

# INTERIM JOINT COMMITTEE ON JUDICIARY

## Minutes of the 1st Meeting of the 2018 Interim

June 1, 2018

### Call to Order and Roll Call

The 1st meeting of the Interim Joint Committee on Judiciary was held on Friday, June 1, 2018, at 10:00 AM, in Room 171 of the Capitol Annex. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Joseph M. Fischer, Co-Chair; Senators Danny Carroll, Perry B. Clark, Ray S. Jones II, Dan "Malano" Seum, Robert Stivers II, and Robin L. Webb; Representatives John Blanton, McKenzie Cantrell, Jeffery Donohue, Daniel Elliott, Joni L. Jenkins, Chad McCoy, Reginald Meeks, Jason Nemes, Jason Petrie, Brandon Reed, and Gerald Watkins.

Guests: Senator Jimmy Higdon, Heather Wagers, Sgt. Tim Moore, Ariaiah Faulkner, Kelly Stephens, Jason Cloyd, Laura Sudkamp, Turney P. Berry, and John T. McGarvey.

LRC Staff: Katie Comstock, Alice Lyon, Matt Trebelhorn, Breanna Miller, and Yvonne Beghtol.

Chairman Westerfield welcomed Calista Petrie, in attendance with Representative Petrie.

### **Expungement: 18RS SB 171**

Senator Higdon gave an update on 2016 HB 40, an expungement bill, and some concerns with its current standing. He sponsored SB 171, which did not pass, to try to rectify some of these concerns. SB 171 would have encouraged economic development, by allowing those who have made a mistake a better opportunity at entering the workforce. A four-tier system of 5, 10, 15, and 20-year eligibility was suggested, where the individual must have a clean record and pay the \$500 expungement application fee to cover the costs incurred in expunging the record. The fee would be distributed to the Kentucky State Police, Commonwealth Attorneys, and Library and Archives. Some convicted before 1975 are currently not eligible for expungement. SB 171 would give them the option to apply if they meet the criteria. Senator Higdon would like to see judges, prosecutors, attorneys, and victims given more discretion in evaluating the eligibility of each application. The felony of complicity, currently not expungable, would become eligible under SB 171.

In response to Senator Carroll's comment that only those who committed their offense before the age of 25 should be eligible to apply, Senator Higdon said he was open to suggestions and believes that giving judges more discretion would help address the concern. Senator Stivers commented that he does not believe age to be a factor.

Senator Webb expressed concern with veterans and women who medicate due to mental health issues, and their eligibility.

Representative Watkins believes the fee amount may be an obstacle for many and suggests reducing the amount.

In response to Senator Stivers' question as to the feedback Senator Higdon has received from prosecutors regarding the changes in SB 171, Senator Higdon gave examples of prosecutors' concerns and assured that he is taking those into consideration to reach a common ground on the expungement criteria. He continues to consult with others in an effort to make SB 171 presentable and passable.

Representative Nemes stated that he agrees that these people have earned the right to request an expungement based on having completed their time and not having any further offenses. He said that SB 171 does not go far enough and that misdemeanors after 5 years and no further offenses should automatically come off the individual's record at no cost.

Representative Cantrell mentioned the Reily Reentry Project in Louisville, which offers a clinic on the expungement process, provides volunteer attorneys, pays expungement fees, and gives information on moving forward. She agrees that the \$500 filing fee is an issue for most applicants and would like to see it reconsidered.

Senator Higdon clarified that the application fee is \$50. Courts would have the discretion for the additional \$450 in fees.

### **Expungement Certification Process**

Heather Wagers, with the Kentucky State Police (KSP), introduced Sgt. Tim Moore, who explained that arrest records and court records are used to determine if the individual qualifies for expungement. At times there are inaccuracies found in the record system due to human error in data entry. Those inaccuracies are often found during the certification process and corrected.

Ariah Faulkner, Program Coordinator with KSP, reviewed the expungement process. KRS 431.079 went into effect in January of 2014, requiring each expungement request to include a Certificate of Eligibility. The \$40 certification fee is split between the Administrative Office of the Courts (AOC) and KSP. A maximum of 60 days to complete

the request is allotted and is valid for 30 days upon completion. The certificate must be filed with the application. An expungement certification can be requested online, in person, or by mail. If applying online, the applicant can check the status of their request online. When completed, they will receive an email notification. If applying in person or by mail, the results will be mailed to the applicant.

One reason KSP and AOC's records differ is because AOC purges most misdemeanors after 5 years, whereas KSP retains theirs for 80 years. Another reason is that AOC records any offense, whereas KSP records only those that required fingerprinting. KSP reviews each charge for accuracy. AOC's records are based on name, birthdate, and other identifiers, while KSP's records are based on fingerprinting. This is where discrepancies are found and addressed. Each charge is evaluated for eligibility based on the expungement statutes. The average number of charges per certification is 57, which can take hours to evaluate. The certification contains the certification notice, KSP's criminal report, and AOC's criminal report.

Kelly Stephens, with AOC, reviewed the effects of the passing of HB 40 in 2016. The number of requests rose from 7,889 in 2015 to 11,148 in 2016 and have remained steady. The number of granted expungements after the passing of HB 40 are evident in the increase from 83 in 2016 to 912 in 2017. The increase of acquitted, dismissed, and misdemeanor conviction expungements has also increased from 4,367 in 2016 to 7,733 in 2017.

In response to Chairman Fischer's question as to whether there is data to show how many of those convicted of the 61 listed felonies would become eligible for expungement, Ms. Stephens explained that there is no data because eligibility is not based solely on the charge but also on the defendant's circumstances. AOC hopes to track the information to get a better sense of that data.

Ms. Stephens reported on the difficulty in determining eligibility due to statutes being amended through the years, changing the penalty levels, underlying offense, and the scope. Chairman Westerfield asked if language could be added to the statute to overcome this issue. Ms. Stephens believes there is some wording in SB 171 that may address this issue. Another issue is if the offense qualifies based on whether it was dismissed with or without prejudice. AOC feels the judge should be able to determine whether a case is eligible, regardless of prejudice, based on the case, consulting with the prosecutor, and reviewing the record individually. This is one area in which KSP and AOC sometimes view eligibility differently, but they are working to make sure they are in compliance. There is concern as to whether a grand jury or district court judge should review the case. Making sure all agencies that have records actually expunge them is another concern. Regardless of the effort to completely expunge a record, there are always agencies or websites that may have a photo or document pertaining to the case available.

Expungement workshops have been offered throughout the Commonwealth. AOC reaches out to help those who are eligible. Expungement encourages rehabilitation and SB 171 is a positive expansion of this effort.

Senator Jones gave examples of inaccuracies in the certification process. One gentleman was charged with another person's felony due to a data entry error. Another individual was sure he had a felony, but the expungement certification did not list one. The person did not have a case number or disposition and could not tell if it had been dismissed or if other action had occurred. Further research showed that the FBI had reported the felony. Knowing how to file can be an issue. Jason Cloyd, with AOC, said that data entry errors have been an issue, but working through the expungement process is bringing these issues to light and they are being corrected. Ms. Wagers and Ms. Faulkner said that they are highly committed to working with AOC to cross-reference information to rectify these discrepancies. Ms. Stephens said that nothing replaces the original court records, so they can refer to those for guidance in what the offense record should be, along with information received from the agencies, the defendant, and the files available

Senator Seum suggested that, due to the complexity of some of these cases, having a particular judge and attorney who specializes in the expungement process may be helpful, or even having an Expungement Court that specializes in just this matter.

Representative Reed questioned how the fees are to be distributed. There are several agencies and departments that are given additional work in the expungement process. Ms. Stephens believes a portion is directly attributed to the District Court Clerk's fund.

### **Safe Act Update**

Laura Sudkamp, Laboratory Director with KSP, reported that the number of rape kits submitted have increased since the passing of SB 63. Because some cases require several assignments, backlog on completing cases has been a concern. When new information is received on a case, it goes back to the initial date when the case was received, so it is difficult to determine the turnaround time on an individual case. Due to loss of staffing and training new employees, the completion rate dropped in 2013. If staff can be retained, the number of completed cases should increase. KSP's Forensic Analyst and Forensic Supervisor salaries are below the national average. Cases are required to be completed within 90 days, but they are currently delayed about 6 months. If staffing can be maintained and salaries increased, she hopes to be down to 90 days by the end of this year.

Safe Act 2016 requires law enforcement to submit kits to the lab within 30 days. A Kit Tracking System is in place in which the hospital can enter information the date the victim was seen, and the process can begin. This will help KSP see if the kits are being submitted within 30 days from the start date. Law enforcement is required to retain evidence either 10 or 50 years unless certain conditions are met. This is not always done.

Law enforcement is to inform a victim if there is a “hit” on DNA in the database. Chairman Westerfield asked if not having contact information for the victim is a major reason why this may not be happening. Ms. Sudkamp agreed but believes it still needs to be worked on. Due to the DANY Grant, SAKI Grant, and SB 63 all coming into effect at the same time, Ms. Sudkamp chose to hold off on kit tracking. She is now prepared to look for grant money for kit tracking. Idaho has a system they are willing to share at no cost. Victims will be able to log on and view and track their kits.

In response to Senator Carroll’s question about the ability of contracting cases out to private labs, Ms. Sudkamp said they outsourced the DANY kits, but it requires three review processes and it is almost more time efficient to do it themselves. There is also the issue of subpoenaing an analyst, should it be required, and how difficult that can be when outsourced.

Chairman Westerfield recognized Ms. Sudkamp and her lab team for working so hard and efficiently under such difficult staffing situations and at such a low pay grade. He then noted that Ms. Sudkamp receiving the Briggs J. Wright award earlier this year.

Ms. Sudkamp responded to Representative Meeks question as to how much the DANY and SAKI grants cost and how many kits they would fund. The DANY grant was for \$1.9 million, which processed 3,173 kits, from which over 800 profiles have been entered into the database with around 400 hits. The SAKI grant, through the Attorney General’s office from the Bureau of Justice Assistance, allows them to outsource 1,500 kits. Those have been shipped out but have not gotten the results yet.

In response to Representative Blanton’s question as to what the current \$32,000 entry level position salary will be raised to with the new budget, Ms. Sudkamp’s estimates \$36,000, which still keeps Kentucky at the bottom of the pay grade. Ms. Sudkamp says they are looking at other creative ways to find funding to increase salaries and retain their staff. Representative Blanton noted that agencies across the state receive information at no cost from the KSP lab, so keeping the lab well-staffed and efficient is beneficial for all. Ms. Sudkamp said they operate for 15 to 20 million dollars a year.

### **Uniform Fiduciary Access to Digital Assets Act**

Turney P. Berry of Wyatt, Tarrant & Combs stated that the Uniform Fiduciary Access to Digital Assets Act has been adopted in 42 states. The issue it intends to resolve is to grant access to an executor of a deceased person’s electronic accounts. Currently, a federal statute denies access. There is also the privacy concern. The Terms of Service prohibit a person from giving access to the account to anyone. However, a person can include in a will that a fiduciary should have access to email. An executor sends a certificate of qualification to the internet provider to allow access. There is a case of a man who died in 2006 giving rights to his executor, and 12 years later the case is still being appealed. The

difficult issues here are privacy, contracts, and the necessity of making a will and keeping it updated.

John T. McGarvey, legislative liaison for the Kentucky Uniform Law Commission, noted that all of Kentucky's bordering states have accepted the Act, once Missouri votes to approve it. Fiduciaries have always had access to manage tangible assets, and this would give them the right to manage electronic assets.

In response to Representative Cantrell, Mr. Berry said that the Act deals with access only, not to what someone may post about anyone else.

Mr. McGarvey stated that a person can also use a power of attorney, a will, or an online tool that gives the specific option to grant a fiduciary access to digital accounts.

In response to Chairman Westerfield's question as to whether providers are starting to offer this as an option in their online Terms of Agreement, Mr. Berry said that Google has an online tool, but it is difficult to find. Some providers use no access as a positive area of competition, stating they offer better security or privacy than other providers. Other providers boast that they are more access friendly.

Chairman Westerfield announced that his desire was to see the original version of the Act passed, which does not require a subscriber to opt in. Just as no judge would question an executor's power to have access in obtaining any item from the house to distribute as seen fit, so should an executor have access to online assets.

Mr. Berry justified the revised version of the Act by explaining that people once considered email to be something that was private, that no one would have access to. People now know that this is not true; privacy is a persuasive argument for the reformed version.

Mr. McGarvey said he came around to the revised version of the Act when he considered that communication by mail could be torn up, pitched, or burned. Email is archived. There are things that some people do not want known, which is why he believes the revised version is a better version. He said that bankers would like to see the Act in place so that the digital accounts can be managed by the fiduciary.

Chairman Westerfield reminded members of the free CLE courses offered by LRC on June 6 and 27, and also of the July 6 meeting to be chaired by Chairman Fischer.

There being no further business, the meeting adjourned at 12:05 pm.