2019 Annual Conference

Lake Placid, New York

Appeals and Other Post-Conviction Proceedings
Involving Town and Village Court Cases

September 17, 2018
Presented by:
James P. Maxwell, Esq.
1.0 MCLE Professional Practice
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for all attorneys including those who are
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the Onondaga County Bar Asssociation.

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PROFESSIONAL EXPERIENCE

ONONDAGA COUNTY DISTRICT ATTORNEY'S OFFICE
Syracuse, New York
1989 to 2018
Former duties: Former Bureau Chief of the Law and Appeals Bureau

SYRACUSE UNIVERSITY COLLEGE OF LAW
Adjunct Professor -- Appellate Advocacy Skills
Fall 2002 to Fall 2016

HISCOCK LEGAL AID SOCIETY
Syracuse, New York
1986 to 1989 -- Staff Attorney, Appeals Unit

BROOME COUNTY DISTRICT ATTORNEY'S OFFICE
Binghamton, New York
1982 to 1985 – Assistant District Attorney

EDUCATION

Boston College Law School - Juris Doctor, 1981
Canisius College - Bachelor of Arts, 1978

OTHER

Member of the Character and Fitness Committee
Fifth Judicial District, Fourth Department
May 2006 to Present

NYPTI Prosecutor of the Year
Appellate Advocacy Award – 2010

Onondaga County District Attorney's Advisory Council
Distinguished Service Award - 2017

APPEALS AND OTHER POST-CONVICTION PROCEEDINGS INVOLVING TOWN AND VILLAGE COURT CASES

Presented to the
NEW YORK STATE MAGISTRATES ASSOCIATION
2019

Presented by James P. Maxwell
Former Chief Assistant District Attorney
Onondaga County District Attorney's Office
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TOPICS FOR DISCUSSION

Understanding the changes to CPL 460.10 (3) and CPL 460.70 (1)

The Affidavit of Errors system

Filing a Return to an Affidavit of Errors

Audio recordings in the courtroom

Stay of sentence

Appellate review powers

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Sealing of convictions under CPL 160.59

Motions to vacate convictions or sentences under CPL Article 440

Case law of interest

I. Understanding the changes to CPL 460.10 (3) and CPL 460.70 (1)

The changes took effect on October 20, 2107.

CPL 460.10 (3) (a) now gives appellants 60 days from the date that appellants receive a transcript of the recording of the proceedings to file an affidavit of errors.

The statute requires that an appellant file a notice of appeal within 30 days of sentencing (or issuance of an order being appealed) in order to take advantage of the new provision permitting an appellant to obtain the transcription of the proceeding before filing the affidavit of errors.

The statute still permits an appellant to file an affidavit of errors within 30 days of sentencing (or the filing of the order being appealed) and not file a notice of appeal at all, but in order to take an appeal by filing an affidavit of errors it would be very unlikely that the appellant would have the transcription of the proceedings when filing the affidavit of errors.

The major advantage to this change in the statute is that it gives appellants the chance to compose an affidavit of errors based on a reading of the transcription of the court appearances. This should prove particularly helpful where the appeal is handled by an attorney who was not the trial attorney.

The amendment to CPL 460.70 added a sentence to the statute directing that that the transcription of the recording of the proceedings be filed with the court "as directed by the chief administrator of the courts." According to the State Assembly's memorandum in support of this law, this was added to "provide a Statebased funding mechanism for indigent defendant's counsel to procure a transcribed copy of the electronic recording."

The Affidavit of Errors system

The affidavit of errors method of bringing an appeal predates the use of recording devices in local courts. While the term "court of record" is often used to describe the distinction between cases where the affidavit of errors system is not used and cases where it is used, the statute makes a distinction between proceedings recorded by a court stenographer and proceedings which were not recorded by a court stenographer.

CPL 460.10 explains the procedure used in an appeal taken as of right from a local court where the proceedings were not recorded by a court reporter. The appeal goes to County Court (except in the downstate area, where it goes to the Appellate Term).

In addition to providing the time limits for filing a notice of appeal and an affidavit of errors (already discussed), CPL 460.10 (3) (a) includes the directive that an appellant must "set forth" in an affidavit of errors the "alleged errors or defects in the proceedings which are the subjects of the appeal."

Thus, a proper, all-inclusive affidavit of errors should have in it every issue that the appellant plans to raise on appeal.

Filing a Return to an Affidavit of Errors

CPL 460.10 (d) instructs local courts on the requirements of the response to the affidavit of errors, known as a "return." The statute provides only 10 days for the court to file a return. The return, along with a copy of the affidavit of errors itself, has to be filed with the clerk of the appellate court (in our County, that is County Court). The local court also must deliver a copy of the return to the parties.

The return itself "must set forth or summarize evidence, facts or occurrences in or adduced at the proceedings resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors" (CPL 460.30 (3) (d).

This part of the statute does not reference the transcribed minutes of the recorded proceedings, which should be in the possession of the court whenever the appellant takes advantage of the newly extended deadline for filing the affidavit of errors.

Just as a properly written affidavit of errors is supposed to contain every issue that will be raised on appeal, a properly written return should include the local court's response to each of those issues.

Audio recordings in the courtroom

A local court should conduct a recorded proceeding with awareness that the recording has limitations. The recording itself (unlike a court reporter) is not going to note who is present in court unless someone says out loud who is present in court.

Someone (such as the presiding Judge), should make sure the recording includes statements of basic information, including:

- A defendant's presence or absence
- During a jury trial, the presence or absence of the jury at any particular time
- Whether a particular discussion is at the bench outside the hearing of the jury
- Who is present at a bench conference
- Whether counsel for the defense is present for the proceeding
- Whether an Assistant District Attorney is present for the proceeding

Having people say who they are when they start speaking in court (at least the first time they speak in court) should help a transcriptionist prepare a cogent document.

Transcriptions of recordings often have inaudible words or phrases.
The person preparing the transcription might place "[INAUDIBLE]" every time the recording is unclear, and might simply type an incorrect word or phrase. (This can

happen with court reporters too – see People v Bethune, 29 NY3d 539 [2017]). A local court's return is an opportunity to give the appellate court accurate information by correcting errors or adding information that the transcriptionist could not decipher.

Stay of sentence

A person sentenced to jail time by a local court may seek a stay of the jail sentence while bringing an appeal.

According to the Uniform Rules for Trial Courts (22 NYCRR 200.31), a stay may be issued by a County Court Judge "to which the appeal has been taken" or a Supreme Court Justice in the judicial district where the local court is located. (This provision also permits a City Court Judge to issue a stay in a case handled in City Court – but does not provide for a Town or Village Court Justice granting a stay.) A defendant may make only one application for a stay (CPL 460.50 [3]).

Unless the stay is extended, if the appeal is not argued or submitted to the appellate court within 120 days of the issuance of the stay, the defendant must surrender to the trial-level court to commence or resume the sentence (CPL 460.60 [4]).

If County Court affirms the conviction when the defendant is out of jail on a stay, County Court must remit the case to the local court, and that court must give the defendant (and defendant's surety and attorney) at least two days' notice to surrender. If necessary, the local court may issue a bench warrant (CPL 460.50 [5]).

Generally, courts are more likely to grant a stay where the sentence is short. The argument that is often made is that without a stay the defendant will serve all or most of the sentence before having a chance to argue to an appellate court that the sentence is too harsh.

Appellate review powers

An intermediate appellate court (County Court in cases from local courts) has the authority to:

- Modify a sentence that it finds to be unduly harsh or severe
- Review preserved questions of law
- Review unpreserved issues in the interest of justice
- Weigh the evidence

Of course, the intermediate appellate court may decide to grant no relief (see generally CPL 470.15).

A defendant is not permitted to appeal from a non-final ruling, such as a denial of a suppression motion, and must instead only appeal after a conviction. The People have the right to appeal in certain limited circumstances (see CPL 450.20).

The party that does not prevail in a County Court appeal may ask the Court of Appeals to grant permission to appeal to that Court (CPL 460.20 [1], [2] [b]; note: County Court does not have the authority to grant permission to appeal its decision to the Court of Appeals). The Court of Appeals, however, does not have interest of justice jurisdiction and so cannot to review unpreserved claims or modify a sentence as unduly harsh or severe (see CPL 470.35).

Extensions of time to take an appeal

CPL 460.30 gives an intermediate appellate court the authority to extend the time for a defendant to file a notice of appeal or an affidavit of errors where the defendant failed to do so in the time required. This motion to extend the time is supposed to be made with due diligence and in any case not more than a year after the time for filing has passed. Where the one-year grace period has passed, a defendant might still get an extension by filing a coram nobis motion with the intermediate appellate court (see People v Syville, 15 NY3d 391 [2010]).

Sealing of convictions under CPL 160.59

CPL 160.59 became effective on October 7, 2017. It provides an opportunity for people who have not been in trouble for 10 years to ask a court to grant a limited sealing of the records pertaining to as many as two "eligible offenses," but not more than one felony. The statute itself lists the crimes that are not eligible for sealing, such as any sex offense and any violent felony. The sealing is limited in the sense that the sealing makes the record of the conviction unavailable to the public (with certain exceptions). A conviction sealed under this statute is still a conviction for the purpose of a future case in which the existence of a prior conviction would increase the penalty or is an element of the new charge. The goal of the statute is to help people with remote criminal histories obtain employment.

The motion is made to the sentencing judge, but if the judge who imposed the sentence no longer sits in that court, the motion may be decided by any other judge sitting in that court.

Some confusion may arise where a defendant has convictions in different courts. The statute allows sealing of up to two eligible offenses (but not more than one felony). Where one of the offenses is more serious than the other, the application goes to the court where the more serious conviction was obtained. If the two offenses are of equal level but obtained in different courts, the application goes to the court with the more recent conviction (see CPL 160.59 [2] [a]). However, the statute also provides that where a defendant is making more than one application the matter goes to County Court or Supreme Court (CPL 160.59 [2] [d]).

The court must request and receive from the Division of Criminal Justice Services the defendant's fingerprint based criminal history (CPL 160.59 [2] [d]). The court may

deny the application if the defendant does not qualify for sealing under the terms of the statute (see CPL 160.59 [3]).

The District Attorney's office is entitled to receive a copy of the application and has 45 days to object to the application. If the District Attorney does not oppose the application and the defendant qualifies for relief under the terms of the statue, the Court may decide the application without holding a hearing. If the District Attorney's office opposes sealing, the Court must conduct a hearing (CPL 160.59 [6]).

The statute lists seven non-exclusive factors that a court shall consider in deciding the application (CPL 160.59 [7]).

Motions to vacate convictions or sentences under CPL Article 440

Defendants may at any time after sentencing make a motion to the Court that handled the case asking the Court to vacate the conviction under CPL 440.10 or set aside a sentence under CPL 440.20.

CPL 440.10 (2) has several procedural grounds that, where applicable, may require or permit the denial of a motion to vacate a conviction without holding a hearing.

CPL 440.20 relief is required where a sentence is "unauthorized, illegally imposed or otherwise invalid as a matter of law." In other words, this statute is not a way for a Court to change its mind about a previously imposed valid sentence, but it is a way for a sentence that is illegal to get fixed (without a defendant having to seek that relief on appeal).

Case law of interest

People v Smith, 27 NY3d 643 (2016) – This case exposed the misconception that the use of recording devices meant that an affidavit of errors was no longer needed to bring an appeal from a court where the proceedings were not recorded by a court stenographer.

People v Flores, 30 NY3d 229 (2017) – The Court of Appeals ruled that County Court lacked jurisdiction to decide defendant's case, but granted defendant the opportunity to seek permission to extend the time to file an affidavit of errors, where no affidavit of errors was filed when County Court decided the appeal.

People v Leonard, 62 NY2d 404 (1984) – The People's failure to make a sufficient record in the Town of Vestal Justice Court resulted in a trespass conviction being vacated but the Court of Appeals.

COURTS—APPEAL AND REVIEW

CHAPTER 195

A. 7446

Approved August 21, 2017

Effective October 20, 2017

AN ACT to amend the criminal procedure law, in relation to procedures for taking an appeal from a court that is not designated a court of record

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

Section 1. Paragraph (a) of subdivision 3 of section 460.10 of the criminal procedure law, as added by chapter 671 of the laws of 1971, is amended to read as follows:

(a) Within thirty days after entry or imposition in such local criminal court of the judgment, sentence or order being appealed, the appellant must file with such court either (i) an affidavit of errors, setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal. Where a notice of appeal is filed, the appellant must serve a copy thereof upon the respondent in the manner provided in paragraphs (b) and (c) of subdivision one, and, within ~~thirty~~ sixty days after ~~the filing thereof~~ the appellant receives a transcript of the electronically recorded proceedings, must file with such court an affidavit of errors.

§ 2. Subdivision 1 of section 460.70 of the criminal procedure law, as amended by chapter 83 of the laws of 1995, is amended to read as follows:

1. Except as provided in subdivision two, the mode of and time for perfecting an appeal which has been taken to an intermediate appellate court from a judgement, sentence or order of a criminal court are determined by rules of the appellate division of the department in which such appellate court is located. Among the matters to be determined by such court rules are the times when the appeal must be noticed for and brought to argument, the content and form of the records and briefs to be served and filed, and the time when such records and briefs must be served and filed.

When an appeal is taken by a defendant pursuant to section 450.10, a transcript shall be prepared and settled and shall be filed with the criminal court by the court reporter Electronically recorded proceedings that were not recorded by a stenographer shall be transcribed and filed with the court as directed by the chief administrator of the courts The expense for such transcript and any reproduced copies of such transcript shall be paid by the defendant. Where the defendant is granted permission to proceed as a poor person by the appellate court, the court reporter shall promptly make and file with the criminal court a transcript of the stenographic minutes of such proceedings as the appellate court shall direct. The expense of transcripts and any reproduced copies of transcripts prepared for poor persons under this section shall be a state charge payable out of funds appropriated to the office of court administration for that purpose. The appellate court shall where such is necessary for perfection of the appeal, order that the criminal court furnish a reproduced copy of such transcript to the defendant or his counsel.

§ 3. This act shall take effect on the sixtieth day after it shall have become a law.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title M. Proceedings After Judgment (Refs & Annos)
Article 460. Appeals--Taking and Perfection Thereof and Stays During Pendency Thereof (Refs & Annos)

McKinney's CPL § 460.10

§ 460.10 Appeal; how taken

Effective: October 20, 2017
Currentness

1. Except as provided in subdivisions two and three, an appeal taken as of right to an intermediate appellate court or directly to the court of appeals from a judgment, sentence or order of a criminal court is taken as follows:

(a) A party seeking to appeal from a judgment or a sentence or an order and sentence included within such judgment, or from a resentence, or from an order of a criminal court not included in a judgment, must, within thirty days after imposition of the sentence or, as the case may be, within thirty days after service upon such party of a copy of an order not included in a judgment, file with the clerk of the criminal court in which such sentence was imposed or in which such order was entered a written notice of appeal, in duplicate, stating that such party appeals therefrom to a designated appellate court.

(b) If the defendant is the appellant, he must, within such thirty day period, serve a copy of such notice of appeal upon the district attorney of the county embracing the criminal court in which the judgment or order being appealed was entered. If the appeal is directly to the court of appeals, the district attorney, following such service upon him, must immediately give written notice thereof to the public servant having custody of the defendant.

(c) If the people are the appellant, they must, within such thirty day period, serve a copy of such notice of appeal upon the defendant or upon the attorney who last appeared for him in the court in which the order being appealed was entered.

(d) Upon filing and service of the notice of appeal as prescribed in paragraphs (a), (b) and (c), the appeal is deemed to have been taken.

(e) Following the filing with him of the notice of appeal in duplicate, the clerk of the court in which the judgment, sentence or order being appealed was entered or imposed, must endorse upon such instruments the filing date and must transmit the duplicate notice of appeal to the clerk of the court to which the appeal is being taken.

2. An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were recorded by a court stenographer is taken in the manner provided in subdivision one; except that where no clerk is employed by such local criminal court the appellant must file the notice of appeal with the judge of such court, and must further file a copy thereof with the clerk of the appellate court to which the appeal is being taken.

3. An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer is taken as follows:

(a) Within thirty days after entry or imposition in such local criminal court of the judgment, sentence or order being appealed, the appellant must file with such court either (i) an affidavit of errors. setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal. Where a notice of appeal is filed, the appellant must serve a copy thereof upon the respondent in the manner provided in paragraphs (b) and (c) of subdivision one, and, within sixty days after the appellant receives a transcript of the electronically recorded proceedings, must file with such court an affidavit of errors.

(b) Not more than three days after the filing of the affidavit of errors, the appellant must serve a copy thereof upon the respondent or the respondent's counsel or authorized representative. If the defendant is the appellant, such service must be upon the district attorney of the county in which the local criminal court is located. If the people are the appellant, such service must be upon the defendant or upon the attorney who appeared for him in the proceedings in the local criminal court.

(c) Upon filing and service of the affidavit of errors as prescribed in paragraphs (a) and (b). the appeal is deemed to have been taken.

(d) Within ten days after the appellant's filing of the affidavit of errors with the local criminal court, such court must file with the clerk of the appellate court to which the appeal has been taken both the affidavit of errors and the court's return, and must deliver a copy of such return to each party or a representative thereof as indicated in paragraph (b). The court's return must set forth or summarize evidence, facts or occurrences in or adduced at the proceedings resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors.

(e) If the local criminal court does not file such return within the prescribed period, or if it files a defective return, the appellate court, upon application of the appellant, must order such local criminal court to file a return or an amended return, as the case may be, within a designated time which such appellate court deems reasonable.

4. An appeal by a defendant to an intermediate appellate court by permission, pursuant to section 450.15, is taken as follows:

(a) Within thirty days after service upon the defendant of a copy of the order sought to be appealed, the defendant must make application, pursuant to section 460.15, for a certificate granting leave to appeal to the intermediate appellate court.

(b) If such application is granted and such certificate is issued, the defendant, within fifteen days after issuance thereof, must file with the criminal court in which the order sought to be appealed was rendered the certificate granting leave to appeal together with a written notice of appeal, or if the appeal is from a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer, either (i) an affidavit of errors, or (ii) a notice of appeal. In all other respects the appeal shall be taken as provided in subdivisions one, two and three.

5. An appeal to the court of appeals from an order of an intermediate appellate court is taken as follows:

(a) Within thirty days after service upon the appellant of a copy of the order sought to be appealed, the appellant must make application, pursuant to section 460.20, for a certificate granting leave to appeal to the court of appeals. The appellate division of each judicial department shall adopt rules governing the procedures for service of a copy of such order.

(b) If such application is granted, the issuance of the certificate granting leave to appeal shall constitute the taking of the appeal.

[*(c) to (e). Repealed*]

6. Where a notice of appeal, an affidavit of errors, an application for leave to appeal to an intermediate appellate court, or an application for leave to appeal to the court of appeals is premature or contains an inaccurate description of the judgment, sentence or order being or sought to be appealed, the appellate court, in its discretion, may, in the interest of justice, treat such instrument as valid. Where an appellant files a notice of appeal within the prescribed period but, through mistake, inadvertence or excusable neglect, omits to serve a copy thereof upon the respondent within the prescribed period, the appellate court to which the appeal is sought to be taken may, in its discretion and for good cause shown, permit such service to be made within a designated period of time, and upon such service the appeal is deemed to be taken.

Credits

(L.1970, c. 996, § 1. Amended L.1971, c. 671, § 4; L.1977, c. 699, §§ 1, 2; L.1992, c. 85, § 1; L.1994, c. 137, § 1; L.2017, c. 195, § 1, eff. Oct. 20, 2017.)

Effective: October 7, 2017

McKinney's **CPL § 160.59**

§ 160.59 Sealing of certain convictions

Currentness

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

(a) "Eligible offense" shall mean any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article six-C of the correction law. For the purposes of this section, where the defendant is**convicted** of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.

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

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

2. (a) A defendant who has been **convicted** of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was **convicted** of the most serious offense to have such **conviction** or **convictions sealed**. If all offenses are offenses with the same classification, the application shall be made to the court in which the defendant was last **convicted**.

(b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the defendant has been **convicted**, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the defendant as to whether he or she has filed, or then intends to file, any application for **sealing** of any other eligible offense; (iii) a copy of any other such application that has been filed; (iv) a sworn statement as to the **conviction** or**convictions** for which relief is being sought; and (v) a sworn statement of the reason or reasons why the court should, in its discretion, grant such **sealing**, along with any supporting documentation.

(c) A copy of any application for such **sealing** shall be served upon the district attorney of the county in which the **conviction**, or, if more than one, the **convictions**, was or were obtained. The district attorney

shall notify the court within forty-five days if he or she objects to the application for **sealing**.

(d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is filed in which case the application shall be assigned to the county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the defendant, including any**sealed** or suppressed records. The division of criminal justice services also shall include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the defendant.

3. The sentencing judge, or county or supreme court shall summarily deny the defendant's application when:

(a) the defendant is required to register as a sex offender pursuant to article six-C of the correction law; or

(b) the defendant has previously obtained **sealing** of the maximum number of**convictions** allowable under section 160.58 of the criminal procedure law; or

(c) the defendant has previously obtained **sealing** of the maximum number of**convictions** allowable under subdivision four of this section; or

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

(e) the defendant has an undisposed arrest or charge pending; or

(f) the defendant was **convicted** of any crime after the date of the entry of judgement of the last **conviction** for which **sealing** is sought; or

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

(h) the defendant has been **convicted** of two or more felonies or more than two crimes.

4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, a defendant who stands **convicted** of up to two eligible offenses, may obtain **sealing** of no more than two eligible offenses but not more than one felony offense.

5. Any eligible offense may be **sealed** only after at least ten years have passed since the imposition of the sentence on the defendant's latest **conviction** or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the **conviction** for which the application for**sealing** is sought, shall be excluded and such ten year period shall be extended by a period or periods 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, the sentencing judge or 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.

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.

8. When a sentencing judge or county or supreme court orders **sealing** pursuant to this section, all official records and papers 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 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 division shall retain any finger-prints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services regarding the records that shall be **sealed** pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for **sealing** of any other eligible offense.

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

(a) the defendant or the defendant's designated agent;

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

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

(d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of

police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation there-to; or

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

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

11. No defendant shall be required or permitted to waive eligibility for **sealing** pursuant to this section as part of a plea of guilty, sentence or any agreement related to a**conviction** for an eligible offense and any such waiver shall be deemed void and wholly unenforceable.

Credits

(Added L.2017, c. 59, pt. WWW, § 48, eff. Oct. 7, 2017. Amended L.2017, c. 60, §§ 4, 5, eff. Oct. 7, 2017.)