S T A T E O F N E W Y O R K

10571

I N A S S E M B L Y

June 6, 2012

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Lentol) -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to authorizing the sealing of certain records of conviction or adjudication

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The criminal procedure law is amended by adding a new section 160.65 to read as follows:

S 160.65 SEALING RECORD OF CONVICTION OR ADJUDICATION.

1. ELIGIBLE APPLICANTS. (A) A PERSON IS ELIGIBLE TO APPLY TO SEAL A RECORD OF CONVICTION, OR IN THE CASE OF YOUTHFUL OFFENDERS, AN ADJUDICATION, SUBJECT TO THE PROVISIONS OF THIS SECTION.

(B) THE RECORD SOUGHT TO BE SEALED SHALL BE THE PERSON'S ONLY FELONY CRIMINAL CONVICTION OR ADJUDICATION.

(C) IN THE CASE OF MISDEMEANORS, NO MORE THAN THREE MISDEMEANOR CONVICTIONS OR ADJUDICATIONS ARE SUBJECT TO SEALING PURSUANT TO THIS SECTION.

(D) FURTHER, A PERSON SHALL BE DULY TERMINATED AND DISCHARGED FROM EVERY ASPECT OF THE SENTENCE, INCLUDING INCARCERATION, PROBATION, PAROLE, CONDITIONAL RELEASE, POST-RELEASE SUPERVISION, CONDITIONAL DISCHARGE, AND/OR ANY ORDER OF PROTECTION ON THIS OR ANY OTHER MATTER AGAINST THE PERSON MUST HAVE EXPIRED. THERE CAN BE NO UNDISPOSED ARRESTS AT THE TIME OF APPLICATION.

2. GRADE OF CRIME. A PERSON SHALL HAVE BEEN CONVICTED OF A NON-CRIMINAL PETTY OFFENSE SET FORTH IN THE PENAL LAW, OR ADJUDICATED A YOUTHFUL OFFENDER UNDER SECTION 720.35 OF THIS CHAPTER.

3. TYPE OF CRIME. FOR THE PURPOSES OF THIS SECTION, NO RECORDS INVOLVING SEX CRIMES, CRIMES WITH VICTIMS WHO WERE CHILDREN, CRIMES AGAINST THE ELDERLY, OR CRIMES INVOLVING PUBLIC CORRUPTION ARE ELIGIBLE FOR SEALING. AMONG FELONIES, ONLY CLASS D AND E NON-VIOLENT FELONIES ARE ELIGIBLE.

4. WAITING PERIOD. A PERSON CANNOT APPLY UNTIL A WAITING PERIOD, BEGINNING ON THE DATE THAT THE MOST RECENT SENTENCE OR RESENTENCE IS

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

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IMPOSED, ELAPSES. DURING THIS PERIOD THERE CAN BE NO CONVICTIONS FOR A CRIME. THE FOLLOWING WAITING PERIODS SHALL APPLY UNDER THIS SECTION:

(A) FOR A PERSON WHO HAS BEEN CONVICTED OF AN ELIGIBLE PETTY OFFENSE, THE WAITING PERIOD SHALL BE TWO YEARS FROM THE DATE OF THE MOST RECENT CONVICTION.

(B) FOR A PERSON WHO HAS BEEN CONVICTED OF AN ELIGIBLE MISDEMEANOR, ADJUDICATED YOUTHFUL OFFENDER ON A MISDEMEANOR, OR CONVICTED OF A NON-CRIMINAL OFFENSE, THE WAITING PERIOD SHALL BE FIVE YEARS FROM THE DATE OF THE MOST RECENT CONVICTION OR ADJUDICATION.

(C) FOR A PERSON WHO HAS BEEN CONVICTED OF AN ELIGIBLE NON-VIOLENT D OR E FELONY, OR ADJUDICATED YOUTHFUL OFFENDER ON A FELONY, THE WAITING PERIOD SHALL BE EIGHT YEARS FROM THE DATE OF CONVICTION OR ADJUDICATION.

5. THE MOTION. A MOTION UNDER THIS SECTION SHALL BE SWORN TO UNDER PENALTY OF PERJURY AND SHALL INCLUDE:

(A) A LIST OF EACH OF THE PERSON'S CONVICTIONS IN NEW YORK STATE, ANY CONVICTIONS IN ANY OTHER STATE OR IN FEDERAL COURT, THE SENTENCE FOR EACH SUCH CONVICTION AND THE DATE OF THE SENTENCE. NON-CRIMINAL CONVICTIONS OUTSIDE NEW YORK STATE NEED NOT BE INCLUDED.

(B) A STATEMENT AS TO THE TERMINATION OF EACH ASPECT OF THE SENTENCE FOR EACH OF THE ABOVE-LISTED CONVICTIONS, INCLUDING THE DATES OF TERMINATION FROM PROBATION, PAROLE OR OTHER SUPERVISORY SENTENCES, A STATEMENT AS TO THE EXISTENCE OF ORDER OR ORDERS OF PROTECTION AND THE END DATE OF SUCH, AND A STATEMENT AS TO THE COMPLETION OF ANY CONDITIONAL SENTENCES OR ANY OTHER CONDITIONS OF SENTENCE IMPOSED BY THE COURT OR BY LAW, ALTHOUGH THIS SHALL NOT BE CONSTRUED TO REQUIRE A PERSON TO HAVE RESTORED DRIVING OR OTHER PRIVILEGES THAT HAVE BEEN LOST, SUSPENDED OR REVOKED DUE TO THE CONVICTION.

(C) A DESCRIPTION OF THE NATURE AND CIRCUMSTANCES OF EACH CRIME LISTED IN PARAGRAPH (A) OF THIS SUBDIVISION.

(D) A DESCRIPTION OF THE NATURE OF THE PERSON'S PERSONAL CIRCUMSTANCES SINCE THE CONVICTION, WHICH SHALL ESTABLISH THAT THE PETITIONER IS ENTITLED TO THE RELIEF PROVIDED IN THIS SECTION.

6. FILING FEE. MOTIONS UNDER THIS SECTION SHALL BE ACCOMPANIED BY A FEE OF NINETY-FIVE DOLLARS. THE FILING FEE SHALL BE WAIVED ONLY UPON A FINDING OF A PERSON'S INDIGENCE. WHEN IMPOSED, THE FILING FEE SHALL BE PAID TO THE CLERK OF THE COURT OR ADMINISTRATIVE TRIBUNAL THAT RENDERED THE CONVICTION.

7. SERVING THE MOTION. (A) THE MOTION FOR SEALING A RECORD OF CONVICTION SHALL BE SERVED UPON THE PROSECUTING AGENCY THAT ORIGINALLY PROSECUTED THE CASE. IF THE PERSON WAS ON PROBATION, THE APPLICABLE PROBATION DEPARTMENT SHALL BE SERVED. THE MOTION FOR SEALING A RECORD OF CONVICTION SHALL BE MADE TO THE JUDGE WHO ORIGINALLY SENTENCED THE PERSON. IN THE EVENT SUCH JUDGE IS UNAVAILABLE, OR IN THE DISCRETION OF THE SUPERVISING OR ADMINISTRATIVE JUDGE OF THAT COURT, MOTION SHALL BE MADE TO A SITTING JUDGE IN THE COURT IN WHICH THE CONVICTION WAS ORDERED.

(B) THE PROSECUTING AGENCY MAY FILE AN ANSWER TO THE MOTION PRIOR TO THE RETURN DATE OF THE MOTION.

(C) THE COURT MAY GRANT THE MOTION ON SUBMISSIONS IF THE PROSECUTING AGENCY DOES NOT FILE AN OPPOSITION.

(D) IF THERE IS OBJECTION, THE COURT MUST REVIEW THE ISSUES OF FACT AND LAW AND DETERMINE THE MERITS OF THE MOTION.

8. FACTORS TO CONSIDER. (A) WHEN REVIEWING THE MOTION, THE COURT MAY CONSIDER ANY RELEVANT FACTORS, INCLUDING BUT NOT LIMITED TO: (I) THE CIRCUMSTANCES AND SERIOUSNESS OF THE OFFENSE OR OFFENSES THAT RESULTED IN THE CONVICTION OR CONVICTIONS, (II) THE CHARACTER OF THE PERSON

INCLUDING WHAT STEPS THE PERSON HAS TAKEN SINCE THE TIME OF THE OFFENSE TOWARD PERSONAL REHABILITATION, INCLUDING TREATMENT, WORK, SCHOOL, COMMUNITY SERVICE, OR OTHER PERSONAL HISTORY THAT DEMONSTRATES REHABILITATION, (III) THE PERSON'S CRIMINAL HISTORY, (IV) THE IMPACT OF SEALING THE PERSON'S RECORDS UPON HIS OR HER REHABILITATION AND HIS OR HER SUCCESSFUL AND PRODUCTIVE REENTRY AND REINTEGRATION INTO SOCIETY, AND ON PUBLIC SAFETY, AND (V) ANY STATEMENT MADE BY THE VICTIM OF THE OFFENSE WHERE THERE IS IN FACT A VICTIM OF THE CRIME.

(B) THE COURT SHALL GRANT THE MOTION UNLESS SEALING THE RECORDS WILL HARM PUBLIC SAFETY OR WOULD NOT SERVE THE INTERESTS OF JUSTICE. IF THE COURT DEEMS IT NECESSARY, THE COURT MAY ORDER A REPORT AS TO THE APPLICANT'S BACKGROUND AND CIRCUMSTANCES FROM A LOCAL PROBATION DEPARTMENT, OR AGENCY DEEMED QUALIFIED BY THE COURT TO PREPARE SUCH A REPORT.

9. HEARINGS. UPON THE REQUEST OF EITHER PARTY OR SUA SPONTE, THE COURT MAY CONDUCT A HEARING AS TO ANY ISSUE OF FACT OR LAW OR IN THE COURT'S DISCRETION, MAY HEAR TESTIMONY OR ACCEPT WRITTEN SUBMISSIONS RELATING THE MERITS OF THE MOTION OR ANY MATTER DEEMED APPROPRIATE BY THE COURT IN FURTHERANCE OF DETERMINING THE MOTION. WHEN THE COURT ORDERS A HEARING AND THE PERSON IS FINANCIALLY UNABLE TO AFFORD COUNSEL, THE COURT SHALL ASSIGN COUNSEL.

10. DECISION ON AN APPLICATION. A DECISION GRANTING OR DENYING A MOTION UNDER THIS SECTION SHALL BE IN WRITING AND SHALL STATE THE REASONS FOR THE COURT'S RULING, UNLESS THE COURT GRANTS THE MOTION WITHOUT OBJECTION OR WRITTEN RESPONSE BY THE PROSECUTOR, IN WHICH CASE THE COURT MAY ISSUE AN ORDER WITHOUT A WRITTEN DECISION. IF SEALING IS DENIED, THE PERSON CAN REAPPLY AFTER ONE YEAR.

11. EFFECT OF SEALING. A SEALED CONVICTION SHALL NOT OPERATE AS A DISQUALIFICATION OF ANY PERSON TO PURSUE OR ENGAGE IN ANY LAWFUL ACTIVITY, OCCUPATION, PROFESSION OR CALLING UNLESS SO ORDERED BY THE COURT. EXCEPT WHERE SPECIFICALLY REQUIRED OR PERMITTED BY STATUTE OR UPON SPECIFIED AUTHORIZATION OF A SUPERIOR COURT, NO SUCH PERSON SHALL BE REQUIRED TO DIVULGE INFORMATION PERTAINING TO THE SEALED RECORD. SUCH PERSON SHALL BE PERMITTED TO RESPOND IN THE NEGATIVE TO THE QUESTION "HAVE YOU EVER BEEN CONVICTED OF A CRIME OR VIOLATION?" OR TO ANY QUESTION WITH THE SAME SUBSTANTIVE CONTENT. THE PROTECTION IS THE SAME AS SECTION 160.50 OF THIS ARTICLE: A NULLITY. UNDER EXISTING LAW, NON-GOVERNMENTAL EMPLOYERS ARE NOT PERMITTED TO ASK PROSPECTIVE APPLICANTS IF THEY HAVE BEEN ARRESTED.

12. SEALING PROCESS. WHEN A COURT ORDERS SEALING PURSUANT TO THIS SECTION, ALL OFFICIAL RECORDS AND PAPERS RELATING TO THE ARRESTS, DETENTIONS, PROSECUTIONS, AND CONVICTIONS, INCLUDING ALL DUPLICATES AND COPIES THEREOF, ON FILE WITH THE DIVISION OF CRIMINAL JUSTICE SERVICES OR ANY COURT SHALL BE SEALED AND NOT MADE AVAILABLE TO ANY PERSON OR PUBLIC OR PRIVATE AGENCY; PROVIDED, HOWEVER, THE DIVISION SHALL RETAIN ANY FINGERPRINTS, PALM PRINTS, PHOTOGRAPHS, OR DIGITAL IMAGES OF THE SAME. SEALING SHALL NOT HAVE ANY IMPACT ON DNA EVIDENCE OR INFORMATION ON FILE. RECORDS SHALL BE UNSEALED ONLY PURSUANT TO COURT ORDER EXCEPT THAT THE FOLLOWING AGENCIES MAY MAINTAIN RECORDS IN THE FOLLOWING MANNER:

(A) THE DIVISION OF CRIMINAL JUSTICE SERVICES SHALL MAINTAIN A SEALED RECORD IN ITS DATABASE IN A MANNER THAT WILL NOT BE ACCESSIBLE TO ANYONE OTHER THAN LAW ENFORCEMENT AGENTS OR PROSECUTION AGENCIES IN THE COURSE OF A CRIMINAL INVESTIGATION OR PROSECUTION, OR UPON A COURT ORDER OR COURT-ORDERED SUBPOENA ORDERING RELEASE OF THE INFORMATION. IN THE EVENT THE PERSON IS ARRESTED SUBSEQUENT TO THE SEALING OF THE RECORDS, THE UNSEALED RECORD SHALL BE INCLUDED IN THE DIVISION OF CRIMINAL JUSTICE

SERVICES "NYSID" SHEET THAT IS PRINTED OUT BASED ON THE PERSON'S FINGERPRINTS. A COURT, UPON DETERMINING IT IS IN THE INTERESTS OF JUSTICE TO UNSEAL SUCH A RECORD, SHALL ORDER ITS UNSEALING, WHICH SHALL ALLOW THE PROSECUTOR AND THE COURT TO UNSEAL THE RECORDS OF THEIR AGENCY PERTAINING TO THAT ARREST. ANY SUCH UNSEALED FILES SHALL BE MADE AVAILABLE TO THE PERSON AND HIS OR HER ATTORNEY.

(B) THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND ALL LOCAL JAIL OR PRISON AGENCIES SHALL MAINTAIN SEALED RECORDS IN A MANNER THAT PRECLUDES THE PUBLIC FROM OBTAINING INFORMATION RELATING TO THE ARREST, DETENTION OR CONVICTION OF THE PERSON WHOSE RECORD HAS BEEN SEALED, INCLUDING BUT NOT LIMITED TO REMOVAL FROM ALL PUBLICLY AVAILABLE DATABASES ON THE INTERNET AND OTHERWISE. HOWEVER, SUCH AGENCIES SHALL MAINTAIN A RECORD OF PERSONS WHO HAVE BEEN IN CUSTODY WHICH SHALL BE KEPT BY A CUSTODIAN OF THOSE RECORDS WITHIN THE AGENCY. IN THE EVENT THE PERSON SHALL BE READMITTED TO THE FACILITY, THE CUSTODIAN IS AUTHORIZED TO RE-OPEN SUCH FILES, TO BE USED SOLELY FOR THE AGENCY'S OFFICIAL PURPOSES.

13. UNSEALING FOR CAUSE. IF, SUBSEQUENT TO THE SEALING OF MISDEMEANOR RECORDS, FELONY RECORDS, OR YOUTHFUL OFFENDER ADJUDICATION RECORDS THAT HAVE SUBSTITUTED FOR A MISDEMEANOR OR FELONY CONVICTION PURSUANT TO THIS SECTION, THE PERSON WHO IS THE SUBJECT OF SUCH RECORDS IS ARRESTED FOR OR FORMALLY CHARGED WITH ANY MISDEMEANOR OR FELONY OFFENSE, SUCH RECORDS SHALL "SPRING BACK" AND BE UNSEALED IMMEDIATELY AND REMAIN UNSEALED; PROVIDED, HOWEVER, THAT IF SUCH NEW MISDEMEANOR OR FELONY ARREST RESULTS IN A TERMINATION IN FAVOR OF THE PERSON AS DEFINED IN SUBDIVISION THREE OF SECTION 160.50 OF THIS ARTICLE OR BY CONVICTION FOR A NON-CRIMINAL OFFENSE AS DESCRIBED IN SECTION 160.55 OF THIS ARTICLE, SUCH UNSEALED RECORDS SHALL BE RE-SEALED PURSUANT TO THIS SECTION. NOTHING IN THIS SECTION SHALL CHANGE THE SENTENCING PROVISIONS IN THE PENAL LAW. A SEALED RECORD, UNSEALED AT THE TIME OF A RE-ARREST, SHALL CONTINUE TO QUALIFY AS A CONVICTION FOR SENTENCING PURPOSES AND MAY BE USED TO ESTABLISH AN ELEMENT OF A CRIME AS PROVIDED IN THE PENAL LAW.

14. PUBLISHING SEALED INFORMATION. IT SHALL BE A CLASS A MISDEMEANOR TO PUBLISH INFORMATION REGARDING THE ARREST, DETENTION OR CONVICTION OF A PERSON WHOSE RECORD HAS BEEN SEALED. A PERSON AGGRIEVED BY A VIOLATION OF THIS SECTION SHALL HAVE THE RIGHT TO INSTITUTE A CIVIL PROCEEDING, REGARDLESS OF WHETHER A CRIMINAL ACTION WAS COMMENCED. A PERSON IS ENTITLED TO FIVE HUNDRED DOLLARS FOR EACH OCCURRENCE ALONG WITH THE ACTUAL DAMAGES CAUSED BY THE DISCLOSURE OF SUCH SEALED RECORD. LAW ENFORCEMENT, PROSECUTION OFFICIALS AND EMPLOYEES OF THE OFFICE OF COURT ADMINISTRATION SHALL HAVE A DEFENSE TO A CRIMINAL OR CIVIL ACTION UNDER THIS SECTION IF THEY BELIEVED, IN GOOD FAITH, THAT THEY WERE PERMITTED OR REQUIRED BY LAW TO DISCLOSE A SEALED CONVICTION. THERE SHALL BE NO PROSECUTORIAL OR LAW ENFORCEMENT IMMUNITY UNDER THIS SECTION FOR ANY GOVERNMENT OFFICIAL WHO KNOWINGLY AND INTENTIONALLY PUBLISHES A SEALED RECORD WHICH SUCH OFFICIAL KNOWS TO HAVE BEEN SEALED UNDER THIS SECTION. IF A CONVICTION IS UNSEALED PURSUANT TO A NEW ARREST, THE PROVISIONS OF THIS SUBDIVISION SHALL NOT APPLY.

15. APPEALS. EITHER PARTY MAY APPEAL AS OF RIGHT FROM THE COURT'S ORDER. THE APPEALING PARTY SHALL SERVE NOTICE OF APPEAL UPON THE COURT AND THE OPPOSING PARTY WITHIN THIRTY DAYS OF THE SERVICE OF THE COURT ORDER. IF THE ORDER IS APPEALED BY THE PROSECUTING AGENCY, SUCH NOTICE OF APPEAL SHALL BE DEEMED A STAY OF THE ORDER TO SEAL THE RECORDS. THE PROSECUTING AGENCY SHALL PERFECT THE APPEAL WITHIN SIXTY DAYS, OR THE SEALING ORDER SHALL IMMEDIATELY TAKE EFFECT UNLESS THE COURT GRANTS AN EXTENSION OF THE TIME TO PERFECT THE APPEAL UPON GOOD CAUSE SHOWN BY THE

PROSECUTOR. THE APPEAL SHALL BE TAKEN TO THE SAME COURT TO WHICH THE APPEAL OF THE ORIGINAL CONVICTION COULD HAVE BEEN BROUGHT. THE STANDARD OF REVIEW AT THE INTERMEDIATE APPELLATE COURT SHALL BE ABUSE OF DISCRETION. THE DECISION OF AN INTERMEDIATE APPELLATE COURT SHALL BE APPEALABLE TO THE NEW YORK STATE COURT OF APPEALS UPON THE ISSUANCE OF A CERTIFICATE GRANTING LEAVE PURSUANT TO SECTION 460.20 OF THIS PART.

16. WAIVER OF RIGHT IMPERMISSIBLE. THE WAIVER OF THE RIGHT TO MAKE AN APPLICATION UNDER THIS SECTION MAY NOT BE A CONDITION OF A GUILTY PLEA ENTERED IN ANY CASE IN NEW YORK STATE.

S 2. Subdivision 16 of section 296 of the executive law, as separately amended by section 3 of part N and section 14 of part AAA of chapter 56 of the laws of 2009, is amended to read 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, OR BY A CONVICTION WHICH IS SEALED PURSUANT TO SECTION 160.65 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 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, OR BY A CONVICTION WHICH IS SEALED PURSUANT TO SECTION 160.65 OF THE CRIMINAL PROCEDURE LAW. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed 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, OR BY A CONVICTION WHICH IS SEALED PURSUANT TO SECTION 160.65 OF THE CRIMINAL PROCEDURE LAW.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all convictions occurring

prior to, on, and after such date. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made on or before such date.