

RECOMMENDATION TO THE LEGISLATURE OF ALASKA FROM THE ALASKA CRIMINAL JUSTICE COMMISSION

Recommendation 3-2018, adopted April 23, 2018:

Enact Redaction Statutes for Most Offenses

Alaskans with past criminal records often have difficulty in obtaining employment, housing, financial loans, and financial aid. Employers, landlords, and loan officers may see that a person has a criminal record and dismiss an application from a qualified individual without first looking at how old the record is or what conduct occurred—and without checking to see if that conduct has any bearing on the applicant’s suitability.

Many people with past criminal records have been productive citizens for years, if not decades, since their crime. In some cases, these records relate to conduct that is no longer criminalized in the State of Alaska, or to convictions that have been set aside by a judge. There are many Alaskans who have been fully rehabilitated and do not pose a threat to public safety, but continue to be subject to the stigma that comes from having a criminal conviction on one’s record.

The Alaska Criminal Justice Commission has researched various ways to provide relief from these harsh collateral consequences of a conviction. In some cases, automatic redaction¹ of a criminal conviction after a certain period of time may be appropriate. In other cases, a judge should make a determination based on a petition submitted by the person who wishes to redact their criminal history. It is the Commission’s hope that redaction will ease the reentry process for deserving individuals who have fully satisfied their debt to society.

The Commission thoroughly researched this issue, and took into account any available data as well as how other states approach this topic. The Commission’s deliberations included consideration of the following issues:

Restitution. The Commission wishes to highlight the importance of restitution and the need to make the victim whole. The Commission recognizes that some restitution payments are considerable and petitioners may not have the means to pay the entire amount of their restitution before they become eligible for redaction. In these cases, it is important for the court to consider the input of the victim.

Recidivism. The Commission looked at research on recidivism and re-offense rates. People who have been incarcerated are most likely to recidivate within three years of being released from custody. Those convicted of domestic violence crimes have much higher rates of recidivism.

Time to redemption. The Commission also looked at research on “time to redemption” – that is, the time it takes for someone who has been convicted to reach the same risk of future arrest

¹ The word “expungement” is often used in this context. However, many people assume that “expungement” signifies the complete destruction of information. The Commission does not propose destroying information, but rather limiting access to information, as explained in the sections below.

ACJC Recommendation 3-2018

Redaction

as that of the general population. The research found that the younger a person was at the time of arrest, the longer it takes for that person's risk of being arrested to reach that of the general population.² Additionally, the more prior convictions the person had at arrest, the longer it took for that person's risk of a future arrest to reach that of the general population.

The Commission's research on recidivism and time to redemption informed the recommendations regarding waiting periods for redaction, as outlined in sections (3)(b) and (3)(c) below.

In light of the Commission's research on barriers to reentry, recidivism, and time to redemption, the Commission recommends that the Alaska Legislature enact statutes pursuant to the following recommendations.

1.) Convictions for simple possession of marijuana and minor consumption of alcohol should be redacted automatically and immediately.

The Commission recommends automatic redaction of records relating to conduct that is no longer criminalized. Simple possession of marijuana³ was decriminalized following the voter referendum in 2014.⁴ In 2016, SB 165 reduced all Minor Consuming Alcohol (MCA)⁵ offenses to violations, and directed the Court System not to publicly publish the record of any such violation.⁶

The Commission recommends that all convictions for these two offenses should be redacted automatically and immediately.⁷ This recommendation applies to all cases where these offenses have been charged as standalone offenses, and applies to convictions as well as cases where the charge was dismissed or never prosecuted

See section 4 below for the Commission's recommendations for the proposed effect of redaction.

2.) Successful Suspended Imposition of Sentence cases should be redacted automatically 1 year or 5 years after the date of set-aside.

Suspended Imposition of Sentence (SIS) is a form of sentencing wherein a judge may suspend the defendant's sentence and order the defendant to a term of probation. If the defendant successfully completes the term of probation, the court may then set aside the defendant's

² This may seem counterintuitive, because criminal activity among young people can often be attributed to their youth; one might think that a person who was arrested at a young age would be more likely to be rehabilitated. This may be true, but it is also true that the younger a person begins, the longer it takes for that person to "age out" of crime.

³ AS 11.71.060(a)(1)-(2).

⁴ 2014 Ballot Measure No. 2, § 1, eff. Feb. 24, 2015; enacted in AS 17.38.020.

⁵ AS 04.16.050.

⁶ Ch. 32 SLA 2016.

⁷ The Commission recognizes that this provision will have a fiscal impact because of the analysis required by the agencies that will be redacting these records. The Commission intends for these agencies to redact these records as soon as they are practically able to do so.

ACJC Recommendation 3-2018

Redaction

conviction.⁸ In determining whether to set a conviction aside, judges typically look at whether the defendant has accrued any new criminal history or any serious probation violations, and also consider any objections from the prosecutor or probation officer.

If a conviction is set aside, it will be designated as such in CourtView and in APSIN (the criminal history database maintained by the Department of Public Safety). The record of this set aside conviction, however, will still be accessible on CourtView and will appear in background checks.

The Commission therefore recommends that the records of all SIS cases be redacted automatically 1 year after the date of set-aside in misdemeanor cases and 5 years after the date of set-aside in felony cases.

Recognizing that restitution may still be owed in some cases when they become eligible for set-aside, the Commission also recommends that the court consider any outstanding restitution obligations when a conviction in an SIS case is eligible to be set aside.⁹

See section 4 below for the Commission's recommendations on what effect redaction should have.

3.) Most offenses should be eligible for redaction by petition, with some exclusions.

For offenses other than MCA and simple marijuana possession, and offenses resolved through an SIS, the Commission recommends that redaction generally be available upon petition, subject to an individualized determination by a judge. Redaction in these cases should only be available to those who have not had a new conviction since being convicted of the offense or offenses sought to be redacted.

a.) Process

The Commission recommends a petition process that would start when a person with a criminal history submits a petition to the court. The petition should be submitted using the original case number of the conviction sought to be redacted, and should include an affidavit from the petitioner stating that the conviction is eligible for redaction and the petitioner has not had any new convictions.

The petitioner would also be required to serve the prosecutor's office with a copy of the petition. If the prosecutor's office chooses to file an opposition to the petition, it must do so within 30 days.

⁸ See AS 12.55.085.

⁹ The obligation to pay restitution still stands after a conviction is set aside. However, if a set aside case is redacted, it may be more logistically difficult for a victim to enforce the restitution obligation. If a judge is notified of an outstanding restitution obligation at the time when an SIS case is eligible to be set aside, the judge may then consider whether the person seeking a set aside is making regular payments and whether the outstanding amount is substantial.

ACJC Recommendation 3-2018

Redaction

The prosecutor must attempt to notify any victim in the case, if any identifiable victim exists. If a victim exists and the prosecutor's office is not able to locate the victim within 30 days of receiving a copy of the petition, the prosecutor must notify the court of this fact. If the victim is notified and the victim opposes the petition, the prosecutor must notify the court.

If the prosecutor opposes the petition, the prosecutor may consent to a determination on the pleadings. If the prosecutor does not consent to a determination on the pleadings, the court shall issue a scheduling order within 90 days of receiving the prosecutor's response.

Whether through a written order or on the record at a hearing, the court shall make a determination using the factors and standards as outlined in section (d) below.

b.) Convictions for misdemeanor offenses.

The Commission recommends that most misdemeanor convictions should be eligible for redaction except sex offenses for which there is a registration requirement.¹⁰ For misdemeanor convictions for misconduct involving a controlled substance, the conviction should be eligible for redaction 4 years after the petitioner has been unconditionally discharged from custody, probation or parole for that offense. For misdemeanor convictions for violent offenses and sex offenses without a registration requirement, the conviction should be eligible for redaction 7 years after unconditional discharge. All other misdemeanor convictions should be eligible for redaction 3 years after unconditional discharge. Whether the waiting period is 3, 4, or 7 years, the petitioner must not have any new convictions in that period of time.

c.) Convictions for felonies.

The Commission recommends that felonies should also generally be eligible for redaction. The following felony offenses should not be eligible for redaction: sex offenses, unclassified offenses, and attempt, solicitation, or conspiracy of those offenses. For all other felony offenses, eligibility for redaction should begin 10 years after the date of unconditional discharge. The petitioner must not have any new convictions in that period of time.

d.) Redacting multiple offenses, subsequent petitions

The Commission intends that this recommendation will apply to people who have made a lasting change and turned away from a life of crime. The Commission does not intend redaction to be used as a serial option to clean one's slate if the petitioner has not truly turned over a new leaf.

As such, a petitioner may elect to redact multiple offenses in one petition, so long as each offense is eligible as outlined above. However, if a petition for redaction is granted, the petitioner may not seek redaction again if the petitioner commits a subsequent offense.

¹⁰ The Commission intends that registrable sex offenses would remain ineligible for redaction even after the registration period has expired.

ACJC Recommendation 3-2018

Redaction

If a petition for redaction is denied, the petitioner may not seek redaction again until one year after the date the court denies the petition.

4.) Effect of redaction.

If a petitioner successfully obtains redaction of a conviction, the record of conviction should be retained in APSIN and available for law enforcement and prosecution purposes. The redacted record may still be used as a predicate or enhancement for purposes of charging and sentencing in future criminal cases. It may be used in assessing a defendant for pre-trial release. It may also be used for impeachment purposes when the person whose record was redacted is testifying under oath.¹¹

The Court System should treat the record of the conviction as confidential, meaning access to the record would be restricted to: (1) the parties to the case; (2) counsel of record; (3) the prosecuting attorney; (4) individuals with a written order from the court authorizing access; and (5) court personnel for case processing purposes only.¹²

The Department of Public Safety (DPS) should also withhold disclosure of a redacted conviction in a standard background check. Standard background checks are those that are available to any person who has authorization from the subject.

If a record of conviction is redacted, the petitioner:

- May choose not to disclose the conviction,
- May not be held guilty of perjury for failing to disclose the conviction, and
- May not be fired or discharged from employment for not disclosing the conviction.

Redaction does not relieve a petitioner of any restitution obligation. The Commission recommends that if an offense is redacted with restitution still outstanding, the victim be given information on the outstanding restitution and how to collect on a restitution judgement, and that the restitution judgment be made accessible and identifiable to the victim and subject to the victim's review.

There are additional considerations regarding the criminal history information retained at DPS that that the legislature may wish to take into account in enacting any redaction legislation.

- In addition to standard background checks, DPS also releases a different kind of background check to "interested persons." This type of background check is available for purposes of employing someone with supervisory or disciplinary power over a minor or dependent adult. It releases more information than the standard background check.

¹¹ In child custody cases, there is a presumption of custody if a parent has two DV events on their record; the Legislature may wish to add a provision retaining records for these purposes.

¹² The Court System may also send information about the redacted records to the Department of Public Safety, and make restitution judgments available to any victim owed restitution.

ACJC Recommendation 3-2018

Redaction

- DPS is required to send criminal history information to the FBI, which is retained in national databases. It is possible for DPS to tell the FBI that an existing record has been redacted, and the FBI may make a notation of that in their database.
- Some employers, and certain state agencies, are required by law to enquire about certain convictions. The legislature may wish to make an exception so that those employers and agencies may fulfil their legal obligation.
- The Legislature may also wish to create provisions that protect employers from liability if they hire a person with a redacted record.

5.) Certificates of Rehabilitation

Using the same petition process as described in section 3 above, a petitioner may also elect to petition for a certificate of rehabilitation.¹³ As with redaction, the petitioner must not have had any new offenses. The same notice procedures also apply. The petitioner may apply any time after unconditional discharge from custody, probation or parole.

In cases involving sex offenses, unclassified offenses, and attempt, solicitation, or conspiracy of those offenses, the court may grant the petition in its discretion, taking into account the factors listed in section (3)(e) above.

In all other cases, if the prosecutor does not oppose the petition, the court shall grant the petition with a written order. If the prosecutor does oppose the petition, the court shall grant the petition unless it finds by clear and convincing evidence that the petitioner has not been rehabilitated, accounting for the factors listed above.

If the court grants the petition, it shall provide the petitioner with a certificate indicating that the petitioner has not committed any new offenses and has shown evidence of rehabilitation.

¹³ If a petitioner is granted a certificate of rehabilitation, that does not prevent the petitioner from later petitioning for a redaction.