

**COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA**

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs

VINCENT SMITH,

Defendant.

**Affirmation in Support of
Motion for Conditional
Sealing Pursuant to
CPL ' 160.58**

Case No.

AFFIRMATION

IMA LAWYER, ESQ., affirms the following under penalty of perjury:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York, and I represent Mr. Vincent Smith on this motion pursuant to Criminal Procedure Law (CPL) §160.58 to conditionally seal his October 10, 2001 conviction for grand larceny in the fourth degree as well as a prior January 15, 1999 misdemeanor conviction for criminal possession of a controlled substance in the seventh degree.

2. I base this affirmation upon personal knowledge and information and belief. The sources of my information and belief are my review of criminal history and court records regarding the two convictions, my conversations with Mr. Smith, and my review of the recently enacted conditional sealing statute.

3. These two convictions represent Mr. Smith=s sole contacts with the criminal justice system. Both convictions have prevented Mr. Smith from achieving his career goals and attaining full community membership.

A. Factual Background

4. *[Identify conviction dates and sentences imposed for no more than 3 prior misdemeanor convictions that are subject to sealing because they involve Penal Law Article 220 or 221 offenses].*

5. *[Identify arrest date for the conviction subject to conditional sealing because of completion of a judicially sanctioned drug treatment program].*

6. *[Include facts pertaining to the judicially sanctioned drug treatment that the defendant completed. Be sure to include facts showing that a judge ordered or otherwise sanctioned the program. Also include facts showing one of the following: 1) that the treatment program was established as a judicial diversion program under newly enacted CPL Article 216; 2) that the treatment program is one “heretofore known as a drug treatment alternative to prison,” such as DTAP, Project P.R.O.U.D., or Drug Court; or 3) that the program was “another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision.” For the latter, look for facts showing the defendant’s participation in a credentialed substance abuse treatment program with an aftercare component while under law-enforcement or court supervision which lasted for approximately 12 months or longer (including aftercare and supervision.)]*

7. *[Include facts showing that the defendant completed the judicially sanctioned treatment program and as a result, was diverted from a jail or prison sentence.]*

8. *[Include facts showing that the defendant completed any imposed sentence, including, for example, completion of probation supervision and payment of restitution.]*

9. *[If court, treatment, or law enforcement records are not available to corroborate any of these foregoing facts, consider including an affidavit from the defendant establishing the*

needed facts.]

10. *[Consider also including facts identifying how the defendant's criminal record has frustrated his efforts to fully reintegrate into the community by, for example, obtaining and maintaining employment, getting accepted into an institution of higher education, obtaining housing, being able to live with a family member, etc.]*

B. Mr. Smith Meets the Eligibility Requirements for Conditional Sealing Pursuant to CPL § 160.58 and Has a Prior Misdemeanor Conviction that is Subject to Conditional Sealing.

11. Pursuant to newly enacted Criminal Procedure Law (CPL) §160.58, an individual is eligible for conditional sealing as long as the individual: 1) has been convicted of “any offense in article two hundred twenty or two hundred twenty-one of the penal law or a specified offense defined in subdivision five of section 410.91 of” the CPL; 2) has successfully completed the sentence imposed for the offense; and 3) has successfully completed a CPL Article 216 judicial diversion program or “one of the programs heretofore known as drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements, and level of supervision.” See CPL § 160.58(1).

12. Mr. Smith's conviction was for grand larceny in the fourth degree pursuant to Penal Law § 155.30(1), which is one of the offenses enumerated in CPL § 410.91(5), a specified offense under CPL § 160.58(1). Thus, he meets the first of the eligibility criteria set forth above.

13. Mr. Smith also meets the second criteria in that on March 31, 2005, he was discharged from probation supervision, the sentence imposed for this conviction.

14. Finally, Mr. Smith meets the third requirement in that he completed [*identify whether the defendant completed: 1) a CPL Article 216 diversion program; 2) “one of the programs heretofore known as a drug treatment alternative to prison;” or 3) “another judicially*

sanctioned drug treatment program of similar duration, requirements and level of supervision”].

15. In addition, Mr. Smith’s January 15, 1999 conviction for criminal possession of a controlled substance in the seventh degree is also subject to conditional sealing because it is a prior conviction for an offense defined in Penal Law Article 220, as specified in CPL § 160.58(2).

C. Sealing Mr. Smith’s Sole Criminal Conviction Will Enhance Public Safety by Allowing Him to Successfully Reintegrate into the Community

16. Section § 160.58(3) of the Criminal Procedure Law calls upon the Court to consider the following four factors in deciding a motion to conditionally seal a conviction: 1) the circumstances and seriousness of the offense; 2) the individual’s character, including completion of judicially sanctioned treatment; 3) the individual’s criminal history; and 4) the impact sealing will have on the individual’s rehabilitation and his “successful and productive reentry and reintegration into society, and on public safety.” All four of these factors weigh strongly in favor of granting Mr. Smith’s request for conditional sealing.

17. Mr. Smith’s history consists of non-violent offenses, all of which are related to his substance abuse problem which he has addressed through successful completion of substance abuse treatment.

18. *[Consider including the following, which go to character and commitment to maintaining sobriety, and which are all objective evidence of the individual’s rehabilitation and commitment to living a law-abiding life:*

-- written recommendations from treatment providers showing successful participation in or completion of treatment;

-- ongoing participation in recovery groups, including NA, AA;

- employment since arrest or efforts to obtain employment;*
- efforts to enhance employability through completion of or participation in work readiness programs, job training, and vocational training*
- efforts to obtain a better education, including obtaining a GED, obtaining a college degree, or getting into a college or university;*
- maintaining stable family relationships;*
- providing for or caring for dependants;*
- involvement in a faith community;*
- involvement in other community organizations, including volunteer work.]*

19. *[Consider also specifying how the defendant's criminal record has posed barriers to achieving employment/educational goals and how helping the defendant to achieve these goals will increase the defendant's ability to reintegrate into the community, thereby enhancing public safety.]*

20. Since his last conviction, Mr. Smith has repeatedly demonstrated in word and deed his commitment to this community and to living a law-abiding, productive life. As a community, we have failed to acknowledge this commitment and have instead allowed his criminal conviction to continue to stigmatize him.

21. By enacting CPL § 160.58, New York's Legislature has acknowledged the wisdom of lifting the stigma of a criminal conviction where an individual has objectively demonstrated his or her commitment to living a law-abiding life by completing a judicially-sanctioned substance abuse treatment program, complying with supervision, and successfully competing any imposed sentence. Because Mr. Smith has met these requirements, I request that this Court conditionally seal his conviction and alleviate him of the stigma that has haunted him

for the past eight years.

WHEREFORE, on behalf of Mr. Smith, I request an order pursuant to CPL § 160.58 conditionally sealing his October 10, 2001 conviction for grand larceny in the fourth degree and his prior January 15, 1999 misdemeanor conviction for criminal possession of a controlled substance in the seventh degree. I also request that, pursuant to CPL § 160.58(2)(a), this Court request a copy of Mr. Smith's official criminal history record from the Division of Criminal Justice Services or the Federal Bureau of Investigations and make it available to the District Attorney and Mr. Smith's counsel.

Affirmed under penalty of perjury, this the ____ day of September, 2009.

To: 1) Sentencing Judge of case that involved judicially sanctioned drug treatment

2) District Attorney's Office on each conviction that is subject to conditional sealing, including the prior misdemeanor convictions . (Note that CPL 160.58(2)(d) requires that the "district attorney in each jurisdiction in which the defendant has been convicted of an offense with respect to which sealing is sought" be put on notice of the motion for conditional sealing).

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MEMORANDUM OF LAW

Mr. Smith offers the following Memorandum of Law in support of his motion to conditionally seal his 2001 grand larceny in the fourth degree conviction as well as his prior 1999 misdemeanor conviction for criminal possession of a controlled substance in the seventh degree.

A. Conditional Sealing Is a Narrowly Tailored Means of Providing a Meaningful Second Chance for a Individuals Who Have Proven Their Commitment to Their Rehabilitation.

Over the past two decades, as we have adopted many “tough on crime” policies, our State has enacted a myriad of obstacles to full reintegration for people who have a criminal conviction. Referred to as “collateral consequences,” these legal and social barriers often have life-long consequences. In 2006, a Special Committee of the New York State Bar Association (NYSBA) defined “collateral consequences” as follows:

The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system [that] often erect formidable barriers for criminal

defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.

Special Committee of the New York State Bar Association, “Re-Entry and Reintegration: The Road to Public Safety,” (available at the publications section of the New York State Bar Association at www.nysba.org), at 7. The NYSBA’s Special Committee devoted more than a year to examining the impact a criminal conviction has on a person’s life, focusing on the following areas: employment, education, benefits, financial stability, housing, and family relationships. The end result was a comprehensive report that concluded as follows:

New York has unwittingly constructed formidable barriers to those attempting to re-enter society following interaction with the criminal justice system... As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life - family, shelter, work, civic participation, and financial stability. These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price.

Id. at 443.

Sealing conviction information is one means by which to dismantle the barriers identified in this report. It is neither a new nor unproven means by which to provide people who have been arrested for a low-level, non-violent crime a better chance at reintegrating into the community. Other states have been sealing conviction information for years. Even in New York, prosecutors and judges have sealed criminal history records by dismissing the charges against those individuals who successfully complete court or prosecutor-mandated substance abuse treatment. Indeed, since 1992 the Onondaga County District Attorney’s Office has been sealing criminal history information by dismissing the felony and misdemeanor charges against those individuals who successfully participate in and complete the requirements of Project P.R.O.U.D.

In 2009, New York enacted significant reforms to the Rockefeller Drug Laws. A key component of this legislation is Criminal Procedure Law (CPL) §160.58, which allows for the conditional sealing of non-violent, addiction-driven criminal convictions for those individuals who have objectively proven their commitment to their rehabilitation by completing required treatment and successfully completing their sentences. This provision acknowledges what district attorneys and judges have recognized for years -- sealing arrest information gives people a genuine second chance, thereby decreasing recidivism rates and enhancing public safety. CPL § 160.58, however, includes safeguards that are not present in outright dismissal of a case. First, the statute gives clear guidance as to when conditional sealing is appropriate, requiring judges to consider four factors when making a conditional sealing decision. See CPL § 160.58(3). Second, the sealing is *conditional* only, meaning that if an individual is re-arrested or otherwise charged with a new crime, the case is *automatically* unsealed. See CPL § 160.58(8).

Though the conditional sealing legislation is an important component of the new statutory provisions regarding judicial diversion (outlined in newly enacted CPL Article 216), it is clear that conditional sealing is also available to individuals who benefited from traditional means of diversion, such as programs like Syracuse's Community Treatment Court, the Onondaga County District Attorney's Project P.R.O.U.D., and similar judicially-sanctioned programs. See CPL § 160.58(1); see also July 7, 2009 Memorandum of Michael Colodner, Counsel for the Office of Court Administration, to all Supreme Court Justices and County Court Judges, at 4 (noting that the newly enacted conditional sealing statute applies to cases that pre-date its enactment).

At its core, conditional sealing recognizes the efficacy of what judges and district attorneys have been doing for the past two decades and formalizes the process, adding built-in

safeguards. It is a narrowly-tailored means by which to ensure that people who have objectively demonstrated their commitment to their rehabilitation do not face needless hurdles to furthering their rehabilitation.

B. Conditional Sealing Will Enhance Public Safety by Increasing Employment Opportunities for Individuals Who Have Demonstrated Their Readiness to Re-Enter the Workforce

While there are many ways in which a criminal conviction forever stigmatizes a person, one particular area of concern is employment. Research has long shown that obtaining employment is a key factor in furthering an individual's desistance from criminal conduct. See e.g., A. Blumstein and K. Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," Criminology, 47(2), May, 2009, 327-359 (discussing and citing research demonstrating that employment is a one factor that is a "powerful predictor[] of such desistance"). The NYSBA's Special Committee emphasized that employment is a critical aspect of an individual's efforts to live a law-abiding life:

Without employment [formerly incarcerated] individuals cannot meet their own or their families' basic needs. Without guidance or other resources, many revert to their former criminal behavior. As one New York probation commissioner put it, "Either they work or they go back to jail."

New York State Bar Association Report, at 59, (citing Paul Rossi, as quoted in Shapiro, Walter, "Prison Nation Turns Its Back on Released Convicts," USA Today, May 30, 2001, at 10a).

Unfortunately, unemployment rates are disturbingly high for people with a criminal history record. Id. at 59 (noting that 60% of formerly incarcerated individuals are unemployed one year after release and that in New York, 83% of those on probation who violated the terms of their probation were unemployed at the time of the violation). These high unemployment

rates are a by-product of the stigma associated with having a criminal record as well as the myriad of legal barriers to employment as a result of the occupational licensing requirements that make it either impossible or very difficult for people with a criminal, history record to obtain the requisite licensing to work at a certain occupation. See e.g. Legal Action Center, “New York State Occupational Licensing Survey,” 2006, (available at: [www.lac.org/doc_library/lac/publications/Occupational Licensing Survey 2006.pdf](http://www.lac.org/doc_library/lac/publications/Occupational_Licensing_Survey_2006.pdf).) (noting that in New York, over 100 occupations require some type of license, registration, or certification by a State agency, such as the Department of Education, the Department of State, or the Department of Health).

Over the past two decades, the problem of employment for people with a criminal history record has grown worse as more employers are obtaining criminal history information:

With the rapid advancement in information technology, individuals with a criminal record are not only haunted by the question about their criminal background on job applications, but also faced with computerized criminal background checks upon which employers increasingly rely. Criminal background checks reveal the person’s old criminal record and highlight that fact, thereby overshadowing a law-abiding life led since. Computerized criminal records can have life long memories...

“Redemption in the Presence of Widespread Criminal Background Checks,” at 327. See also Kevin Johnson, “Study Could Ease Concerns Over Hiring Ex-Offenders,” USA Today, July 1, 2009 (noting a 2006 survey by the Society of Human Resource Managers which found that 80% of private employers conduct criminal background searches). The criminal background check industry is now a multi-billion dollar industry, as more and more companies are getting into the business of selling criminal background records. See e.g. <http://en.wikipedia.org/wiki/ChoicePoint> (noting that Choicepoint, one of the three larger companies that conducts criminal background searches, was purchased by Reed Elsevier in

February, 2008 for \$3.6 billion). As a result, it is becoming increasingly difficult for an individual to apply for a job without having a criminal background check disclose a criminal conviction, no matter how old this conviction is or what the person has done since to demonstrate a genuine commitment to living a law-abiding life.

Conditional sealing recognizes that obtaining and maintaining gainful employment is a critical part of one's rehabilitations. People whose criminal conduct has been fueled by their addiction, but who have successfully completed substance abuse treatment and court-imposed sentences have not just paid the price for their criminal conduct; they have also proven themselves ready and willing to enter the work force and to productively work with others. But if their criminal history information is made available to employers, they will face insurmountably high barriers to obtaining full time work at a living-wage. Continuing to stigmatize such individuals by denying them employment opportunities hurts our communities by making it impossible for such individuals to successfully further their rehabilitation and meaningful reintegration into the community, thereby increasing the likelihood that they will re-offend -- diminishing public safety as whole.

CONCLUSION

CPL § 160.58 was enacted for the very purpose of helping people like Mr. Smith fully reclaim their lives by recognizing their commitment to their rehabilitation and to living a law-abiding life. Now is the time to finally give Mr. Smith a genuine second chance by conditionally sealing the convictions that have frustrated his efforts to fully reintegrate into the community.

Respectfully submitted:

