Sealing Law Is Step in Right Direction

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June 20, 2017 | 0 Comments

The recent victory for Raise the Age advocates came with a potential added benefit for New Yorkers of all ages. Appended to reforms aimed at more fairly dealing with the state's juvenile population, is Criminal Procedure Law §160.59. The statute provides for the sealing of past criminal convictions, under certain limited criteria, and is an attempt to bring New York up to speed with the majority of states on the question of just how long someone should be haunted by isolated mistakes in their past.

The law goes into effect this October and will allow people to apply for the sealing of up to two criminal convictions. One of those convictions can be a felony provided it's not a violent felony, a defined sex felony, or an A-level drug conviction. All misdemeanors other than forcible touching and sexual abuse are eligible for sealing. However, to be eligible, the conviction must be more than ten years old and the person must not have had any intervening criminal convictions or pending criminal charges.

The sealing law could affect tens of thousands of now law-abiding New Yorkers who suffer many collateral consequences from old convictions. These collateral consequences can range from being denied employment, certain licenses, housing, education, and critical loans. It is legalized discrimination that disproportionately affects our most vulnerable citizens and until now it has been inexorable.

Under the statute, "sealing" means that, with some exceptions, all official records and documents pertaining to the sealed conviction will not be made available to any person or private agency.

Background checks by nongovernmental private employers would not reveal the convictions. However, state and federal agencies will still have access to the information.

The law will go into effect two years after former Eastern District Judge John Gleeson articulated the injustice of systems that permit the implacable permanence of all criminal records. Writing in *Doe v. United States*, 110 F. Supp. 3d 448 (EDNY 2015), in support of his decision to expunge a fraud conviction, Judge Gleeson encapsulated the sentiment behind the expungement and sealing movement when he noted that:

There is a growing recognition that the adverse employment consequences of old convictions are excessive and counter-productive. Doe's criminal record has prevented her from working, paying taxes, and caring for her family, and it poses a constant threat to her ability to remain a law-abiding member of society. It has forced her to rely on public assistance when she has the desire and the ability to work. ... There is no justification for continuing to impose this disability on her. I sentenced her to five years of probation supervision, not to a lifetime of unemployment.

As commendable and well-reasoned as Judge Gleeson's decision was, it was subsequently overturned by the U.S. Court of Appeals for the Second Circuit. Federal convictions remain nearly impossible to expunge or seal.

Under New York's new statute, mere eligibility for sealing does not mean automatic sealing. Those seeking relief must meet all of the statutory requirements before applying to the sentencing judge. Provided the applicant is not statutorily barred from attaining sealing, the district attorney's office will be given the opportunity to oppose. If they oppose the sentencing judge "shall" conduct a hearing on the sealing. At the hearing, the judge may consider items such as:

- The amount of time elapsed since last conviction;
- The initial arrest charge and the seriousness of the offense;
- The seriousness of other convictions;
- The character of the defendant, including rehabilitation and treatment measures as well as work, schooling, and volunteer programs;
- Victim statements;
- The impact of sealing with regard to the defendant;
- The impact of sealing with regard to public safety.

If there is no opposition by the district attorney's office then the application must be granted and the conviction(s) sealed. Apparently, a standardized form will be created by the chief administrator of the courts to facilitate these applications.

It's important to note that none of the above constitutes a classic expungement statute of the kind seen in other states. Such statutes, which exist in states like Vermont, Rhode Island, and Kansas, among others, can result in the actual deletion of a criminal record as opposed to merely sealing it. So while this new sealing statute is certainly a step n the right direction, it pointedly does not allow someone to completely clear their name in the way an expungement statute would. It's difficult to see why New York, with its veneer of progressiveness, has never embraced this further step. But, at a minimum, advocates for true expungement would seem to have cause for optimism.

For criminal defense attorneys, the new sealing statute means both opportunity and responsibility. CPL §160.59 will create a new practice area attorneys should be aware of so that they may effectively advise clients of its potential benefits. It may also create a professional responsibility to identify and inform suitable candidates for this novel relief. Beyond that, skillful litigation may be required, especially in those cases that result in a hearing. Regardless of how

legal practice evolves in response, clients can now be advised that the adverse consequences arising from a conviction may not be permanent; that a mistake, even a criminal one, need not be a specter that haunts them for the rest of their lives.

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