New York Legislative Revisions

David L. Cohen, Esq.
Law Office of David L. Cohen, Esq., Kew Gardens

Robert J. Masters, Esq.
Queens County District Attorney's Office, Kew Gardens

Honorable Barry Kamins
Aidala, Bertuna & Kamins P.C., NYC

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MARC C. GANN*
GERARD C. McCLOSKEY
DAVID J. BARRY

ZEENA J. ABDI
PHILIP P. NASH
JONATHAN P. MANFRE

+Also member PA, MA, TX and D.C. Bars
*Also member MD Bar

COLLINS GANN
McCLOSKEY & BARRY PLLC
ATTORNEYS AT LAW
Dedicated Legal Counsel Since 1990

Of Counsel
ALAN H. FELDSTEIN^
Tel: (818) 508-1820

ANSANELLI LAW GROUP, LLP
Tel: (631) 598-0337

TAMA BETH KUDMAN ≠
Tel: (561) 472-0811

^Member CA Bar only
≠ Member NY, NJ and FL Bars

A Second Chance for Our Clients: Sealing Criminal Records

Rick Collins, Esq. & Phil Nash, Esq.

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Criminal Record Sealing: The Time Has Come

By Rick Collins

This article appeared in the June edition of the *Nassau Lawyer*.

We live in an age of divided politics, where the Left and the Right seem like they cannot bridge the chasm on even minor issues, let alone many of the more serious issues facing our country. So, when politicians from opposite sides of the aisle who do not see eye-to-eye on almost *anything* come together to introduce legislation in Congress, it is noteworthy. What issue can bring both sides together? For Republican Senator Rand Paul of Kentucky and Democratic Senator Cory Booker of New Jersey, that issue is the sealing or expungement of criminal records relating to nonviolent offenses.[1]

After a person is convicted of a crime, either via plea or after trial, the judge imposes sentence and the defendant then serves that sentence, whether it is a period of incarceration, a term of probation, or the performance of community service. What happens next, however, is that reentry into productive society is hampered by the easy discoverability of a criminal conviction as part of a routine background check. As a result, those with convictions are chronically unemployed or underemployed, with a percentage needing taxpayer-subsidized assistance to survive.[2] Recognizing that a criminal conviction presents countless obstacles including hurdles to employment, education, and housing,[3] these federal legislators from both sides of the aisle are sponsoring a "second chance" bill to lessen the collateral consequences of a federal criminal conviction.[4]

[1] REDEEM Act, S. 827, 115th Cong. (2017).
[2] John Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, The Heritage Found. Legal Memorandum No. 200 (Mar. 7, 2017), *available at* https://goo.gl/hyq6CR.
[3] *Id.*
[4] S. 827.

Sealing in New York

At the state level, the same issue bounced around Albany for many years, with the support of the Nassau County Bar Association and the New York State Bar Association (NYSBA). As Co-Chair of the NYSBA Criminal Justice Section's Sealing Committee, I helped draft the Report and Recommendations on criminal record sealing that was adopted as NYSBA policy in 2012.[5] For five years, I was part of a broader coalition in support of various record sealing bills that were introduced in Albany, but none passed . . . until now.

In April, New York joined the ranks of many states nationwide by enacting a broad criminal record sealing statute: Criminal Procedure Law section 160.59.[6] The far-reaching impact of this change in the law, which becomes effective in October, will improve the lives of thousands of ex-offenders and their families.

Prior to section 160.59, the state's only sealing law was limited to circumstances in which the person completed a judicially sanctioned substance abuse treatment program as part of his or her sentence.[7] That sealing law contains a "spring-back provision," so if sealing is granted on a case but the person is subsequently rearrested on new charges, the sealed records are no longer deemed sealed.[8] That law does not extend the benefit of record sealing beyond those who struggled with drug or alcohol addiction and sought proper treatment as a condition of their sentence. Possession crimes, non-violent offenses, or a first-time DWI conviction would remain forever a part of a person's record. No matter how many years passed without any new contact with the criminal justice system, there was no mechanism under the law to seal these convictions from public view. As a result, thousands of non-

[5] N.Y. State Bar Ass'n, Sealing Records of Conviction Regarding Certain Crimes (2012), *available at* https://goo.gl/R0aSfM.
[6] At the time of this article's publishing, the law has not been printed in an official reporter, but is available online at https://goo.gl/schQPF.
[7] Crim. Proc. Law § 160.58.
[8] The records will remain sealed if the new charges result in a dismissal or noncriminal disposition.

violent first time offenders in New York lived with the stigma of a criminal conviction, even decades after their sentence concluded and their debt to society was paid.

Section 160.59, passed as part of the 2017–18 budget negotiations, changes that and expands criminal record sealing to many non-violent crimes, both misdemeanors and felonies. Violent offenses and sex offenses are excluded from eligibility, as are people with two or more felony convictions or more than two misdemeanor convictions. The law permits two eligible offenses to be sealed, but not more than one eligible felony offense may be sealed. Sealing eligibility begins ten years from the date that sentence was imposed (the time is tolled if the person is incarcerated), provided there have been no new convictions since then.[11]

The Mechanics and Effects of Sealing

To start the sealing process, the law directs that an application be filed with the court, addressed to the judge who oversaw sentencing. Should that judge no longer be on the bench, then the application is to be filed with the supervising judge. A copy must be served on the local District Attorney, and the prosecutor is given 45 days to file an opposition. If the DA's office opposes, then the judge must conduct a hearing.[12]

Every sealing application must include a sworn statement by the applicant detailing the reasons why the court should exercise its discretion and grant sealing. This statement is the applicant's chance to explain how living with the stain of a criminal conviction has negatively impacted his or her life, and also to demonstrate the extent of the positive changes that have been made over the years. Diplomas, employment history, character reference letters, and other "supporting documentation" are permitted to be included as exhibits. The applicant's statement, along with any exhibits, should aid the judge in

[11] Crim. Proc. Law § 160.59(2)(a), (3)(h), (5).
[12] *Id.* § 160.59(2)(c), (d).

determining the character of the applicant and the important effect that sealing would have on productive reintegration into society.[15]

If sealing is granted, then the conviction and any records related to that conviction are sealed and would only be made available to law enforcement in select circumstances. The new law does not contain a "spring back provision," so a subsequent conviction would not reopen previously sealed cases. The practical effect of sealing is that the conviction would no longer appear on a background check and information related to the conviction does not have to be disclosed when applying for employment, housing, or educational opportunities.[18] It is as if the sealed record never happened, and the applicant can finally close that chapter in his or her life.

The Federal REDEEM Act

Senators Paul and Booker seek to bring a similar "second chance" opportunity to the federal level through the Record Expungement Designed to Enhance Employment Act of 2017, or "REDEEM Act."[19] There is no current federal statute that allows for the sealing of federal convictions. The REDEEM Act would change that, and would give those convicted of nonviolent crimes the chance to petition the court to have their records sealed.

Speaking in support of the legislation, Senator Paul said, "The biggest impediment to civil rights and employment in our country is a criminal record. Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. Many of these young people could escape this trap if criminal justice were reformed, if records were expunged after time served, and if non-violent crimes did not become a permanent blot preventing employment."[21]

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[15] *See id.* § 160.59(2)(b)(v), (7).
[18] *Id.* § 160.59(8), (9).
[19] REDEEM Act, S. 827, 115th Cong. (2017).
[21] Press Release, Senator Cory Booker, U.S. Senators Booker and Paul Introduce Legislation Calling for Criminal Justice Reform (July 8, 2014), https://www.booker.senate.gov/?p=press_release&id=100.

The bill directs the judge considering a sealing application to weigh the interest of public knowledge and safety, plus the government's interest in maintaining the accessibility of the protected information, against the conduct and demonstrated desire of the petitioner to be rehabilitated and positively contribute to the community, and the interest of the petitioner in having the protected information sealed. Additionally, the law would specifically direct the court to consider the impact a conviction has on the petitioner to secure and maintain employment.[23]

The REDEEM Act would incentivize states to create sealing laws in line with the federal statute by prioritizing those states in certain grant applications. The law would similarly incentivize states to increase the age of criminal responsibility to 18.[25] This would be good news for New York, now that its laws have been changed.

Criminal Procedure Law section 160.59 comes after years of tireless work by members of many organizations and individuals. The sponsors—Democratic New York State Assemblyman Joseph R. Lentol and Republican State Senator Patrick M. Gallivan—reached across the aisle to get the job done. The new law will have profound beneficial effects on people throughout New York whose lives have been derailed by the lasting impact of a criminal record. The same opportunity is sorely needed at the federal level to permit thousands more to put their convictions behind them. With Rand Paul and Corey Booker agreeing on an issue, this is clearly an idea whose time has come.

Rick Collins is the NCBA Vice-President. A former prosecutor, he practices criminal defense in multiple jurisdictions as a principal in Collins Gann McCloskey & Barry PLLC. He acknowledges the contributions of NCBA member Philip Nash, Esq. in preparing this article.

[23] S. 827 § 2(a).
[25] *Id.* § 6.

160.58 Conditional sealing of certain controlled substance, marihuana or specified offense convictions.

§ 160.58 Conditional sealing of certain controlled substance, marihuana or specified offense convictions.

1. A defendant convicted of any offense defined 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 this chapter who has successfully completed a judicial diversion program under article two hundred sixteen of this chapter, 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, and has completed the sentence imposed for the offense or offenses, is eligible to have such offense or offenses sealed pursuant to this section.

2. The court that sentenced the defendant to a judicially sanctioned drug treatment program may on its own motion, or on the defendant's motion, order that all official records and papers relating to the arrest, prosecution and conviction which resulted in the defendant's participation in the judicially sanctioned drug treatment program be conditionally sealed. In such case, the court may also conditionally seal the arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors, which for purposes of this subdivision shall be limited to misdemeanor offenses defined in article two hundred twenty or two hundred twenty-one of the penal law. The court may only seal the records of the defendant's arrests, prosecutions and convictions when:

(a) the sentencing court has requested and received from the division of criminal justice services or the Federal Bureau of Investigation a fingerprint based criminal history record of the defendant, including any sealed or suppressed information. The division of criminal justice services shall also 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. The parties shall be permitted to examine these records;

(b) the defendant or court has identified the misdemeanor conviction or convictions for which relief may be granted;

(c) the court has received documentation that the sentences imposed on the eligible misdemeanor convictions have been completed, or if no such documentation is reasonably available, a sworn affidavit that the

sentences imposed on the prior misdemeanors have been completed; and

(d) the court has notified the district attorney of each jurisdiction in which the defendant has been convicted of an offense with respect to which sealing is sought, and the court or courts of record for such offenses, that the court is considering sealing the records of the defendant's eligible misdemeanor convictions. Both the district attorney and the court shall be given a reasonable opportunity, which shall not be less than thirty days, in which to comment and submit materials to aid the court in making such a determination.

3. At the request of the defendant or the district attorney of a county in which the defendant committed a crime that is the subject of the sealing application, the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant's arrests, prosecutions and convictions. In making such a determination, the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section; (iii) the defendant's criminal history; and (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety.

4. When a 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; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same.

5. When the court orders sealing pursuant to this section, the clerk of such court shall immediately notify the commissioner of the division of criminal justice services, and any court that sentenced the defendant for an offense which has been conditionally sealed, regarding the records that shall be sealed pursuant to this section.

6. Records sealed pursuant to this subdivision 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 thereto.

7. The court shall not seal the defendant's record pursuant to this section while any charged offense is pending.

8. If, subsequent to the sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed; provided, however, that if such new misdemeanor or felony arrest results in a termination in favor of the accused as defined in subdivision three of section 160.50 of this article or by conviction for a non criminal offense as described in section 160.55 of this article, such unsealed records shall be conditionally sealed pursuant to this section.

- CPL § 160.58 - 2009 statute enacted to aid only those whose drug or alcohol addiction led them to commit crimes.
    - Applicant must have completed a “judicially sanctioned” drug treatment program
    - under-utilized statute
    - If granted, records conditionally sealed
        - “spring-back provision”
        - effectively placing the person on lifetime probation to retain the sealed status

160.59 Sealing of certain convictions.

§ 160.59 Sealing of certain convictions.

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 fingerprints, 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 thereto; 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.

CPL 160.59 EXCLUDIBLE FELONIES

PL 130.20 Sexual Misconduct; PL 130.25 Rape 3°; PL 130.30 Rape 2°; PL 130.35 Rape 1°; PL 130.40 Criminal Sexual Act 3°; PL 130.45 Criminal Sexual Act 2°; PL 130.50 Criminal Sexual Act 1°; PL 130.52 Forcible Touching; PL 130.53 Persistent Sexual Abuse; PL 130.55 Sexual Abuse 3°; PL 130.60 Sexual Abuse 2°; PL 130.65 Sexual Abuse 1°; PL 130.65-a Aggravated Sexual Abuse 4°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.67 Aggravated Sexual Abuse 2°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.85 Female Genital Mutilation; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 130.91 Sexually Motivated Felony; PL 130.95 Predatory Sexual Assault; PL 130.96 Predatory Sexual Assault Against a Child

PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child w/ a Controlled Subs. or Alcohol

PL 125.10 Criminally Negligent Homicide; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.12 Vehicular Manslaughter 2°; PL 125.13 Vehicular Manslaughter 1°; PL 125.14 Aggravated Vehicular Homicide; PL 125.15 Manslaughter 2°; PL 125.20 Manslaughter 1°; PL 125.21 Aggravated Manslaughter 2°; PL 125.22 Aggravated Manslaughter 1°; PL 125.25 Murder 2°; PL 125.26 Aggravated Murder; PL 125.27 Murder 1°; PL 125.40 Abortion 2°; PL 125.45 Abortion 1°; PL 125.50 Self-Abortion 2°; PL 125.55 Self Abortion 1°; PL 125.60 Issuing Abortion Articles

A Class A felony offense.

Class B violent felony offenses: PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°; PL 265.09 Criminal Use of a Firearm 1°; PL 265.13 Page 3 of 3 Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer; PL 120.07 Gang Assault 1°; PL 215.17 Intimidating a Victim or Witness 1°; PL 490.35 Hindering Prosecution of Terrorism 1°; PL 490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses: An attempt to commit any of the Class B violent felony offenses listed above; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121.13 Strangulation 1°; PL 140.25 Burglary 2°; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor; PL 265.19 Aggravated Criminal Possession of a Weapon; PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°;

Class D violent felony offenses: An attempt to commit any of the Class C violent felony offenses listed above; PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menacing a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5), (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°; PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1°; PL 240.62 Placing a False Bomb or Hazardous Substance 1°; PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°;

Class E violent felony offenses: PL 110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Falsely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime conspired to commit is one of the charges listed in this section.

A conviction that requires registration as a sex offender.

Criminal Certificate of Disposition Request Form for CPL 160.59 Sealing Application

To: _____ **Court**
Number & Street: _____
City, State & Zip: _____
Phone: _____

NOTE: The name, address and phone number of the court can be found by selecting the County and Court Type in the Court Locator at: http://www.nycourts.gov/courts/index.shtml

Please complete the information below to request a criminal Certificate of Disposition for your CPL 160.59 sealing application. You may either bring your completed form to the court in person, or you may mail the completed form to the court. A fee of five ($5) dollars is required in courts located outside the City of New York, and a fee of ten ($10) dollars is required in courts located within the 5 boroughs of the City of New York. When delivering your request in person, you may pay in cash or by certified check or money order, and you must provide a valid photo ID. When mailing your request, you must pay by certified check or money order (do not send cash in the mail), and the form must be notarized below.

Requestor Information (only the defendant or the defendant's agent may use this form to request a Certificate of Disposition)	
	Date of Request:
Requestor	Name:
	Address:
	Phone:
	Email:
Role	I am the Defendant
	I am the Defendant's Agent (must provide notarized authorization from the defendant)
Receipt	Please mail to the above address (must provide self-addressed stamped envelope)
	I will pick up at court when notified
For Court Use Only	☐ Certificate of Disposition fee paid Cash Certified Check # Money Order #
	☐ Proper ID provided (specify):
	☐ Written authorization provided (for Defendant's Agent only)
	☐ Self-addressed stamped envelope provided (for request to receive Certificate of Disposition by mail only)

Defendant Information			
Name	First:	Middle:	Last:
AKA(s)			
Date of Birth			
Sex	Male Female Unknown		

Case Identifiers (provide as much information as you can)	
Docket, Indictment, SCI or IDV Number	
Arrest Number	
Order of Protection Number	
Certificate of Disposition Number	
Criminal Justice Tracking Number (CJTN)	
Complaint Number	
Ticket Number	

Other Identifiers (provide other identifiers if known)				
NYSID Number				
Partial Docket Number				
Motorist ID Number				
Arrest Date		or Date Range	from	to
Incident Date		or Date Range	from	to
Address				
License Plate Number				
Charges				
Other				

NOTE: Form MUST be notarized when submitting a request by mail.

_____
Signature of Requestor

Sworn to before me this ___
day of _____, 20____

_____
Notary Public

In the Matter of the Application of:

❶Name: _____

❷AKA(s): _____

Notice of Motion and Affidavit in Support Sealing Pursuant to CPL 160.59

❸NYSID: _____

❹Motorist ID #: (VTL Crimes) _____

❺DOB: _____

This is a Notice of Motion for sealing New York State convictions pursuant to Criminal Procedure Law (CPL) 160.59. The applicant moves to seal the following case(s):

❻ Docket, Indictment, or SCI Number	❼ Court Name	❽ Conviction Charge	❾ Law/Section/Subsection	❿ Conviction Date	⓫ Sentence Date	⓬ Sentence Term	⓭ Release Date from any incarceration

ATTACHMENTS:

⓮Applicant attaches the following documents in support of the request for sealing (applicant may attach documents related to reasons why the case(s) should be sealed, including evidence of rehabilitation, letters of recommendation, employment status, etc.):

1. Affidavit in Support of Sealing Pursuant to CPL 160.59 [see page 2].
2. Affidavit of Service on the District Attorney [see page 3].
3. Certificate of Disposition for each conviction for which I am requesting sealing.
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

APPLICANT UNDERSTANDS THE FOLLOWING PROCEDURES AND REQUIREMENTS OF THIS MOTION :

If applicant is applying to seal two cases, this motion must be filed in the court where the most serious conviction was entered. If both cases involve convictions of the same class (e.g., two class A misdemeanors or two class B misdemeanors), the motion must be filed in the court where the more recent conviction was entered.

A copy of this Notice of Motion and all supporting documents must be served on the District Attorney of each county where a conviction listed above was entered.

The District Attorney has 45 days after being served with this Notice of Motion to consider whether to consent to the sealing or to oppose the sealing.

If the District Attorney opposes the sealing, the court will conduct a hearing and consider any evidence offered by either party that would aid the court in deciding whether to seal your convictions.

Before deciding this motion, the law requires the court to have a fingerprint-based criminal history report (rap sheet), which will include any sealed or suppressed cases and any criminal history information that occurred in jurisdictions outside of New York. By filing this Notice of Motion, you are agreeing to be fingerprinted if required. When the motion is filed, the clerk of the court will provide instructions if you must be fingerprinted.

Affidavit in Support of Sealing Pursuant to CPL 160.59

The applicant states the following facts upon information and belief that they are true:

⓯I was convicted of a crime or crimes in no more than two criminal transactions in New York State or elsewhere, and no more than one of those criminal convictions includes a conviction for a felony offense. I do not have any open or pending criminal charges against me.

⓰I am not applying to seal any of the following offenses:

a. a sex offense defined in article one hundred thirty of the Penal Law;
b. an offense defined in article two hundred sixty-three of the Penal Law;
c. a felony offense defined in article one hundred twenty-five of the Penal Law;
d. a violent felony offense defined in section 70.02 of the Penal Law;
e. a class A felony offense defined in the Penal Law;
f. a felony offense defined in article one hundred five of the Penal Law where the underlying offense is not an eligible offense;
g. an attempt to commit an offense that is not an eligible offense if the attempt is a felony; or,
h. an offense for which registration as a sex offender is required pursuant to article six-C of the correction law.

⓱It has been over 10 years since I was sentenced for my most recent case. I did not count any jail or prison time I served after being sentenced in calculating the 10-year period.

Moreover, the applicant, having been sworn, says:

I have attached a copy of a certificate of disposition or other similar documentation for each conviction listed above, or an explanation of why such certificate or other documentation is not available.

⓲I ***have*** ***have not*** filed any other application to seal a conviction pursuant to either CPL 160.58 or CPL 160.59. If I did file another application, I have attached it to this motion.

⓳I ***do*** ***do not*** intend to file any other application to seal an eligible conviction pursuant to either CPL 160.58 or CPL 160.59. If I do intend to file another application, the following conviction is the one I will ask to have sealed:

Docket/Indictment/SCI Number(s)	Court Name	Conviction Charge	Law/Section/Subsection	Charge Weight	Conviction Date	Sentence Date	Sealing Section
							CPL 160.58 CPL 160.59

⓴The court, in its discretion, should grant this application for sealing pursuant to CPL 160.59 for the following reasons (you must specify your reasons, which may include information about positive steps you've taken since your conviction – add additional pages if necessary):

_____.

_____
Signature of Applicant

Street Address: _____
City, State & Zip: _____
Phone (optional): _____
Email (optional): _____

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

Affidavit of Service

STATE OF NEW YORK
COUNTY OF _____

The undersigned, being sworn, says:

_____, is over 18 years of age and resides at:
[name of person serving/mailing]

_____.
[address of person serving/mailing]

That on _____, deponent served the within **Notice of Motion and Affidavit in Support of Sealing Pursuant to CPL 160.59** and the following supporting documents:
[date of service/mailing]

_____

upon the District Attorney(s) of the following county/counties: _____
[name(s) of county/counties]

at the following address(es): _____

_____.
[address(es) of District Attorney's office(s)]

Select one:

by mailing a complete copy in a properly stamped and addressed envelope at the post office or official depository of the United States Postal Service.

by personally delivering a complete copy to the District Attorney's Office.

_____
Signature of person serving/mailing

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

NOTE: ***If service was made upon more than one District Attorney's office, and service was made on different dates or by different people, attach separate Affidavits of Service.***

INSTRUCTIONS

The instruction for each number below refers to the corresponding number in the **Notice of Motion and Affidavit in Support Sealing Pursuant to CPL 160.59** form. For additional help, and to find a fillable version of this form online, go to the Unified Court System's website at http://www.nycourts.gov/forms/index.shtml

1. Enter your full legal name.
2. Enter any names you are also known as (AKA) in addition to your legal name. If you used a different name than your legal name on a case you are applying to seal, make sure you also list that name.
3. Enter your New York State Identification Number (NYSID). This number can be found on the Certificate of Disposition you obtained from the court where your conviction occurred.
4. If you were convicted of a crime under the Vehicle and Traffic Law (VTL), enter your Motorist ID from your driver's license. (You will know that it is a Vehicle and Traffic Law charge if it says VTL in the conviction description on your Certificate of Disposition from the court.) If you do not have a VTL charge, you are not required to enter your Motorist ID.
5. Enter your date of birth.
6. Enter the court's docket number if you were convicted and sentenced in a city, town or village court, or enter the indictment/SCI number if you were convicted and sentenced in a supreme or county court. The case number will be in the Certificate of Disposition you get from the court.
   NOTE: If you were convicted of a charge in another case that was part of the same incident, enter the information for #6 to #13 for the related case in the same row. (e.g., You were arrested for DWI and Unauthorized Use of a Vehicle, and both crimes occurred from the same incident. You were convicted for a misdemeanor DWI in the City Court, but you were convicted for a felony Unauthorized Use of a Vehicle in the County Court.)
7. Enter the name of the court where you were convicted and sentenced. The name of the court will be on the Certificate of Disposition you get from the court.
8. Enter the name of the charge for which you were convicted and sentenced (e.g., Petit Larceny, or Burglary 3°, or Criminal Possession of a Controlled Substance 7°, etc.). The name of the conviction will be in the Certificate of Disposition you get from the court. If the Certificate of Disposition lists more than one charge in the same case, list the most serious charge.
   For example:
   - If you were sentenced for an A misdemeanor and a B misdemeanor, enter the A misdemeanor.
   - If you were sentenced for a felony and a misdemeanor, enter the felony.
   - If you were sentenced for a C felony and an E felony, enter the C felony.
   - If you were sentenced for two charges of the same weight (e.g., two A misdemeanors), enter the first charge listed in the Certificate of Disposition.
9. Enter the law, section and subsection, if any, of the charge for which you were convicted and sentenced. The law, section and subsection will be in the Certificate of Disposition you get from the court.
   For example:
   - PL 155.30(1)
   - PL 220.03
   - VTL 1192 (2-a)
10. Enter the date you were convicted. This is the date that you entered a plea or were found guilty after a trial. The conviction date will be in the Certificate of Disposition you get from the court.
11. Enter the date you were sentenced. (Some people are convicted and sentenced on the same date. Others are convicted and come back to court at a later date for sentencing.) The sentence date will be in the Certificate of Disposition you get from the court.
12. Enter the sentence you received. The sentence will be in the Certificate of Disposition you get from the court.
    For example:
    - Conditional discharge
    - 5 years probation
    - 60 days jail and 3 years probation
    - 6 months jail
    - 1-3 years state prison

⓭ If you served any time in jail or state prison after you were sentenced, enter the date you were released. If you did not serve any time in jail or state prison after you were sentenced, leave this blank.

⓮ Documents in support of sealing:

1. Affidavit in Support of Sealing Pursuant to CPL 160.59 [page 2 of this form]. The purpose of the affidavit is to provide additional information to support your motion for sealing. Make sure it is completed and attached.
2. Affidavit of Service [page 3 of this form]. The law requires you to provide a copy of your motion and supporting papers to the District Attorney in the county where you were convicted and sentenced before you file them with the court. If you are applying to seal two cases, and you were convicted and sentenced in different counties, you must send copies to the District Attorney in BOTH counties.
   NOTE: If you served two different District Attorneys, and they were served on different dates and/or by different people, you must complete and attach a separate Affidavit of Service (page 3) for each.
3. Certificate of Disposition. You must attach a Certificate of Disposition for each conviction that you are asking the court to seal. To get a Certificate of Disposition, you must contact the court where you were convicted and sentenced. If you are applying to seal two cases, you must get a Certificate of Disposition for each case. If you cannot get a Certificate of Disposition, you must attach an explanation why a Certificate of Disposition is not available. Further information about getting a Certificate of Disposition is available on the court's website.

4.-10. If you have any additional documents evidencing your rehabilitation, you should attach them. These can include documents such as a certificate of relief from civil disabilities, verification of employment, community service, volunteer or charity work; educational transcripts; letters of recommendation or commendation from employers, teachers/professors, community leaders, charitable organizations; certificates of successful completion of a drug or alcohol treatment program, etc. You are not required to submit additional supporting documents.

⓯ You are telling the court that you have not been convicted in more than two criminal cases, and that no more than one of those cases was a conviction for a felony charge.

⓰ If you were convicted of any of the crimes listed below, you are not eligible for sealing the conviction pursuant to CPL 160.59. (check your Certificate of Disposition to verify that it does not include any of the following charges). You are telling the court that you are not moving to seal any of the following:

a. PL 130.20 Sexual Misconduct; PL 130.25 Rape 3°; PL 130.30 Rape 2°; PL 130.35 Rape 1°; PL 130.40 Criminal Sexual Act 3°; PL 130.45 Criminal Sexual Act 2°; PL 130.50 Criminal Sexual Act 1°; PL 130.52 Forcible Touching; PL 130.53 Persistent Sexual Abuse; PL 130.55 Sexual Abuse 3°; PL 130.60 Sexual Abuse 2°; PL 130.65 Sexual Abuse 1°; PL 130.65-a Aggravated Sexual Abuse 4°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.67 Aggravated Sexual Abuse 2°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.85 Female Genital Mutilation; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 130.91 Sexually Motivated Felony; PL 130.95 Predatory Sexual Assault; PL 130.96 Predatory Sexual Assault Against a Child

b. PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol

c. PL 125.10 Criminally Negligent Homicide; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.12 Vehicular Manslaughter 2°; PL 125.13 Vehicular Manslaughter 1°; PL 125.14 Aggravated Vehicular Homicide; PL 125.15 Manslaughter 2°; PL 125.20 Manslaughter 1°; PL 125.21 Aggravated Manslaughter 2°; PL 125.22 Aggravated Manslaughter 1°; PL 125.25 Murder 2°; PL 125.26 Aggravated Murder; PL 125.27 Murder 1°; PL 125.40 Abortion 2°; PL 125.45 Abortion 1°; PL 125.50 Self-Abortion 2°; PL 125.55 Self-Abortion 1°; PL 125.60 Issuing Abortion Articles

d. Class B violent felony offenses:
   PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°; PL 265.09 Criminal Use of a Firearm 1°; PL 265.13

Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer; PL 120.07 Gang Assault 1°; PL 215.17 Intimidating a Victim or Witness 1°; PL 490.35 Hindering Prosecution of Terrorism 1°; PL 490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses:

An attempt to commit any of the Class B violent felony offenses listed above; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121.13 Strangulation 1°; PL 140.25 Burglary 2°; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor; PL 265.19 Aggravated Criminal Possession of a Weapon; PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°;

Class D violent felony offenses:

An attempt to commit any of the Class C violent felony offenses listed above; PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menacing a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5), (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°; PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1°; PL 240.62 Placing a False Bomb or Hazardous Substance 1°; PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°;

Class E violent felony offenses:

PL 110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Falsely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

e. A Class A felony offense (abbreviated on your Certificate of Disposition as “AF”).

f. A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime you conspired to commit is one of the charges listed in this section.

g. An attempt to commit a crime is displayed on your Certificate of Disposition as “Attempted” and will have the number 110 displayed before the section and subsection (e.g., Attempted Robbery 2°; PL 110-160.10). If it is a felony level offense, the charge weight will be BF, CF, DF or EF.

h. A conviction that requires you to register as a sex offender.

⓱ Your most recent conviction and sentence must be more than ten years ago. However, if you were in jail or prison after you were sentenced, that time does not count. For example, your last conviction was 11 years ago and you served 2 years in state prison (11 – 2 = 9), that is only 9 years and you will not qualify for sealing for another year.

⓲ If you have filed another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, attach a copy of that application regardless of whether it was granted, denied or is still pending.

⓳ If you are going to file another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, list the cases that you intend to include in the application and indicate the sealing section for which you intend to apply.

⓴ You must tell the court why you believe your prior convictions should be sealed. This is your opportunity to tell the court why sealing your convictions is in the interest of justice, such as participating in treatment programs, work or schooling, or participating in community service or other volunteer programs. If you need more space, continue your comments on a separate sheet of paper.

New York State District Attorney's Offices by County

County	Address 1	Address 2	Room/Suite Floor	City/Town	State	Zip Code
Albany County District Attorney's Office	Albany County Judicial Center	6 Lodge Street		Albany	NY	12207-2111
Allegany County District Attorney's Office	7 Court Street		Room 333	Belmont	NY	14813-1044
Bronx County District Attorney's Office	198 E. 161st Street		4th Floor	Bronx	NY	10451-3536
Broome County District Attorney's Office	George Harvey Justice Building	45 Hawley Street	4th Floor	Binghamton	NY	13902-3722
Cattaraugus County District Attorney's Office	Cattaraugus County Center	303 Court Street		Little Valley	NY	14755-1028
Cayuga County District Attorney's Office	95 Genesee Street			Auburn	NY	13021-3698
Chautauqua County District Attorney's Office	1 N. Erie Street			Mayville	NY	14757-1000
Chemung County District Attorney's Office	226 Lake Street	P.O. Box 588		Elmira	NY	14902-0588
Chenango County District Attorney's Office	26 Conkey Avenue	P.O. Box 126	2nd Floor	Norwich	NY	13815-0126
Clinton County District Attorney's Office	Clinton County Government Center	137 Margaret Street	Suite 201	Plattsburgh	NY	12901-0059
Columbia County District Attorney's Office	325 Columbia Street			Hudson	NY	12534-1902
Cortland County District Attorney's Office	Cortland County Courthouse	46 Greenbush Street	Suite 102	Cortland	NY	13045-2765
Delaware County District Attorney's Office	1 Courthouse Square		Suite 5	Delhi	NY	13753-1600
Dutchess County District Attorney's Office	236 Main Street			Poughkeepsie	NY	12601-3102
Erie County District Attorney's Office	25 Delaware Avenue			Buffalo	NY	14202-3926
Essex County District Attorney's Office	7559 Court Street	P.O. Box 217		Elizabethtown	NY	12932-0217
Franklin County District Attorney's Office	355 West Main Street		Suite 466	Malone	NY	12953-1855
Fulton County District Attorney's Office	County Office Building	223 West Main Street		Johnstown	NY	12095-2309
Genesee County District Attorney's Office	1 West Main Street			Batavia	NY	14020-2019
Greene County District Attorney's Office	411 Main Street			Catskill	NY	12414-1363
Hamilton County District Attorney's Office	P.O. Box 277	White Birch Lane		Indian Lake	NY	12842-0277
Herkimer County District Attorney's Office	301 N. Washington Street		Suite 2401	Herkimer	NY	13350-1299
Jefferson County District Attorney's Office	175 Arsenal Street			Watertown	NY	13601-2563
Kings County (Brooklyn) District Attorney's Office	350 Jay Street			Brooklyn	NY	11201-2900
Lewis County District Attorney's Office	7660 North State Street			Lowville	NY	13367-1562
Livingston County District Attorney's Office	Livingston County Courthouse	2 Court Street		Geneseo	NY	14454-1048
Madison County District Attorney's Office	Veteran's Memorial Building	P.O. Box 578		Wampsville	NY	13163-0578
Monroe County District Attorney's Office	47 S. Fitzhugh Street			Rochester	NY	14614-1414
Montgomery County District Attorney's Office	58 Broadway	P.O. Box 1500		Fonda	NY	12068-1500
Nassau County District Attorney's Office	262 Old Country Road		2nd Floor	Mineola	NY	11501-4251
New York County (Manhattan) District Attorney's Office	1 Hogan Place			New York	NY	10013-4311
Niagara County District Attorney's Office	Niagara County Courthouse	175 Hawley Street	3rd Floor	Lockport	NY	14094-2740
Oneida County District Attorney's Office	235 Elizabeth Street			Utica	NY	13501-2201
Onondaga County District Attorney's Office	505 S. State Street		4th Floor	Syracuse	NY	13202-2183
Ontario County District Attorney's Office	Ontario County Courthouse	27 N. Main Street	3rd Floor	Canandaigua	NY	14424-1447
Orange County District Attorney's Office	40 Matthews Street			Goshen	NY	10924-1964
Orleans County District Attorney's Office	13925 State Route 31		Suite 300	Albion	NY	14411-9385
Oswego County District Attorney's Office	Public Safety Center	39 Churchill Road		Oswego	NY	13126-6671
Otsego County District Attorney's Office	197 Main Street			Cooperstown	NY	13326-1128
Putnam County District Attorney's Office	40 Gleneida Avenue			Carmel	NY	10512-1705
Queens County District Attorney's Office	125-01 Queens Boulevard		Suite 7	Kew Gardens	NY	11415-1514
Rensselaer County District Attorney's Office	Rensselaer County Courthouse	80 2nd Street		Troy	NY	12180-4098

Richmond County (Staten Island) District Attorney's Office	130 Stuyvesant Place		Suite 602	Staten Island	NY	10301-1900
Rockland County District Attorney's Office	1 South Main Street		Suite 500	New City	NY	10956-3539
Saratoga County District Attorney's Office	25 West High Street			Ballston Spa	NY	12020-1963
Schenectady County District Attorney's Office	Schenectady County Courthouse	612 State Street	3rd Floor	Schenectady	NY	12305-2112
Schoharie County District Attorney's Office	157 Depot Lane	P.O. Box 888	2nd Floor	Schoharie	NY	12157-0888
Schuyler County District Attorney's Office	105 9th Street			Watkins Glen	NY	14891-1435
Seneca County District Attorney's Office	44 West Williams Street			Waterloo	NY	13165-1338
St. Lawrence County District Attorney's Office	48 Court Street			Canton	NY	13617-1197
Steuben County District Attorney's Office	3 East Pulteney Square			Bath	NY	14810-1510
Suffolk County District Attorney's Office	William J. Lindsay County Complex	77 Veterans Memorial Highway		Hauppauge	NY	11788
Sullivan County District Attorney's Office	Sullivan County Courthouse	414 Broadway		Monticello	NY	12701-1380
Tioga County District Attorney's Office	20 Court Street			Owego	NY	13827-1792
Tompkins County District Attorney's Office	320 North Tioga Street			Ithaca	NY	14850-4206
Ulster County District Attorney's Office	Ulster County Courthouse	275 Wall Street		Kingston	NY	12401-3817
Warren County District Attorney's Office	1340 State Route 9			Lake George	NY	12845-3434
Washington County District Attorney's Office	Municipal Center - Building B	383 Broadway		Fort Edward	NY	12828-1001
Wayne County District Attorney's Office	Hall of Justice	54 Broad Street		Lyons	NY	14489-1199
Westchester County District Attorney's Office	111 Dr. Martin Luther King, Jr. Boulevard		3rd Floor	White Plains	NY	10601-2500
Wyoming County District Attorney's Office	Wyoming County Courthouse	147 North Main Street		Warsaw	NY	14569-1123
Yates County District Attorney's Office	415 Liberty Street			Penn Yan	NY	14527-1122

RICHARD D. COLLINS+
MARC C. GANN*
GERARD C. McCLOSKEY
DAVID J. BARRY

ZEENA J. ABDI
PHILIP P. NASH
JONATHAN P. MANFRE

+Also member PA, MA, TX and D.C. Bars
*Also member MD Bar

Of Counsel
ALAN H. FELDSTEIN^
Tel: (818) 508-1820

ANSANELLI LAW GROUP, LLP
Tel: (631) 598-0337

TAMA BETH KUDMAN ≠
Tel: (561) 472-0811

^Member CA Bar only
≠ Member NY, NJ and FL Bars

Learn if you qualify to have your record sealed.
Consult with an attorney to confirm eligibility

STEP 1
Convicted of more than 1 felony?

If no, go to Step 2
If yes, ineligible

STEP 2
Convicted of more than 2 misdemeanors?

If no, go to Step 3
If yes, ineligible

STEP 3
Convicted of a violent crime, sex offense, Class A felony, or other ineligible offenses?
If no, go to Step 4.
If yes, ineligible

STEP 4
Required to register as a sex offender?

If no, go to Step 5
If yes, ineligible

STEP 5
Is it less than 10 years since the date of sentence (or release from incarceration)?

If no, go to Step 6
If yes, ineligible

STEP 6
Convicted of a crime after the conviction you're trying to seal (including out-of-state)?

If no, go to Step 7
If yes, ineligible

STEP 7

Are there any pending charges against you?

If no, eligible
If yes, ineligible

ELIGIBLE FOR SEALING

New York Legislative Revisions

Hon. Barry Kamins
Aidala, Bertuna & Kamins P.C., NYC

New York Law Journal

'U.S. v. Wade' Turns 50: New Era in Eyewitness Identification

Criminal Law and Procedure columnist Barry Kamins writes: Long before the term "wrongful conviction" became commonplace, the U.S. Supreme Court in 1967 noted the conclusion by one commentator that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors that all other factors combined." Fifty years later, New York is about to embark on a new era of eyewitness identification.

By Barry Kamins | June 02, 2017

Fifty years ago, on June 12, 1967, the U.S. Supreme Court decided the *Wade-Gilbert-Stovall* trilogy and expressed its concerns about the possibility and dangers of suggestive identification procedures. *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). Long before the term "wrongful conviction" became commonplace, the court noted the conclusion by one commentator that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors that all other factors combined." *U.S. v. Wade*, 388 at 229 (quoting Patrick Wall, "Eye-Witness Identification in Criminal Cases").

Fifty years following *Wade*, New York is about to embark on a new era of eyewitness identification. Effective July 1st, newly enacted legislation will permit evidence that a witness identified the defendant from a photograph provided, however, that a "blind" or "blinded" identification procedure was utilized. In addition, the New York Court of Appeals will decide shortly whether trial courts must include a cross-racial identification charge unless the parties agree that no cross-racial identification has occurred. *People v. Boone*, 129 A.D.3d 1099 (2d Dept. 2015), leave granted.

Following on the heels of the *Wade* trilogy, the legislature enacted Criminal Procedure Law §710.20(6) to meet the concerns expressed by the Supreme Court. Under that statute, a defendant can raise a constitutional challenge to suggestive pre-trial confrontations. The essential goal of the statute "is to enable pre-trial judicial scrutiny of state sponsored identification procedures" and "to assess whether the results, by virtue of undue suggestions, are too unreliable to be admitted at trial." Hibel, "New York Identification Law," at §1-6.

Independent of any constitutional concerns, New York has maintained an evidentiary rule—and was the only state to do so—that does not permit evidence that, prior to trial, a witness identified the defendant from a photograph. This evidentiary rule has existed statutorily for 90 years.

In *People v. Caserta*, 19 N.Y.2d 18 (1966), the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the court referred to the source of these photographs as the "rogues gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible. *People v. Perkins*, 15 N.Y.3d 200 (2010). If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule has been re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that the scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure—some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only quid pro quo.

The new legislation, (L. 2017, Ch. 59, effective July 1, 2017), does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures. It has been documented that the state of mind of the administrator conducting a photo array might contribute to the suggestiveness of the procedure. Administrators who know the identity of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

A "blind" procedure is one in which the administrator does not know the identity of the suspect. A "blinded" procedure is one in which the administrator does not know the location of the suspect's photo in the array.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the twenty-second state to utilize blinded identification procedures.

The failure to utilize a "blind" or "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL §710.20(6).

The legislation also requires the Division of Criminal Justice Services to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. In addition, the Division of Criminal Justice Services must develop a training program regarding these best practices. It is important to note, however, that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

A number of these best practices are critical to the fairness and accuracy of identification procedures. For example, the method of selecting fillers for a live lineup or photo array affects the reliability of any identification. The Innocence Project has noted that administrators frequently select fillers for identification procedures by attempting to match *the appearance of the suspect.* This is problematic: "When fillers are selected that do not resemble the *witness's* description, this can cause the suspect to stand out because of the composition of the lineup." "Eyewitness Identification Reform," Innocence Project, at 2 (emphasis added).

Another best practice calls for the documentation of a witness's confidence in his or her identification at the time an identification is made. It is important to record a witness's initial level of confidence because "information provided to a witness after an identification suggesting that the witness selected the right person can dramatically, yet artificially, increase the witness's confidence in the identification. Id. at 4. Further, research has disproved any correlation between a witness's level of confidence at *trial* and the witness's accuracy of the identification. See Hibel, supra at §6.02.

Other best practices include the documentation of identification procedures and the nature of instructions given to a witness before conducting a photographic array or live lineup.

With the enactment of this legislation, New York has entered a new era of eyewitness identification. It remains to be seen whether law enforcement agencies will aggressively utilize the best practices identified in the legislation so that identification procedures will be even more reliable and accurate. In addition, will the police forgo the use of traditional, corporeal identifications in favor of photo arrays? In the end, a picture may indeed be worth more than a thousand words.

New York Law Journal

Expanding the 'Wade' Hearing: New Police Identification Protocols

Criminal Law and Procedure columnist Barry Kamins reviews the new best practices for identification procedures by witnesses, which reflect the results of substantial scientific research in the area of memory, perception and recall.

Case Digest Summary

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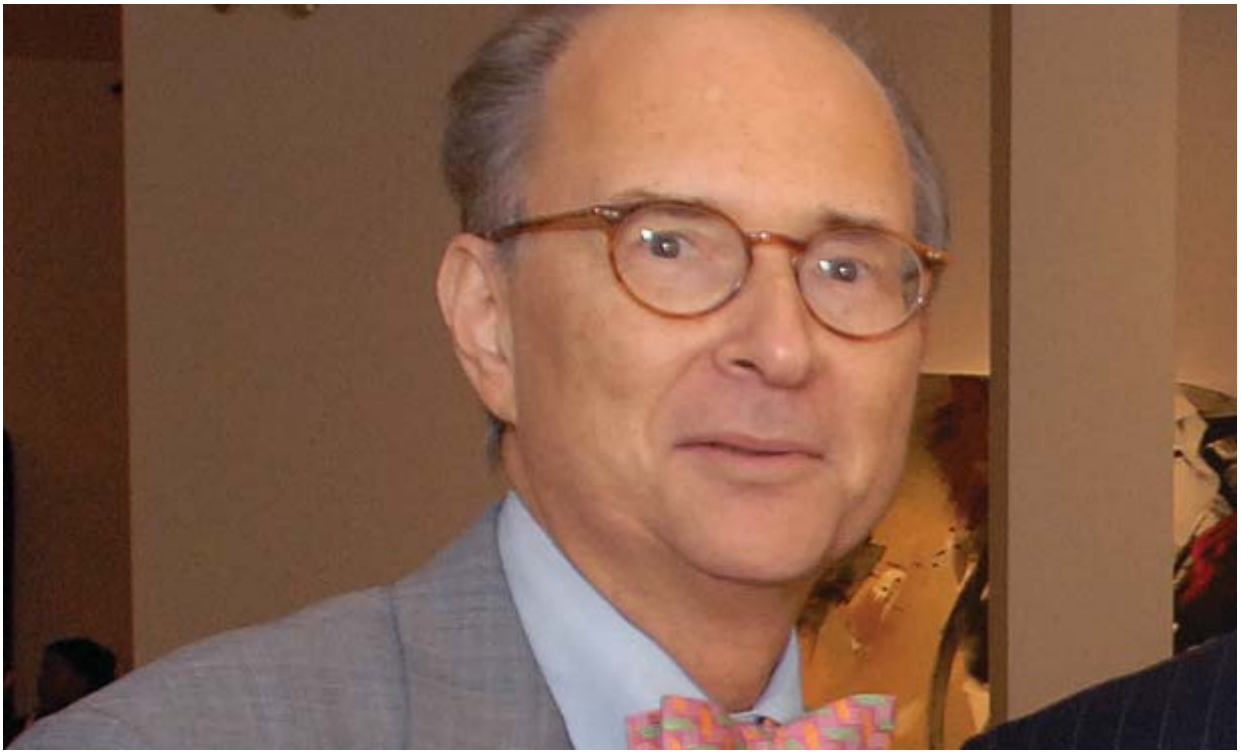

Barry Kamins (NYLJ/Rick Kopstein)

The law has begun to catch up with the science of memory and perception. In June, the Division of Criminal Justice Services (DCJS) promulgated a significant number of new protocols for photographic and corporeal (live lineup) identification procedures. These procedures were disseminated to all police departments around the state and their presence or absence will now be the subject of the pre-trial *Wade* hearing, during which defense counsel can raise a constitutional challenge to suggestive pre-trial confrontations.

The protocols were the result of recent legislation, (L.2017, Ch. 59, eff. July 1, 2017), discussed in the prior column, permitting evidence at trial that a witness identified a suspect from a photograph. Such evidence will only be admissible if a "blind" or "blinded" identification procedure was utilized. The legislation overruled a 90-year-old evidentiary rule in New York that had precluded such evidence as part of a prosecutor's evidence-in-chief.

Although prosecutors will now have an additional opportunity to offer evidence at trial linking a defendant to the crime, they will also have an additional obligation—at the *Wade* hearing—to establish that the "blind" array was lawfully conducted and not suggestive. At a *Wade* hearing, while a defendant has the ultimate burden to prove that a pre-trial identification was unduly suggestive, the People have the burden of going forward with proof that the identification procedure was non-suggestive. *People v. Chipp*, 75 N.Y.2d 327 (1990).

The legislation also required DCJS to promulgate a number of best practices for photo and corporeal identification procedures. These protocols were subsequently established by DCJS and intended to meet the needs of all police departments in New York regardless of size or resource limitations.

These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

Significantly, these protocols are not mandatory, and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

In a "blind" procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array—one to assemble the array and one to administer it.

In a "blinded" procedure, while the administrator may know who the suspect is, by virtue of the procedure's administration, the administrator does not know the suspect's position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone, other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the "two-person shuffle." Or the administrator can create multiple arrays in which the suspect's position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the "one-person shuffle." Regardless of which procedure is used, the administrator should be positioned in such a way so that he is not in the witness's line of sight during the viewing of the array.

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness's description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness's description. "The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness's description." New York Identification Law, Hibel, at 4-16.

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness whether or not a person is in custody or whether the police have any corroborating evidence, e.g., a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows who is the perpetrator.

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

Finally, the witness should be told that every witness who makes an identification will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind.

After viewing a “blind” or “blinded” photo array, the witness will be asked whether he/she recognized anyone and, if so, what photograph was recognized. In addition, the witness will be asked “from where do you recognize the person in the photograph?” Finally, the witness will be asked to describe his or her level of confidence, e.g., “Without using a number, how sure are you?”

The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects at the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as well as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness had identified the correct suspect.

A few observations can be made about the new protocols. The “blind” procedure requires the use of two individuals while the “blinded” procedure, using the “one-person shuffle,” only requires one administrator. Thus the “blinded” array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols reflect the results of substantial scientific research in the area of memory, perception and recall as they relate to eyewitness identification. As mentioned earlier, they are not mandatory and the failure to utilize them will not mandate the suppression of a pre-trial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures involving pre-trial identification.

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform. “The Promises and Pitfalls of State Eyewitness Identification Reforms,” 104 Ky. L.J. 99 (2016). Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*, 27 A.3d 872 (2011), the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature, i.e., more than 2,000 studies, has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (dissenting opinion); *U.S. v. Wade*, 388 U.S. 218, 229. In promulgating new protocols, New York has taken one more step to ensure the fairness of statewide identification procedures.

New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

Substantive Legislation in the Budget Bill

There were four substantive pieces of legislation that were enacted as part of this year's budget bill: evidence of identification by photographs; videotaping of confessions; raising the age of criminal responsibility; and sealing of prior convictions.

Identification by Photograph

Effective July 1, 2017, a witness can now testify during trial that he identified a suspect from a photograph.[1] Such evidence, however, will only be admissible if a "blind" or "blinded" identification procedure was utilized. Those terms will be defined below.

Prior to enacting this legislation, New York had maintained an evidentiary rule – the only state to do so – that did not permit evidence that, prior to trial, a witness had identified the defendant from a photograph. This evidentiary rule existed statutorily for 90 years.

In *People v. Caserta*,[2] the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the Court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the Court referred to the source of these photographs as the "rogues' gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the Court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel

Hon. Barry Kamins is a retired Supreme Court Justice, author of *New York Search and Seizure* (Lexis-Nexis 2017) and a partner in Aidala, Bertuna & Kamins. He is an adjunct professor of law at Brooklyn Law School where he teaches New York Criminal Procedure.

mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible.[3] If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule was re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure – some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only *quid pro quo*.

The new legislation does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures.

In a "blind" procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array – one to assemble the array and one to administer it.

In a "blinded" procedure, while the administrator may know who the suspect is, by virtue of the procedure's administration, the administrator does not know the suspect's position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone, other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the "two-person shuffle." Or the administrator can create multiple arrays in which the suspect's position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the "one-person shuffle." Regardless of which procedure is used, the administrator should be positioned in such a way so that he or she is not in the witness's line of sight during the viewing of the array.

The above procedures were mandated based on the scientific literature that established certain principles relating to the role of an administrator conducting a photo array. It has been documented that the state of mind of the administrator might contribute to the suggestiveness of a photo array. Administrators who know the identity of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the 22nd state to utilize blinded identification procedures.

The failure to utilize a "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL § 710.20(6).

The legislation also required the Division of Criminal Justice Services (DCJS) to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. It is important to note that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

In June, DCJS promulgated these procedures and disseminated them to all police departments around the state. These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

Seven Aspects of Administering Photo Arrays

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness's description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness's description. "The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness's description."[4]

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness

whether a person is in custody or whether the police have any corroborating evidence, e.g., a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows the identity of the perpetrator.

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

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The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects at the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as well as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness identified the correct suspect.

A few observations can be made about the new protocols. The "blind" procedure requires the use of two individuals while the "blinded" procedure, using the "one-person shuffle," only requires one administrator. Thus the "blinded" array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols are not mandatory and a failure to utilize them will not mandate the suppression of a pre-trial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures of pre-trial identification.

New procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.

A National Trend

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.[5] Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*,[6] the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful conviction in this country.[7]

Video Recording of Custodial Interrogations

A second substantive enactment in the budget bill requires the video recording of custodial interrogations by a public servant at a detention facility when the interrogation involves certain enumerated felonies.[8]

A "detention facility" is defined as any location where an individual is being held in connection with criminal charges that have been or may be filed. The statute expressly includes a police station, correctional facility, holding facility for prisoners and a prosecutor's office. The recording must include the entire custodial interrogation, including the administration of *Miranda* warnings and the waiver of such rights.[9]

The video recordings are required only when the interrogation involves one of 19 enumerated felonies. They fall within the following categories: any A-1 felony other than a controlled substance felony under Article 220 of the Penal Law; any Class B violent offense under

Article 125 of the Penal Law (homicide); any Class B violent felony offense under Article 130 of the Penal Law (sex offense); and the A-II felonies of predatory sexual assault (PL § 130.95 and § 130.96). As a result, the statute does not apply to certain significant felonies, including second-degree rape and first-degree robbery.

The statute excuses the failure to record a statement for "good cause" by the prosecutor and lists 10 examples of what would constitute good cause. The excuses fall into several general categories: where the failure to record is beyond the control of the People; where the recording would jeopardize the safety of any person or reveal the identity of a confidential informant; or where a suspect refuses to be interrogated if the interrogation is recorded.[10] The list is not exhaustive.

The prosecutor has the burden of establishing good cause for the failure to record the interrogation. Should a court find, however, that there was not good cause for failing to record, the court may not suppress a confession or statement based solely on that ground. A court shall consider the failure to record as a factor, but not as the sole factor, in determining whether such confession shall be admissible at trial. At the defendant's request, the court must instruct the jury that the People's failure to record may be weighted as a factor, but not as the sole factor, in determining whether a statement was voluntarily made, or was made at all.[11]

Raising the Age of Criminal Responsibility

The third new law raises the age of criminal responsibility in New York.[12] As of October 1, 2018, all 16-year-olds and, on October 1, 2019, all 17-year-olds with a few exceptions, will no longer be criminally responsible for misdemeanors – those charges will now be handled in Family Court where the individual may be adjudicated a "juvenile delinquent." The only exception is where the misdemeanor is either accompanied by a felony charge, is the result of a guilty plea in satisfaction of felony charges, or falls under the Vehicle and Traffic Law. In those instances, the misdemeanor charges will remain in the local criminal court. In addition, traffic infractions and stand-alone violations will continue to be adjudicated in local criminal courts.

The adjudication of felonies for this age group is more complicated. All felony cases will originate in a newly established Youth Part in the Superior Court in each county, presided over by Family Court judges who will receive specialized training in juvenile justice and adolescent development.[13]

A 16-year-old or 17-year-old who is charged with a felony under the new law is designated an "adolescent offender" (AO) and, upon arrest, the AO will be arraigned in the Youth Part.[14] Thus, individuals in this age group will bypass the local criminal court completely unless they are arrested at a time when the Youth Part is not in session, e.g., at night or on the weekend. At those times, the AO must be arraigned before special "accessible magistrates" designated by the presiding justice of each Appellate Division. These magistrates must be specially trained in juvenile justice and adolescent development and, presumably, current local criminal court judges would fill the role of "accessible magistrates."[15]

Once an adolescent offender is arraigned in the Youth Part, there is a provision for the case to be removed to Family Court where the individual could be adjudicated a "juvenile delinquent." Whether a case is removed depends on the severity of the offense.

When an adolescent offender is charged with any crime *other* than (1) a class A (non-drug) felony; (2) a violent felony; or (3) a felony for which a juvenile offender would be criminally responsible under CPL § 1.20(42), the statute comes close to a presumption in favor of a removal to Family Court.

The statute provides that the case "shall" be removed to Family Court *unless* the prosecutor files a motion within 30 days of the arraignment to prevent the removal. Ultimately, the court shall grant the motion for removal unless it determines that "extraordinary circumstances" exist that prevent the transfer to Family Court. The statute does not define "extraordinary circumstances."[16]

When an adolescent offender is charged with a class A (non-drug) felony or a violent felony, the court must adjourn the case no later than six calendar days after the arraignment. At the second appearance, the court must review the accusatory instrument to determine whether the case should be removed to Family Court. In order for the prosecutor to prevent the removal he or she must prove by a preponderance of the evidence that one of the following is established in the accusatory instrument: (1) the defendant caused "significant physical injury" (not defined) to a non-participant in the offense; (2) the defendant displayed a firearm, shotgun, rifle, or deadly weapon; or (3) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual contact or sexual contact.[17]

If the prosecution satisfies its burden, the case remains in the Youth Part and the defendant is prosecuted as an adult. Should the defendant be convicted, the court "shall consider the age of the defendant in exercising its discretion at sentencing."[18]

Under the new statute, *juvenile offenders* are arraigned in the Youth Part after their arrest and thus bypass the local criminal court unless the Youth Part is not in session.[19] The procedures for removing juvenile offenders to Family Court remains the same as under the prior statute although the numbering of the sections has changed.[20]

It should be noted that juvenile offenders and adolescent offenders who are not removed to Family Court are prosecuted as adults in the Youth Part. Nonetheless, they are still eligible for youthful offender treatment.

Finally, adolescent offenders who are held on bail prior to a conviction will no longer be held on Riker's

Island as of October 1, 2018. Each county must provide a "detention center for older youth."[21] An adolescent offender sentenced to an indeterminant or determinate sentence will be committed to the Department of Corrections and Community Supervision for placement in an adolescent offender facility.

Expansion of New York's Sealing Statute

The fourth substantive change in the budget bill is an expansion of New York's sealing statute that aligns this state with a majority of other states in addressing the collateral consequences of past convictions. A new section, Criminal Procedure Law § 160.59, applies to all offenders (adults, adolescent offenders and juvenile offenders) who have past convictions.[22] It is the first time New York will seal prior convictions – the current law only sealed violations and dismissed cases.

Under the new statute, an application can be made to seal up to two convictions, only one of which can be a felony. To qualify for sealing, at least 10 years must have elapsed from the date of sentence or the release from incarceration, whichever comes later.[23] The application must be made to the sentencing judge and if the applicant has two convictions, the application must be made to the judge who presided over the higher classification of crime. If the two crimes are misdemeanors, the application must be made to the judge who sentenced the defendant on the later date.

If the prosecutor objects to the application, he or she has 45 days to file an objection and a court can conduct a hearing to make a determination. Pursuant to the statute, the court must consider any relevant factors including the impact of sealing upon the defendant's reentry or rehabilitation as well as the impact on public safety and the public's confidence.[24]

Certain convictions are not eligible for sealing, including violent felonies, sex offenses under Article 130 of the Penal Law, homicides, A felonies, and an offense for which registration as a sex offender is required.[25]

The new sealing statute is different from the current sealing statutes (CPL §§ 160.50 and 160.55). First, unlike the current statutes, the new law permits the Department of Criminal Justice Services to retain the fingerprints and photographs of the defendant. In addition, the new law permits a number of "qualified agencies," including prosecutors' offices, to have access to these records.

Finally, a defendant cannot be required to waive the right to apply for sealing as part of any plea agreement.[26] In addition, an inquiry about a prior sealed conviction will constitute an unlawful discriminatory practice.[27]

Other Legislation

Aside from the budget bill, the legislature enacted a number of individual bills addressing criminal justice issues. As usual, the legislature amended the definition of certain crimes and increased penalties of others. It should be noted that for the second year in a row, Governor Cuomo vetoed a bill that would have amended the definition of a gravity knife. Over the past 14 years, more than 65,000 New Yorkers have been arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[28] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law, which was enacted in 1958, has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople including the widely used utility knife with a half-inch blade and the standard folding knife.

The governor vetoed last year's bill because, in his opinion, the bill would have potentially legalized all folding knives and placed a burden on law enforcement to determine the design attributes of each knife. This year in vetoing the bill, the Governor found that while it did succeed in removing any ambiguity in the definition of a gravity knife, "it did so in a way that would essentially legalize all folding knives."[29] This, he said, would have resulted in greater confusion among law enforcement and knife owners.

The legislature has responded to an increase of bomb threats against Jewish community centers, by adding "community center" to the definition of "public place." As a result, a person who makes a bomb threat against a community center can now be convicted of the felonies of Placing a False Bomb and Falsely Reporting an Incident.[30] In addition, the legislature closed a loophole that had existed in enforcing the crime of Obstructing a Firefighting Operation. The law has been expanded to protect a firefighter who is performing emergency medical care on a sick or injured person.[31]

In another amendment, the legislature has eliminated the inconsistent regulation of "sparkling devices" throughout New York State. A new law authorizes the sale of "sparkling devices" outside of cities with a population of one million or more, exempting them from the definition of "fireworks" and "dangerous fireworks."[32] Finally, illegal deer poaching is now a misdemeanor, punishable by up to a year in jail.[33]

As part of the budget bill, New York State will reimburse all counties for improvements in indigent defense

services. This builds upon a 2014 settlement in which the state agreed to settle a class-action lawsuit[34] that accused the state of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the state to pay for improved services to indigent defense systems in those counties, but did not address New York's other 57 counties.

Under the new legislation, the Office of Indigent Legal Services must provide a statewide plan to provide for the following: ensuring that defendants are represented by counsel at arraignment; reducing caseloads for public defenders; and improving the resources available to attorneys representing indigent defendants. In addition, the state will provide up to $250 million over six years to pay for the implementation of these reforms.[35]

A "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.

Procedural Changes

A number of procedural changes were enacted in the last legislative session. In 2016, the legislature enacted a bill establishing requirements for law enforcement agencies with respect to sexual offense evidence kits. This year the legislature has enacted several amendments that clarify last year's bill.

First, it was clarified that the requirements apply to police and prosecutorial offices. Second, agencies are required to develop a DNA profile when the biological evidence obtained is eligible for comparison to the federal CODIS database. The agencies are also required to take an inventory of the kits and submit the inventory to the New York State Division of Criminal Justice Services. The agencies will also have less time to submit these kits for analysis; the time has been shortened from 180 days to 30 days. Failure to comply with the time frames for submission and testing, however, will not be grounds for suppression of evidence under Criminal Procedure Law § 710.20. Finally, the effective date of most of these changes was extended to one year after it becomes law.[36]

Under current law, a pre-sentence investigation report may be waived by the parties when a sentence of felony probation is to be imposed. A new law now also permits a waiver of the report when a conditional discharge is to be imposed.[37] Another new law would require police officers investigating a vehicular accident to request that all operators of the motor vehicles involved in the accident submit to a field sobriety test where a person was seriously injured or killed as a result of the accident. The request must be made if the police officer has reasonable grounds to believe that the operator committed a "serious traffic violation," defined as operating a vehicle in violation of enumerated sections of the Vehicle and Traffic Law. These violations include driving with a suspended license, leaving the scene of an accident, speeding, and reckless driving. A motorist who refuses to take the test would be subject to a suspension of his or her license.[38]

Another procedural change is designed to facilitate the appeal from a court that is not designated a court of record. These courts do not utilize stenographers to make records of the proceedings. As a result, an appeal is heard on a record pieced together by means of (1) "an affidavit of errors" prepared by the appellant and (2) a summary of the facts made by the judge. A decade ago the Office of Court Administration installed electronic recording devices in these courts. Nonetheless, the Court of Appeals recently held that a transcript derived from an electronic recording of the proceedings is not an acceptable substitute for the filing of an affidavit of errors.[39] In order to provide an appellant sufficient time to obtain the transcript of the electronic recording, an amendment extends the time to file a Notice of Appeal from 30 to 60 days.[40]

Finally, the legislature has concluded that the felony of animal fighting is a heinous crime that remains largely undetectable. As a result, it has added this crime to the list of designated crimes eligible for an application for an eavesdropping or video surveillance warrant.[41]

Sex Offenders

Several new laws will affect sex offenders. First, a "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.[42] Second, the Division of Criminal Justice Services must notify the appropriate law enforcement agency within two business days (rather than 48 hours) if a registered sex offender changes residence or enrolls in an institution of higher learning.[43]

Crime Victims

Victims of crimes will benefit from several new laws. Initially, the court system will make available translation services to all Family and Supreme Courts to assist in the translation of orders of protection where the person protected by the order has limited English proficiency or has a limited ability to read English.[44] In addition, victims of domestic violence can now make an application in County and Family Court, in addition to Supreme Court, for an order separating their voting registration records and any other records from records available to the public.[45]

Under a new law, prosecutors must provide the Board of Parole with a copy of the written notice it provides crime victims regarding the disposition of a criminal case and the victim's right to be heard by the board. This will enable the board to contact crime victims about the status of a parolee's hearing.[46] Finally, crime victims will now be compensated for transportation costs associated with any appearance in a criminal case from an arraignment through post-trial hearings.[47] In addition, reimbursement for crime scene cleanup expenses will now be paid to additional members of a victim's family.[48]

inmate to have bail posted, if the delay is requested by a pretrial services agency.[55]

Second, the Department of Corrections will begin accepting cash bail payments online, beginning on April 1, 2018, and once cash bail is posted an inmate must be released within five hours (beginning on October 1, 2017); four hours (beginning on April 1, 2018); and three hours (beginning on October 1, 2018).[56]

Finally, where a defendant is held on bail, the Department of Corrections shall ensure that a "bail facilitator" meets with an inmate within 48 hours of admission to a facility. The facilitator must explain to the inmate how to post bail or bond, the fees that may be collected by bail bond companies and must assist the inmate with any reasonable measures related to the posting of bail.[57] ■

The legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.

Prisoners

Several new laws will impact prisoners. Recognizing that inmates are routinely transferred from one facility to another for a variety of reasons, the legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.[49] The Parole Board will now be required to post its administrative appeal decisions online within 60 days of its determination.[50] Finally, last year a new law authorized the use of a qualified interpreter at parole hearings where an inmate does not speak English or speaks English as a second language. This year, an amendment requires the interpreter to be appointed by the New York State Office of General Services.[51]

Extending Laws

A number of laws scheduled to sunset this year have been extended. For example, Kendra's Law was extended until June 20, 2022; it established a statutory framework for court-ordered assisted outpatient treatment of individuals with mental illness.[52] A number of laws had their expiration dates extended from September 1, 2017 to September 1, 2019: numerous sentencing laws as well as laws relating to inmate work-release programs, electronic court appearances in designated counties, and the use of closed-circuit television for certain child witnesses.[53] Finally, certain sections of the Arts and Cultural Law, relating to the resale of tickets to places of entertainment, have been extended until June 20, 2018.[54]

New York City Local Laws

The New York City Council has enacted a number of local laws designed to facilitate the posting of bail and the release of inmates. First, in any case where less than $10,000 bail is set, the New York City Department of Corrections may delay the transportation of the defendant to a correctional facility for four to 12 hours to permit the

1. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.30), eff. July 1, 2017.
2. *People v. Caserta*, 19 N.Y.2d 18 (1966).
3. *People v. Perkins*, 15 N.Y.3d 200 (2010).
4. *New York Identification Law*, Hibel, at 4–16.
5. *"The Promises and Pitfalls of State Eyewitness Identification Reforms,"* 104 Ky. L.J. 99 (2016).
6. *State v. Henderson*, 27 A.3d 872 (2011).
7. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (*dissenting opinion*); *U.S. v. Wade*, 388 U.S. 218, 219.
8. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.45).
9. Amending Penal Law § 60.45(3).
10. Amending Penal Law § 60.45(3).
11. Amending Penal Law § 60.45(3)(d).
12. 2017 N.Y. Laws ch. 59, eff. October 1, 2018 and October 1, 2019.
13. Criminal Procedure Law § 722.10 (CPL).
14. CPL § 1.20(44).
15. CPL §§ 722.20 and 722.21.
16. CPL § 722.23(1).
17. CPL § 722.23(2).
18. Penal Law § 60.10(a).
19. CPL § 722.20.
20. *Id*.
21. Correction Law § 40(2).
22. 2017 N.Y. Laws ch. 59, eff. October 7, 2017; ch. 60.
23. CPL § 160.59(5).
24. CPL § 160.59(7).
25. CPL § 160.59(1).
26. CPL § 160.59(11).
27. Executive Law § 296 (16).
28. Penal Law § 260.00(5).
29. Governor's veto message, No. 171.

30. 2017 N.Y. Laws ch. 167, eff. November 12, 2017 (amending Penal Law § 240.00).
31. 2017 N.Y. Laws ch. 124, eff. November 1, 2017 (amending Penal Law § 195.15).
32. S. 724, awaiting the governor's signature.
33. S. 387, awaiting the governor's signature.
34. *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010).
35. 2017 N.Y. Laws ch. 59.
36. S. 980, awaiting the governor's signature.
37. 2017 N.Y. Laws ch. 194, eff. August 21, 2017 (amending CPL § 390.20).
38. S. 5562, awaiting the governor's signature.
39. *People v. Smith*, 27 N.Y.3d 643 (2016).
40. 2017 N.Y. Laws ch. 195, eff. October 20, 2017 (amending CPL § 460.10).
41. A.2806, awaiting the governor's signature.
42. 2017 N.Y. Laws ch. 60, eff. July 1, 2017 (amending CPL § 700.05).
43. 2017 N.Y. Laws ch. 17, eff. January 27, 2017 (amending Correction Law § 168-j).
44. 2017 N.Y. Laws ch. 55, eff. July 19, 2017 (amending Judiciary Law § 212).
45. S.6749, awaiting the governor's signature.
46. 2017 N.Y. Laws ch. 193, eff. August 21, 2017 (amending CPL § 440.50).
47. S.338, awaiting the governor's signature.
48. 2017 N.Y. Laws ch. 117, eff. January 21, 2018 (amending Executive Law § 624).
49. 2017 N.Y. Laws ch. 254, eff. September 21, 2017.
50. S.3982, awaiting the governor's signature.
51. 2017 N.Y. Laws ch. 9, eff. March 8, 2017 (amending Executive Law § 259-i).
52. 2017 N.Y. Laws ch. 67.
53. 2017 N.Y. Laws ch. 55.
54. 2017 N.Y. Laws ch. 68.
55. Local Law 1541, eff. September 20, 2017.
56. Local Law 1531, eff. October 1, 2017.
57. Local Law 1561, eff. January 18, 2018.

NEW YORK STATE | Division of Criminal Justice Services

ANDREW M. CUOMO
Governor

MICHAEL C. GREEN
Executive Deputy Commissioner

MEMORANDUM

TO: New York State Criminal Justice Executives

FROM: Mike Green
Executive Deputy Commissioner

DATE: June 21, 2017

SUBJECT: Identification Procedures: Photo Arrays and Line-ups Model Policy, Protocol and Forms

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Effective July 1, 2017, pursuant to recent changes in Criminal Procedure Law (60.25 & 60.30) - New York will join 49 other states by allowing certain photo identification evidence to be admitted at trial in a criminal case. The law recognizes that eyewitness identification evidence, if properly gathered, can serve as important and reliable evidence to convict the guilty or, if unfairly or improperly gathered, can be a factor to contribute to the wrongful conviction of an innocent. Thus the law now permits what is often the most reliable form of eyewitness identification evidence – a photo identification resulting from a procedure conducted shortly after the crime. But the law also recognizes the need to protect against even inadvertent error in gathering identification evidence - thus requiring as a condition of admissibility that the procedure be conducted in one of two specified ways. This statute also required the Division of Criminal Justice Services (DCJS) to promulgate standardized and detailed written protocols for the administration of both photo array and line-up identification procedures.

By way of background, in 2015 the Municipal Police Training Council (MPTC) adopted a model policy – developed from input of key stakeholders and based on best practices – to provide guidance to law enforcement agencies on the process of conducting photo array and line-up identification procedures. The recent statutory change, as referenced previously, will now permit the prosecution to introduce testimony of photo identification evidence in the direct case **so long as the procedure is conducted in a blind or blinded manner.**

To implement this change in law, the original MPTC model policy was revised at the Council's 228th meeting on June 7, 2017 to provide further guidance on conducting legally sufficient identification procedures. It was also adopted by DCJS as the standardized protocol and forms for the administration of photo array and live line-up identification procedures pursuant to Executive Law 837 subdivision 21. Furthermore, the statute amended section 840 of the Executive Law requiring the MPTC to implement a training program for all current and new police officers on these established protocols.

This training is currently under development and will be announced and made available to agencies in the near future.

The work completed by DCJS and MPTC takes into account the varying sizes and resources of New York State law enforcement agencies. Per statute the policy and protocol is grounded in evidence-based principles. It provides best practices for each step of the process ranging from selection of fillers and witness invitation through documentation of the procedure and communication with the witness once the procedure has been completed. It was again reviewed by an experienced panel of criminal justice professionals to ensure that it provides best practices for the use of identification evidence, while being mindful of the realities faced by law enforcement and prosecutors.

Please note that failure to comply with the protocol cannot constitute the sole legal basis for suppression per Criminal Procedure Law 710.20(6), but admissibility of evidence of an identification procedure using a photo array will minimally require a blind or blinded procedure (Criminal Procedure Law 60.25 & 60.30).

Questions regarding the model policy, protocol and forms, or the upcoming online training should be directed to Senior Training Technician (Police) Michael Puckett at (518) 497-4917 or via e-mail at michael.puckett@dcjs.ny.gov. You may also download the document by clicking on or visiting the following link: https://goo.gl/sWQNmb.

Identification Procedures: Photo Arrays and Line-ups

Municipal Police Training Council Model Policy

and

Identification Procedures Protocol and Forms

Promulgated by the
Division of Criminal Justice Services
Pursuant to Executive Law 837 (21)

June 2017

NEW YORK STATE | Division of Criminal Justice Services | Municipal Police Training Council

80 South Swan Street, Albany, New York 12210

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Identification Procedures: Photo Arrays and Line-ups Model Policy
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Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

The Identification Procedures: Photo Arrays and Line-ups Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. This model policy has been promulgated as the protocol and forms by DCJS pursuant to subdivision 21 of section 837 of the Executive Law of New York.

The Municipal Police Training Council (MPTC) approved the model policy in June 2017.

Acknowledgements

The District Attorney's Association of the State of New York "Photo Identification Guidelines", the District Attorney's Association of the State of New York "Line-up Procedure Guidelines", the International Association of Chiefs of Police "Eyewitness Identifications Model Policy", the National Academy of Sciences report titled: "Identifying the Culprit: Assessing Eyewitness Identification", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations for Improving Eyewitness Identifications" served as a basis for this model policy.

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by the following associations and agencies:

District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State Office of Victim Services

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

I Purpose

Executive Law §837 subdivision 21 directs the Division to establish a standardized protocol and forms for the administration of photo array and live lineup identification procedures, and this document was developed to meet that requirement. This protocol is grounded in evidence-based principles and is intended to meet the needs of all police departments in New York State regardless of size or resource limitations.

In 2017 New York State's Criminal Procedure Law (CPL) was amended to permit the admissibility of photo array evidence where the procedures were conducted with safeguards to ensure accuracy. As a result of these changes, the prosecution is permitted to introduce testimony in a direct case by the person who made a photo identification – **so long as the procedure is conducted in a blind or blinded manner.** The protocols outlined here were developed to further structure the administration in a method and manner designed to ensure fair and reliable eyewitness identification procedures.

The Municipal Police Training Council has not only endorsed this protocol and forms, but also has implemented an online training program for all current and new police officers pursuant to subdivision 4 of section 840 of the Executive Law. All police agencies should have written policies that guide the administration of eyewitness identification procedures that comply with the CPL sections discussed herein. Policies based on these protocols will meet this requirement.

II Definitions

A. **Photo array**: A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime.

B. **Line-up**: A collection of individuals, organized in a row, who are shown to a witness to determine if the witness can recognize a person involved with the crime.

C. **Suspect**: Person the police believe has committed the crime.

D. **Filler:** A person, other than the suspect, who is used in either a live line-up or a photo array.

E. **Administrator:** The person who is conducting the identification procedure.

F. **Blind Procedure:** An identification procedure where the administrator does not know the identity of the suspect.

G. **Blinded Procedure:** An identification procedure where the administrator may know who the suspect is, but by virtue of the procedure's administration, the administrator does not know where the suspect is in the array viewed by the

witness. This procedure is designed to prevent the administrator from being able to inadvertently provide cues to the witness.

H. **Confidence Statement:** A statement from an eyewitness immediately following their identification regarding their confidence or certainty about their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

III Photo Arrays

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the array.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.

5. There should be at least five fillers, in addition to the suspect.

6. Only one suspect should be in each array.

7. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.

8. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.

9. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.

B. Inviting the witness to view the array

1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a photo array in connection with the crime committed on (*date and location*).”

2. The investigator should avoid addressing whether or not a person is in custody.

3. Investigators should give no opinion on their perception of the witness's ability to make an identification.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other identifications, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be pictured.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

5. Instructions to the witness about the quality of the photographs.

a. Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.

c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

a. The witness should sign the form indicating their consent or lack of consent.

b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Photo arrays must always be conducted using either a “blind procedure” or “blinded procedure”. A “blind” procedure is preferable, where circumstances allow and it is practicable.

2. If the procedure is blinded, the administrator should handle and display the array so that the administrator does not know suspect’s position in the array until the procedure has completed.

3. Two methods that can be used to successfully accomplish a blinded procedure are:

a. "Two person shuffle" – the array is assembled by someone other than the administrator and then it is placed into an unmarked folder for the administrator.

b. "One person shuffle" – multiple arrays are created by the administrator and the suspect's position is different in each. Three sealed envelopes containing the arrays are provided to the witness who selects one to use. The envelopes should be identical and free of any markings. The witness should sign and date the two unused envelopes across the seal. These envelopes should also be preserved.

4. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness' line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.

5. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.

7. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.

8. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

9. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

E. Post viewing questions

1. After viewing the array ask the witness the following questions:

a. Do you recognize anyone?

b. If so, what number photograph do you recognize?

c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence Statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documentation

1. Document any changes made to any of the photographs used.

2. Document where the procedure took place, who was present, the date and time it was administered.

3. Preserve the photo array in the original form that was shown to each witness.

4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.

5. Recording the Procedure

   a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

   b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

   c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

      (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy;

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

7. The confidence statement should be documented verbatim.

8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.

G. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: “Great job” or “We knew you would recognize him” or even nodding his/her head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

IV Live Line-ups

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the line-up.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness

5. Where practicable there should be five fillers, in addition to the suspect, but in no case, should there be less than four fillers used.

6. Only one suspect should appear per line-up.

7. If necessary, all members of the line-up should be seated to minimize any differences in height.

8. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.

9. The suspect should be allowed to pick his position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.

10. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by the security officer.

B. Inviting the witness to view the line-up

1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*).”

2. Investigators should give no opinion on their perception of the witness’ ability to make an identification.

3. The investigator should avoid addressing whether or not a person is in custody.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be present.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

   d. Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.

5. Instructions to the witness about line-up members moving, speaking, or changing clothing:

    a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.

    b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

    a. The witness should sign the form indicating their consent or lack of consent.

    b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Where practicable, taking into account resource limitations, a blind procedure should be used to conduct and administer a line-up, but is not required.

2. After the instructions are given, the administrator – whether the procedure is to be conducted blind or not – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.

3. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

4. Witnesses must view the line-up separately.

5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.

7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

8. The security officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the security officer and it also removes the potential for distracting the witness as the line-up is being viewed.

E. Post-viewing questions

1. After viewing the line-up the witness should be asked:

   a. Do you recognize anyone?

   b. If so, what is the number of the person that you recognize?

   c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documenting the procedure

1. Recording the Procedure

a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

(i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy.

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.

2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

3. The confidence statement should be documented verbatim.

4. Document where the procedure took place, who was present, the date and time it was administered.

5. Anything the line-up members are asked to do (e.g., speak, move, or change clothing) must be documented.

6. Document all people in the viewing room with the witness and the line-up room with the suspect.

7. Document the officer or person who escorts the witnesses to and from the line-up room.

8. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.

9. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.

G. Defendant's right to counsel

1. There are circumstances where during a line-up a suspect may have a defense attorney present.

2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.

3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.

H. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

I. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

LINE-UP FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE LINE-UP

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of our on-going investigation into a crime that occurred at (*location*) on (*date*) you are about to view a line-up. (*Use similarly neutral language to invite witness to the identification procedure.*)
- You will look through a one-way mirror and see six people in the line-up. They will not be able to see you.
- There will be a number associated with each person on the other side of the mirror.
- Take whatever time you want to view the line-up.
- The perpetrator may or may not be present.
- Do not assume I know who the perpetrator is.
- I want you to focus on the lineup and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Members of the line-up can be requested to speak, move, or change clothing.
- If one line-up member is asked to speak, move, or change clothing, then all the line-up members will be asked to do the same.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words, without the use of numbers. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the line-up I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the person you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

LINE-UP CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Line-up Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Line-up Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Security Officer: _____

Rank: _____ Command: _____ ID #: _____

Asst. District Attorney Present? Yes □ No □

Name of ADA: _____ Phone #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

Line-up photograph taken? Yes □ No □ Witness initialed? Yes □ No □

Position	Name	Number Held	Age	Height	Weight
1					
2					
3					
4					
5					
6					

Suspect's name:_____ D.O.B. _____ Position:_____

Comments: _____

_____

Signature of Administrator: _____ Date: _____

LINE-UP FORM

RUNNING THE LINE-UP AND RESULTS

Witness:_____ Administrator: _____

Instructions to the administrator conducting the line-up:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- After instructing the witness, stand away and out of the witness' line of sight, while still being able to observe and hear the witness.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording obtain consent from the witness.
- A photo should be taken of the line-up and the witness should sign the photo to attest that it represents the line-up that they viewed.
- Introduce by name all individuals present in the viewing room to the witness.
- Tell the witness when the identification procedure will begin, (e.g. "You will now look through the one way mirror.")
- If there is a need to have a line-up member speak, move, change clothing, or some other activity, then all the line-up members must do the same activity.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE LINE-UP, ASK THE FOLLOWING QUESTIONS

☐ Did you recognize anyone in the line-up? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

☐ If so, what is the number of the person that you recognize? _____

☐ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

_____

Date: _____ Time: _____ Witness Signature: _____

LINE-UP FORM

SUSPECT'S COUNSEL SHEET

Suspect's attorney present? Yes ☐ No ☐

Suspect's attorney: _____ Telephone: _____

The suspect's attorney was instructed ***not*** to speak while in the viewing room with the witness.

Yes ☐ No ☐

If suspect's attorney makes requests about the line-up, record the request and whether the request was agreed to or refused:

1. Request: _____

   Agreed ☐ Refused ☐

   Reason for refusal? _____

   _____

2. Request: _____

   Agreed ☐ Refused ☐

   Reason for refusal? _____

   _____

3. Request: _____

   Agreed ☐ Refused ☐

   Reason for refusal? _____

   _____

PHOTO ARRAY FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE PHOTO ARRAY

- ☐ With your consent, the procedure may be recorded using video or audio.
- ☐ Do you consent to recording? Video and Audio ☐ Audio Only ☐ No ☐ Initial: _____
- ☐ As part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) you will view a photo array. (*Use similarly neutral language to invite witness to the identification procedure.*)
- ☐ It consists of six photographs of individuals. Each photograph has a number underneath the photograph.
- ☐ Take whatever time you want to view the photo array.
- ☐ The perpetrator may or may not be pictured.
- ☐ Do not assume that I know who the perpetrator is.
- ☐ I want you to focus on the photo array and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- ☐ Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- ☐ Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
- ☐ Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs.
- ☐ If you do make an identification I will ask you to describe your level of confidence about that identification using your own words. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- ☐ After you have had an opportunity to view the photo array I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the photograph you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- ☐ I may ask follow up questions.
- ☐ The investigation will continue regardless of whether or not you make an identification.
- ☐ **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

PHOTO ARRAY CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Photo Array Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Photo Array Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

The original photo array MUST be preserved.
Attach a copy of the photo array to this form and provide the information below, if available.

Position	Name	NYSID (where applicable)	Date of Photo
1			
2			
3			
4			
5			
6			

Suspect's name:_____ D.O.B. _____ Position: _____

Was any photo altered? Yes □ No □

If yes, which? _____

Describe the alteration: _____

Comments: _____

Signature of Administrator: _____ Date: _____

PHOTO ARRAY FORM

SHOWING THE PHOTO ARRAY

Witness:_____ Administrator: _____

Procedure conducted: □ blind □ blinded

If blinded, indicate method: □ One-person shuffle □ Two-person shuffle □ Other: _____

Instructions to the administrator showing the photo array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- Provide the photo array(s) in an envelope or folder (or in three sealed envelopes if using the "one person shuffle" method) when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording, obtain consent from the witness.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THE FOLLOWING QUESTIONS

□ Did you recognize anyone in the photo array? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

□ If so, what is the number of the photograph that you recognize? _____

□ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you?_____

_____

_____

Date: _____ Time: _____ Witness Signature: _____