

**The Bronx
Defenders**

**Redefining
public
defense**

**New York State Assembly
Standing Committee on Codes and Standing Committee on Correction**

**Hearing re: Sealing of criminal records and expansion of youthful offender status
December 10, 2019**

**Written Testimony of The Bronx Defenders
By Eli Northrup, Policy Counsel to the Criminal Defense Practice**

My name is Eli Northrup and I am Policy Counsel to the Criminal Defense Practice at The Bronx Defenders. Thank you for the opportunity to testify before you today on this important matter.

The Bronx Defenders (“BxD”) is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

I. Introduction

The sealing of criminal convictions is critical if New York wants to reform its criminal legal system. As the Notice for this hearing acknowledges, however, “[w]hile the sealing provisions enacted as part of Rockefeller Drug Law reform and Raise the Age legislation marked a significant step forward, the laws have been underutilized.” This is both because the laws don’t

go far enough, and because they are extremely hard to navigate. Sealing should be made more widely available and more accessible. In addition, New York should embrace automatic expungement to actually clear people's records of criminal charges.

Moreover, youthful offender status (hereinafter "YO") must be expanded, and older youth must be allowed to benefit. YO status is a crucial tool that makes allowances for the developing brain of young adults. It provides young people charged with crimes an opportunity to put their useful digressions behind them and move on with a clean slate as they become adults. In order to accomplish these laudable goals, certain changes must be made to the current program. Specifically:

- YO status should be extended to age 25.
- Teens and young adults should get more than one opportunity to receive YO.
- Courts should consider a wide variety of mitigation factors.

Simply put, young adults should be punished less severely than adults because they are less culpable due to their developing brains. Multiple other states have extended youth protections to young adult defendants, including Michigan,¹ which allows YO status up to age 23, and California,² which grants YO parole hearings up to age 25. We urge you to make these concrete changes that take into account what brain science already tells us: the criminal legal system is no place for young people.

II. Sealing and Expungement Laws

Nationally, at least 70 million people — 1 in 3 adults — have a criminal record. In New York, at least 1.3 million people — 1 in 7 adults — have a criminal record.³ Data and research confirm the widespread consequences of such records; having a criminal conviction creates significant barriers to reintegrating into society and to securing basic housing, employment and other opportunities to civil wholeness. Never has there been a more important opportunity to create comprehensive records clearance and expungement for impacted individuals in our state.

While New York has been a nationwide leader in reform of the criminal legal system, we have lagged behind when it comes to the sealing and expungement. There are currently 21 states that

¹ M.C.L. § 762.11.

² Cal. Penal Code § 3051.

³ Cuomo, Andrew, "Employers are often unwilling to hire someone convicted of a crime. That's a problem-and it needs to change." LinkedIn, July 18, 2017 available at <https://www.linkedin.com/pulse/employers-often-unwilling-hire-someone-convicted-crime-andrew-cuomo>; "Governor Cuomo Announces First in the Nation Regulation to Prohibit Insurance Companies from Denying Coverage to Businesses Seeking to Hire Formerly Incarcerated New Yorkers." available at <https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-regulation-prohibit-insurance-companies-denying-coverage>

have passed laws creating or expanding sealing or expungement of records, but New York's sealing laws are limited, confusing and inaccessible in comparison. They fail to address the growing needs of people with convictions who are struggling to lead full, unencumbered lives because of their involvement with the criminal legal system.

For example, Criminal Procedure Law § 160.59, effective as of October 2017, is a narrow sealing law with limited eligibility that is not well known and hard to navigate, despite the fact that the law was passed as an expansion of prior sealing laws. In addition to requiring an affirmative application, the law requires that at least 10 years must have passed from sentencing or release from prison in order to seek its benefits, and people must have two or fewer convictions on their record to be eligible for sealing. The law also requires analysis of the nature of the crime that was purportedly committed — convictions that are deemed violent offenses are ineligible for sealing. Even though we affirmatively screen our clients and members of our community regarding their eligibility, the long list of requirements limits the pool of people who are actually eligible to apply for sealing.

Even after our clients avail themselves of § 160.59 and successfully seal their convictions, we have seen how they still may be denied professional occupational licenses. This can be a very demoralizing and damaging experience for a person who is trying to move on from their past and become a productive member of society.

Take for example Anna, who is a mother of two young children and a Bronx resident. Anna worked as a home health aide. Due to unfortunate circumstances, Anna was arrested for the first and only time in her life in 2007 and by 2009, she took a plea related to insurance fraud. She was devastated by this process and related that she took a plea upon advice of her then attorney, thinking it would be the quickest way to resolve the criminal court allegations. Upon arrest, Anna's license was suspended; upon taking the plea, she lost her license and was unable to continue to work.

For many years, Anna attempted to work other odd jobs to survive, but none that were as stable, that paid as much or that gave her as much satisfaction as her home health aide job. At every corner, she was turned away from work because of her conviction. Though she was unable to work as one, Anna took classes and obtained certificates to grow her skills as a home health aide. She even obtained a certificate of relief from disabilities to remove employment consequences to her conviction, but to no avail.

In 2018, Anna came to The Bronx Defenders for services and after screening her, we notified her that she could be eligible for sealing under § 160.59. Unfortunately, she would have to wait an additional year because only 9 years had passed since her sentencing. In 2019, we assisted Anna to apply for and successfully seal her conviction. However, while Anna waited to become

eligible and apply for sealing, her application for a home health aide license was denied by the Department of Health and she continued to lose job opportunities due to her one and only conviction.

Anna is one of so many New Yorkers who want to get to work and live full and free lives, but are prevented from doing so because of their convictions. Instead of limited sealing, New York should have full expungement of convictions. Rather than an application, the expungement should be automatic. We should reduce the waiting period of ten years to be eligible for expungement and also increase the categories of offenses eligible for expungement. Additionally, we should remove the lifetime conviction qualification barrier, so that many more people are eligible for relief. We are proud members of the Clean Slate New York coalition fighting for legislation that will take automatic expungement further and allowing a path forward for clearing stale criminal records. We know we can do better. New Yorkers who have already paid their debt to society should not be punished indefinitely for their criminal legal system involvement.

III. Youthful Offender Status

As public defenders, we see how the YO law plays out on a day-to-day basis in the criminal legal system. Our experience has shown us the devastating consequences that a single criminal conviction can have on the life of a young person. It has also demonstrated the arbitrary nature of the 18-year-old cut off for benefitting from YO status. We urge lawmakers to expand YO to address these issues.

A. The real consequences of a criminal conviction

For many people, the worst part of contact with the criminal legal system is not a sentence, but the civil consequences that follow from the conviction itself. Civil consequences of convictions — once described as “collateral,” but now understood to be central to the operation and impact of the criminal legal system — often last a lifetime and make it impossible for people to move on with their lives. These enmeshed consequences include: impediments to obtaining a college education, loss of employment licenses, suspension of driver’s licenses, loss of public benefits, loss of and barriers to obtaining public housing, and loss of participation in voting and juries. For parents, a criminal conviction can set in motion government interference with the right to parent one’s children. For non-citizens, a criminal conviction can limit the ability to travel freely or trigger deportation proceedings. These enmeshed consequences, which simultaneously interfere with multiple domains in a person’s life, can hamstring the ability for our clients to continue to function in society after contact with the criminal legal system. This is especially true for young

people, who are at a moment in their lives with the greatest potential to develop stability as well as the greatest vulnerability to its loss.

Let's take an example of a hypothetical 19-year-old who is convicted of a drug offense. We'll call him Jason. Let's say Jason has just been convicted of one count of Criminal Possession of a Controlled Substance in the Seventh Degree, a class A misdemeanor. If Jason wants to attend college after his sentence, he will be ineligible for federal student loans for the next year. Unable to afford college, Jason will also struggle to obtain a skilled job in any of more than 100 professions that require job licenses including, among many others, home health aide, locksmith, and security. He will also have to disclose the fact of his conviction every time he applies for a job for the rest of his life. If Jason lives in public housing, his entire family may face eviction as a result of the conviction. Jason will be ineligible to apply for public housing for three years after he completes his sentence. If he is not a United States citizen, Jason will also become deportable after a second drug related offense and inadmissible to the country after a first conviction.

These are not just hypothetical situations. Each element of Jason's fictional story mirrors the stories of real clients we have represented. We share a few of their stories here.

1. Shawn's case⁴

Take the case of Shawn, a 20 year-old with no prior criminal record who was arrested in March of this year. Shawn grew up in the Soundview area of the Bronx in a loving home with his father, mother, and brother. He had an idyllic childhood in many ways, but that all changed when he was twelve years-old. In 2011, his father tragically passed away of a sudden heart attack. Abruptly, Shawn was called upon to fulfill the role of "man of the house," trying to help provide for and protect his entire family.

This meant becoming the primary caregiver of his disabled mother, whose diabetes and other medical issues rendered her effectively immobile. He was suddenly responsible for assisting her with all of her appointments, making sure she took her medications, and ensuring she got the proper care. He did the grocery shopping, cooked dinner, and took care of the household chores. Not surprisingly, these responsibilities were all-consuming, and Shawn stopped going to high school in the 9th grade. In addition to taking care of his mom, he worked nights in a warehouse to make ends meet. But even that was not enough.

⁴ Pseudonyms used throughout to protect client confidentiality.

In March officers barged into his apartment where they found a gun and a small quantity of drugs which he had been selling when he could for extra money. Shawn was embarrassed and crushed by the arrest and the prospect of having a criminal record. Eventually he entered into an agreement which would allow him to plead to a misdemeanor if he completed the BronxConnect Beyond program. Over the next several months he became a model participant, taking classes in anger management, employment readiness, and life skills; getting his OSHA 30 and Flaggers Construction certifications; and reengaging with GED classes, all while continuing to work at the warehouse overnight. Upon completion of the program, he was hired by a construction company — his first project is fixing the very building where he grew up.

While Shawn was able to avoid a felony conviction, he will have a misdemeanor on his record which will follow him for the rest of his life. He is exactly the type of person for whom YO status should be available. The law should change so that a youthful mistake won't define a young man like Shawn for the rest of his life.

2. Tonia's Case

The limits of YO have very real consequences in the immigration context as well. We represent Tonia, a 37 year-old woman who has lived in the U.S. lawfully since she was 17 years old. As a single mother living in New York she raised three children, all of whom are U.S. citizens. In 2017, she left the U.S. for the first time in 20 years in order to attend her grandfather's funeral. When she arrived back in the country she was arrested by immigration authorities at the airport and ultimately detained for a period of four months. The sole basis for her removal were two misdemeanor convictions from when she was 19 years old.

These two convictions (for petit larceny and assault) are the entirety of her criminal record. If she had been able to get YO on either one of them, she would not have been subject to removal or mandatory detention. In the four months she was detained and at risk of removal, she and her children suffered immensely, especially her two youngest, who were in NYC elementary schools and both experience learning disabilities.

3. Johan's case

We also represent Johan, a 17-year-old who recently pled guilty to attempted felony assault. Johan was one of a group of teenagers who stole a man's phone, and he was arrested before the Raise the Age law was implemented for 17-year-olds. Because there were no serious injuries and no weapon was used, Johan's case almost certainly would have been removed to Family Court under the Raise the Age. Under the current law, however, he was prosecuted as an adult.

Born in the Dominican Republic and living in the Bronx since the age of three, Johan is a Legal Permanent Resident of the United States. As a non-citizen, Johan risked deportation if he lost at trial. A YO adjudication would have shielded Johan from deportability and inadmissibility (a restriction on the ability to travel outside the country). But because Johan had been adjudicated a YO once before, he was no longer eligible for YO status. The prosecutor offered a felony plea and a six month therapeutic program. The plea avoided the consequence of deportation but made Johan potentially inadmissible to the United States. For Johan, this means that he will probably never see his grandfather who lives in the Dominican Republic again.

B. Reforms are necessary

Under the Raise the Age Act which recently went into effect, 16- and 17-year-olds have their criminal cases transferred to Family Court. This is the default for all but the most serious of felonies; it is a presumption that requires “extraordinary circumstances” to overcome.⁵ As a result, 18 year-olds whose cases are still in criminal court are the only ones who stand to benefit from YO going forward.

The momentous change to our legal system for young people under Raise the Age brings with it an opportunity to rethink the purpose of the system as a whole and, specifically, the way that we approach young people when they are accused of both the most serious and the most minor crimes. Unlike Raise the Age, the YO law, enacted in 1971 and not amended since 1980, does not take into account the recent research on the development of the adolescent brain.

It’s important to note that YO status is not a free ride. YO can come with onerous obligations and serious sentences, including programming, probation, or even prison time. Often, courts use these options as an incentive, offering young people a chance at rehabilitative services, but with a jail alternative for failing to complete them. By expanding YO, we give deserving young people the opportunity to grow into adulthood without the stain of a criminal conviction on their permanent record.

YO status must be expanded to benefit larger age-ranges and broader categories of offenses. Specific reforms are necessary and are the subject of current legislative efforts, such as Assembly Bill A8381, sponsored by Assemblymember O’Donnell.

1. Expand YO to young adults up to age 25.

While it’s true that the age of majority has long been 18 for most purposes, research over the past 20 years conclusively shows that the brain does not fully mature until age 25.⁶ We know that

⁵ C.P.L. § 722.23(1).

⁶ Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 *Neuropsychiatric Disease and Treatment* 449 (2013).

while certain areas of the brain have matured fully by age 18, many areas, and most notably the areas associated with emotional responses and decision making, have not. This is because the area of the brain associated with emotional regulation and decision making (the frontal lobe and more specifically the prefrontal cortex) take longer to fully develop.

This means that even once a young person turns 19, they still face deficits in their ability to control impulses, think rationally about the consequences of their actions, and control their emotional responses in a heated moment.⁷ They may also struggle to weigh the gains of an immediate reward against the long-term consequences of the action. All of these deficits contribute significantly to behavior that triggers an arrest and consequently, a criminal charge.⁸ As such, a 19 to 25 year-old facing criminal charges — though an adult in the eyes of the law — still, in many ways, has the immature brain of an adolescent.

In our work representing young people in the Bronx, we often see the following scenario play out: A young person finishes high school, finds themselves without the skills or preparedness to find a job, and without the necessary guidance to pursue higher education. It is often during this time period, while feeling lost with a great deal of idle time, that young people find themselves facing criminal charges.

Fortunately, New York City is rich with youth-focused programming, and many of these programs target youth between the ages of 16-24, as this age bracket is the most at-risk due to factors explained in the scenario above. The availability of this programming is a reflection of the particular challenges facing our young clients and reinforces the need to have the law treat them differently. These programs provide critical support and resources to keep youth connected — from mentorship and recreational activities to vocational training and paid internship opportunities. Granting young people the opportunity to resolve their criminal cases through participation in these programs benefits everyone. The young person has an opportunity to identify educational and vocational goals and receive the support they need to achieve those goals, and as a result they are no longer idle and lost and are less likely to be arrested again.⁹

2. Teens and young adults should get multiple chances at YO

Some might think that one stint in adult court should be enough to “scare a kid straight,” but the truth is more complicated. Many complex factors can contribute to teen criminal behavior, such

⁷ Somerville, L., *Searching for signatures of brain maturity, what are we searching for?* Neuron, 92, 1164-1167 (2016).

⁸ Zimmer, C. *You're an adult, Your brain, not so much.* New York Times, available at <http://clbb.mgh.harvard.edu/youre-an-adult-your-brain-not-so-much/> (2016).

⁹ U.S. Department of Justice. (2000, November). *Employment and Training for Court-Involved Youth.* Retrieved from <https://www.ncjrs.gov/pdffiles1/ojdp/182787.pdf>

as housing instability,¹⁰ exposure to violence,¹¹ and the impulse to react to threat.¹² Rehabilitation, processing of past trauma, and learning new behaviors are processes which take place over time as the teen brain matures. A relapse does not mean that the child refuses to change; it means that the child is still a work in progress. Several states, including Alabama¹³ and Oklahoma,¹⁴ recognizing this process, allow unlimited chances at YO status.

Additionally, leaving the decision completely up to the judge (rather than making it mandatory) leads to disparate outcomes among counties and among judges. For example, in 2017, 5.2% of 16- and 17-year-olds arrested in the Bronx for felonies received adult, non-YO convictions;¹⁵ however, 35.7% of Cayuga County 16- and 17-year-olds arrested for felonies received adult, non-YO convictions.¹⁶ The brains of Cayuga County teens do not mature faster than Bronx County teens, nor do they suffer less from the lasting consequences of adult sentences and permanent criminal records. Leaving YO determinations up to the discretion of judges leads to unacceptable disparities that could be fixed by legislation.

3. Courts should consider a wide variety of mitigation factors.

At present a court is restricted in what it can consider when evaluating whether to grant YO. For example, a court is only permitted to grant YO for certain offenses based on two mitigation factors: (1) the circumstances that bear upon the manner in which the crime was committed or (2) that the defendant played a minor role.¹⁷ This is even true for certain non-violent drug charges. Stigmatizing children with criminal convictions for drugs only hinders rehabilitation, making it more likely that the child will be unable to find employment in the future¹⁸ and will feel forced to return to drugs in order to support themselves.

This contrasts sharply with the intent of Raise the Age, where most cases are removed to family court unless there is “strong proof that the young person is not amenable or would not benefit in any way from the heightened services in family court.”¹⁹ Under Raise the Age, even where there

¹⁰ Patrick J. Fowler et al. *Family and Housing Instability: Longitudinal Impact on Adolescent Emotional and Behavioral Well-Being*, 53 Soc. Sci. Res. 364 (2015).

¹¹ Maggie Price et al., *Trauma Experience in Children and Adolescents: An Assessment of the Effects of Trauma Trauma Type and Role of Interpersonal Proximity*, 27(7) J. Anxiety Disorders 652 (2013).

¹² Michael Dreyfuss et al., *Teens Impulsively React rather than Retreat from Threat*, 36 Dev. Neurosci. 220, (2014).

¹³ Ala. Code 15-19-1 & seq.

¹⁴ Okla. Stat. § 10A-2-5-206

¹⁵ NYS Division of Criminal Justice Services, 2013-2017 Dispositions of Arrests Involving 16 and 17 Year Olds, Bronx County, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispo-youth-arrests/bronx.pdf>.

¹⁶ NYS Division of Criminal Justice Services, 2013-2017 Dispositions of Arrests Involving 16 and 17 Year Olds, Cayuga County, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispo-youth-arrests/cayuga.pdf>.

¹⁷ C.P.L. § 720.10(3).

¹⁸ Amanda Agan & Sonja B. Starr, *The Effect of Criminal Records on Access to Employment*, University of Michigan Law School Scholarship Repository (2017).

¹⁹ Transcript New York State Assembly Session, April 8, 2017, pgs. 38-39.

are aggravating factors, the “court must also consider . . . a wide range of individual factors, such as economic difficulties, substandard housing, poverty, learning difficulties, of course, and educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavioral role models, abuse of alcohol or controlled substances by the defendant, by family or by peers. . . .”²⁰ These mitigating factors contextualize why a crime occurred and also provide insight into rehabilitative options. Courts should be able to consider these same mitigating factors when contemplating YO.

IV. Conclusion

The time has come to update our sealing laws and expand YO status. The current laws are overly restrictive, out-of-line with scientific research, and antithetical to the pursuit of justice. Thank you for your consideration of these important matters.

²⁰ *Id.* at 40.