

Post-Conviction Actions Task Force Minutes

Tuesday, July 10, 2018

Established by A.O. No. 2018-52

Present: Jerry Landau, Chair; Kurt Altman; Alex Benezra; Cathy Clarich; Mirisue Galindo; Jeremy Mussman (proxy Joe Cappellini); Aaron Nash; Tom O'Connell; Leonard Ruiz; Judge Keith Russell; Amber Sliwinski; Mikel Steinfeld

Appearing Telephonically: Judge Sam Myers; Judge Antonio Riojas

Absent: Julie Ahlquist; Colleen Clase; Kirstin Flores; Jeremy Ford; Will Gaona; Ryan Glover; Judge John Hudson; Sandra Hunter; Donald Jacobson; Lisa Royal; Kathy Waters

Presenters/Guests: Jennifer Carstens; Judge Kathleen Quigley (telephonic); Art Glenberg

Staff: Theresa Barrett; Jennifer Greene; Susan Pickard; Kathy Sekardi

Welcome and Introductions

Jerry Landau, Chair, welcomed the members. He briefly discussed Administrative Order (A.O.) 2018-52 that established the Task Force.

Self-introductions were made by all who were in attendance either in person or on the telephone.

Report from the Juvenile Adjudication Set Aside Subcommittee (formerly Workgroup)

The minutes for this portion of the meeting are organized by code section, statute, then instructions and form. Because the discussion moved from item to item and back again, all discussion related to an item is under that item's heading and does not necessarily appear chronologically.

Judge Kathleen Quigley, Juvenile Adjudication Set Aside Subcommittee Chair, presented proposed amendments to A.C.J.A. §3-402; and Arizona Revised Statutes (A.R.S.) §§ 8-348(B), 8-349(D), and 13-912.01; and draft Instructions and an Application to Seal Juvenile Records and Application to Set Aside and Restore Right to Possess a Gun for use statewide.

Action Item: The Task Force members agreed that the Juvenile Adjudication Set Aside Subcommittee should proceed with discussions and develop recommendations regarding presumptive record sealing and set aside.

A.C.J.A. §3-402: Superior Court Records Retention and Disposition Schedule

The proposed code section would amend the length of time that the court must retain a juvenile delinquency record from 25 to 60 years. Keeping the records for 60 years means the record is available to assist the person with explaining juvenile adjudications that can appear in a background check over the course of his or her lifetime.

Comments:

1. Paper records cannot always be protected and may not last 60 years.
2. Electronic records must be migrated to the most recent software and hardware to be maintained.
3. Records Retention Schedules:
 - a. In the Superior Court, criminal case records are permanently maintained.
 - b. In the Limited Jurisdiction Court, depending upon the nature of the offense, the case records are maintained for five to eight years.
4. The Arizona Department of Public Safety maintains criminal history records for 99 years.
5. If a case record has been destroyed and the defendant wants to pay fines, fees and restitution that is owed, there is no case number to which the clerk can apply the funds and no accounting to determine the remaining amount owed. If the record is sealed, this issue does not exist, the accounting remains.
6. What does a court do when an individual applies for a set aside and the court record, paper or electronic, no longer exists?
 - a. This needs to be addressed with those who have record retention expertise.
 - b. The code has been revised two to three times in the last 10 years, the issue has come up each time, but has not been addressed.
7. In California, juvenile records are destroyed at age 35. The juvenile has a right to request possession of the court file in lieu of destruction.
8. Juvenile records are not on public access.

Motion: To accept the proposed amendment to Arizona Code of Judicial Administration §3-402, Record Series Number 15, to retain juvenile delinquency case files for 60 years following the year the case was filed by Aaron Nash. **2nd:** Kurt Altman **Vote:** Passed unanimously.

A.R.S. §8-348: Setting aside adjudication; application; release from disabilities; exceptions

The proposed statute would increase the juvenile court's jurisdiction to 19 years of age in certain situations by adding subsection C.5.

Comments:

1. Another approach to extending the court's jurisdiction, may be to amend the first sentence of subsection A to read ". . . a person who is at least eighteen or at least nineteen years of age if jurisdiction was extended..."
2. Subsection B may need to be amended to mirror A.R.S. §13-907 in relation to the department of transportation.

Action Item: Mr. Landau asked the members to take a close look at the whole of A.R.S. §8-348 and return to the next meeting with suggested amendments, if any.

Motion: To accept A.R.S. §8-348(C)(5) as drafted by Judge Myers. **2nd:** Mikel Steinfeld **Vote:** Passed unanimously.

A.R.S. §8-349: Destruction Sealing of juvenile records; electronic research records

The proposed statute would:

- amend the section title moving from destruction of the record to sealing the record.
- increase the ability of a juvenile to address the record for purposes of clarifying a background check.
- allow a juvenile who did not successfully terminate probation but has turned his or her life around, to apply to the court at age 21 to have his or her record sealed.
- allow reconsideration of restitution owed when the juvenile turns 18 if there are extenuating circumstances.
- limit consideration of fines, fees, and restitution for sealing purposes to those owed by the juvenile.
- within six months of notification by the Superior Court that a person's juvenile record is sealed, the Department of Child Safety shall destroy all delinquency court, juvenile probation, and Department of Juvenile Corrections records produced in the delinquency matter.
- define sealing and limit the request to unseal the record to the person or the person's conservator or guardian.

Comments:

1. Subsection (B)(5):
 - a. Should begin with "All VICTIM restitution" to mirror the adult set aside. The same language should be used in subsection (C)(6).
 - b. The need to have "monetary assessments" paid in full was also removed as a barrier from the adult set aside statute. No objection to removing this language was expressed.
2. A request to seal a case that was diverted will need a separate process. Because when diversion is successful, the records are either maintained by juvenile probation or court administration.

(Continued after lunch)

Additional statutory considerations

Designating an Undesignated Felony as a Class 6 Misdemeanor

The workgroup requested guidance regarding developing a proposed statute that would extend juvenile court jurisdiction beyond age 18 or 19 to address undesignated felonies. Currently once the child turns 18, the court loses jurisdiction and cannot designate the offense as a misdemeanor.

Restoration of civil rights

A.R.S. §13-912.01 can currently be read to include misdemeanor offenses, for which the right to possess a gun or firearm is not lost, except as a requirement of probation. This provision should be limited to persons who were adjudicated delinquent for a felony. The proposal would eliminate subsection A and renumber subsections B and C as A and B. "[F]or a felony offense" would be added to the first sentence of new subsection A after "adjudicated delinquent."

In A.R.S. 13-912-01(C) is a requirement that for certain violations the youth cannot have his or her right to possess a gun or firearm restored until age 30. For adults this is a 10-year waiting period. Question posed to the task force is should the waiting period be the same?

Judicial Officer Training Recommendations

1. Train juvenile court judicial officers:
 - a. to inform juveniles of the loss of a right to possess a gun or firearm during a plea agreement when the youth is admitting to a felony and at disposition,
 - b. about the impact of sentencing a juvenile to the Arizona Department of Juvenile Corrections close in time to his or her 18th birthday,
 - c. to order DPS to remove the juvenile's fingerprints from the criminal history database when a case that was charged in adult court is reverse transferred or dismissed.
2. Develop a form of notice advising of the loss of the right to possess a gun or firearm and about having that right restored.

Overall Comments:

1. In A.R.S. 8-349(B) the required age to apply to have records sealed is 18 or 19, in (D) because a certain offense was charged, the age is 21, and in 13-912-01(C) again because a certain offense was charged, the age to apply is 30. Caution should be taken regarding the differing ages when developing a process for presumptive sealing.
2. Because of the limited impact of a juvenile adjudication as compared with a criminal conviction, the set aside process is almost a non-issue in juvenile, the major issue is sealing the record versus destruction of the record.
3. The inability of the military to access records is an important component and could cost juveniles the ability to enlist in the armed forces.
4. A DUI conviction as a juvenile can tremendously hamper that person's ability to become employed as an adult.

Call to the Public

Before breaking for lunch, Mr. Landau made the first of two calls to the public. No comments were made.

A.O. 2018-52 and A.C.J.A. §1-202

Mr. Landau discussed the Task Force's mandate to further consider setting aside of criminal convictions, restoration of civil rights, and the setting aside and disposition of records of juvenile adjudications, and membership. He urged all members to read A.C.J.A. §1-202 pertaining to public meeting policy.

Report from the Juvenile Adjudication Set Aside Subcommittee (cont.)

A.R.S. §8-349: Destruction Sealing of juvenile records; electronic research records (cont.)

Comments: (cont.)

Action Item: Invite a victim's advocate to provide input at the next meeting.

5. Subsection (C) - Add a list of factors that a judicial officer must consider before ordering a court record sealed.
6. Subsections (D)(1) and (E)(1) - Are there other laws or rules that define why age 21 was used versus age 18?
7. Subsection (E) - "Extenuating circumstances" should be defined. Does this refer to financial hardship or a relative victim asking the court to seal the record or set aside the adjudication?
8. NEW Subsection (F) - The court shall inform the Department of Public Safety when a record is sealed.
9. Subsection (G)
 - a. If the juvenile is no longer on probation and has his or her record sealed, what incentive is left to encourage the continued payment of victim restitution? A juvenile restitution order can be issued and recorded.
 - b. If victim restitution is reduced to a juvenile restitution order, the victim must pay to have it recorded. Can recording fees be waived?

Action Item: Mr. Landau to discuss recording fee waiver with members of the Arizona Association of Counties.

10. Subsection (H)
 - a. The nondisclosure statement is troublesome, "for any purpose" should be replaced with "except as otherwise provided by law."
 - b. When does the ability to not disclose begin, as soon as the record is sealed, or after a specified period?
11. Where does the military search to discover a juvenile record? If they have access to JOLTS can the record in JOLTS be removed when the case is sealed?
12. Subsection (J)
 - a. The members discussed a variety of others (such as the victim, parents, the military and agencies of this state or a political subdivision) who may need access to the sealed record.
 - b. The Department of Public Safety must receive court records directly from the court or an attorney to assist a juvenile with correcting his or her criminal history record. Can the defendant request that the court release a copy of the record to a third-party designee?
 - c. At issue is "obtained" versus "requested" in paragraph 1.
 - d. Add "3. An agency of this state or a political subdivision upon request of the person whose records were sealed." And "4. A third party as the result of a court order requested by the person whose records were sealed."
13. Currently the county attorney can object to the destruction of records until the person is 25 years of age. The amendment is suggesting that the age be changed to 21. The reasoning behind this age should also apply to the sealing of the record unless other entities are permitted to request a court order to unseal the record.
14. Should an age-based tiered approach for sealing a case record under A.R.S. §13-501 be developed?

The discussion was tabled for completion at the next meeting.

Restoration of Civil Rights Workgroup - *Judge Sam Myers, Chair*

Jeff Cappellini discussed automatic restoration of civil rights in the United States reviewing the outcome of a fifty state and District of Columbia survey. Automatic restoration of civil rights has economic and efficiency advantages and can reduce the confusion among election officials caused by improper instructions given to felons.

- Two states do not suspend the right to vote, hold public office, or serve on a jury.
- Seven states do not allow for any type of automatic restoration of rights.
- Fifteen states and the District of Columbia allow for the automatic restoration of all civil rights that are suspended.
- Thirteen states allow for the automatic restoration of voting rights alone.
- Eight states allow for the automatic restoration of the right to vote and hold office, but not the right to serve on a jury.
- Three states allow for the automatic restoration of the right to vote and serve on a jury, but not the right to hold office.
- Arizona and Nevada allow for automatic restoration of civil rights for first-time, non-violent offenders, but require a restoration process thereafter. This is also known as a bifurcated system.

Jennifer Carstens, AOC Extern, shared an informational summary as well.

Comments:

1. Clarity in the statutes is paramount.
2. What does automatic mean? Does the person need proof of restoration?
3. Arizona's bifurcated system is confusing for those seeking restoration. The consistency of all automatic or all upon motion may be problematic but would be less confusing.
4. Clarification is needed regarding the restoration of gun or firearm rights in conjunction with restoring civil rights and set aside.
5. Should rights be separated and addressed individually?
6. From a clerk's perspective, there are definite efficiencies gained when using an automated process with a set number of years after an identified date.
7. Consider nature of the offense (category or chapter) versus number of offenses when limiting automatic restoration.

Mr. Landau outlined the issues that need to be discussed regarding restoration of rights. (e.g. automatic versus upon motion in some or all cases, addressing each right to be restored separately, restoring rights from a conviction in Federal Court.)

The consensus of the members at this time would be to restore all civil rights (excluding gun or firearm rights) automatically.

Discuss A.R.S. § 13-907 and Rule 29 Set Aside - Tom O'Connell, Chair

Mr. O'Connell, reviewed HB 2312 that amended A.R.S. §13-907, Rule 29 regarding set aside and the Application to have a Conviction Set Aside.

Comments:

1. Include a checkbox to indicate that the person is requesting reconsideration of a prior decision regarding a set aside.
2. Clarify that a person can request a hearing, but the court may rule without a hearing.
3. Review the language in Rules 29.5 and 30.5
 - a. Replace "A hearing must be held no later than 120 days after the application's filing, unless the court finds good cause for an extension. With "The court may set a hearing no later than 120 days after the application's filing, unless the court finds good cause for an extension."

Good of the Order/Call to the public

1. Arthur Glenberg, Tempe People Power, made comment during the call to the public.
2. Leonard Ruiz was asked to advise Bill Montgomery of Task Force's objectives and ascertain his interests.
3. With a goal of completing Task Force objectives prior to the October AJC meeting when legislative proposals are considered, Mr. Landau asked the members if it was feasible to add a meeting in August, possibly the 20th or 22nd.
4. Mr. Landau will invite Judges Quigley and McCullough to become Task Force members.
5. Staff was asked to invite the members of the Juvenile Adjudication Set Aside Subcommittee to the next meeting.

Adjournment

The meeting adjourned at 3:01 p.m.

Next Meeting:

Thursday, September 13, 2018
10:00 a.m. to 3:00 p.m.