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TO: House Judiciary Committee

FROM: Kansas Judicial Council – Ron Wurtz, Retired Federal Public Defender & Member of the Judicial Council Criminal Law Advisory Committee

DATE: February 7, 2022

RE: Testimony in Support of 2022 H.B. 2556 - 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 2022 H.B. 2556, prohibiting the denial of expungement due to the petitioner’s inability to pay outstanding costs, fees, fines, or restitution.

2021 Legislative Session – S.B. 105

The contents of 2022 H.B. 2556 are the same as the contents of 2021 S.B. 105, as it was amended in the 2021 legislative session by the Senate Judiciary Committee. The Senate Judiciary Committee amended S.B. 105 to fix a record access issue pointed out by the Office of Judicial Administration, and then recommend 2021 S.B. 105 be passed as amended. Subsequently, the bill was not considered by the Senate as a whole before the turnaround deadline and died.

2022 H.B. 2556

With the goal of reducing financial hurdles and increasing access to expungements for indigent offenders, 2022 H.B. 2556 amends the adult expungement statutes, K.S.A. 2021 Supp. 12-4516 (municipal court offense) and 21-6614 (district court offense) to:

(1) allow the expungement 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 the expunged case file in order to facilitate the collection of outstanding costs, fees, fines, and restitution.

1. *Waiting Period*

A person may not file a petition for expungement until a specified 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 payment 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. For this reason, the Committee unanimously supports adding "For the

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. 2021 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").

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. 2021 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. 2021 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 pay. The Committee unanimously agreed expungement should not be denied due to the petitioner’s *inability* to pay costs, fees, fines, or restitution; however, an *unwillingness* to pay may be considered as a factor in denying expungement.

The bill adds the following subsection to K.S.A. 2021 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. 2021 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. 2021 Supp. 12-4516(i) and 21-6614(i), pages 5 and 13, adding a new subsection allowing access to the expunged case file the purpose of collecting the outstanding costs, fees, fines, or restitution.

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.

Rather than allowing access to the expunged case file in its entirety, the Council's original proposal was to limit access to only documents and information pertaining to the collection of the outstanding costs, fees, fines, or restitution. However, during the hearing on 2021 S.B. 105 in the Senate Judiciary Committee, the Office of Judicial Administration explained that its case management system could not be programed to only allow access to certain documents within a case file. Therefore, with the support of the Council, the Senate Judiciary Committee amended the bill to alleviate this concern. The amended language is what is in 2022 H.B. 2556.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

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Victor Braden, Chair, Deputy Attorney General; Topeka

Aaron Brietenbach, Sedgwick County Deputy District Attorney; Wichita

Natalie Chalmers, Assistant Solicitor General; Topeka

Randall Hodgkinson, Kansas Appellate Defender Office & Visiting Assistant Professor of Law at Washburn University School of Law; Topeka

Sal Intagliata, Member at Monnat & Spurrier, Chartered; Wichita

Christopher M. Joseph, Partner at Joseph Hollander & Craft, LLC; Topeka

Ed Klumpp, Chief of Police-Retired, Topeka Police Department; Topeka

Hon. Cheryl A. Rios, District Court Judge in the Third Judicial District; Topeka

Ann Sagan, Assistant Federal Public Defender, Federal Public Defender District of Kansas; Topeka

Kirk Thompson, Director of the Kansas Bureau of Investigation; Topeka

Rep. John Wheeler, Kansas House of Representatives, District 123; Garden City

Ronald Wurtz, Retired Public Defender (Federal and Kansas); Topeka

Prof. Corey Rayburn Yung, KU School of Law Professor; Lawrence

Ad Hoc Members:

Shawn DeJarnett, Municipal court prosecutor; Wellington

John Goodyear, Attorney with the League of Kansas Municipalities; Topeka

Marilyn Harp, Executive Director of Kansas Legal Services; Topeka

John Houston, Office of Judicial Administration; Topeka