

ACJC Workgroup on Barriers to Reentry
Staff Notes and Member Assignments from April 5, 2016
at the Brady Building, 5th floor conference room

Commissioners attending: Brenda Stanfill, Jeff Jessee
Commissioners absent: Dean Williams
Participating: Deb Periman (UAA), Morgen Jaco (for DOC Comr. Dean Williams)
Alysa Wooden (DHSS), Cathleen McLaughlin (partners for Progress),
Barbara Armstrong (UAA Justice Center)
Staff present: Mary Geddes, Susie Dosik

Next meeting is: April 22, 2016, 1:00-3:00 PM, Brady Building 5th floor

Materials distributed before meeting: Memo on DHSS Proposed Regulatory Changes (Dosik)
Brief Overview 3 State Expungement Statutes (Armstrong)
Snapshot Offender Employment (Periman)

DHSS proposals for regulatory changes. DHSS has proposed changes to barrier crimes and other related regulations at <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=180130>. At staff's request the comment period on the proposed regulations had been extended by another 45 days to April 25. Susie Dosik prepared an analysis of the proposed changes, identifying six changes, for the workgroup. (Attached)

1. Currently the requirements for a criminal history check and bars to employment in 7AAC 10.900-.990, as written, applies only to "barrier crimes." The proposed DHSS regulations as crafted appear to significantly expand barriers to employment by including "civil conditions" and "findings" registered in some specified but other unidentified civil databases as among those events which can presumptively bar individuals from employment. Staff Susie Dosik said that the proposed language seems both broad and vague, allowing checks for conduct without respect to time limits and in contexts where much less due process has been afforded. Participants thought the vague language ("any court or agency finding that the person was "involved in a matter that the department determines would be inconsistent with the standards for protection of the health, safety, and welfare of recipients of care" (Proposed 7 AAC 10.905 (3)) allows DHSS too much discretion.

2. With respect to the proposed change that individuals would be permitted to apply directly for a waiver, instead of relying on an employer to undergo the process, 7 AAC 10.902 and throughout, was thought to be a helpful change.

3-4. Proposed additional permanent barrier crimes seemed merely to bring state law into alignment with federal requirements. There was also an addition of several new 5-year barrier crimes. Susie did not think adding new barrier crimes was particularly significant assuming that there is always a nexus to the employment sought.

5-6. A proposed regulation, 7 AAC 10.905(f), eliminating 1-year barrier crimes from the matrix, seems positive. Also, under 7 AAC 10.910 - .990, time frames for the waiver process are clarified and made transparent, another very positive change.

Comr. Stanfill agreed with Susie's summary of the proposed changes and asked whether the workgroup should propose that the Commission formally comment. Comr. Jessee recommended doing so. There was consensus that Susie should write-up a proposal for a Commission Recommendation reflecting both concerns with #1, but also its positive reactions to #2 and #6.

Clemency/Expungement. Deb Periman and Barbara Armstrong had prepared two documents: one which outlined employment barriers faced by individuals with a criminal record, and the other explaining a few other states' statutes which provide clemency and expungement. We listed the different types of issues under this topic:

- the currently inactive executive clemency process (power reserved for the Governor)
 - Const. Art. 3, § 21;
 - AS 33.20.070,
 - 33.20.080(a))
- current records rules and laws concerning case information and whether those laws need further reform
 - §22.35.030 (new);
 - 47.12.300;
 - Rule 37.5. Access to Court Records;
 - Rule 37.6. Prohibiting Access to Public Case Records;
 - Rule 37.7. Obtaining Access to Non-Public Court Records;
 - Rule 37.8. Electronic Case Information
- the sealing of criminal justice information “that, beyond a reasonable doubt, resulted from mistaken identity or false accusation.”
 - § 12.62.180
- the availability of DPS records (electronically stored in APSIN) for use in background reports reflecting both arrests and convictions, available to any person for a fee
 - 13 AAC 68.310

We discussed the difference in those mechanisms that achieve a legal effect (i.e. such that individual can lawfully state they have no criminal record) versus those that achieve a public effect (records are unavailable through the State). We acknowledged the difficulties in this digital info age of being able to 'retrieve' any conviction information which is already 'out there.' Barbara noted that because of this, expungement while valuable is not 100% successful in removing barriers. Nevertheless there was interest in a statutory approach that could 'pair' both effects.

At this point in the discussion, Comr. Jessee had to disconnect because of another matter. Comr. Stanfill noted that 'pardons' are very politically unpopular and maybe the Washington state model is a better approach. The 'lookbacks' for subsequent criminal acts seem to make sense in terms of recidivism statistics. (see excerpt below)

- Vacating record of conviction for certain felony and misdemeanor convictions: Per Washington’s Sentencing Reform Act of 1981, amended in 2012. “Every offender who has been [discharged from sentence] may apply to the sentencing court for a vacation [emphasis added] of the offender's record of conviction. If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.
- Effect of vacatur: The fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution. A conviction that has been vacated under Wash. Rev. Code § 9.94A.640 may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.
- Ineligibility to have a record of conviction “cleared”: An offender is ineligible to have the record of conviction “cleared” if he has been convicted of a new crime, if there are any charges pending against him, *or if the offense was a violent offense or crime against a person (including domestic violence and misdemeanors)*. Class A felonies (violent offenses and crimes against the person) are ineligible for vacatur, as are certain Class C felony repeat juvenile DUI offenses. Convictions for misdemeanors deemed violent or sex offenses are not eligible to be “cleared.”
- Waiting period to apply: Felony B and C offenders must wait 10 years after the date of discharge, with no new crimes intervening. Misdemeanor offenders must wait 3 – 5 years following discharge.
- Impact on federal immigration consequences: Vacatur of a conviction does not relieve the federal immigration consequences of a conviction.

Comr. Stanfill noted that any new scheme would have to consider the list of – and possibly defer to - federal barrier crimes.

Deb and others remembered that Doug Wooliver may have earlier legislators’ proposals for an expungement statute. [I have contacted Doug who will look for such info].

Anchorage Reentry Coalition: Morgen Jaco, Cathleen McLaughlin and Alyssa Wooden are participating in the Reentry coalition and workgroups and will mine them for ideas to forward to the Commission. Cathleen said that the Housing Workgroup has had some recent discussion about existing AHFC policies.

Ban the Box: Mary Geddes reported that she is still awaiting a response from DOA Commissioner Sheldon Fisher on the Ban the Box proposals which she and Susie Dosik discussed in February with the Deputy Commissioner Leslie Ridle. By way of background, the proposed regulations would impact state employee hiring except when there are statutory or regulatory restrictions on eligibility for hiring, e.g. corrections, law enforcement. The proposed statute would have broader reach, extending Ban the Box provisions to quasi-governmental entities and state contractors.

MEMORANDUM

TO: Barriers to Reentry Workgroup

FROM: Susie Mason Dosik

DATE: March 2, 2016

RE: **Proposed Regulatory Changes to 7 AAC 10 relating to Title 47 Barrier Crimes**

The Department of Health and Social Services has proposed changes to 7 AAC 10 which governs Title 47 Barrier Crimes. Staff reviewed the “Proposed Changes to Regulations” published December 28, 2015 and attended a public hearing on February 12, 2016. Staff reviewed the proposed regulations. The most relevant ones to this workgroup are described below:

1) The regulations would amend the applicability of 7 AAC 10.900 - .990 to allow civil “conditions” to trigger Title 47 barriers.

7 AAC 10.015 and throughout. These provisions would broaden the scope of the regulations so that the Title 47 barriers would be triggered by “civil findings,” such as licensing decisions, placement on a registry, or any court or agency finding that the person was “involved in a matter that the department determines would be inconsistent with the standards for protection of the health, safety, and welfare of recipients of care.” (Proposed 7 AAC 10.905 (3).

2) Individuals would be permitted to apply directly for a waiver, instead of relying on an employer to undergo the process.

7 AAC 10.902 and throughout. If adopted, these regulatory changes would explicitly allow individuals to preemptively obtain a waiver for certain positions. For example, it would allow a person who wished to apply to Providence Hospital as a medical assistant to obtain a waiver prior to his/her employment application to the hospital. Current regulations do not permit this.

3) Adds new permanent barrier crimes

7 AAC 10.905(b)(10). Sex trafficking 1, 2, and 3 (replaces Promoting Prostitution 1, 2, and 3).

7 AAC 10.905(b) (13)-(15). New permanent barriers would include: any criminal offense or civil finding for which federal laws prohibit approval, or restrict payments (including adoption and foster care assistance, and Medicare and state health care assistance); placement on a registry or database for a reason that is inconsistent with the standards for the protection of public health, safety, and welfare; offenses in 47.05.310(c)(1), including neglect, abuse, or exploitation of a child or vulnerable adult; and medical assistance fraud under AS 47.05.210.

7AAC 10.930(i) and (j) would be repealed and (k) amended, however, thus permitting a waiver for any permanent barrier crime with additional review.

4) Adds new 5-year barrier crimes

7 AAC 10.905(d) (5). New five-year barrier crimes would include Harassment 1, Misconduct Involving a Corpse, Cruelty to Animals, Promoting an Exhibition of Fighting Animals, Misconduct Involving Weapons 3, Criminal Possession of Explosives, and Unlawful Furnishing of Explosives.

5) Eliminates 1-year barrier crimes

7 AAC 10.905(f). One-year barrier crimes currently include Criminal Mischief 5 (if DV-related), Unlawful contact 1 and 2, and Harassment (if DV-related). These would be eliminated from the matrix.

6) Time frames for the waiver process are clarified and made transparent.

7 AAC 10.910 - .990. If adopted, the proposed regulations, many of them repealed and readopted, would formalize the department's current practices regarding the Title 47 waiver process and time guidelines. Some provisions include: 7 AAC 927 Request for Redetermination; 7 AAC 10.930(a)(4) (permitting a statement and proof from the individual describing actions the individual has taken to reduce the risk of reoffending); 7 AAC 10.930(b)(1) (department's review of waiver application for completeness within 30 days and opportunity to cure within 30 days); 7 AAC 10.935 (Review of a request for a variance to include review committee, review by the commissioner, time frames, etc.); 7 AAC 10.950 (Request for reconsideration of a variance request decision).

Brief Overview of Selected State Expungement & Sealing Statutes

Information excerpted and condensed from National Association of Criminal Defense Lawyers (NACDL) Restoration of Rights Resource Project website <https://www.nacdl.org/rightsrestoration/>

Texas - information on NACDL website updated January 2, 2015

More restrictive system: A pardon is required before a conviction can be considered for expungement. Deferred adjudication may result in sealing for most offenses, with a five-year waiting period for felonies; "expunction" for Class C misdemeanors. "Expunction" also available for non-conviction records.

- **Expungement of pardoned offenses and nonconviction records:** “[E]xpunction” of all arrest records may be ordered in cases where an arrest does not result in a conviction, or where the conviction has been subsequently pardoned. Individuals are entitled to expungement of acquittals, dismissals, and arrests not leading to conviction, unless another offense for which the person was convicted or remains to be prosecuted, or if the person has been convicted of another crime within the previous five years.
- **Effect of expungement:** “[T]he release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited,” and “the person arrested may deny the occurrence of the arrest and the existence of the expunction order.” ... “When questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, [the person] may state only that the matter in question has been expunged.” Expungement applies to pardons restoring civil rights, as well as pardons predicated upon a finding of innocence.
- **Waiting period:** Except in the case of pardon and acquittal, or where the statute of limitations for prosecuting has tolled, a waiting period applies: 180 days for a class C misdemeanor charge (if no felony charge from same incident); one year for class B or A misdemeanor (if no felony charge from same incident); three years for felony. The waiting period may be waived by the prosecuting attorney.
- **Impact of community service:** Except for Class C misdemeanors, offenders are not entitled to expunction where a period of community supervision has been ordered, even if the charges are later dismissed pursuant to a deferred adjudication plan.
- **Deferred adjudication nondisclosure:** A person discharged after completion of community supervision may petition the court for an “order of nondisclosure.”
- **Exceptions under deferred adjudication nondisclosure:** Exceptions specified include offenses requiring sex offender registration, and specified violent offenses. Most offenses are eligible for deferred adjudication, except for DUI, repeat drug trafficking near a school, a range of repeat felony sex crimes, and convictions for child sex crimes and murder.
- **Attorney General opinion re meaning of nondisclosure:** An order of nondisclosure prohibits criminal justice agencies from disclosing to the public criminal history record information related to an offense, and criminal history record information subject to an order of nondisclosure is excepted from required disclosure under the Public Information Act. A criminal justice agency may disclose criminal history record information that is the subject of the order only to other criminal justice agencies, for criminal justice or regulatory licensing purposes; one of the specified licensing and employment agencies; or the person who is the subject of the order. (The agencies specified include schools, hospitals, various public licensing boards and agencies.) If a law enforcement agency receives a request for information subject to a section 411.081(d) nondisclosure order from a person who is not authorized to receive the information, the agency may inform the person that it has "no record."

Mid-range system: All but the most serious offenses may be "vacated" after 5–10 year waiting period; most misdemeanors eligible after 3–5 year waiting period. Pardon automatically vacates conviction.

- **Vacating record of conviction for certain felony and misdemeanor convictions:** Per Washington’s Sentencing Reform Act of 1981, amended in 2012. “Every offender who has been [discharged from sentence] may apply to the sentencing court for a *vacation* [emphasis added] of the offender's record of conviction. If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.
- **Effect of vacatur:** The fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution. A conviction that has been vacated under Wash. Rev. Code § 9.94A.640 may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.
- **Ineligibility to have a record of conviction “cleared”:** An offender is ineligible to have the record of conviction “cleared” if he has been convicted of a new crime, if there are any charges pending against him, or if the offense was a violent offense or crime against a person (including domestic violence). Class A felonies (violent offenses and crimes against the person) are ineligible for vacatur, as are certain Class C felony repeat juvenile DUI offenses. Convictions for misdemeanors deemed violent or sex offenses are not eligible to be “cleared.”
- **Waiting period to apply:** Felony B and C offenders must wait 10 years after the date of discharge, with no new crimes intervening. Misdemeanor offenders must wait 3 – 5 years following discharge.
- **Impact on federal immigration consequences:** Vacatur of a conviction does not relieve the federal immigration consequences of a conviction.

More liberal system: Expungement for non-violent first offenders 5–10 years after completion of sentence. Sealing following deferred adjudication and successful completion of five-year probationary period.

- **Definition of expungement:** “the sealing and retention of all records of a conviction and/or probation and the removal from active files of all records and information relating to conviction and/or probation.”
- **Expungement exception:** Expungement is not available to persons convicted of specified serious violent offenses.
- **Disclosure of conviction:** Person whose conviction has been expunged “may state that he or she has never been convicted of the crime” in any application for employment, license, or other civil right or privilege, or any appearance as a witness.
- **Requirement to disclose conviction:** Conviction must be disclosed in connection with application for certain jobs, such as teaching, early childhood education, law enforcement, a coaching certificate, and the practice of law, and for purposes of certain specified licensing decisions.
- **Waiting period for first offender expungement:** **Felony** first offenders may apply for expungement of record 10 years after completion of sentence. **Misdemeanor** first offenders may apply for expungement of record 5 years after completion of sentence.
- **Nonconviction records:** “Any person who is acquitted or otherwise exonerated of all counts in a criminal case, including, but not limited to, dismissal or filing of a no true bill or no information, may file a motion for the sealing of his or her court records in the case, provided, that no person who has been convicted of a felony shall have his or her court records sealed pursuant to this section.”
- **Deferred sentencing:** A record of deferred sentence may be sealed after a five-year probation period.
- **Filings:** A post-plea disposition pursuant to R.I. Gen. Laws § 12-10-12 (“Filing of Complaints”) results in the automatic destruction of the complaint after one year of good behavior (no arrests during this year and compliance with all imposed conditions of the “filing”).
- **Drug Court:** Post-plea cases sent to drug court are dismissed and expunged after successful completion of the program.
- **Nolo plea followed by probation:** A person who pleads nolo contendere and is placed on probation will be deemed to have no conviction if probation is successfully completed. Evidence of the nolo plea may not be introduced in any court proceeding, except that it may be provided to a court in a subsequent criminal proceeding. Where the offense constitutes a crime of violence, the plea shall be regarded as a conviction for purposes of purchasing a firearm. Sealing available on same basis as any other nonconviction record.

NOTE: Oregon

Oregon passed a statute in June 2015 which allows for expungement of certain marijuana offenses committed prior to the state’s legalization of the drug.

Snapshot: The Public Costs of Barriers to Employment Resulting from a Criminal Record

- In 2015 there were over 35,000 admissions of Alaskans to correctional facilities, with an average of 5,023 Alaskans in some type of correctional facility each day (Alaska Dept. of Corrections 2015 Offender Profile);
- More than 81% of Alaska Offenders held in institutions in 2015 were released within 36 months of admission (Alaska Dept. of Corrections 2015 Offender Profile), resulting in thousands of individuals moving from a correctional facility back into Alaska communities each year
- A Sentencing Project study estimated that as of 2011 there were approximately 1,520 Alaska parents in prison; the majority of Alaskans released from prison each year are of parenting age
- The American Bar Association's National Inventory of the Collateral Consequences of Conviction cataloged over 1,500 state and federal statutes and regulations that limit the employment prospects of Alaskans with a criminal record
- Of more than 200 clemency petitions currently pending in Alaska, more than 50% are from applicants who have been fully released from the correctional system but are experiencing employment difficulties due to their criminal records
- Loss of employment resulting from a criminal record adversely impacts Alaska's economy in significant ways:
 - The lost labor output of former offenders reduces the overall economic productivity of the state – researchers studying the national labor market in 2008 estimated that the inability of former offenders to find employment lowered the total male employment rate by 1.5 to 1.7 percentage points. “In GDP terms, these reductions cost the U.S. Economy between \$57 and \$65 billion in lost output.” (Alaska Prisoner Reentry Task Force Five-Year Prisoner Reentry Strategic Plan, 2011-2016).
 - Public funds are diverted from other projects to support the nutritional, housing, medical, and other needs of the children and other family members of former offenders who are unable to find work, as well as of the former offenders themselves
 - Lack of meaningful employment is a key factor driving up recidivism rates: increased recidivism diverts public funds from other projects to cover resulting increases in policing and correctional costs
 - Lack of meaningful employment is a key factor in relapse or increased levels of substance abuse, resulting in diversion of public funds from other projects to cover increased emergency services, hospital admissions, and other medical, mental health, and social welfare needs of former offenders related to substance abuse and treatment
- Loss of employment resulting from a criminal record reduces public safety in significant ways:
 - Criminal behavior is statistically far more likely to be repeated when a former offender lacks meaningful employment
 - Joblessness is associated with increases in psychological and physical aggression
 - Unemployment or underemployment is a key predictor of domestic violence, one of the most significant public health and law enforcement challenges in the state
 - Family economic stress contributes to myriad physical and mental disorders including anxiety, sleep problems, digestive ailments, headaches, and increased drug and alcohol use