excluded and such three year period shall be extended by a period equal to the time served under such incarceration.

6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the ~~[district attorney]~~ prosecutor, the sentencing judge or local, county or supreme court shall ~~[conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application]~~ inform the applicant of their right to supplement their application with additional materials that would aid the sentencing judge in their decision or to a hearing on the application in order to consider arguments by either party that would aid the sentencing judge in their decision. Once the applicant indicates whether they intend to proceed with or without supplementation or a hearing, the sentencing judge or local, county or supreme court, may proceed.

7. ~~[In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not limited to:~~

~~(a) the amount of time that has elapsed since the defendant's last conviction;~~

~~(b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense;~~

~~(c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;~~

~~(d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs;~~

~~(e) any statements made by the victim of the offense for which the defendant is seeking relief;~~

~~(f) the impact of sealing the defendant's record upon his or her rehabilitation and upon his or her successful and productive reentry and reintegration into society; and~~

~~(g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law]~~ Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section, the sentencing judge or local, county or supreme court shall order sealing, unless the prosecutor shows by clear and convincing evidence that exceptional circumstances weigh against such relief. In determining whether exceptional circumstances exist the court shall consider if the sealing would create an unreasonable risk to public safety, balanced against the benefit of sealing the record upon the applicant's successful and productive reentry and reintegration into society.

8. When a sentencing judge or local, county or supreme court orders sealing pursuant to this section, 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 arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court, police agency or prosecutor's office shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the

1 division shall retain any fingerprints, palmprints and photographs, or  
2 digital images of the same. The clerk of such court shall immediately  
3 notify the commissioner of the division of criminal justice services,  
4 the heads of all appropriate police departments and other law enforce-  
5 ment agencies, regarding the records that shall be sealed pursuant to  
6 this section. The clerk also shall notify any court in which the  
7 [defendant] applicant has stated, pursuant to paragraph (b) of subdivi-  
8 sion two of this section, that [~~he or she has~~] they have filed or  
9 [~~intends~~] intend to file an application for sealing of any other eligi-  
10 ble offense.

11 9. Records sealed pursuant to this section shall be made available to:

12 (a) the [defendant] applicant or the [~~defendant's~~] applicant's design-  
13 nated agent;

14 (b) qualified agencies, as defined in subdivision nine of section  
15 eight hundred thirty-five of the executive law, and federal and state  
16 law enforcement agencies, when acting within the scope of their law  
17 enforcement duties; or

18 (c) any state or local officer or agency with responsibility for the  
19 issuance of licenses to possess guns, when the person has made applica-  
20 tion for such a license; or

21 (d) any prospective employer of a police officer or peace officer as  
22 those terms are defined in subdivisions thirty-three and thirty-four of  
23 section 1.20 of this chapter, in relation to an application for employ-  
24 ment as a police officer or peace officer; provided, however, that every  
25 person who is an applicant for the position of police officer or peace  
26 officer shall be furnished with a copy of all records obtained under  
27 this paragraph and afforded an opportunity to make an explanation there-  
28 to; or

29 (e) the criminal justice information services division of the federal  
30 bureau of investigation, for the purposes of responding to queries to  
31 the national instant criminal background check system regarding attempts  
32 to purchase or otherwise take possession of firearms, as defined in 18  
33 USC 921 (a) (3).

34 10. [~~A conviction which is sealed pursuant to this section is included~~  
35 ~~within the definition of a conviction for the purposes of any criminal~~  
36 ~~proceeding in which the fact of a prior conviction would enhance a~~  
37 ~~penalty or is an element of the offense charged.~~

38 11. No [defendant] person shall be required or permitted to waive  
39 eligibility for sealing pursuant to this section as part of a plea of  
40 guilty, sentence or any agreement related to a conviction for an eligi-  
41 ble offense and any such waiver shall be deemed void and wholly unen-  
42 forceable.

43 11. Denial under this section is without prejudice to subsequent  
44 relief under this section.

45 12. An application under this section, and all pertinent papers and  
46 documents, shall be confidential and may not be made available to any  
47 person or public or private agency except where specifically authorized  
48 by the court.

49 § 2. This act shall take effect immediately.