



MEMORANDUM OF SUPPORT

A2699 (Lentol) / S5593 (Hassell-Thompson) & A2990 (Aubry) / S2029 (Hassell-Thompson)

June 12, 2015

Brooklyn Defender Services (BDS) strongly supports A2699 (Lentol) / S5593 (Hassell-Thompson) and A2990 (Aubry) / S2029 (Hassell-Thompson), which together, would finally enable criminal justice-involved people to obtain relief from stigma and pursue a successful life. BDS is a public defense organization that provides innovative, multi-disciplinary, and client-centered criminal defense, family defense, immigration and civil legal services, reentry support, and social work support to more than 45,000 indigent Brooklyn residents every year.

The need for this legislation is clear. Some of the most debilitating collateral consequences of contact with the criminal justice system could be substantively mitigated through a robust sealing statute and effective oversight of its implementation. An additional statute to “Ban the Box” on job applications would help those whose convictions cannot be sealed without any risk to public safety. “Sealing” generally means that a case is removed from the criminal records available to most employers and the general public, though law enforcement and certain employers with vulnerable clients maintain unencumbered access. “Expungement” means a record is completely erased. New York State does not expunge any criminal records. 7.1 million New Yorkers, or 36%, have criminal records. This figure is significantly higher than the national rate—28.8% of the total U.S. adult population—and exemplifies the enormous reach of the dragnet of our criminal justice system.¹

EXISTING LAW

Under existing New York State law, the vast majority of criminal offenses, no matter how trivial, cannot be sealed. With certain exceptions, favorable dispositions, such as dismissals and Adjournments in Contemplation of Dismissal (ACD), and non-criminal violations are sealed. Since 1991, these records are supposed to be sealed automatically, though it is not clear that this always occurs, as online for-profit databases containing criminal histories have proliferated without any meaningful oversight. Arrests ending in Youthful Offender (YO) adjudication are automatically sealed, as are all juvenile delinquency cases heard in Family Court. However, cases involving

¹ Lauren-Brooke Eisen, Nicole Fortier & Inimai Chettiar, Federal Prosecution for the 21st Century (Brennan Ctr. for Justice 2014).

Juvenile Offenders—juveniles age 13 through 15 charged with certain serious crimes in the adult criminal court system—are not sealed.

According to the New York State Department of Labor, “It is an unlawful discriminatory practice for an employer to make any inquiry about any arrest or criminal accusation of an individual which is not currently pending against that individual, or which has been resolved in favor of that individual, resolved by a youthful offender adjudication, or resulted in a sealed conviction.”² Pursuant to the New York Correction Law, it is also unlawful discrimination to deny a job or license application based on one or more convictions unless there is a “direct relationship” between the criminal offense and the job or license in question, or if providing the job or license would “involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”³

PROPOSED AMENDMENTS

A2699 (Lentol) / S5593 (Hassell-Thompson) would expand current sealing law to cover nearly all types of misdemeanors. Specifically, a person with no more than three misdemeanor convictions (excluding sex offenses) could apply for sealing five years after the date of conviction or release from incarceration, whichever is later, if she has not been convicted of another crime during the that period. Upon receiving applications for sealing, courts would notify DA’s and allow 30 days for comment, and DA’s must notify victims, if there are any. Courts would have ultimate discretion, and may consider relevant factors, including statements made by the victim. There would be an \$80.00 filing fee which could be waived in cases of indigence. The bill would also prohibit employment discrimination based on sealed records.

A2990 (Aubry) / S2029 (Hassell-Thompson) would amend the Human Rights Law to provide that no employer may ask about a criminal conviction unless such employer first makes a conditional offer of employment. Such offer could then be withdrawn in accordance with Article 23-A of the correction law where there is a direct relationship between the employment and the conviction or hiring the person would threaten public safety or property.

JUSTIFICATION

If the purpose of a publicly accessible criminal history and arrest record is to enhance public safety by informing employers, landlords, universities and others about criminal justice-involved applicants, studies prove this policy has the opposite effect. Indeed, there is an abundance of research demonstrating the adverse impacts of criminal records on individuals, families, and communities, including as it relates to public safety. People with open criminal records face rejection by schools, employers, landlords, and lenders, leaving them with few options. Portions of this research were highlighted in the final report of the Governor’s Commission on Youth, Public Safety and Justice: The U.S. Equal Employment Opportunity Commission reports that 92% of employers subject job candidates to criminal background checks. A nationwide survey found that 62% of colleges use criminal justice information in the admissions process. Even if an ex-offender is accepted to a college, she faces exceptional barriers to pay for it, as many public and private

² NY Human Rights Law §296(16)

³ NY Correction Law §752

loans, scholarships, and grants are not available to persons with criminal convictions.⁴ Likewise, even if a person with a criminal record obtains a job, she can expect to earn up to 30% less than other employees with comparable skills and experience.⁵ Even within this hiring bias, stark racial disparities exist, as white Americans with criminal records face a 50 percent reduction in employment opportunities and black Americans with criminal records face a 64 percent reduction in employment opportunities. A person with a criminal record is ineligible for unemployment insurance, worker's comp, veteran's annuities, and other crucial components of our social safety net.⁶

This loss of opportunities for meaningful, productive involvement in society harms all of us. Ex-offenders who are unemployed are 3 to 5 times more likely to reoffend than those with jobs. Inability to access entitlements likely also increases recidivism. Thus, facilitating the successful re-entry of formerly incarcerated people is a matter of public safety.

Successful re-entry—helping people stay out of jail and prison—is also a matter of fiscal responsibility. The annual cost of custody for each person in New York City jails is \$167,731, according to the New York City Independent Budget Office. The annual cost of incarceration in state prisons is \$60,000 per person.⁷ These figures exclude the costs of lost productivity, adverse health impacts, shelter stays related to adverse housing impacts, and foster care. Requiring more than a third of all New Yorkers to disclose past transgressions, including those that are decades old, without any context destabilizes marginalized communities with chronic unemployment and missed educational opportunities. The effects ripple throughout New York State's economy.

Expanding the State's sealing law and banning the box on employment applications would dramatically improve the chances for criminal justice-involved people to find and maintain jobs, education opportunities, housing and more. It would create a break in the long chain of collateral consequences and help combat the broader problem of inequality that is tearing apart our society.

Any cries about the impending disaster that would follow the passage of these bills can be rebutted with ample evidence from the precedent set by other states and localities. Please see the table in Appendix A1 for examples of sealing and expungement laws in other states. Also, according to the National Employment Law Project, more than 100 cities and counties have adopted "Ban the Box" legislation. 17 states have adopted the policy for public employees, six of which have adopted it for private employers, as well. None of these statutes has been repealed.

BDS RECOMMENDATIONS

- 1.) While BDS does not have a position on specific waiting periods for sealing, we believe that people must be given the chance to move past their involvement in the criminal justice system and pursue successful lives as quickly as possible. Other states offer examples, as indicated in the table in Appendix A1.

⁴The Governor's Comm'n on Youth, Pub. Safety & Justice, Recommendations for Juvenile Justice Reform in New York State (2015).

⁵ Harry Holzer, Steven Raphael & Michael A. Stoll, Employment Barriers Facing Ex-Offenders (Urban Inst. 2003).

⁶The Governor's Comm'n on Youth, Pub. Safety & Justice, Recommendations for Juvenile Justice Reform in New York State (2015).

⁷The Price of Prisons (VERA Inst. of Justice 2012).

- 2.) For sealing legislation to be maximally effective, it must include effective penalties for maintaining inaccurate criminal records. Because for-profit databases that amass bulk criminal justice data have become the go-to sources for background checks, it is critical to ensure that their information is updated to erase sealed records. Companies like First Advantage have become global clearinghouses and offer discounts for record-seekers. Under existing law, people facing unlawful discrimination have no recourse but to file a complaint with the New York State Division of Human Rights, and it is unclear whether such complaints realistically result in job placements for the individuals making them.
- 3.) Approximately 2.1 million arrest records in New York contain errors, including hundreds of thousands that do not even include case dispositions, according to an analysis by the Legal Action Center. To obtain their own records and, say, check for errors, New Yorkers must pay \$65 to the Office of Court Administration or approximately \$60 to MorphoTrust USA, a for-profit vendor contracted by the Division of Criminal Justice Services. There is a burdensome fee waiver for indigence, but it is not available to all who need it. New Yorkers should be able to review their own criminal justice records for free. Otherwise, we are left to trust an immense bureaucracy with a terrible track record to seal convictions.
- 4.) New York's sealing law should not exclude particular classes of crimes. Such a blanket policy should be replaced by an individualized process of assessment based on non-discriminatory criteria. People should not be defined by a conviction for the rest of their lives, particularly in a criminal justice system as unfair and unequal as the one that exists today.

Thank you for your consideration of our comments.

Appendix A1

Sealing and Expungement Laws in Other States

Arkansas	Misdemeanors can be sealed within 60 days of the sentence's completion and felonies can be sealed after a 5-year period.
Ohio	One felony and up to 2 misdemeanors can be sealed after a 1-3 year grace-period and upon a rehabilitation showing.
NH	Violations can be "annulled" (sealed) after 1 year. Others have different waiting periods: three years for misdemeanors, five years for a class B felony and ten years for a Class A felony and sexual assault, indecent exposure, and lewdness, all subject to the discretion of the court.
Utah	Most offenses can be expunged after a 3-7 year waiting period unless the court finds it would be "contrary to public interest." A pardon entitles a person to immediate expungement. Juvenile records may be expunged after reaching age 18 following a one-year waiting period if they do not have an adult criminal record. People can petition for expungement of non-conviction records if the case ends in acquittal or the charges being dismissed 30 days after arrest took place. Class C misdemeanors receiving deferred adjudication also may qualify.
Vermont	Most misdemeanors and certain felonies can be expunged 10 years after completion of sentence, or 20 years if convicted of another crime. A court can also seal a record, rather than expunge it, if it "better serves the interest of justice."
Wisconsin	Misdemeanors and felonies may be sealed by the trial court at time of the sentence if the crime was committed before the age of 25.