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TO: Senate Judiciary Committee

FROM: Kansas Judicial Council – Ron Wurtz, Retired Federal Public Defender

DATE: February 10, 2021

Re: Testimony in Support of 2021 SB 105 Prohibiting Denial of Expungement Due to the Petitioner’s Inability to Pay Outstanding Costs, Fees, Fines, or Restitution

The Kansas Judicial Council (Council) and its Criminal Law Advisory Committee (Committee) recommend the passage of 2021 SB 105. Kansas statutes authorize the expungement of an adult conviction and related arrest records in K.S.A. 2010 Supp. 12-4516 (municipal court offense) and K.S.A. 2019 Supp. 21-6614 (district court offense).

With the goal of reducing financial hurdles and increasing access to expungements for indigent offenders, 2021 SB 105 amends the adult expungement statutes, K.S.A. 2019 Supp. 12-4516 and 21-6614 to:

- (1) allow the waiting period to begin before the person has completed payment of costs, fees, fines, or restitution;
- (2) prohibit courts from denying an expungement due to the petitioner’s inability to pay costs, fees, fines, or restitution;
- (3) require payment of costs, fines, fees, and restitution after expungement; and
- (4) allow certain people to access documents and information regarding the costs, fines, fees, and restitution after the expungement for the purpose of collecting the debt.

1. *Waiting Period*

A person may not file a petition for expungement until a certain number of years (1, 3, 5 or 10 years) have passed since the person “satisfied the sentence imposed” or was “discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence.”¹ In practice, the requirement that the person “satisfied the sentence imposed” is commonly interpreted to include the satisfaction of all fines, fees, court costs, and restitution. Fines and restitution orders are, by definition, part of a person’s sentence.² However, this can be problematic within the limited context of expungements.

Requiring the payment of all fines, fees, court costs, and restitution before the “waiting period” begins is a heavy burden on indigent offenders. Often, the record of the conviction or diversion prevents the person from obtaining a job that would then enable the person to pay off the outstanding debt.

The Committee unanimously supports adding “For the purposes of this section, the determination of when the person satisfied the sentence imposed excludes the payment of costs, fees, fines and restitution” to K.S.A. 2020 Supp. 12-4516(m) and 21-6614(n) on pages 7 and 16 of the bill.

2. *Prohibiting Denial of Expungement Due to Inability to Pay*

Once the waiting period has passed, a person may petition the court for expungement. K.S.A. 2020 Supp. 12-4516(h) and 21-6614(h) state that the court shall order the expungement if (1) the petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner; (2) the circumstances and behavior of the petitioner warrant the expungement; and (3) the expungement is consistent with the public welfare. The court has discretion when evaluating whether the person’s circumstances and behavior warrant the expungement and whether the expungement is consistent with the public welfare.

The court should not use outstanding costs, fines, fees, and restitutions as an automatic bar to expungement. Instead, the statute should require the court’s evaluation of the petitioner’s circumstances and behavior include the petitioner’s ability and willingness to

¹ The Committee recognized that depending on the case, a person’s failure to pay fines, fees, court costs, or restitution may prevent the person from being discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence. Failure to be discharged would prevent the expungement waiting period from beginning. The terms of probation, community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence are determined based on the individual facts of each case and vary across the state. The Committee decided against recommending any amendments regarding unpaid costs, fines, fees, or restitution in statutes governing probation, community correctional services programs, parole, postrelease supervision, conditional release or a suspended sentence.

² See *e.g.* K.S.A. 2019 Supp. 8-1567 (statute requires the court to order a monetary fine as part of the sentence for driving under the influence); and see *State v. Hall*, 298 Kan. 978, 983, 319 P.3d 506 (2014) (“Restitution constitutes part of a criminal defendant’s sentence”).

pay. The Committee unanimously agreed (1) expungement should not be denied due to the petitioner's inability to pay costs, fees, fines, or restitution; and (2) an unwillingness to pay may be considered as a factor in denying expungement.

The bill adds the following subsection to K.S.A. 2020 Supp. 12-4516(h) and 21-6614(h) on pages 3 and 12:

“The court shall not deny the petition for expungement due to the petitioner’s inability to pay outstanding costs, fees, fines or restitution. The petitioner’s unwillingness, rather than inability, to pay such costs, fees, fines or restitution may be considered as a factor in denying the petition for expungement.”

3. *Payment of Outstanding Debt*

While outstanding costs, fines, fees, and restitution should not be an automatic bar to expungement, the expungement should not alter or remove the petitioner’s responsibility to pay the outstanding debt. The amendments to K.S.A. 2020 Supp. 12-4516(i)(5) and 21-6614(i)(6), pages 5 and 13, include a clear statement that an expungement does not relieve a defendant’s responsibility to satisfy any outstanding costs, fees, fines, or restitution.

4. *Access to Documents to Facilitate Collection of Outstanding Debt*

Generally, when a record is expunged, it is sealed and only accessible by a limited number of people in specific circumstances. In order to make sure the expungement does not prevent the future collection of the outstanding costs, fees, fines, or restitution, the Committee supports the amendments to K.S.A. 2020 Supp. 12-4516(i) and 21-6614(i), pages 5 and 14, adding a new subsection allowing limited access to documents and information regarding the outstanding costs, fees, fines, or restitution for the purpose of collecting the debts.

The new subsections authorize access for the petitioner, the clerk of the court, the agent who is hired by the court to provide collection services, anyone to whom the petitioner was ordered to pay restitution in the case, and an attorney authorized to act on behalf of the listed individuals. The list includes a provision allowing the court to authorize access to someone not otherwise listed if the court determines that access to the documents or information pertaining to the outstanding costs, fees, fines, or restitution is necessary for the purposes of collecting the outstanding debt.

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