Memorandum in Support of Legislation to Add a New Section 845-c of the Executive Law to Improve the Accuracy of Criminal Records

Proposed Amendment

Section 1. The executive law is amended by adding a new section 845-c to read as follows:

S 845-C. CRIMINAL HISTORY RECORD SEARCHES; UNDISPOSED CASES. 1. WHEN, PURSUANT TO STATUTE OR THE REGULATIONS OF THE DIVISION, THE DIVISION CONDUCTS A SEARCH OF ITS CRIMINAL HISTORY RECORDS AND RETURNS A REPORT THEREON, ALL REFERENCES TO UNDISPOSED CASES CONTAINED IN SUCH CRIMINAL HISTORY RECORD SHALL BE EXCLUDED FROM SUCH REPORT.

2. FOR PURPOSES OF THIS SECTION, "UNDISPOSED CASE" SHALL MEAN A CRIMINAL ACTION OR PROCEEDING, OR AN ARREST INCIDENT, IDENTIFIED IN THE DIVISION'S CRIMINAL HISTORY RECORDS FOR WHICH NO CONVICTION, IMPOSITION OF SENTENCE, ORDER OF REMOVAL OR OTHER FINAL DISPOSITION, OTHER THAN THE ISSUANCE OF AN APPARENTLY UNEXECUTED WARRANT, HAS BEEN RECORDED AND WITH RESPECT TO WHICH NO ENTRY HAS BEEN MADE IN THE DIVISION'S CRIMINAL HISTORY RECORDS FOR A PERIOD OF AT LEAST FIVE YEARS PRECEDING THE ISSUANCE OF SUCH REPORT.

3. THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION SHALL NOT APPLY TO CRIMINAL HISTORY RECORD INFORMATION (A) PROVIDED BY THE DIVISION TO QUALIFIED AGENCIES PURSUANT TO SUBDIVISION SIX OF SECTION EIGHT HUNDRED THIRTY-SEVEN OF THIS ARTICLE, OR TO FEDERAL OR STATE LAW ENFORCEMENT AGENCIES, FOR CRIMINAL JUSTICE PURPOSES; (B) PREPARED SOLELY FOR A BONA FIDE RESEARCH PURPOSE; OR (C) PREPARED FOR THE INTERNAL RECORDKEEPING OR CASE MANAGEMENT PURPOSES OF THE DIVISION.

4. NOTHING CONTAINED IN THIS SECTION SHALL BE DEEMED TO PERMIT OR REQUIRE THE RELEASE, DISCLOSURE OR OTHER DISSEMINATION BY THE DIVISION OF CRIMINAL HISTORY RECORD INFORMATION THAT HAS BEEN SEALED IN ACCORDANCE WITH LAW.

S 2. Subdivision 2 of section 212 of the judiciary law is amended by adding a new paragraph (t) to read as follows:

(T) TAKE SUCH ACTIONS AND ADOPT SUCH MEASURES AS MAY BE NECESSARY TO ENSURE THAT NO WRITTEN OR ELECTRONIC REPORT OF A CRIMINAL HISTORY RECORD SEARCH CONDUCTED BY THE OFFICE OF COURT ADMINISTRATION, OTHER THAN A SEARCH CONDUCTED SOLELY FOR THE INTERNAL RECORDKEEPING OR CASE MANAGEMENT PURPOSES OF THE JUDICIARY OR FOR A BONA FIDE RESEARCH PURPOSE, CONTAINS INFORMATION RELATING TO AN UNDISPOSED CASE. FOR PURPOSES OF THIS PARAGRAPH, "UNDISPOSED CASE" SHALL MEAN A CRIMINAL ACTION OR PROCEEDING, OR AN ARREST INCIDENT, APPEARING IN THE CRIMINAL HISTORY RECORDS OF THE OFFICE OF COURT ADMINISTRATION FOR WHICH NO CONVICTION, IMPOSITION OF SENTENCE, ORDER OF REMOVAL OR OTHER FINAL DISPOSITION, OTHER THAN THE ISSUANCE OF AN APPARENTLY UNEXECUTED WARRANT, HAS BEEN RECORDED AND WITH RESPECT TO WHICH NO ENTRY HAS BEEN MADE IN SUCH RECORDS FOR A PERIOD OF AT LEAST FIVE YEARS PRECEDING THE ISSUANCE OF SUCH REPORT.

NOTHING CONTAINED IN THIS PARAGRAPH SHALL BE DEEMED TO PERMIT OR REQUIRE THE RELEASE, DISCLOSURE OR OTHER DISSEMINATION BY THE OFFICE OF COURT ADMINISTRATION OF CRIMINAL HISTORY RECORD INFORMATION THAT HAS BEEN SEALED IN ACCORDANCE WITH LAW.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to searches of criminal history records conducted on or after such date; provided, however, that prior to such effective date, the division of criminal justice services, in consultation with the state administrator of the unified court system as well as any other public or private agency, shall undertake such measures as may be necessary and appropriate to update its criminal history records with respect to criminal cases and arrest incidents for which no final disposition has been reported.

Need for Amendment

Under Criminal Procedure Law §160.50 records pertaining to criminal actions that have been terminated in favor of the accused are to be sealed. These include cases that prosecutors elect not to prosecute (CPL §160.5(3)(i)) and arrests that the police elect not to pursue (CPL §160.50(3)(j). Yet in many cases, administrative failures occur, leaving information about these and other cases that have ended in a person's favor unsealed on the person's permanent criminal record (also known as a rap sheet) maintained by the Division of Criminal Justice Services (DCJS). Attempts to correct these errors often prove unsuccessful because no information about the cases can be found, either because the parties involved have destroyed their or because no records have been generated because of the preliminary nature of the case (see attached case example). These permanent inaccuracies on a person's record often lead to a loss of employment and housing opportunities. In order to remedy this problem, we support legislation amending the executive law and adding a new section 845-c so that incomplete records will not be disclosed by DCJS or the Office of Court Administration (OCA) for civil purposes if no entry has been made on the DCJS record for at least 5 years.

In an age where the criminal history background check is almost universal, New York's sealing laws act as a guard against illegal workplace discrimination by preventing the inappropriate disclosure or use by employers or licensing agencies of records of arrest that resulted either in a violation (non-criminal) conviction or were terminated in a person's favor. However, the sealing laws are only effective if the various entities in the criminal justice system communicate with each other. According to Criminal Procedural Law, the arresting agency, the district attorney, the clerk of the court, and OCA are all responsible for reporting to DCJS that certain criminal actions ended in a person's favor. Administrative failures do occur, however, and sometimes these agencies fail to update DCJS as required. Since there is no current system for ensuring that agencies update DCJS, many records at DCJS remain inaccurate for a long time without anyone's knowledge. As DCJS cannot currently act without information from the relevant agency, these inaccuracies become permanent once enough time has passed for the criminal justice agency involved to be able to destroy the original record according to its own record retention schedule. In situations where the case has been terminated in a person's favor, the original record may be destroyed after only six years by the courts and OCA. Other agencies, including the police and the District Attorneys' Offices have their own record retention schedules.

As a result, people with permanent inaccuracies on their rap sheet are in limbo: they cannot contest inaccurate or incomplete information on their rap sheet if the necessary correctives (the original records) have been purged. Such people also lose the protection they are entitled to under New York State sealing laws and the Federal and New York State Fair Credit Reporting Acts.

To remedy this problem, we support a bill that amends the executive law and adds a new section 845-c so that certain incomplete records will not be disclosed by DCJS or the Office of Court Administration (OCA) for civil purposes if no entry has been made on the DCJS record for at least 5 years. The failure in communication among the various criminal justice agencies has caused countless individuals to lose employment, benefits and housing opportunities. This proposal corrects these administrative failures and will help many New Yorkers lead productive, law-abiding lives.

Case Example

The following case example illustrates the lack of a safety net for people whose rap sheets have errors - even though these errors may cost them their jobs, and hurt their chances of leading law abiding lives.

The Bronx Defenders represented a client who was applying for a job as an accountant at a nonprofit that is licensed by the Office of Mental Retardation and Developmental Disabilities (OMRDD). OMRDD did a background check on the client and held his application for the job in abeyance until he resolved "an open felony charge" from April 2006. The Bronx Defenders could not find any record of the arrest in the record review generated by the Office of Court Administration (OCA).

However, a CRIMS database search in the Unified Court System (UCS) revealed that the arrest had not been docketed. An undocketed arrest is either an arrest that the district attorney (DA) declined to prosecute (DP) or an arrest that the arresting agency voided at the precinct level. In both cases, the arrest is considered terminated in a person's favor and must be sealed under CPL §160.50 and should not be accessible to employers or licensing agencies such as OMRDD.

To advocate for their client's job, the Bronx Defenders went to the district attorney's office and the precinct to find adequate proof that their client's arrest had not been docketed. The DA's office had no record of any charges being prosecuted against their client. When the Bronx Defenders tried to get the a letter from the DA's office saying that there were no pending charges and offered to bring the client to the DA's office to be fingerprinted, the DA's office refused to provide such a letter. Some people in the DA's office even told the Bronx Defenders, "Dealing with this is nobody's job." The Bronx Defenders were told that if the clerk's office in criminal court had no record of a DP, then it must have been a voided arrest, and that they should go to the precinct where he was arrested.

At the precinct, the Bronx Defenders did not meet success either They were told that the only way their client could receive a copy of his arrest report was by requesting it through the Freedom of Information Law (FOIL) Unit, a process which would take six to nine months, by which point the job would no longer be available.