

SEALING CRIMINAL RECORDS: HOW TO REVIEW A RAP SHEET FOR ERRORS

Watch for Common Errors: (1) Unsealed arrests or dispositions
(2) Arrests without dispositions
(3) Open Warrants that should be vacated

What Criminal Dispositions Should Be Sealed?

“Favorable Dispositions” should be sealed under CPL § 160.50

(DCJS, police, prosecutor, and court records are sealed)

(Dispositions after 11/1/1991 are sealed automatically. Prior records require an application to the court.)

Acquittal	Decline Prosecution (Nolle Prosequi)
Dismissal, including:	Decline to File Accusatory Instrument (by Police)
Dismissal by Grand Jury, No True Bill	Order Setting Aside the Verdict
Dismissal in Interests of Justice, Clayton Motion	Order Vacating a Judgment
Dismissal of Information	Habeas Appeal
Adjournment in Contemplation of Dismissal, ACD	
(*Dismissed as Covered is <u>not</u> sealed)	Conviction for 221.05 – Unlawful Possession of Marijuana (After 3 yrs. if no later drug convictions)

Violations and Traffic Infractions should be sealed under CPL §160.55

(DCJS, police, and prosecutor records are sealed, but not court records)

(Convictions after 11/1/1991 are sealed automatically. Prior records require an application to the court.)

All Traffic Infractions and Violations, except for DWAI (VTL § 1192(1)) and two specific Loitering violations (PL § 240.35(3) [voided in 1983; repealed in 2010] & 240.37(2)) are sealed.

Common Penal Law Violations

100.00 – Criminal Solicitation, 5°	240.35 – Loitering (Not 240.35(3) “in a deviant manner” or 240.37(2) “for prostitution”)
140.05 – Trespass	240.40 – Appearance in Public Under Influence of Narcotics or Drug other than Alcohol
145.30 – Unlawfully Posting Advertisements	245.01 – Exposure of a Person
215.58 – Failing to Respond to Appearance Ticket	245.02 – Promoting Exposure of a Person
240.20 – Disorderly Conduct	245.05 – Offensive Exhibition
240.26 – Harassment, 2°	

Common VTL Infractions

509 – “Violations” (general infractions)	511-a – Facilitating unlicensed operation, 3°
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Other Sealed Dispositions*

Youthful Offender Adjudications (CPL § 720.35)	Family Court Finding Sealed by Motion** (Fam. Ct. Act § 375.2)
Criminal Case Removed to Family Court (CPL § 725.15)	Family Court Expungement (Fam. Ct. Act § 375.3)
Juvenile Delinquency Favorable Termination (Fam. Ct. Act § 375.1)	Restricted Use of Family Court Records (Fam. Ct. Act § 381.2)
Privacy of Family Court Records (Fam. Ct. Act § 166)	Conditionally Sealed Convictions (CPL § 160.58)

* This handout describes only the effects and mechanics of CPL §§ 160.50 & 160.55, not these additional provisions.

** FCA § 375.2 permits sealing of records when there is an actual finding of delinquency that is less than a designated felony. Sealing is not automatic, the respondent must file a formal motion with the court, and the motion cannot be made until the respondent’s sixteenth birthday. Records sealed pursuant to 375.2 are available if there is a subsequent adult conviction.

What Happens When a Case is Sealed?

(a) Favorable Dispositions

- Clerk of court must **send notification** of qualifying disposition to DCJS and relevant police agency.
- Every **photograph, fingerprint, or palmprint** taken must be returned to the person who received the favorable disposition or be destroyed. Also, police departments and law enforcement agencies must track down and have returned or destroyed copies of any photographs, fingerprints, or palmprints that may have been shared with other agencies or jurisdictions. CPL § 160.50(a) & (b).
 - Digital fingerprints may be retained if the person already has a fingerprint on file that has not been sealed. CPL § 160.50(e).
- **All official records and papers**, including copies but not including published judicial decisions or opinions, shall be sealed and “**not made available to any person or public or private agency.**” CPL § 160.50(c).
 - Only under certain narrowly defined circumstances can the sealed records be released by court order. CPL § 160.50(d).
 - A record of a sealed arrest will remain in a confidential file at DCJS and can be accessed if:
 - 1) The client requests it.
 - 2) The client applies for a gun license.
 - 3) The client applies for a job as a law enforcement or peace officer.
 - 4) The client is arrested while on parole or probation.
 - 5) A prosecutor or law enforcement official establishes that “justice requires.”

(b) Violations or Infractions (Petty Offenses)

- Those convicted of a violation or infraction are protected by substantially similar statutory language as those who received a favorable disposition. The major exception is that **court documents are not sealed** under CPL § 160.55(c).
- Because court records of charges and convictions are not sealed under CPL § 160.55, these records are publicly available in courthouses and, more important, through OCA’s statewide Criminal History Record Search. Potential employers and landlords frequently use this OCA search, which is statewide and available to anyone with a name, date of birth, and a \$55 fee.
- **Warning:** In 2009, the Legislature amended CPL § 160.55 to permit access to **sealed records related to domestic violence harassment offenses (P.L. § 240.26)**, but for “law enforcement” purposes only. The otherwise sealed records are now available to “a police agency, probation department, sheriff’s office, district attorney’s office, department of correction of any municipality and parole department, *for law enforcement purposes*, **upon arrest** in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title.” CPL § 160.55(1)(d). Related fingerprints can be retained as well. CPL § 160.55(1)(a).

- **Practice Tip:** OCA sells access to criminal histories online. While the OCA Criminal History Record Search (CHRS) has a policy of not reporting arrests disposed in convictions for violations (sealed under CPL 160.55), errors persist and **many sealed violation arrests are reported**. In addition, most courts do not seal these cases until the termination of the sentence – usually a Conditional Discharge of one year. As a result, private **background check companies routinely have arrest information** that they provide to employers. In addition, **always warn defendants that employers and others can easily discover the arrest underlying a sealed violation conviction** because the court records remain public.

What Does This Mean for My Case?

If opposing counsel or the court mentions a disposition that qualifies to be sealed, tries to proffer any of the records from the sealed case, or tries to elicit testimony based on those records, argue that sealed records cannot be admitted, considered, or unsealed for the purposes of an Article 10.

The sealing statutes use mandatory language and operate automatically to seal qualifying dispositions. Therefore, the sealing provisions apply regardless of whether dispositions are marked administratively as “sealed.”

(a) Favorable Dispositions

- The case for inadmissibility is stronger because court records are sealed and CPL § 160.60 applies.
- Cite and quote CPL § 160.60, and have the Court take judicial notice of it:

Upon the termination of a criminal action or proceeding against a person in favor of such person, . . . the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.

(b) Violations or Infractions

- Beware because anything in the criminal court file remains unsealed under CPL § 160.55.
- Pay careful attention to how a document is authenticated. If the source of the document is a police or prosecuting agency, it should be excluded.

Legal Argument for Exclusion

1. Sections 160.50 and 160.55 of the Criminal Procedure Law are part of a **broad public policy** of protecting those who have been charged with a criminal offense, **but never convicted of a crime**, from collateral consequences arising from the prosecution.
2. The sealing statutes absolutely **require the sealing** of all official records and papers relating to an arrest or prosecution that ends in a favorable termination or conviction of a non-criminal offense.
 - a. The sealing statutes **explicitly prohibit** DCJS (which prints the rap sheets), the **police**, and **the prosecution** from providing any information about qualifying cases to any public or private agency, including the courts.
 - b. If you do not have proof that record is sealed, argue that ACS has the burden to show that the record is unsealed. The sealing statutes use **mandatory language** and **operate automatically** to seal qualifying dispositions. Therefore, the sealing provisions apply regardless of whether dispositions are marked administratively as “sealed.”
3. The official records and papers from sealed criminal cases are **inadmissible** at trial and may not be used even to **refresh the recollection** of a witness. *See, e.g., Property Clerk v. Taylor*, 237 A.D.2d 119 (N.Y. App. Div. 1st Dep’t 1997) (“the testimony of the chemist . . . was not based on any independent recollection but rather her review of lab reports that had been sealed pursuant to CPL 160.50” and therefore inadmissible).
 - a. Parties are free to testify from memory about, and adduce **independent evidence** of, the conduct leading to criminal charges in a case that was sealed.
 - b. **Practice Tip:** Make sure to *voir dire* every witness on their access to and review of sealed records prior to their testimony.
 - i) Consider asking whether opposing counsel used the sealed records while prepping the witness.
 - ii) Note that independent recollection by police officers of any specific past arrest is unrealistic – make sure to *voir dire* or cross-examine extensively on whether testifying officers reviewed sealed records. Adduce testimony on the purposes of police paperwork (including refreshing recollection), average arrests of the officer, how many since the incident, etc.
4. **Preserve the record** with specific objections to each sealed record and point of testimony, including every time a witness refreshes her recollection from or refers to a sealed record.

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- a. In summations and argument, emphasize that no independent evidence (including unrefreshed recollection) supports the opposing party. (This strategy also makes a record concerning prejudice.)

Documents to Prove Sealing

- **Certificate of Disposition** (necessary for sealing all cases except Decline Prosecution and Voided Arrests): Available from the court clerk in the court where the case was heard. You will need a release from your client, or the client can obtain it in person with ID.
- **Affidavit in Support of Declining/Deferring Prosecution** (necessary for sealing Decline Prosecution cases) (often still called a **343-Dismissal Form**): Available by contacting the District Attorney's office where the case was referred and requesting a Decline Prosecution Form / 343-Dismissal Form. In police decisions to decline to file accusatory instrument ("voided arrests"), you must contact the head of the arresting agency.
- **Arrest Report** (necessary for sealing arrests voided at the police precinct): Available through FOIL for your client. You will need a release from your client.

Limits on Use of Sealed Records

- ◆ No unsealing or use in **employment** disciplinary proceedings. *Matter of Joseph M. v. New York City Board of Education*, 82 N.Y.2d 128, 134 (1993); *In the Matter of Scott D.*, 13 A.D.3d 622 (2d Dept. 2004); *Application of Police Commissioner of the City of New York*, 131 Misc. 2d 695 (Sup. Ct. N.Y. Co. 1986).
- ◆ No unsealing or use in **eviction** proceedings. *People v. Diaz*, 15 Misc.3d 410 (Sup. Ct. N.Y. Co. 2007); *People v. Manauri R.*, NYLJ 21, col. 1 (Sup. Ct. Bronx Co. Oct. 22, 2004); *People v. Canales*, 174 Misc. 2d 387 (Sup. Ct. Bronx 1997).
- ◆ No unsealing or use in property **forfeiture** proceedings. *Property Clerk v. Bonilla*, NYLJ 20, col. 1 (Sup. Ct. New York Co. Nov. 25, 2002).
- ◆ No unsealing or use in Family Court **Article 10 proceedings**. *Matter of Jala G.*, decided Dec. 3, 2009, Bronx Family Court, Honorable Judge Drinane.
 - "DIR sought to be introduced is indeed the type of document with the contemplated scope of CPL §160.50(1)(c)."
 - "the DIR... became a sealed document on the date of disposition of the respondent's criminal court proceeding."
- ◆ No unsealing or use in **criminal sentencing**. *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005).
 - It is illegal to use **Domestic Incident Reports (DIRs)** from sealed arrests (including voided arrests, declined prosecutions, dismissed cases, or sealed violations) for any purpose in another case, including a new criminal case.

- **Warning:** The DA Narcotics Eviction Units have made *ex parte* motions in Supreme Court to have criminal cases unsealed under CPL §§ 160.50 & 160.55 for use in drug eviction proceedings. The statutes arguably may *not require notice* to your client. Be on the watch for motions to unseal in other contexts, including Article 10 proceedings.
- Make an effort to discover which judge in your borough is signing these orders. Ask the judge if you can oppose these motions, or at least educate him or her on the law.
 - Drug evictions are an insufficient basis for unsealing, *see People v. Manauri R.*, NYLJ 21, col. 1 (Sup. Ct. Bronx Co. Oct. 22, 2004); *People v. Canales*, 174 Misc. 2d 387 (Sup. Ct. Bronx 1997).
 - If your client's case has been unsealed, make a motion in the court that issued the order to reconsider or vacate the unsealing order.

Other Information about Sealing

• **Administrative Process:** If a disposition is not marked as sealed on the Certificate of Disposition, then the automatic sealing process has failed (a fairly common occurrence). You should obtain a certified copy of the disposition and mail it to DCJS, demanding that the record be sealed. Send the letter to the following address:

DCJS
Record Review Unit
4 Tower Place
Albany, NY 12203-3764

• **Time Frame:** It will probably take up to three months for records to be sealed administratively through DCJS. Court dispositions that incorrectly omit the sealing status can be corrected immediately by working with the Clerk.

• Records cannot be expunged or erased in New York.

• **Felony & misdemeanor convictions cannot be sealed**, except under the new conditional sealing provision (C.P.L. § 160.58.) NY law does provide for Certificates of Relief from Disabilities and Certificates of Good Conduct, which can mitigate many of the hidden consequences of criminal convictions. *See* Corr. L. §§ 701-703; 703-a - 703-b; *Certificates that Promote Rehabilitation: Why They Are So Important and How to Get Them* (The Bronx Defenders, Feb. 2010).