

Alaska Criminal Justice Commission
WORKGROUP ON BARRIERS TO REENTRY

Meeting Summary
November 17, 2017, 9:30-11:30 AM

Denali Commission Conference Room
510 L Street, Suite 410
Anchorage, AK
And audio teleconference

Commissioners: Quinlan Steiner, Joel Bolger

Participants: Devin Urquhart, Tom Begich, Kathy Monfreda, John Skidmore, Rob Henderson, Doug Wooliver, Nancy Meade, Christina Shadura, Donald Revels, Fred Dyson, Karen Cann

Staff: Susie Dosik, Barbara Dunham

Issue with CourtView Recommendation

Barbara Dunham, staff attorney for the Commission, explained that the workgroup's previous recommendation, that the Supreme Court remove SIS and MCA cases from CourtView, had been approved by the Commission. After that, however, Mike Matthews at DOC informed staff that one of his duties at DOC is to verify whether someone is disqualified from PFD eligibility due to serving time in prison. He uses CourtView to verify the information and if SIS records are removed, DOC might not be making correct determinations. A small group would get together at a later date to discuss this.

Nancy Meade, General Counsel for the Court System, wondered why DOC was not using APSIN for this purpose. APSIN is the official database of criminal justice information and CourtView may not be as accurate. Kathy Monfreda, Chief of the Criminal Records & Identification Bureau at DPS, confirmed that SIS cases are on APSIN though they may not always get the information if the cases are set aside.

Justice Joel Bolger said that the set aside part wouldn't necessarily matter for purposes of verifying PFD eligibility. The Supreme Court will hold off taking action on this recommendation until this issue is worked out.

Expungement

Barbara explained that she had given a presentation on expungement at the last meeting of the full Commission. The Commission had agreed that this group should work on trying to modify the Arkansas statutes to suit Alaska's needs. She had prepared a summary of the Arkansas statute and made some preliminary suggestions for modification.

Terminology

Barbara noted that the Arkansas statute used the word "sealing" while this group had been using the word "expungement." Kathy explained that in the world of criminal justice record keeping, sealing typically means retaining a file and limiting access while expungement means destruction of the record.

Barbara said that the Court System has two avenues for limiting access to records; one is to make the file confidential and one is to seal the file. In earlier meetings the group had discussed making the court file confidential as sealing is more extreme.

Nancy suggested this could be cleared up with drafting that makes it explicit as to what would happen to the file. If the statutory language just says “sealed” it would be problematic for the court system.

Eligibility

Barbara explained that the Arkansas statutes restricted eligibility for expungement to certain misdemeanors and felonies. Felonies included in the Arkansas statutes were all felonies of the lowest level of classification, all unclassified felonies, Class A and B drug felonies, and solicitation for those felonies. It also included nonviolent felonies committed when the offender was under age 18. Barbara suggested, among other things, that unclassified felonies should be excluded (those tend to be the worst types of offenses in Alaska), as well as all sex offenses.

Rob Henderson, Deputy Attorney General, asked what should be done about non-classified felonies. John Skidmore, Director of the Criminal Division at the Department of Law, noted they were scattered throughout Alaska’s statutes. Rob suggested listing excluded offenses would be easier than listing included offenses. Doug Wooliver, Deputy Administrative Director for the Court System, asked whether the Arkansas statute allowed the offender to have one prior felony in addition to the one sought to be expunged. John said that was his reading, and Rob suggested that provision could be modified to allow expungement for first time felonies only.

Sen. Tom Begich asked if the idea was to just list the offenses that are not allowed to be expunged. John said that would be consistent with the practice in many other states. Justice Bolger asked if the excluded offenses should be unclassified felonies, sex offenses, and attempt or solicitation of those offenses? John said that the drafters of the law would have to be very careful—if this becomes a recommendation, the recommendation should warn drafters that there are two places in statute where sex offenses are defined, and it would behoove them to ensure that all sex offenses are included in that definition. Kathy noted that AS 12.63 contained the sex offender registry provisions, including misdemeanors, which could be referenced for drafting.

Sen. Begich asked if the idea was to exclude those with prior felonies, what would happen in a case where a felony was expunged and then the offender committed another felony, and also how out of state felonies would be considered. John noted that most other states with expungement laws have a provision that allows expunged offenses to be used as a predicate; the records are kept so that in the case of a petition for expungement of a second felony, the state would know. As to the latter question, John explained there is existing language in statutes that can be used to consider convictions from other states.

Nancy wondered from what point the waiting period should be measured. Rob suggested using “date of unconditional discharge” which is language that exists elsewhere in Alaska’s statutes. There is already case law on how to interpret it. The group discussed that this would be a finding of fact for parties to argue before a judge.

Restitution

Barbara asked how restitution should be handled—whether the offender’s waiting period would start once restitution was paid off, whether the offender should have paid it off by the time they petition for an expungement order, or whether the offender needed to show satisfactory installment payments.

Public Defender Quinlan Steiner said that would have to be dealt with carefully, as some offenders can have huge judgments for restitution that they may never be able to pay. He was wary of verging on territory where someone could be punished or have probation/parole revoked for not being able to pay. There may be cases where there is no difference between two similar offenders looking to get a record expunged other than the fact that one has enough money to pay restitution and the other doesn’t.

Judicial Council staff attorney Susie Dosik pointed out that the point of expungement is to make someone more employable. If an offender becomes more employable, that increases their ability to pay restitution. Quinlan added that this would serve victim interests. Rob said that if restitution had not been made, the victim had not been made whole, and questioned whether the offender should be made whole by having a record expunged at that point. The amount of restitution is a result of the offender’s actions.

Quinlan said that the restitution order becomes a civil judgment which will remain in effect. Justice Bolger wondered whether there would have to be some provision about accessing an expunged record for that purpose.

Nancy noted that there might be an issue with making the file confidential anyway. Older files are converted to electronic format and it may not be possible to go back and search the electronic files and limit access to an individual case record. Susie asked if instead, it would be possible to have the court clerks be the gatekeepers; rather than change or move the record (whether paper or electronic), court clerks would have a flag in the system so they would know not to release a particular record. Nancy thought that was possible—she said she would need to think about it.

Justice Bolger said the group would have to be careful in discussing restitution judgments—no separate file is automatically created when a restitution order is issued; rather, the law provides that the victim can enforce the order as a civil judgment.

Nancy noted that since the Court System assumed the duty of collecting and enforcing restitution payments, only one person has opted for civil collection. Most of the restitution orders are to pay the State of Alaska, State Farm Insurance, and businesses. Susie asked if the Court System was collecting restitution, whether it would be able to tell the status of a given order for the purposes of making a determination for expungement. Nancy said she thought so.

John noted that it was common in other states to require full payment of restitution. Quinlan said the group should let the Commission decide. He thought it was a fairness issue, because similarly situated offenders may or may not get expungement depending only on their ability to pay restitution. He thought there could be a provision allowing expungement if the offender has made regular payments.

Barbara wondered whether there could be a provision allowing expungement where the offender has outstanding restitution if the victim consents. Quinlan said it could also be up to the judge’s discretion. Rob said he would be more comfortable allowing expungement where an offender still owed

restitution if the victim consented. Nancy pointed out that often the victim can't be located to receive restitution payments. Justice Bolger suggested a provision allowing for expungement if the offender has made voluntary payments rather than just garnishment. Quinlan said that the prospect of expungement in such cases could provide an incentive to make payments.

Assemblyman Fred Dyson said that in cases where the real victim is the insurance company, it doesn't feel as personal. There is pending legislation to expand bridging funds for restitution. The bridging payments are made up front to the victim and then the offender pays the restitution to the fund later. It was never intended to let the offender off the hook however.

Barbara asked if the various options for dealing with restitution should be presented to the Commission for a vote: (1) expungement is allowed if restitution has not been paid; (2) expungement is not allowed if restitution has not been paid; (3) expungement is allowed if restitution has not been paid but the victim consents to expungement; (4) if restitution has not been paid, that is a factor for the judge to weigh using discretion. The group concurred.

Violent vs. Nonviolent Felonies, Felonies by Offenders Under 18

The group discussed whether all violent felonies should be excluded from expungement eligibility. John noted that other states have excluded all violent or all higher-level felonies. Rob said that in the case of a first-time Assault 3, he would be comfortable leaving it up to the judge's discretion. John said that it may come down to the standard the judge would use in those cases. He suggested excluding all unclassified, Class A, and Class B felonies in AS 11.41. Quinlan said he would prefer leaving it to the judge's discretion in those cases.

In the case of offenses committed by offenders under 18, Rob noted that would cover very few cases, only those who were subject to automatic waiver of juvenile jurisdiction—i.e., very serious crimes. Justice Bolger wondered if they would therefore be covered under the other exclusions. John said the offenses not covered would be Robbery 1, Assault 1, Arson, and Attempted Murder. Rob said there might be some juvenile robbery cases where expungement was appropriate. Quinlan said that expungement may be appropriate for adults in those cases. Justice Bolger suggested leaving the AS 11.41 Class A and B off the list for all offenders in that case; it would be left up to the judge's discretion, and the seriousness of the offense would be taken into consideration.

The group agreed to the following absolute exclusions (regardless of the age of the offender): unclassified felonies, sex offenses, and attempt and solicitation of those offenses. Other offenses would be subject to varying standards for judicial discretion depending on the level and type of offense. Justice Bolger suggested including the fact that the offense was a Class A or B 11.41 offense as a factor the judge should weigh in consideration.

Quinlan wondered if the group would consider lowering the 10-year range for the felonies. Some people have long sentences followed by long probation and parole periods; an additional 10 years would be a very long wait. John pointed out that the 10-year lookback period was used to determine a person's priors for purposes of presumptive sentencing.

Misdemeanors

Regarding misdemeanors, Justice Bolger wondered if having a three-year waiting period for DUIs would interfere with the lookback period for DUI sentencing. Rob noted that there is a provision for using

the expunged offense as a predicate for charging and sentencing in future crimes. Quinlan noted that provision could equally apply to felonies.

Barbara asked if there should be any absolute exclusions for misdemeanor expungement. Rob said he didn't think it was necessary so long as there was a provision allowing each case to be heard by a judge.

Doug, looking at the provision for drug offenses, asked what "drug-free" meant in this context. He wondered if there was an objective way to determine that. John suggested it would mean no new charges, convictions, or PTRPs for drug use. Justice Bolger suggested that could be used as a factor to be weighed by the judge.

Doug noted that it might be best to have expungement cases determined solely on the record in a majority of cases, to make the process as automatic as possible and avoid hearings, which are costly. Rob said he didn't necessarily disagree for misdemeanors, but there should be a higher standard for DV cases.

For SIS, MCA, and marijuana possession cases, the group agreed that those standalone offenses should be expunged automatically, without the necessity of a petition. For SIS cases, Kathy thought that DPS could likely program their system so that SIS cases would all be reviewed one year after set-aside—so long as DPS is notified of the set-aside from the Court System.

Public comment

Assemblyman Dyson asked if the group was going to address the list of barrier crimes that prevent a person from getting certain jobs or licenses. John noted the group has been concerned with getting expungement done. Nancy said she recalled that there didn't seem to be any low-hanging fruit on the list and that tackling it would be a substantial project. Assemblyman Dyson said he would be interested in looking at the list, and Susie said she would email it to him.

No other public comment was offered.

Next meeting

The next meeting was set for Nov. 28 at 9:30. Barbara said she would revise the Arkansas model further based on this meeting's discussion and circulate another draft. She also said she would recirculate the memo from the Dept. of Law circulated earlier in the year.