CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

CRIMINAL HISTORY SCREENING IN COLLEGE ADMISSIONS

A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS

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INTRODUCTION

This Guide for Attorneys is the product of a journey that began with our clients. The Center for Community Alternatives (CCA) has long had a Reentry Clinic which assists people with criminal histories in overcoming many of the barriers they face because of their past convictions. Many of our Reentry Clinic clients have applied to college, and over the years they have shared with us the increasing array of barriers they face to admission because of their criminal records. In fact, one local community college had an outright bar to admission, informing potential applicants with past felony convictions that they "need not apply."

Our clients' experiences and difficulties compelled us to explore this problem further. In 2010, CCA partnered with the Association of Collegiate Registrars and Admissions Officers (AACRAO) to survey collegiate admissions officers about their policies and practices with regard to applicants who have past criminal justice involvement. This partnership led to CCA's ground-breaking report, *"The Use of Criminal History Records in College Admissions Reconsidered,"* which not only identifies the growing problem of colleges screening applicants for past criminal justice involvement, but also discusses much needed policy changes.

Our journey did not end with this report. Since issuing it, we have received countless calls from defense attorneys whose clients are either enrolled in college or are college-bound and are facing criminal charges. They want to know what strategies they can use to ensure that their clients can still pursue their dreams of achieving a college degree. We also frequently receive telephone calls from attorneys whose former clients have called to ask about how their past conviction will affect their ability to get accepted into a college, or who are facing questions on college applications that seem to require the disclosure of sealed or confidential information.

Over the past two years, these telephone calls have led us to develop a number of strategies that defense attorneys can utilize to protect their clients' dreams of graduating from college. Thanks to a grant from the New York Bar Foundation, we now have the opportunity to put these strategies into writing in this Guide.

A word about language. As we discuss further in this Guide, we live in a society that perpetually punishes people for having a past conviction. One common form of punishment is to attach

dehumanizing language to such individuals. A few years ago, the NuLeadership Policy Group issued an open letter calling for an end to this common practice, stating as follows:

> When we are not called mad dogs, animals, predators, offenders and other derogatory terms, we are referred to as inmates, convicts, prisoners and felons. All terms devoid of humanness which identify us as "things" rather than as people. While these terms have achieved a degree of acceptance, and are the "official" language of the media, law enforcement, the prison industrial complex and public policy agencies, they are no longer acceptable for us and we are asking that you stop using them.
>
> In an effort to assist our transition from prison to our communities as responsible citizens and to create a more positive human image of ourselves, we are asking everyone to stop using these negative terms and to simply refer to us as PEOPLE. PEOPLE currently or formerly incarcerated, PEOPLE on parole, PEOPLE recently released from prison, PEOPLE in prison, PEOPLE with criminal convictions, but PEOPLE.

Throughout this Guide, we have attempted to fully honor the NuLeadership's request, and we refer to people with past convictions as people, not as ex-offenders, ex-convicts, etc.

In a similar vein, for years courts across this nation have clung to the legal fiction that there is a distinction between "direct" consequences of a criminal conviction (that is, the punishment pronounced by the sentencing court), and "collateral" consequences of a criminal conviction (that is, the life-altering consequences that are seldom discussed in court). This legal fiction has been fostered to prevent people from withdrawing their pleas after being confronted with a punishment for their conviction of which they were not aware when they decided to plead guilty. In 2010, the United States Supreme Court rejected this legal fiction in *Padilla v. Kentucky*, a decision which is discussed further in this Guide. Throughout this Guide, we too generally avoid using terminology that promotes this legal fiction, instead using terms that better reflect reality, such as "lifelong consequences," "enmeshed consequences" or "invisible consequences." We use the term "collateral consequences" only when necessary to avoid confusion.

With the foregoing in mind, we hope that you find this Guide to be a beneficial tool for more effective advocacy. We also hope that in some small way this Guide will help you open the door to education for your clients, enriching their lives, increasing their opportunities, and making our communities safer places for us all to live.

ACKNOWLEDGMENTS

Funding for this Guide was provided by the New York Bar Foundation.

We are indebted to our colleague McGregor Smyth, formerly the Managing Attorney of the Civil Action Practice at The Bronx Defenders and currently the Executive Director of New York Lawyers for the Public Interest. As you will see, throughout this Guide we rely on McGregor's sage advice and well-reasoned articles for strategies and best practices for defense attorneys.

DISCLAIMER

Nothing contained in this Guide should be considered legal advice. We have attempted to provide information that is current and topical. However, because the law and policies of institutions of higher education change so rapidly, we cannot guarantee that this information will always be up-to-date or correct.

Because this Guide was written for New York defense lawyers, much of it (particularly Parts V and the Appendix) focus solely on New York law. Nonetheless, much of the advice and advocacy suggestions in this Guide are applicable outside of New York.

USE OF THIS GUIDE FOR PURPOSES OTHER THAN CLIENT ADVICE AND ADVOCACY

If you would like to use this Guide or portions of it for training or CLE purposes, whether oral or print, please contact the Justice Strategies unit of the Center for Community Alternatives. Questions about the availability of CCA staff to conduct training or CLEs related to this Guide should also be directed to CCA's Justice Strategies unit.

JUSTICE STRATEGIES

Substantive questions about this Guide and the information contained herein as well as questions about its use should be directed to CCA's Co-Directors of Justice Strategies:

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Part I
THE GROWTH OF CRIMINAL HISTORY SCREENING IN COLLEGE ADMISSIONS

The enmeshed or "collateral" consequences of a criminal conviction affect people long after they have paid their debt to society, creating barriers to employment, housing, civic participation and to a rapidly growing extent, a college education. In recent years, colleges and universities across the United States have increasingly asked applicants about past criminal justice involvement on admissions applications, conducted criminal background checks as part of the application process, and created exclusionary policies based on the information disclosed by applicants or the background checks.[1]

There is no evidence that students with criminal history records commit crimes on campus at a rate any higher than other students. Yet, a few high profile crimes and concerns about campus safety and institutional liability have led to admissions policies that now require prospective applicants to disclose their criminal records and even their secondary school disciplinary history. Since 2006, the Common Application,[2] which is currently used by 488 universities and colleges, has included questions about both criminal convictions and school disciplinary records.[3] Many colleges that do not use the Common Application also include such questions on their applications.

The Center for Community Alternatives (CCA) in partnership with the American Association of Collegiate Registrars and Admission Officers (AACRAO) conducted a nation-wide survey to explore the use of criminal records in college applications and admissions and determine how widespread the use of criminal records is. In 2010 CCA released a pioneering report discussing the findings of the survey and the depth of the issue, entitled *The Use of Criminal History*

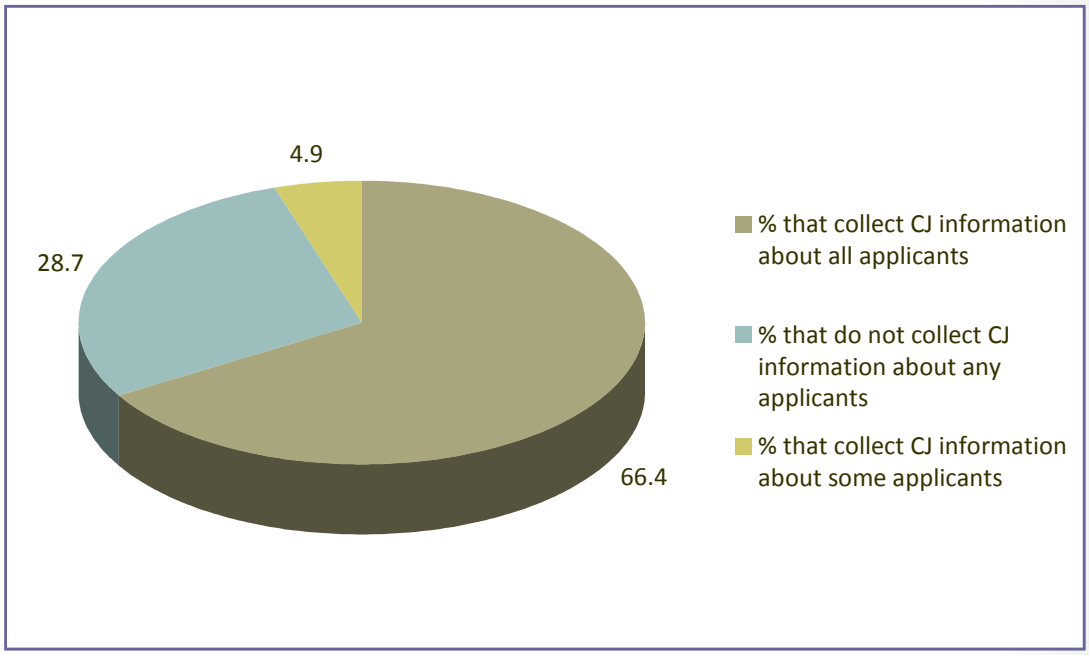
[1] Center for Community Alternatives and National H.I.R.E. Network, *Closing the Doors to Higher Education: Another Collateral Consequence of a Criminal Conviction*, (2008) available at www.communityalternatives.org/pdf/HigherEd.pdf.

[2] The Common Application is a not-for-profit membership organization that provides a common, standardized college application for use by its member organization. The application is available in online and print version for First-year and Transfer Applications. By using this one application, students may apply to multiple schools who are organization members.

[3] Jaschik, S. Innocent (Applicant) Until Proven Guilty. *Inside Higher Ed* (March 6, 2007) available at http://www.insidehighered.com/news/2007/03/06/common.

Records in College Admissions Reconsidered.[4] Among other findings, the survey discovered that a majority of the responding colleges collect criminal justice information in the application process. As shown in Figure 1 below, 66.4% of colleges collect criminal justice information.

Figure 1
Practices regarding the collection of criminal justice information



The number of colleges that are members of the Common Application and accept their applications has more than doubled in the past 10 years, so it is anticipated that the use of criminal records in admissions will continue to be a growing problem. Nonetheless, a significant minority - 38% - of the colleges that responded to the CCA survey do not consider criminal justice information in the application process, and none of these colleges indicated any concern that this policy had diminished safety on their campuses.[5]

Current Practices

There are two primary methods through which colleges and universities collect criminal history information: self-disclosure in response to questions on the application; and criminal background checks. Though self-disclosure is the most common practice, 20% of the colleges that responded indicated that they engage in some form of background screening, either in

[4] Center for Community Alternatives, *The Use of Criminal History Records in College Admissions Reconsidered*, (2010) available at http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf.
[5] *Id.*

addition to or instead of self-disclosure.[6] For the colleges that require self-disclosure on the application, the inquiry may not end with the application. An affirmative response to the self-disclosure question may give rise to a request for additional information or a background check. Examples of information that some colleges request once they learn of an applicant's criminal conviction include:

- Certificate of Disposition
- Letter from parole or probation officer
- Certificate of Relief from Disabilities
- Letter of explanation
- Criminal History Record (Some SUNY colleges specifically require applicants to provide a copy of their personally-obtained Division of Criminal Justice Services (DCJS) Criminal History Record.)

In a recent SUNY draft policy statement (FAQ) all campus admissions offices are being advised that they must request the Criminal History Record from applicants who respond affirmatively to the self-disclosure question. This practice requires an applicant to make a request directly to DCJS to obtain his or her own criminal history record, at his or her own expense, and to submit it to the admissions office. This procedure is particularly troublesome for several reasons. Pursuant to 9 NYCRR § 6050.1, a person may request his or her own DCJS Criminal History Record for personal use and to confirm the accuracy of the criminal history information. The Criminal History Record provided by DCJS to an individual requesting his or her own record is for the requester's "eyes only" as it is an "unsuppressed" copy meaning that it includes arrests and dispositions that have been sealed and "convictions" that resulted in Youthful Offender adjudications that are confidential and are not considered criminal convictions. It is ironic that the instructions to the online SUNY application instruction sheet indicate that an applicant should not disclose a Youthful Offender adjudication, but when an applicant is required to provide the campus admissions office with a DCJS Criminal History Record, the confidential Youthful Offender information contained in that record is improperly revealed and stripped of its confidential nature.

Not all affirmative responses give rise to an automatic exclusion, but many colleges have created at least some criminal justice-related automatic bars to admission. Violent felony convictions and sex offense convictions are the most likely to trigger automatic denial of admission.[7] Almost forty percent of colleges surveyed require that prospective students have completed any term of community supervision (probation or parole) before they can be admitted.[8]

[6] *Id.*
[7] *Id.*
[8] *Id.*

Examples of Application Questions

College applications differ from college to college and among the various system-wide applications and there is a wide variation when it comes to how the criminal history inquiry is posed. The questions range from those applications that limit the question to felony convictions to other applications that broadly ask about any arrest, even if the arrest did not result in a criminal conviction. Still other applications do not even ask about criminal history. As discussed later in this Guide, being aware of these variations may help you work with a college applicant to develop a strategy that enhances his or her chances for admission. Below are some examples of the questions about criminal history that appear on admissions applications:

Common Application:

Have you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime?
○ Yes ○ No
[Note that you are not required to answer "yes" to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise ordered by a court to be kept confidential.]

SUNY [Application Services Center (ASC) online application]:

Have you been convicted of a felony? □ Yes □ No

The instructions to the SUNY ASC application provide guidance to the applicant as follows: A felony in NY State law is defined as a crime for which more than one year in prison may be imposed. The felony question applies if you have been convicted as an adult. If you have been adjudicated as having juvenile delinquent or youthful offender status, you are required to respond to the felony question 20a by indicating a response of "no."
It is interesting to note that not all SUNY schools ask for self-disclosure in the same way. For those applicants who use an application to a particular campus instead of the ASC application, the inquiry may be:

Have you ever been convicted of a crime? □ Yes □ No

There may be no instruction giving guidance as there is with the ASC application.

Depending upon the school the individual is applying to, the applicant may have a choice as to which application to use. For example, a student applying to SUNY New Paltz could elect to apply via the Common Application or the SUNY ASC application.[9]

[9] SUNY New Paltz is one of 11 of the 64 SUNY campuses that is a member of the Common Application.

Other Examples:

There are colleges that require extensive disclosure about criminal history that extends well beyond a felony or misdemeanor conviction. Below are examples of questions that appear on some far-reaching applications:

- Have you been adjudicated, processed, involved in pretrial diversion or entered into a contract through juvenile court, or arrested without a conviction?
  ○ Yes ○ No

- Have you ever been pardoned or had your record expunged in any court? If so, please provide details as to the crime and conviction. ○ Yes ○ No

- Have you ever entered into any pretrial diversion program as an adult? ○ Yes ○ No

- Have you been arrested for a crime or an offense? ○ Yes ○ No

These questions require applicants to disclose not only arrests that have resulted in criminal convictions, but also arrests for charges that have been dismissed, sealed, expunged, acquitted, pardoned, etc. For example, applicants who have been arrested in New York may be asked about arrests that resulted in a dismissal (and thus are sealed under CPL § 160.50), or a non-criminal offense (which may be sealed under CPL § 160.55), or a Youthful Offender adjudication, (which are deemed confidential under CPL § 720.35). Though these far-reaching questions are of debatable legality and clearly undermine the purpose of New York's sealing and Youthful Offender statutes, there is no law in New York that explicitly prohibits colleges from asking about or considering sealed arrests or arrests that resulted in Youthful Offender adjudications.[10]

These questions are likely to be confusing to college applicants who have been arrested, but whose arrest resulted in a sealing, Youthful Offender adjudication, expungement order, etc. These individuals have often been told by the judge and/or their defense lawyer that they need not disclose these arrests. But should they elect not to disclose, and risk that the college will learn of the arrest and act adversely against them assuming that they "lied" on the application, or should they disclose the arrest and risk not being accepted because of the arrest?

For a more thorough analysis of how to advise clients to answer the criminal history questions on college applications in light of the legal effects of New York's sealing statutes, conditional sealing, Youthful Offender and Juvenile Delinquency adjudications and other dispositions, see Part V of this Guide.

[10] Human Rights Law § 296(16) prohibits employers and occupational licensing agencies from asking about or considering sealed arrests and arrests that resulted in a Youthful Offender adjudication, but the statute does not extend its protections to the domain of higher education. There is an argument that for arrests that are sealed pursuant to CPL § 160.50, the arrest is a "legal nullity" that need not be disclosed. See CPL § 160.60.

Part II
CRIMINAL JUSTICE INVOLVEMENT: THE POTENTIAL IMPACT ON FEDERAL STUDENT LOAN ASSISTANCE

While many criminal defense attorneys are aware that a person's involvement in the criminal justice system may affect his or her ability to receive federal student loan assistance, there is confusion about the specifics of this impact. Convictions for what types of offenses might affect eligibility for student loan assistance? Does a conviction bar eligibility for life? Do only criminal convictions affect student loan eligibility, or can convictions for non-criminal offenses have an impact as well? These are just some of the commonly asked questions. To answer these questions and others, we begin with the general rule and then address the specifics.

The General Rule

A student's eligibility for any grant, loan, or work assistance is automatically *suspended* if the student is convicted of any *offense* under any state or Federal law involving the possession or sale of a *controlled substance*. This automatic suspension applies *only* if the conviction stems from conduct occurring while the person was receiving student aid. *See* 20 U.S.C. § 1091(r)(1).

The Specifics

• *The automatic suspension applies only if the conviction involves conduct that occurred while the student was receiving federal student loans.*

Prior to 2006, the automatic suspension applied to convictions stemming from conduct that occurred even when the student was not in receipt of federal student loans. But in early 2006, federal law was amended to narrow the student loan eligibility suspension to only convictions for conduct that occurred while the student was in receipt of federal student loans. *See* Pub. L. No. 109-71, § 8021, 120 Stat 4 (February, 2006).

The Federal Application for Federal Student Aid (FAFSA) application has been updated to reflect this amendment. Question #23 now asks the following: "*Have you been convicted for the possession or sale of illegal drugs for an offense that occurred while you were receiving federal student aid (grants, loans, and/or work study)?*" Applicants are specifically instructed to answer "No" if the offense was

for conduct that occurred while the applicant was not in receipt of federal student loan assistance.

• *The automatic suspension can apply to criminal* and *non-criminal offenses involving controlled offenses.*

20 USC § 1091(r)(1) suspends eligibility for federal student loan assistance upon a student's conviction for "*any offense*" involving a "*controlled substance*." "Offense" can include non-criminal as well as criminal offenses. To define "controlled substance," 20 USC § 1091(r)(3) incorporates the definition of "controlled offenses" set forth under 21 USC § 802(6), which includes marijuana. Thus, a student's conviction for Unlawful Possession of Marijuana under New York Penal Law § 221.05 will result in the student's suspension for eligibility for federal student loan assistance, despite the fact that this is a non-criminal offense.

• *The automatic suspension applies to any grant, loan, or work assistance as defined in 20 U.S.C. § 1070* et seq. *and 42 USC § 2751* et seq.

20 USC § 1091(r)(1) specifically suspends eligibility for "any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42." Chapter 28 of Title 20, entitled "Higher Education Resources and Student Assistance" is found at 20 USC § 1070, *et seq*. while part C of subchapter I of chapter 34 of Title 42 refers to "Federal Work Study Programs," which is found at 42 USC § 2751 *et seq*.

• *The period of the automatic suspension depends upon the type of conviction and the number of prior offenses.*

The duration of the suspension begins on *the date of the conviction* and ends after the following intervals:

Type of offense	Ineligibility Period for 1st Offense	Ineligibility Period for 2nd Offense	Ineligibility Period for 3rd Offense
Possession of a controlled substance	1 year	2 years	Indefinite
Sale of a controlled substance	2 years	Indefinite	Indefinite

• *Under certain circumstances, the ineligible student may be able to receive federal student loan assistance prior to the expiration of the suspension period.*

There are three ways by which a student may prove his or her "rehabilitation" and thereby be permitted to receive federal student loan assistance prior to the expiration of the suspension period.

First: The student *completes a drug rehabilitation program* that: (i) complies with criteria established by the Secretary of Education; and (ii) includes two unannounced drug tests. *See* 20 USC § 1091(r)(2)(A). The Secretary of Education's criteria for drug rehabilitation programs are found at 34 CFR § 668.40, and include programs that: have received or are qualified to receive funds under a Federal, State or local government program; are administered by a Federal, State, or local government agency or court; have received or are qualified to receive payment from Federally or State licensed insurance company; or are administered or recognized by a Federally or State licensed hospital, health clinic, or medical doctor.

Second: As part of a drug rehabilitation that meets the criteria established by the Secretary of Education (set forth above), *the student successfully passes two unannounced drug tests*. *See* 20 USC § 1091(r)(2)(B).

Third: The student's conviction is "reversed, set aside, or otherwise rendered nugatory." *See* 20 USC § 1091(r)(2)(C).

The Hope Scholarship Tax Credit

A conviction for a controlled substance offense may also limit a student's eligibility for the Hope Tax Credit. The Hope Tax Credit allows for tax credits to students or their taxpaying family member, who have incurred education expenses related to the first two years of post secondary education. *See generally* 26 USC § 25A. This tax credit, however, "shall not be allowed for qualified tuition and related expenses for the enrollment or attendance of a student for any academic period if such student has been convicted of a Federal or State felony offense consisting of the possession or distribution of a controlled substance before the end of the taxable year with or within which such period ends." *See* 26 USC § 25A (b)(2)(D).

Part III
DUTY TO COUNSEL CLIENTS ON ENMESHED CONSEQUENCES OF CRIMINAL JUSTICE INVOLVEMENT

Introduction

For the past three decades, a growing number of professional organizations, including local, state, and national bar organizations, have recognized that defense counsel have a duty to advise their clients of the "invisible" consequences of a criminal conviction – that is, those penalties that are not pronounced in court at sentencing, but which flow from the conviction and have the potential to significantly impact a person's life. The recognition of this duty arises from the reality that in today's world, a criminal conviction results in life-long punishment.

There are at least three phenomena that have contributed to this perpetual punishment:

1) Decision-makers in the domains of employment, housing, volunteer work and other areas are increasingly more likely to conduct criminal history record checks on applicants.[11]

2) The incredible growth of private, for-profit background check companies has made it easier and less-expensive to obtain a person's criminal history record. As noted by a recent report: "*Despite its promotion as a public service, the sale of criminal background reports has become a big business generating billions of dollars in revenue. The Internet has facilitated the emergence of scores of online background screening companies, with many claiming instant access to millions of databases.*"[12]

3) Our "tough on crime" policies have not only resulted in harsher sentencing laws, but also a growing array of barriers to employment, housing, public benefits, and student aid for people with criminal records. The existence of these needless barriers to living a full, law-abiding life in the community was aptly captured in a recent report of a special committee of the New York State Bar Association, which concluded as follows:

[11] This growing trend of colleges and universities to conduct background checks is discussed in CCA's report, "*The Use of Criminal History Records in College Admissions Reconsidered.*"
[12] National Consumer Law Center, "Broken Records: How Errors by Criminal Background Check Companies Harm Workers and Businesses," (2012), available at: http://www.nclc.org/issues/broken-records.html

New York has unwittingly constructed formidable barriers to those attempting to re-enter society following interaction with the criminal justice system... As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life - family, shelter, work, civic participation, and financial stability. These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price.[13]

The Standards and Guidelines

Professional organizations now recognize that because of the life-long, albeit "invisible," nature of the consequences of a criminal conviction, people arrested for a criminal offense cannot make informed decisions about possible dispositions of their cases unless the "invisible" penalties are revealed to them. A sampling of these professional standards and guidelines requiring counsel to identify and discuss these so-called "invisible penalties" – most often referred to as "collateral consequences" – is set forth below:

AMERICAN BAR ASSOCIATION: CRIMINAL JUSTICE STANDARDS

In 1993, the American Bar Association (ABA) adopted "black letter" standards for criminal defense lawyers, prosecutors and judges which are set forth in the *"ABA Standards for Criminal Justice."* The section pertaining to guilty pleas, *Criminal Justice Standards on Pleas of Guilty*, includes the following standard:

> **Standard 14-3.2. Responsibilities of Defense Counsel**
> (f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from the entry of the contemplated plea.

Ten years later, in 2003, the American Bar Association went a significant step further, adopting *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons.* One commentator referred to these new standards as the "first effort since

[13] Special Committee of the New York State Bar Association, "Re-Entry and Reintegration: The Road to Public Safety," (available at the publications section of the New York State Bar Association at www.nysba.org), at 443.

the 1970s to address the collateral legal consequences of a conviction in a coherent and comprehensive fashion."[14]

The ABA's comprehensive approach to hidden punishments includes standards that are designed to accomplish the following: i) *expose hidden punishments* by requiring legislatures to collect and compile all collateral punishments in a single part of the jurisdiction's criminal code; ii) *limit the existence of hidden sanctions* by prohibiting legislatures from imposing collateral sanctions that are not necessary to promote safety; iii) *ensure that defendants are notified* of hidden sanctions; iv) *require consideration of* hidden sanctions by requiring judges to consider such sanctions when deciding upon a sentence; v) *ameliorate* hidden sanctions by calling upon legislatures to enact laws and procedures that allow for review or modification of and waiver or relief from these sanctions; and vi) *prohibit* unreasonable discrimination based upon a person's conviction history.

Unfortunately, these ABA standards differentiate between "collateral sanctions" and "discretionary disqualifications" stating that the stronger standards apply to the former while the weaker ones apply to the latter. "Collateral sanctions" are defined as "a legal penalty, disability or disadvantage, however, denominated, that is imposed on a person automatically upon that person's conviction for a felony misdemeanor or other offense, even if it is not included in the sentence," while "discretionary disqualification is "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction." The financial aid bars described in Part II of this manual are clearly "collateral sanctions," necessitating that, at the very least and *prior* to the entry of a guilty plea, defense counsel identify and counsel clients on this hidden sanction, and the possible dispositions that can ameliorate or avoid it.

The barriers to admission to college, which are described in Part I of this manual, can be characterized as "discretionary disqualifications." However, defense counsel should not view the ABA standards as alleviating their responsibility to counsel clients on the barriers to college admission that are erected by criminal justice involvement. This is true for several reasons. First, the barriers to college admission are real and significant, as discussed in CCA's report, *The Use of Criminal History Records in College Admissions Reconsidered.* From the perspective of a person with a conviction history who is seeking admission to college, the reality of this sanction is not diminished merely because it is not codified. Second, other professional standards, some of which are set forth below, do not make this distinction. Finally, for good reason, the ABA's distinction has been criticized by practitioners who regularly work with people who have a past conviction history. As one practitioner stated: "[M]any of the most dangerous hidden punishments qualify only as 'discretionary disqualifications' under the current definition. Most immigration, public housing, and employment decisions require the intervening decision of an independent court, agency, or official." [15]

[14] Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URBAN L. J. 1705, 1727 (2003).
[15] McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 UNIVERSITY OF TOLEDO L. R. (2005) 479, 493.

NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION

In 1995, the National Legal Aid and Defenders Association (NLADA) adopted *Performance Guidelines for Criminal Defense Representation*. Several sections of the NLADA Guidelines instruct defense counsel of their responsibilities with regard to the life-long consequences of criminal justice involvement, including the following:

Guideline 6.2. The Contents of Plea Negotiations
(a) In order to develop an overall negotiations plan, counsel should be fully aware of, and make sure the client is fully aware of: …
(3) other consequences of conviction, such as deportation, and civil disabilities…

Guideline 6.4. Entry of the Plea before the Court
(a) Prior to the entry of the plea counsel should:
(2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions *and other consequences the accused will be exposed to by entering a plea.* (Emphasis added).

Guideline 8.2. Sentencing Options, Consequences and Procedures
(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
(8) deportation;
(9) use of the conviction for sentence enhancement in future proceedings;
(10) loss of civil rights;
(11) impact of a fine or restitution and any resulting civil liability;
(12) restrictions on or loss of license.

NEW YORK STATE BAR ASSOCIATION

In 2010, the New York State Bar Association (NYSBA) issued its Revised Standards for Mandated Representation, designed to ensure the delivery of high quality criminal defense services. The following Standards discuss counsel's duties relevant to the so-called "collateral" consequences of a criminal conviction:

Standard I-7: Criminal Matters
No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high quality representation. Such representation at the trial court stage means, at a minimum:
a. Obtaining all available information concerning the client's background and circumstances for purposes of … (v) avoiding, if at all possible, collateral consequences including but not limited to deportation or eviction…

e. Providing the client with full information concerning such matters as … (v) immigration, motor vehicle licensing, and other collateral consequences under all eventualities…

NEW YORK STATE DEFENDERS ASSOCIATION

In 2004, the New York State Defenders Association adopted "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State." Standard VIII, A, Duties of Criminal Defense Counsel, includes the following as number 7:

> Counsel should ordinarily meet with the client before entering into plea negotiations, and should explore the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial…. **Counsel should be fully aware of and make sure the client is fully aware of, all direct and potential collateral consequences of a conviction by plea.** Counsel should develop a negotiation strategy based on knowledge of the facts and law of the particular case, the practices and policies of the particular jurisdiction, and the wishes of the client....

This standard puts squarely upon defense counsel the duty of identifying and discussing with the client what the life-long consequences of a conviction may be. The NYSDA standard does not distinguish between "collateral sanctions" and "discretionary disqualifications," but instead requires defense counsel to learn of all "direct *and potential* collateral consequences."

The Duty to Counsel

Taken as a whole, these professional standards and guidelines clearly lay out the duty of defense counsel to fully inform clients about the enmeshed penalties of a criminal conviction. *See Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct. 1473, 1482 (2010) (citing these and other sources in holding that the Sixth Amendment right to the effective assistance of counsel mandates that non-citizen defendants be provided advice, prior to pleading guilty, on the immigration consequences of a conviction).

In the context of barriers to higher education, what does this duty to counsel mean? This question is discussed more fully in the next section of this Guide entitled, *Practice Tips: Providing Advice and Representation.*

Part IV
PRACTICE TIPS:
PROVIDING ADVICE AND REPRESENTATION

Advising clients about barriers to higher education caused by a criminal history record has taken on new importance in light of the expanding use of criminal history screening in college admissions discussed in Part I.

There is a second phenomenon that heightens the need for attorneys to provide representation and advice with this particular barrier in mind – mass criminalization. A criminal history record is now commonplace. As of December 31, 2008, over 92 million adults in the U.S. have a criminal history record (for a misdemeanor or felony arrest or conviction) on file with one of the state criminal history central repositories.[16] A study published in 2012 shows that nearly one-third of American adults have been arrested for illegal or delinquent offenses, excluding minor traffic offenses, by age 23.[17] One of the authors of this study, Robert Brame, told USA Today that, "Arrest is a pretty common experience."[18]

Since there are currently more than 20 million[19] college students enrolled at institutions that confer degrees, undoubtedly, in the course of your practice you will encounter a situation in which you will need to provide guidance and advocacy for a client regarding this issue.

In this part we will address this issue in two different contexts. First, we will discuss advice and representation that should be provided while the criminal case is pending, for both the currently enrolled college student and for the aspiring student who intends to apply to college. Second, we will discuss advice that an attorney should provide after the disposition of the criminal case with regard to the college application process.

Advice and Representation While the Case is Pending

Your representation in most criminal cases should include interviewing and advising your client as to the following:

[16] Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008*, CRIMINAL JUSTICE INFORMATION POLICY REPORT, Washington, D.C., October 2009.
[17] Robert Brame, Michael G. Turner, Raymond Paternoster, and Shawn D. Bushway, "*Cumulative Prevalence of Arrest From Age 8 to 23 in a National Sample*," PEDIATRICS, (January 2012): 21-27.
[18] Donna Leinwood, "Study: Nearly One in Three Will Be Arrested by Age 23," *USA Today*, Dec. 19, 2011.
[19] National Center for Educational Statistics, Digest of Educational Statistics (enrollment fall 2009), Table 196.

1. *Determine if your client is currently enrolled in college. If so,*

   Determine if your client is currently receiving financial aid; if so, advise your client as to the consequences of a conviction for a drug offense.[20]

   i) Determine what the college policy is with regard to arrests and convictions while enrolled as a student to decide if your client has an affirmative duty to disclose the arrest or conviction to college officials, and if so, what the implications of this disclosure will be as well as the implications of failing to disclose.

   ii) Determine if your client will be subject to a college administrative hearing and what the procedures will be and advise accordingly.

   iii) Explain the consequences of a criminal conviction with regard to applying to graduate school and/or pursuing a career that requires occupational licensing. Many careers, not just professional ones, require some kind of licensing. A helpful resource for attorneys whose clients live and work in New York is the Legal Action Center's "New York Occupational Licensing Survey." [21]

2. *If your client is not currently enrolled in college, determine if your client aspires to continue his or her education to the post-secondary level. If so,*

   i) Explain how a criminal conviction may cause barriers to admission to institutions of higher education and how criminal history records are used to screen students in the admissions process at a majority of colleges and universities.

   ii) Talk to your client to help him or her prioritize what consequences of the criminal conviction he or she wants to address.

   iii) Explain to your client the possible and realistic dispositions of the case and how each may ameliorate the consequences in terms of his or her higher education goals.
   - Youthful Offender Adjudication
   - Adjournment in Contemplation of Dismissal
   - Dismissal
   - Plea to a violation
   - Plea down from felony to misdemeanor
   - Sealing Statutes (CPL 160.50 and CPL 160.55)

   iv) Discuss with you client and provide advice about the best and realistically achievable disposition.

[20] See Part II of this Guide.
[21] This survey is available on-line at: http://lac.org/doc_library/lac/publications/Occupational%20Licensing%20Survey%202006.pdf.

v) Explain to your client what can be done to ameliorate the disposition, including, for example, applying for the following:
- Certificate of Relief from Disabilities or Certificate of Good Conduct pursuant to Correction Law § 700, et seq.
- Conditional Sealing (CPL §160.58)

vi) Carefully describe and clarify the nature of the disposition of the case so that the client can later explain the disposition on an application or during an interview. It is best to follow up this conversation with a letter so your explanation is memorialized in writing for your client to review at a later date in time.

3. Whether or not your client is in college at the time of arrest, explain how he or she can obtain a copy of his or her official criminal history record and recommend that this be done. This will provide your client an opportunity to check to make sure that the disposition was properly recorded and that the record properly reflects any sealing, conditional sealing, or YO adjudication from which your client should have benefited.[22] Impress upon your client the importance of doing this. Explain that if the answer he or she gives to a criminal history question does not correspond to the background check that the college receives, the college may use this as a basis to deny admission. CCA's study found that college admissions officers are likely to assume that a student has falsified an application even when it is an honest misunderstanding or when the background check is erroneous and contains information at odds with the applicant's disclosure.[23]

4. Develop and employ the negotiation strategies discussed in Part VI of this guide.

[22] Instructions on obtaining a personal DCJS record are available at: http://www.criminaljustice.ny.gov/ojis/recordreview.htm. Instructions on obtaining a personal FBI criminal history record are available at: http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi.

[23] *The Use of Criminal History Records in College Admissions Reconsidered* at p. 19. Thirty-two percent of schools that consider criminal history information reported that they automatically deny admission to applicants who fail to disclose their criminal record and 46 percent stated that they might deny admission. Most of the comments offered in conjunction with this question on the CCA survey suggest that failure to disclose a criminal record is considered to be a deliberate act of lying or falsification.

Post-Disposition Advice About the College Admissions Process

After the disposition of the case you close your file. However, for your clients, the enmeshed consequences that flow from the case never allow them to close their files. Long after a case is over, a former client may return to your office with questions about a college application, or a new client may consult with you about her desire to apply to college but concerned that her criminal history may stand in the way. Below are some issues that you may want to explore with your client should you find yourself in this situation.

1. Help your clients obtain their criminal history record from the Division of Criminal Justice Services (DCJS) and the FBI.[24] This will allow you and your clients to know exactly what their criminal history is.

   - Do not rely on your clients' recollection of the disposition. Most people are confused about what their record is and as a result, do not accurately report it. Explain to your clients why accuracy is important and as noted above, make them aware that any inaccuracy in their reporting of a disposition may cause the admissions officer to assume that they are intentionally falsifying information if it is different than what appears on a background check.

2. Carefully review the criminal history record with your clients. Review each cycle shown to identify:

   - errors, oversights, mistaken entries, etc.
   - pending arrests and/or incomplete entries.

3. Correct errors that you find in the DCJS record and resolve incomplete cycles. These corrections may include:

   - Incorrect dispositions
   - Failure to indicate that an arrest resulted in a Y.O. adjudication
   - Failure to enter sealing order

[24] *See* note 21, *supra.*

4. For each cycle/disposition, explain to your clients what the disposition actually was and the legal significance. Here is some common terminology that needs to be explained:

- Was there a conviction for a felony, misdemeanor, or violation?
- Is the disposition reportable as a criminal conviction?
- What does an "A.C.D." mean? What does a "C.D." mean?
- What does a Y.O. adjudication mean?
- What does it mean if your client's case was handled in Family Court as a J.D.?
- What if your client's case was handled in adult court as a J.O.?
- What does a sealing under CPL § 160.50 or § 160.55 mean?
- What about a conviction that has been conditionally sealed under CPL § 160.58?

5. Explain to your clients how each disposition legally entitles them to respond to questions that may be included in any application. *For example:*

- Have you ever been convicted of a crime?
- Have you ever been convicted of an offense?
- Have you been convicted of a felony?
- Have you ever been convicted of a misdemeanor, felony or other crime?
- Have you ever been arrested?

6. Explain to your clients that different colleges have different policies. About one-third of all colleges do not consider criminal records, however, a majority of colleges do. Some colleges rely entirely on self-disclosure while others do their own background checks or pay a private company to do so. Still others utilize self-disclosure, and for positive responses, engage in a more far-reaching backgrounding and disclosure process. CCA's report, *The Use of Criminal History Records in College Admissions Reconsidered,* is helpful to familiarize yourself with many of the different policies.

7. Explain to your clients that while some colleges use the criminal justice information to exclude all or some people with certain types of convictions, other colleges do not engage in automatic exclusions, instead using a more balanced and thoughtful approach. For example:

- SUNY relies on the multi-factor analysis of Article 23-A of New York's Correction Law.
- For clients interested in a SUNY school, review Article 23-A with them.

8. Review an application, or several different applications with your client, with an eye towards the particular criminal history question contained in each.

- Point out the differences in how the SUNY application, the Common Application, and the CUNY application treat the criminal history question.

9. With these three types of applications in mind, you should point out that different applications ask the criminal history question in significantly different ways and that some do not ask at all.

10. Help your client choose which application to use. Some colleges use an application form that is unique to their own college or campus. Other colleges that are part of a state or city-wide system accept either the system-wide applicant (i.e. SUNY ASC) or their own unique form. These same schools may also be members of the Common Application and will accept that application form as well. Since each of these application forms may ask a significantly different version of the criminal history question, it is in your client's best interest to wisely choose which application to use.

- Compare the SUNY application criminal history question with how that question is worded in the Common Application.
- Note how an applicant with a misdemeanor conviction would not have to disclose that conviction when responding to the SUNY application but would have to disclose when responding to the Common Application question.

11. Different application forms provide different instructions regarding responses to the criminal history question. Some provide no instructions at all. Note that the instructions may differ significantly, particularly regarding what dispositions need not be reported (exclusions).

- Compare the exclusions in the SUNY application and in the Common Application. (See Part I).
- A review of these instructions and exclusions will help you guide your client as to which application to use when there is a choice of using two different applications for the same college. (i.e. Some SUNY schools accept either the SUNY ASC application or the Common Application).

12. Some colleges are much more transparent and forthright in the process they use when screening from criminal history records, while others are far less transparent about their process. When possible, review with your client the policies of the schools in which he or she has expressed an interest.

13. Review with your client whether his conviction for a drug offense (felony, misdemeanor, or even a violation) occurred while he was receiving federal student aid. If so, explain the automatic suspension period that is applicable and if the suspension period is still in effect, explain what your client can do to become eligible for federal student assistance by proving "rehabilitation." (See Part II of this Guide).

14. Prepare and encourage your client to proactively submit proof of rehabilitation, transformation, changes in goals and attitudes, insights into prior criminal behavior, and reasons he or she is pursuing higher education. This may be part of a personal statement he or she submits with the application.

15. Warn your client about the danger of providing too much information. Some schools do not ask for self-disclosure of criminal history information on the application. However, if an applicant supplies such information in a personal statement or essay, that information may trigger further inquiry from the admissions office that would not have been made had the information not been volunteered. For some of your clients this may be a difficult choice. Understandably the applicant may be very proud of the accomplishment and transformation in his or her life during and/or post-incarceration and want to share it. This should be done with great caution and careful forethought.

16. Encourage your client to request a personal interview when possible. Prepare your client for this interview.

- How to address criminal history
- How to discuss rehabilitation, transformation, motivation, and lessons learned

17. Explain to your client what he or she can do to mitigate his or her criminal history.

- Certificate of Relief from Disabilities or Certificate of Good Conduct
- Conditional sealing

18. A difficult question arises if your client applies to a college that asks applicants to provide the admissions office with a personally-obtained DCJS criminal history record. For most SUNY colleges, this is now standard practice once an applicant discloses a felony conviction on the application as discussed in Part I. A review of the client's DCJS record will allow you to point out that there may be information shown on the record that would otherwise be sealed from public view or is confidential. Disclosure does not mean automatic denial of admission, but your client should be forewarned. Your client may wish to proceed or may decide to save the time and effort and apply to a school where the talent, diversity, perspective, and other contributions to campus life that he or she has to offer will be appreciated.

Part V
HOW TO ADVISE A CLIENT ABOUT ANSWERING THE CRIMINAL HISTORY QUESTION ON A COLLEGE APPLICATION

Practice Advisory

Advising a client about how to respond to the criminal history question on a college application – which has various versions depending on the application - is indeed challenging. It requires both a mastery of New York's sealing and confidentiality laws that are intended and carefully designed to prevent discrimination and avoid the stigma that attaches from an arrest or conviction. It requires a deep understanding of how criminal justice information can contain errors, be misconstrued, and be easily accessed. It also requires giving careful guidance when simple legal answers do not suffice. As noted at the end of Part I, it requires a balancing of the "black and white" legally defensible answer with the more nuanced concern that an admissions officer will not understand the legal justification for a negative response to the criminal history question and will instead assume that there has been an intentional misrepresentation if he or she becomes aware of some seemingly contrary criminal history information. This may result in a denial of admission (or, after admission, a dismissal) without providing the applicant with an opportunity to explain.

In some instances, the application questions that call for the disclosure of information that has been sealed or deemed confidential results from admissions officers' lack of expertise about criminal justice issues. In many other instances, however, college admissions officials have intentionally designed questions that require the disclosure of sealed and confidential information. Such questions are not merely improper and possibly illegal, they also thwart public policy designed to protect against the disclosure of certain information as a means of preventing needless discrimination, promoting a person's successful reintegration into the community, and ultimately enhancing public safety. It is ironic that in their efforts to keep their college campuses safe, some gatekeepers of higher education flagrantly violate public policy and evade legal restrictions. Not only do these improper questions create a dilemma for the applicant, they send a message that in the name of campus safety, many admissions officers have come to engage in questionable practices.

Though improper and possibly illegal, many colleges persist in this problematic practice. When advising their clients, thoughtful lawyers balance the practical reality that colleges often act adversely against applicants who do not disclose the requested information against the legally

authorized responses that college applicants may provide. As you guide your client through the criminal history question(s) on the application you must ensure that your explanation of each of the legally defensible answers suggested below, or the many others that we have not anticipated, are accompanied by a counseling session that reviews the pros and cons of the responses and the possible repercussions caused if the college later learns of the information that the applicant elected - lawfully – to keep confidential. Do not simply provide the answer suggested below. Your most valuable advice is that which is practical.

Never assume that any particular answer is safe and that information will not arise at a later date to contradict the answer provided on the application. Information about your client's criminal history may be revealed in any number of ways. More and more colleges are using internet searches, Facebook searches and the like to search for background information. Some colleges use private background checks. Others require background checks for participation in subsequent internship programs. Disgruntled fellow students have been known to contact the admissions office upon learning of a fellow student's past arrest. For those students who may have multiple criminal justice entries, disclosure of one, perhaps a valid conviction, may lead to disclosure of another that would otherwise be kept confidential.

Legally Authorized Answers to Common College Application Questions

Below are legally authorized answers to questions that commonly appear on college applications with a brief justification for the answer.

I. If your client was adjudicated a Youthful Offender

Question: Have you been convicted of a crime?

Answer: No.

The answer "no" to this question is based upon the Youthful Offender statute itself, CPL § 720.35. The statute provides that:

> *1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense…*
> *2. Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential…*

Question: Have you been adjudicated guilty of a crime?

Answer: No.

Although the question asks about an adjudication of guilty of a crime rather than about a conviction the answer remains "no." This is how the question is posed on the Common Application. There are at least two reasons why the answer to this question would be "no," if responding to the common application. First, a Youthful Offender adjudication is comprised of a Youthful Offender finding and a Youthful Offender sentence. [CPL § 720.10 (6)]. It is not an adjudication that one is guilty of a crime. Second, the Common Application excludes from this question any adjudication that has been ordered by a court to be kept confidential. Upon the judge adjudicating a youth a Youthful Offender, CPL § 720.35 (2) specifically provides that all official records are confidential. It would appear that the adjudication and statute would place a Youthful Offender adjudication within the Common Application's confidentiality exclusion.

Question: Have you been arrested for a crime?

Answer: Yes, although the more legally correct - albeit less practical - response is to refuse to answer this question based upon the confidentiality bestowed by the Youth Offender statute.

This is a good example of a question that is improper to ask on an application. The law in New York is quite clear that the confidentiality conferred by CPL § 720.35 (2) attaches not only to the physical documents constituting the official record of the adjudication of a Youthful Offender but also to the information contained in those documents, including the arrest and the charges. *Barnett v. David M.W.*, 22 A.D.3d 575 (2nd Dept. 2005). As the court in *Barnett* held, a person adjudicated a Youthful Offender can refuse on grounds of confidentiality to answer questions about charges filed against him or her. To require disclosure of charges or an arrest by a person adjudicated a Youth Offender would undermine the statutory grant of confidentiality. *State Farm Fire and Casualty Co. v. Bongiorno*, 237 A.D.2d 31 (2nd Dept. 1997). College admissions officers – or at least their legal counsel - should know this. Yet they continue to ask the question knowing that practically, applicants cannot refuse to respond based upon confidentiality. This question on a college application flies in the face of the public policy of which "the confidentiality of information is part of the comprehensive legislative plan to relieve youth offenders of the consequences of a criminal conviction and give them a 'second chance.'" *Id.* at 36.

This question also helps to illustrate another strategy you may wish to employ. Although a particular college's application may ask about arrests and create the quandary about how to reply for your client who was adjudicated as a Youth Offender, you may want to determine whether that very same college accepts the Common Application, which does not ask about arrests but only convictions.

II. IF YOUR CLIENT WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND THE CASE WAS SUBSEQUENTLY DISMISSED

Question: Have you been convicted of a crime?

Answer: No.

The answer "no" is based upon the ACD statute itself, which provides that an ACD "shall not be deemed a conviction or an admission of guilt." [CPL § 170.55 (8)].

Question: Have you been arrested for a crime?

Answer: No.

The answer "no" in this context requires some statutory analysis coupled with case law:

- Both ACD statutes, CPL §§ 170.55 (8) and 170.56 (4) provide that upon the dismissal of the accusatory instrument "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution."
- Since an ACD dismissal meets the definition in CPL § 160.50 (3) of a "termination of a criminal action in favor of the accused" it gets the benefit of the provisions of CPL § 160.60, which provides both that "the arrest and prosecution shall be deemed a nullity" and that "no such person shall be required to divulge information pertaining to the arrest or prosecution." This key terminology ties into the holding in two cases below, *Kushner v. De La Rosa* and *People v. Ellis*.
- In *Kushner v. De La Rosa*, 72 Misc.2d 319 (Sup. Ct. Queens Co. 1972) the court focused on the language in the ACD statute – "the arrest…shall be deemed a nullity…" to conclude that a person who is conferred the benefit of such statutory language is entitled to legally deny a question about the arrest.
- The court in *People v. Ellis,* 184 A.D.2d 307 (1st Dept. 1992) also concluded that a person could deny an arrest when the criminal action was terminated in favor of the accused, however the *Ellis* court focused on different language. Relying upon the language of CPL § 160.60 that provides that "no such person shall be required to divulge information pertaining to the arrest or prosecution," the court concluded that a person could "deny the existence of prior arrests" that resulted in dismissal of charges and were sealed. The negative answer to the arrest question condoned by the holding in *Ellis* was recently approved in *Padilla v. Bailey*, 2012 WL 4473958 (SDNY 2012).

III. If your client's case was dismissed and sealed pursuant to CPL § 160.50

Question: Have you been convicted of a crime?

Answer: No.

Because the charge has been dismissed there has been no conviction.

Question: Have you been arrested for a crime?

Answer: No.

The legally proper answer is "no" because the sealing pursuant to CPL § 160.50 receives the protection of CPL § 160.60. The language in CPL § 160.60 and the applicable case law – *Ellis* and *De La Rosa* – for the reasons discussed above in the ACD section authorize a person to legally deny the arrest question.

As noted above, knowing the legal answer is only half of the equation in giving sound advice to your client. What if this arrest surfaces later? What if the college requires a DCJS criminal history record for another conviction, and this arrest is revealed? It is important to know the law and the protection it provides, but to also consider the practical implications of denying the arrest.

IV. If your client was convicted of a violation with or without CPL § 160.55 sealing

Question: Have you been convicted of a crime?

Answer: No.

The answer is "no" based upon the definition of "crime" found in Penal Law § 10.00 (6) which is defined as "a misdemeanor or a felony." A conviction for a violation is neither and is therefore not a crime.

Question: Have you been convicted of an offense?

Answer: Yes.

The answer is "yes" because under the Penal Law, a violation is defined as an offense. The answer is "yes" even if the violation was sealed pursuant to CPL § 160.55. This is because a CPL § 160.55 sealing does not benefit from CPL § 160.60, and thus there is nothing defining a CPL § 160.55 sealing as a "legal nullity" which one shall not "be required to disclose." Moreover, though Human Rights Law § 296(16) states that *employment* applicants shall not be required to divulge arrests that resulted in CPL § a 160.55 sealing, this protection does not explicitly extend to the domain of higher education.

Question: Have you been arrested for a crime?

Answer: No - if the arrest charges included only violation charges, since a violation is not a crime.
Yes - if the arrest charges included at least one misdemeanor or felony offense, which are criminal offenses.

Question: Have you been arrested for any offense?

Answer: Yes.

For the same reasons discussed above about the question regarding a conviction for an offense, there appears to be no protection from such a question.

V. IF YOUR CLIENT WAS CONVICTED OF A CRIME BUT THE CONVICTION WAS CONDITIONALLY SEALED PURSUANT TO CPL § 160.58

Question: Have you been convicted of a crime?

Answer: Yes.

CPL § 160.58 sealing does not benefit from CPL § 160.60 and its "legal nullity" language. Additionally, while Human Rights Law § 296(16) prohibits employers from asking job applicants to disclose conditionally sealed convictions, this statute does not explicitly extend to the higher education domain. Thus, there appears to be no protection from such a question.

Exception: If the instructions to the criminal history question in the application provide for an exclusion for sealed records then the answer to this question should be "no."

Question: Have you been arrested for a crime?

Answer: Yes.

For the same reasons stated above, there appears to be no protection from such a question.

VI. IF YOUR CLIENT WAS CONVICTED AS A JUVENILE OFFENDER

Question: Have you been convicted of a crime or a felony?

Answer: Yes to either question.

Since a Juvenile Offender is treated as criminally responsible as an adult and because the juvenile is considered to have an adult criminal record, the answer is "yes."

Exceptions:

i) If your client was adjudicated a Youthful Offender after the Juvenile Offender conviction then the answer to this question would be "no" because there has been no conviction for a crime as explained in the above section on YO. [CPL § 720.35 (1)].

ii) Note should be taken for a client who is applying to a SUNY college. In 2012 SUNY issued a draft FAQ that instructed that "if an applicant was convicted of a felony as a Youthful Offender, Juvenile Delinquent, or Juvenile Offender, or has otherwise had their records sealed…" the applicant "should answer 'no'" to the criminal history question on the application.

Question: Have you been arrested for a crime?

Answer: Yes.

There is no apparent protection from this question even if the Juvenile Offender was adjudicated a Youthful Offender. See note to YO question above.

VI. If your client was adjudicated a Juvenile Delinquent in Family Court

Question: Have you been convicted of a crime?

Answer: No.

The answer to this question is "no" based upon the provision in the Family Court Act § 385.1 (1) that a Juvenile Delinquency adjudication shall not be denominated a conviction and no such person so adjudicated shall be denominated a criminal.

Question: Have you been adjudicated guilty of a crime?

Answer: No.

Although the question asks about adjudication rather than conviction, the answer remains "no." Section 380.1 (1) of the Family Court Act provides that no adjudication as a JD shall be denominated a conviction nor shall such juvenile "be denominated a criminal." That provides some basis for a negative answer. In addition, Family Court Act § 380.1 (3) provides that "no person shall be required to divulge information pertaining to the arrest…or any subsequent proceedings" regarding a juvenile delinquency proceeding. That non-disclosure language is the same as the language focused upon by the court in *People v. Ellis,* 184 A.D.2d 307 (1st Dept. 1992) to authorize a negative response to an inquiry about an arrest. Counsel should also review the Family Court records with the client. You may find that the records were expunged (Family Court Act § 375.3), sealed (Family Court Act § 375.1, or destroyed (Family Court Act § 354.1). Once you have determined the status of the juvenile delinquency records you may find

that the instruction to the criminal history question provides exclusions for adjudications that have been expunged, sealed or destroyed, as is the case for the Common Application.

Question: Have you been arrested for a crime?

Answer: No.

For some of the same reasons addressed above regarding the question about whether the applicant was adjudicated guilty of a crime, the appropriate answer is "no." Reliance upon the statutory language that prohibits requiring any person "to divulge information pertaining to the arrest" regarding a juvenile delinquency proceeding when read in conjunction with the *Ellis* case provides sound basis for a negative response to this question.

Part VI
USING THE EXISTENCE OF THE ENMESHED CONSEQUENCES AS LEVERAGE FOR BETTER ADVOCACY AND OUTCOMES

In a 2009 landmark decision, the United States Supreme Court held that criminal defense attorneys have the affirmative duty to accurately inform their non-citizen clients of the immigration consequences of a guilty plea, particularly deportation. *See Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct. 1473 (2010). While the *Padilla* decision deals most directly with the advice that defense counsel must provide to their non-citizen clients, the decision also encourages defense counsel to use the *existence* of the so-called "collateral consequences" of a conviction to leverage better outcomes.

The *Padilla* underpinnings for this strategy, and approaches to best effectuate it, are outlined in The Bronx Defenders publication, "Defender Toolkit & *Padilla* Compliance Guide: Using Knowledge of 'Enmeshed Penalties' (or Collateral Consequences) to Get Better Results in the Criminal Case." ("*Padilla* Compliance Guide"). This publication is available at: http://www.reentry.net/ny/library/item.135140.

McGregor Smyth has also written the following two companion articles that discuss in more detail how to use the existence of "collateral consequences" to leverage better dispositions:

> "*From 'Collateral' to 'Integral': The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*" HOWARD LAW REVIEW, Vol. 54, No. 3, 795 (2011), available at: www.reentry.net/ny/library/folder.128172-Manuals_and_Overviews_of_Reentry_and_Collateral_Consequences.
>
> "'Collateral' No More – The Practical Imperative for Holistic Defense in Post-Padilla World… Or, How to Get Consistently Better Results for Clients," in publication, *will be available at: www.reentry.net/ny/library/folder.128172-Manuals_and_Overviews_of_Reentry_and_Collateral_Consequences*.

Many of the concepts discussed below are taken from the Bronx Defender's "*Padilla* Compliance Guide" and McGregor Smyth's articles. The information in this part is not intended to supplant the "*Padilla* Compliance Guide" or articles, but instead to pique the interest of defense attorneys and encourage them to read further.

Padilla Revisited: A Framework for Better Advocacy

For years, advocates have recognized the ever-increasing punishments associated with criminal justice involvement and described its broader impact on lawyering:

> *From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability of criminal history data to alter drastically the impact of criminal charges on clients – and the practice for lawyers.*[25]

In *Padilla*, the United States Supreme Court recognized that these so called "collateral consequences" can result in life-long punishment, and that it is no longer constitutionally permissible for defense lawyers to ignore this reality in representing their clients. The Court urged lawyers to defend their clients in a manner that takes into account and, where possible, ameliorates the life-long consequences of criminal justice involvement. The Court did so in two significant ways:

> • **First, the *Padilla* Court summarily rejected the oft-relied upon legal fiction that there is a distinction between "direct" and "collateral" consequences of a criminal conviction**. For years, courts throughout the country had held that defendants did not receive ineffective assistance of counsel when their lawyers failed to advise them of the life-long consequences of their conviction. Courts did so by adopting the legal fiction that these punishments are not the "direct" result of the conviction, but are instead merely "collateral." The *Padilla* Court soundly rejected this legal fiction, stating: "We have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Padilla*, 130 S.Ct. at 1481. While it is true that deportation is "civil" in nature and not pronounced in criminal court as part of the sentence to be imposed, deportation is nonetheless "*intimately related to the criminal* process," *Id.* at 11481. Moreover, deportation can be just as punitive, if not more so, than the criminal penalty that is pronounced at sentencing.
>
> Of course, deportation is not the only civil consequence that is "intimately related" to the criminal process. Our "tough on crime" and "zero tolerance"

[25] The Bronx Defenders, "*Padilla* Compliance Guide."

policies of the last three decades have resulted in an ever-increasing number of civil consequences that are "intimately related" consequences, including loss of employment, disenfranchisement, loss of public housing, loss of student loan eligibility, and barriers to college admission. In *Padilla*, Justice Alito's concurring opinion recognized deportation is not the only significant penalty that flows from a conviction. *Padilla*, 599 U.S. at 1488.

• **Second, the *Padilla* Court explicitly encouraged attorneys to use the existence of these enmeshed consequences to negotiate for better outcomes**. The decision in *Padilla* is not merely about the advice that criminal defense attorneys must provide their clients about possible enmeshed penalties. It is also a decision about opportunity – that is, the opportunity for defense lawyers to be more effective advocates if they use the existence of enmeshed penalties as a means of gaining more leverage in plea negotiations, and thus obtaining better results for their clients. The Court could not have been more clear on this point, stating as follows:

> Informed consideration of deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and the prosecution may well be able to reach agreements that better satisfy the interests of both parties... Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduces the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.[26]

Knowing your client and the possible life-long consequences he or she may face as a result of a criminal conviction is not only a constitutional mandate, it is an opportunity for better, client-centered advocacy.

Concrete Steps for Better Advocacy

In his article "*'Collateral' No More – The Practical Imperative for Holistic Defense in a Post-Padilla World… Or, How to Get Consistently Better Results for Clients,*" McGregor Smyth discusses The Bronx Defenders' fifteen years of experience using the existence of enmeshed consequences for better outcomes. In light of this experience, he states:

[26] *Padilla*, 599 U.S. at 1486.

Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results – and even outright dismissal – when they are able to educate prosecutors and judges on *specific* and severe consequences for their clients and their families. When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness – those that are absurd, disproportionate, or harm innocent family members.[27]

The inability to access higher education is a specific and severe consequence that may result from a conviction and that impacts defendants and their family members.

McGregor Smyth outlines several strategies for responding to the *Padilla* Court's insistence that we no longer close our eyes to the true reality of the punishment associated with criminal justice involvement, and for that reason, his article is a must-read for all defense attorneys. In the context of access to higher education, these strategies can be summarized as follows:

• *Get to know your client and the circumstances of his or her life*. There is much more to our clients than the crimes they have been charged with, and competent defense lawyers must embrace the responsibility to learn more about their clients' lives than the alleged crime. "Focusing narrowly on the "facts" of the criminal allegations can have counter-productive results and miss critical opportunities for better outcomes."[28] In the context of higher education, counsel must find out if the client is currently in college or, if not, is college-bound. Counsel must also discover whether or not the client is currently receiving financial aid to pay for college.

• *Identify the enmeshed penalty or penalties specific to your client*. It is critical to identify the specific consequence or consequences that will result in unfair and disproportionate punishment for your client. As Smyth advises: "Focus on the measured risk of *identifiable* penalties for *specific* clients…. For the purposes of targeted advocacy and negotiation, the penalty must be serious, likely for that client, and something the prosecutor or judge has the power to change."[29] In the context of higher education, the very real consequences not only involve loss of student loan eligibility, but also significant barriers to admission. For the former, counsel need only cite the statute (found in Part II of this Guide); for the latter, CCA's report, "*The Use of Criminal History Records in College Admissions Reconsidered*," can be an effective means of conveying the likelihood that a conviction, particularly a felony conviction, will erect barriers to admission to college.

• *Identify the disposition that is realistic and has the best possibility of ameliorating the enmeshed penalty*. While it would be wonderful for every case to result in a dismissal or a sealable disposition, such an outcome simply is not possible in every situation. You must

[27] McGregor Smyth, "'*Collateral' No More*," at 151 (emphasis in the original).
[28] Id. at 156.
[29] Id. at 160.

identify what is realistic in light of the charges your client faces, his or her prior history and personal circumstances, and local practice. "Advocacy is local and personal. It depends on the law and practice of the courthouse, the community and jury pool, and the circumstances of the person charged with the crime and their family. It also depends on the goals, priorities, and preconceptions of the individual prosecutor and judge. In the context of your own local practice, you will develop a menu of proven strategies based on your knowledge of the law and your clients."[30]

• *Humanize your client by telling his or her story*. Telling your client's story is perhaps the most effective means of transforming him or her from "criminal" to "person" in the eyes of the judge and prosecutor. It is also a means by which to instill in the prosecutor the fact that his or her decision can make a difference in the client's life. "Since they enjoy nearly unfettered discretion, prosecutors must acknowledge that the decision to impose, mitigate, or avoid many of these penalties on people charged with crimes and their families lies in their power."[31]

• *Educate the prosecutor and/or judge about the enmeshed consequence and the impact it will have on your client's life*. Be direct, and talk about what loss of the ability to attend college will mean for your client and his or her family members. Remind the judge and/or prosecutor that the imposition of this penalty will result in unfair, disproportionate punishment.

• *Use the enmeshed consequences to argue for the outcome you want.* "Work towards a shared understanding of both proportionality of penalty and rehabilitative goals in light of the client's story, which can form a productive ground for negotiation at every stage in individual cases, from bail applications to pleas to sentencing."[32] Where appropriate, discuss the disproportionate impact, reminding the prosecution and the judge that you are not seeking "preferred treatment" for your client, but instead insisting that your client not be over-punished. There is no question that loss of the ability to attend college is a significant punishment with life-long implications.

• *Remind the prosecutor and/or the judge of the duty to impose a disposition that best promotes the convicted person's "successful and productive reentry and reintegration into society."* Penal Law § 1.05(6). In this sense, the inability to attend college is not only disproportionate punishment, it is also counter-productive. CCA's report, "*The Use of Criminal History Records in College Admissions Reconsidered*," pages 29-30, can provide defense counsel with the research and data needed to convince even the most reluctant prosecutor of the benefits to the community as a whole, including the public safety benefits, of ensuring that people with past criminal justice involvement are able to access higher education.

[30] Id. at 163.
[31] Id. at 162.
[32] Id at 161.

Putting These Concrete Steps into Action: An Illustration

The following example illustrates how knowing about the barriers to higher education that are closely related from criminal justice involvement can result in better advocacy.

Terrence[33]

One warm night last summer, 19 year old Terrence was hanging out with some friends on Buffalo's west side when two police officers approached and asked Terrence and his friends to empty their pockets. Terrence had a marijuana cigarette in his front left pocket, and as a result of pulling it out of his pocket, he was issued an appearance ticket charging him with Penal Law §221.35 (a B Misdemeanor). Two weeks later, Terrence appeared in Buffalo City Court for arraignment. His assigned counsel, Joanne, looked at the appearance ticket and Terrence's rap sheet (he had no previous arrests), and thought that she could likely negotiate a quick disposition to a guilty plea to Unlawful Possession of Marijuana (UPM), a non-criminal offense, in exchange for a fine and no jail time. Before doing so, however, she spent a few minutes talking to Terrence to learn more about him. She discovered that Terrence grew up in Buffalo, graduated from Buffalo City Schools, and was about to enter his sophomore year at State University of New York (SUNY), Geneseo. Terrence had finished his freshman year with a 3.4 grade point average, and smiled proudly when he told Joanne he had made the Dean's list. School was very important to Terrence, as he was the first person in his family to attend college. Joanne asked Terrence how he was paying for college, and he explained that he was paying through a combination of federal work-study grants and student loans.

Joanne's strategy changed: a UPM conviction would mean loss of the federal work-study and student loans for Terrence. She had a quick conference with the prosecutor handling arraignments, discussing Terrence's lack of arrest record, how well he was doing in school, and the disproportionate punishment of losing the ability to complete college. With this information, she convinced the prosecutor to consent to an adjournment in contemplation of dismissal. Terrence was able to return to college at the end of the summer.

What Worked

Joanne followed the steps outlined above, as follows:

• *Get to know your client*
Before delving into the case with a disposition that she *thought* would be helpful to Terrence, Joanne took a little extra time to talk to Terence and to learn critical information about the context of his life. Learning that he was enrolled in college and dependant upon federal student assistance was critical to the outcome of the case.

[33] This scenario is largely taken from McGregor Smyth's article, "'*Collateral' No More*."

• *Identify the enmeshed penalty specific to your client*
Joanne quickly identified that a conviction for *any* offense involving marijuana would automatically suspend Terrence's eligibility for federal student loan assistance. (See Part II)

• *Identify the disposition that is realistic and can best ameliorate the enmeshed consequence*
Joanne identified the outcome she wanted: an adjournment in contemplation of dismissal. She determined that this disposition was still a realistic possibility, despite the fact that in her particular court, it was outside the normal disposition offered at arraignments for misdemeanor arrests. If this had not worked, Joanne would have asked instead for a guilty plea to disorderly conduct, a violation level conviction that would not result in loss of federal student aid eligibility.

• *Humanize your client by telling his story*
It was neither time consuming nor difficult for Joanne to humanize Terrence by telling the arraigning assistant district attorney Terrence's story. Joanne explained that he was in college, that he was on the Dean's list, and that he was on target to successfully graduate from college. She further explained that he was a first-generation college student and determined to make his family proud. In telling Terence's story, Joanne transformed the prosecutor's initial impression of Terrence as a "stoner" to that of a goal-oriented young man with potential.

• *Educate the prosecutor and/or the judge*
Joanne informed the prosecutor that Terrence would automatically lose the ability to pay for college and would have to drop out if he was convicted of any controlled substance offense, even if the conviction was for a non-criminal offense.

• *Use the enmeshed consequence to argue for the outcome you want*
In advocating for an adjournment in contemplation of dismissal, Joanne talked about how the inability to attend college would be disproportionate punishment for Terrence's mistake of possessing a small amount of marijuana; she talked about how this would be needless disappointment for Terrence's family; and she also convincingly argued how unproductive for the community as a whole it would be for Terrence to drop out of college.

• *Remind the prosecutor/judge of Penal Law § 1.05(6)*
Joanne reminded the prosecutor that imposing a disposition that allowed Terrence to complete college would be most consistent with Penal Law § 1.05(6). Such a disposition would best ensure that, in the future, Terrence would achieve success as law-abiding, productive community-member.

Appendix A
GLOSSARY OF TERMS FOR CRIMINAL HISTORY REPORTING PURPOSES

Adjournment in Contemplation of Dismissal – This disposition of a case is often referred to as an ACD or ACoD and the procedure is found in both CPL § 170.55 and § 170.56. An ACD is an adjournment of the action with a view toward ultimate dismissal of the accusatory instrument in the furtherance of justice. As noted in subdivision (8) of CPL § 170.55 and ACD "shall not be deemed a conviction or an admission of guilt." The purpose is to wipe the slate clean. Upon the dismissal of the accusatory instrument as a result of an ACD "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and conviction." [CPL § 170.55 (8) and § 170.56 (4)]. An ACD dismissal is considered a termination of a criminal proceeding in favor of the accused as defined in CPL § 160.50 (3) and is thus subject to automatic sealing under that statute. An ACD dismissal is also subject to the benefits provided by CPL § 160.50 and upon receiving the dismissal "no such person shall be required to divulge information pertaining to the arrest or prosecution."

Conviction – Means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument, other than a felony complaint, or to one or more counts of such instrument. [CPL § 1.20 (13)].

Crime – Means a misdemeanor or a felony. [PL § 10.00 (16)].

Felony - Means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. [PL § 10.00(5)].

Juvenile Delinquency – Means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime (felony or misdemeanor) if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law. [Family Court Act § 301.2 (1)]. No adjudication under this type of proceeding may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication. Such adjudication "shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling." (Family Court Act § 380.1).

Juvenile Offender – A youth aged 13, 14 or 15 who is prosecuted and convicted of certain felonies in adult criminal court as a juvenile offender is by law criminally responsible and as a result will have an adult criminal record and must report it as such, unless also adjudicated Youthful Offender. [CPL § 1.20 (42) and PL § 10.00(18)].

Misdemeanor - Means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed. [PL § 10.00 (4)].

Offense - Means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same. [PL § 10.00 (1)]. Included within this term are the terms crime, felony, misdemeanor, petty offense, violation and traffic infraction.

Petty Offense – Is the generic term for the non-criminal offense terms of "violation" and "traffic infraction." [CPL § 1.20 (39)].

Violation - Means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed. [PL § 10.00 (3)].

Youthful Offender – Means a person who has been charged in adult criminal court with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old or a person charged with being a juvenile offender who has been adjudicated a youthful offender by a finding, substituted for the conviction of an eligible youth, that he is a youthful offender and has had a youthful offender sentence imposed. (CPL §720.10). "A Youthful Offender adjudication is not a judgment of conviction for a crime or any other offense." [CPL § 720.35 (1)]. All official records relating to a case involving a youth who has been adjudicated a Youthful Offender are confidential. [CPL § 720.35 (2)].