

RECORD-CLEARING AS A RITE OF PASSAGE TO ENGAGE IN THE JUSTICE SYSTEM

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I. Introduction

Over seventy-eight million individuals in the United States – one-third of the country’s adult population – have criminal arrest records.² In Kansas, the incarceration rate increased 215% over the past three decades,³ with Black people overrepresented in both Kansas jails and prisons.⁴

Some believe that the existence of an arrest or conviction record negatively impacts one’s ability to participate in society, compromising educational,⁵ employment,⁶ and housing⁷ opportunities. With respect to employment, governments disable individuals with records from working in certain industries. For example, by law in Kansas, certain convictions disqualify an individual from obtaining employment in the five years following the completion of their sentences in, for example, adult care homes, home health agencies, and hospitals.⁸

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² See FBI, DECEMBER 2020 NEXT GENERATION IDENTIFICATION (NGI) SYSTEM FACT SHEET 1 (2020), <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view>.

³ In 1983, 4,992 people were incarcerated in Kansas. By 2015, that number had risen to 15,742 people. See *Incarceration Trends in Kansas*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-kansas.pdf>.

⁴ Black people constitute 7% of the state’s overall population, but comprise 21% of people in jail and 28% of people in prison. *Id.*

⁵ Of 273 higher education institutions surveyed, 66% reported that they collect information about applicants’ criminal justice history. Some of these institutions use this information in admissions decisions. See *The Center for Community Alternatives (2010), Reconsidered: The Use of Criminal History Records in College Admissions*, New York: Center for Community Alternatives.

⁶ See, e.g., Iris Hentze, *Barriers to Work: People with Criminal Records*, National Conference of State Legislatures (Jul. 17, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>. (In 2014, the United States economy sustained a \$78 billion loss because 1.7 million workers faced employment barriers due to prior felony convictions).

⁷ See, e.g., OSAH, *CRIMINAL JUSTICE ADVOCATES ARE HOUSING ADVOCATES* (2019), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Criminal-Justice-Fact-Sheet.pdf> (noting that “formerly incarcerated individuals experience high rates of homelessness”); Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 Fed. Probation 20, 20 (2007) (finding that 67% of landlords inquire about criminal history on rental applications, and 40% are inclined to reject an applicant with a criminal conviction); see also Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, Prison Policy Initiative (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html#fnref:10>.

⁸ Margaret Colgate Love, *Kansas Restoration of Rights & Record Relief, Restoration of Rights Project* (2020), https://ccresourcecenter.org/state-restoration-profiles/kansas-restoration-of-rights-pardon-expungement-sealing/#IV_Criminal_record_in_employment_licensing.

To address the barriers that individuals with criminal records face, most states – including Kansas – have developed procedures for a charged or convicted individual to clear their record.⁹ This process is frequently referred to as “expungement,” which is defined as “the removal of a conviction from a person’s criminal record.”¹⁰

The Access to Justice Lab at Harvard Law School (“A2J Lab”) undertakes credible evaluation of legal initiatives designed to improve the experience of low- and very-low-income individuals in the justice system. One such evaluation presently underway is the Final Stage Reentry Project, in which, in partnership with Kansas Legal Services, we study the value of criminal record clearing in reducing recidivism and promoting housing and employment security. The Final Stage Reentry Project uses legal assistance, specifically an offer of a traditional attorney-client relationship from an oversubscribed legal aid provider, as an instrument to induce a contrast between individuals who achieve record-clearing versus those who do not. In particular, the Project randomizes which of too-numerous potential clients eligible for record clearing receive an offer of representation; by randomizing the offer of representation, we anticipate that we are randomizing record clearing itself. Implicit in this design is the assumption that individuals who do not receive an offer of representation will be substantially less likely to achieve record clearing than those who do.

While pursuing this study, the A2J Lab encountered members of the Bar in Kansas who believe that, even assuming criminal justice record clearing does promote desirable outcomes (a question the Final Stage Reentry Project investigates), Kansas need not pursue broadly applicable, automated record clearing consistent with the model in, say, Pennsylvania.¹¹ These attorneys appear to believe that the process in Kansas for obtaining an expungement of a charge or a conviction is simple and straightforward, such that anyone who would benefit from it can pursue it easily on their own. A policy-based response is, the argument runs, unnecessary.

To assist in the assessment of this claim from members of the Kansas Bar, this brief article outlines, step by step, the process for obtaining the expungement of a criminal record in Kansas¹² and discusses the various barriers that individuals face throughout the record clearing process. We proceed as follows. In Section II we outline the record-clearing process in Kansas both as written and in practice. In Section III we summarize that process simply. In section IV we offer conclusions.

We disagree that expungement is simple and straightforward in Kansas. Indeed, we disagree that it is simple and straightforward in any jurisdiction that we have reviewed.

⁹ For example, in 2018, twenty states “expanded access to sealing or expungement” of criminal arrests and convictions through the passage of twenty-nine new laws. See MARGARET LOVE & DAVID SCHLUSSEL, REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 2 (2019), <https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf>.

¹⁰ Expungement Definition, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

¹¹ See, 18 PA.C.S. §9122.2, for text of Pennsylvania’s “Clean Slate” legislation.

¹² The process for obtaining clearance of an arrest that did not result in charges or a conviction is similar to that outlined here, but this memo does not address it.

However, that decision is outside of the scope of our authority. As such, we provide this article merely as additional consideration as legislative and other consideration of record-clearing remedies continues.

II. Steps to Clear a Criminal Record in Kansas

In Kansas, arrest records,¹³ criminal convictions, and juvenile adjudications¹⁴ can all be expunged.¹⁵ As the process is similar for all types of expungements, the remainder of this article will focus on the expungement of non-juvenile convictions.

An individual obtains an expungement by petitioning the court of the county in which they were convicted. Some convictions are never eligible for expungement, including murder, rape,¹⁶ and child abuse.¹⁷ All expungement candidates must meet certain criteria and follow a specific procedure.

A. Mandatory waiting period

In Kansas, a convicted individual must wait until three years after discharge from probation or parole before petitioning the court for an expungement of a misdemeanor or minor felony.¹⁸ The waiting period is five years for major felony offenses.¹⁹ Additionally,

¹³ An arrest record may be expunged if (1) the arrest occurred because of mistaken identity; (2) a court has found that there was no probable cause for the arrest; (3) the petitioner was found not guilty in court proceedings; or (4) the expungement would be in the best interests of justice and charges have been dismissed or no charges have been or are likely to be filed. Kan. Stat. Ann. § 21-2410(a)(1), (c).

¹⁴ Both juvenile arrest and conviction records may be expunged, as governed by Kan. Stat. Ann. § 38-2312, and this process may be initiated by the juvenile's parent or guardian if the juvenile is still under age. Kan. Stat. Ann. § 38-2312(a). Expungement is not available for certain serious and violent offenses. Kan. Stat. Ann. § 38-2312(b). An expungement applicant must be at least 23 years of age, or at least two years must have passed since their conviction. Kan. Stat. Ann. § 38-2312(d).

¹⁵ Marilyn Harp, Expungement: Seal Your Criminal Record, Kansas Legal Services, <https://www.kansaslegalservices.org/sites/kansaslegalservices.org/files/Expungement%20Brochure%20rev%202018.pdf> (last accessed Oct. 17, 2021).

¹⁶ In 2011, the Kansas Supreme Court held that an expungement terminates an individual's obligation to register as a sex offender. *State v. Divine*, 291 Kan. 738 (2011). In response, the legislature amended Kan. Stat. Ann. § 21-6614 to clarify that no expungement is available for any part of a sex offender's criminal record. Kan. Stat. Ann. § 21-6614(f).

¹⁷ Kan. Stat. Ann. § 21-6614(e)(1-19). The following criminal convictions cannot be expunged in Kansas: capital murder, murder in the first or second degree, voluntary and involuntary manslaughter, rape, aggravated sexual battery, sexual battery of an underage victim, indecent liberties with a child, criminal sodomy, indecent solicitation of a child, sexual exploitation of a child, aggravated incest, endangering a child, abuse of a child.

¹⁸ Kan. Stat. Ann. § 21-6614(a-b). Offenses requiring a three-year waiting period include: traffic infraction, cigarette or tobacco infraction, misdemeanor, Class D or E felony, severity level 6-10 non-drug crime, severity level 4 or 5 drug crime.

¹⁹ Kan. Stat. Ann. § 21-6614(c). Offenses requiring a five-year waiting period include: Class A, B, or C felony, off-grid felony, severity level 1-5 non-drug felony, severity level 1-3 drug crime, vehicular homicide, drive while license cancelled/suspended/revoked, perjury, applying for title of motor vehicle under false name/address, any crime punishable as felony where motor vehicle used, failing to stop at scene of accident, failing to have motor vehicle insurance, DUI.

an individual must not submit a petition for an expungement if they were convicted of any felony in the preceding two years.²⁰

Research demonstrates that waiting periods, particularly lengthy waiting periods, are a behavioral deterrent to taking action that might result in some benefit or avoid some cost.²¹ Even seconds-long interruptions cause original goal memories to decay,²² and the longer the interruption period, the more the goal is forgotten.²³ This fact is widely known, and legislatures desiring to reduce the incidence of some act sometimes do so by imposing waiting periods, as the abortion context illustrates.²⁴ After Mississippi passed a mandatory waiting period law, for example, 22% fewer abortions were performed in the state than expected in the year after passage.²⁵ Similarly, a study comparing abortions, birth outcomes, and mandatory waiting periods found that two-trip waiting periods (in which a patient must return to the clinic for a second, in-person visit after an initial in-person consultation) reduced abortions by 9%.²⁶ The abortion waiting periods from these laws are shorter than the Kansas expungement waiting periods recited above.

In terms of psychological mechanisms, expungement waiting periods may have the dual effect of delaying relief and discouraging convicted individuals from seeking relief. By the time the applicable waiting period elapses, the now-clearable conviction may no longer be a personal priority. An affected individual may have found a viable, but suboptimal, workaround to obtain gainful employment, housing, etc., despite their criminal record. Some jurisdictions have responded to this problem by eliminating (or greatly reducing the length of) waiting periods, particularly for minor offenses.²⁷

B. Forms

At least according to the law as written, a petitioner must complete six forms to petition for an expungement: (1) Criminal Cover Sheet; (2) Petition for Expungement of Conviction, (3) Notice of Hearing, (4) Order of Expungement of Conviction Cover Sheet; (5) Order for Expungement of Conviction; and (6) Order Denying Expungement of Conviction. These forms are available online at the Kansas Judicial Council website or

²⁰ Kan. Stat. Ann. § 21-6614(h)(1).

²¹ Walter Mischel & Ebbe B. Ebbesen, *Attention in Delay of Gratification*, 16 J. PERSONALITY & SOC. PSYCHOL. 329 (1970).

²² Erik M. Altmann & J. Gregory Trafton, *Memory for Goals: an Activation-based Model*, COG. SCI. 39 (2002).

²³ Christopher A. Monk, J. Gregory Trafton, & Deborah A. Boehm-Davis, *The Effect of Interruption Duration and Demand on Resuming Suspended Goals*, 14 J. EXPERIMENTAL PSYCHOL. 299, 309 (2008).

²⁴ Caitlin Myers, *Cooling off or Burdened? The Effects of Mandatory Waiting Periods on Abortions and Births*, IZA – Institute of Labor Economics (Jun. 2021).

²⁵ THEODORE J. JOYCE, ET AL., GUTTMACHER INST., *THE IMPACT OF STATE MANDATORY COUNSELING AND WAITING PERIOD LAWS ON ABORTION: A LITERATURE REVIEW*, 7 (2009).

²⁶ Myers, *supra* note 24.

²⁷ For example, Washington state provides for the expungement of marijuana convictions with no waiting period. Arkansas recently eliminated its five-year waiting period for certain felonies and its 60-day waiting period for misdemeanors. See David Schluskel & Margaret Love, *Record-breaking number of new expungement laws enacted in 2019*, Collateral Consequences Resource Center (Feb. 6, 2020), <https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/>.

in-person at the reception desk of the District Attorney's Office of the relevant jurisdiction.²⁸ A petitioner must file a separate set of forms for each offense.²⁹

The Kansas Judicial Council's official Instructions for Expungement of Conviction or Diversion contains the following black-box warning, recommending that expungement-seekers obtain the assistance of legal counsel:

Caution: Use of forms without the assistance of an attorney could harm your legal rights. You may want to have an attorney review your completed forms before you file them with the court. These are basic forms and may not cover every situation.³⁰

First, the Criminal Cover Sheet is a one-page document that requires the following information: the petitioner's name; the petitioner's contact information (address, cell phone number, e-mail address); the petitioner's sex, race, ethnicity, and date of birth; the petitioner's driver's license or state identification number; the petitioner's social security number; the petitioner's Kansas Disposition Report (KDR) transaction number; the names and contact information of the petitioner's attorneys (if relevant); the violation date; and the arresting officer name and badge number.³¹

The official Instructions for Expungement do not specify how an individual can obtain the violation date; given the waiting periods recited above, we speculate that few individuals remember the date of the events that led to their arrests. The Instructions also do not specify what a KDR transaction number is (we did not know ourselves until we investigated as we wrote this article) nor how an individual can obtain it. The Instructions do not specify how an affected individual can obtain the arresting officer's name and badge number,³² which we also speculate that almost no individuals remember. Conversations with Kansas Legal Services and the Johnson County³³ Court Clerk and District Attorney offices suggest that much of the information requested on the Criminal Cover Sheet is not actually required for submission, and a petitioner may leave certain fields blank.³⁴ No one with whom we spoke was able to tell us how an affected

²⁸ See Instructions for Filing Petitions and Orders of Expungement, Shawnee County District Attorney (Jul. 2011), https://www.snco.us/da/document/expungement_instructions.pdf.

²⁹ See Instructions for Filing Petitions and Orders of Expungement, Shawnee County District Attorney (Jul. 2011), https://www.snco.us/da/document/expungement_instructions.pdf.

³⁰ Instructions for Expungement of Conviction or Diversion, Kansas Judicial Council (Dec. 2016), <https://www.kansasjudicialcouncil.org/sites/default/files/Instructions%20for%20Expungement%20of%20Conviction%20or%20Diversion%20%2812-2016%29.pdf>.

³¹ Criminal Cover Sheet, Kansas Judicial Council (Dec. 10, 2014), https://www.kansasjudicialcouncil.org/sites/default/files/Criminal%20Cover%20Sheet%20%2812-2014%29_0.pdf.

³² See *supra* note 30. Moreover, this information is oftentimes only included as part of the criminal record if the arresting officer was subpoenaed to a preliminary hearing.

³³ Johnson County is the most populous county in Kansas. See Population of Counties in Kansas, World Population Review (2021), <https://worldpopulationreview.com/us-counties/states/ks>.

³⁴ See Renee Danser, Kansas Legal Services – Arresting Officer Name and Badge Number (Nov. 5, 2021) (on file with the A2J Lab); Hannah Crowe, Johnson County Court Clerk and District Attorney Office – KDR Transaction Number (Nov. 5, 2021) (on file with the A2J Lab); Hannah Crowe, Johnson County

individual pursuing a petition pro se would know what fields may be left blank without speaking with a lawyer (which, as noted above, is allegedly unnecessary in Kansas).

Second, the Petition for Expungement is a two-page document that requires the following information: the petitioner's name; the petitioner's sex, race, and date of birth; the crime for which the petitioner was convicted; the date of the petitioner's conviction, and the identity of the convicting court.³⁵ We note, with respect to this last requirement, that the identity of the convicting court is likely known to the court, given the requirement in Kansas law that the petitioner file the petition in the county (i.e., the court) that rendered the conviction. We suspect that much of the other information in this form particularly, and in other forms as well, is also known to the court, and is easier for the court to access than it is for the petitioner.

Third, the Notice of Hearing is a one-page document that contains the date, time, and location information regarding the petitioner's expungement hearing.³⁶ As explained below, the petitioner must obtain this information from the clerk of the court after submitting their Petition and Criminal Cover Sheet.³⁷ Thus, a petitioner cannot fill out all forms before filing.

Fourth, the Order of Expungement of Conviction Cover Sheet is a one-page document that requires the petitioner's basic identifying information: name, address, social security number, sex, date of birth, race, and ethnicity.³⁸ The purpose of the Cover Sheet is to aid the Kansas Bureau of Investigations (KBI) in expunging the correct conviction in the event that an expungement is ordered.³⁹

Fifth, the Order for Expungement of Conviction is a five-page proposed order granting the requested expungement that requires the same information regarding the petitioner and relevant offense that is contained in the Petition for Expungement.⁴⁰

Court Clerk and District Attorney Office – Arresting Officer Name & Badge Number (Nov. 16, 2021) (on file with the A2J Lab).

³⁵ Kan. Stat. Ann. § 21-6614(g)(1)(A-F).

³⁶ Notice of Hearing on Petition for Expungement of Conviction or Diversion, Kansas Judicial Council (Dec. 2016), <https://www.kansasjudicialcouncil.org/sites/default/files/Notice%20of%20Hearing%20%28conviction%20or%20diversion%29%20%2812-2016%29.pdf>.

³⁷ See *supra* note 30.

³⁸ Order of Expungement of Conviction or Diversion Cover Sheet, Kansas Judicial Council (Dec. 2016), <https://www.kansasjudicialcouncil.org/sites/default/files/Order%20of%20Expungement%20of%20Conviction%20or%20Diversion%20Cover%20Sheet%20%2812-2016%29.pdf>.

³⁹ *Id.*

⁴⁰ Order for Expungement, Kansas Judicial Council (Dec. 2017), https://www.kansasjudicialcouncil.org/sites/default/files/Order%20for%20Expungement%20of%20Conviction%20or%20Diversion%20%2812-2017%29_0.pdf.

Sixth, the Order Denying Expungement of Conviction is a three-page proposed order denying the requested expungement that requires the same information regarding the petitioner and relevant offense contained in the Petition for Expungement.⁴¹

Finally, a petitioner must prepare a Poverty Affidavit if they anticipate not being able to afford the \$195 docket fee that is required to file an expungement Petition.⁴² This is a detailed form in which the petitioner certifies that they are unable to pay the docket fee “by reason of poverty.”⁴³ A petitioner must disclose the name and address of their employer, their income (including employment, rental, interest and/or dividends, spousal support and/or child support, retirement, pension, social security, disability, workers compensation, unemployment benefits), and their assets (including cash, automobile, real property, jewelry).⁴⁴

The accurate completion of these various forms is a central component of obtaining an expungement within the state of Kansas. These forms require a petitioner to obtain and provide to the court multiple pieces of information already in the court’s possession. The process appears to constitute a justice-related “rite of passage.”⁴⁵

Behavioral research shows that voluminous, especially duplicative, paperwork is an imposing hurdle to the successful completion of any process or project. The Center of Economic Progress in Chicago conducted an experiment in 2002 that investigated this phenomenon.⁴⁶ The Center hosted a “First Account Program” to entice unbanked, lower-income populations that primarily relied on check cashers to open low-fee bank accounts.⁴⁷ The participants who had the opportunity to complete most of the voluminous and sometimes duplicative requisite paperwork in the presence of a bank representative were significantly more likely to open an account; the researchers attributed this finding to the lower probability that such participants would “get derailed by procrastination” or “forget about their intention to sign up.”⁴⁸ We speculate that these participants likely also benefited from the opportunity to ask the bank representative questions about the forms while completing the paperwork. To our knowledge, no analogous court representative, one encouraging a petitioner to seek an expungement and in front of whom a petitioner could complete forms and ask questions, exists in Kansas.

⁴¹ Order Denying Expungement, Kansas Judicial Council (Dec. 2016), <https://www.kansasjudicialcouncil.org/sites/default/files/Order%20Denying%20Expungement%20of%20Conviction%20or%20Diversion%20%2812-2016%29.pdf>.

⁴² Poverty Affidavit, Kansas Judicial Council (Jul. 1, 2013), <https://www.kansasjudicialcouncil.org/sites/default/files/Poverty%20Affidavit%20%287-2013%29.pdf>.

⁴³ Kan. Stat. Ann. § 60-2001.

⁴⁴ See *supra* note 42.

⁴⁵ See, Wikipedia, *Rite of Passage*, https://en.wikipedia.org/wiki/Rite_of_passage (last accessed November 18, 2021).

⁴⁶ See Marianne Bertrand, Sendhil Mullainathan, & Eldar Shafir, *Behavioral Economics and Marketing in Aid of Decision Making Among the Poor*, 25 AM. MARKETING ASSN 8, 13 (2006).

⁴⁷ See *id.*

⁴⁸ See *id.*

C. Submission and fees

After accurately completing the requisite forms, a petitioner must file their Petition for Expungement and Criminal Cover Sheet, the first and second forms discussed above. The petitioner must file them with the clerk of the court in the county in which they were arrested.⁴⁹ The petitioner typically must also submit multiple copies of the Petition; the number required varies by county,⁵⁰ so the petitioner must find out the number of copies required and provide them. At this time, the petitioner must pay a docket fee of \$195 via money order.⁵¹ Obtaining a money order requires going to a post office or grocery store with the cash and fee or a check from a personal bank account.⁵² The petitioner may submit these forms and the docket fee money order either in-person at the county courthouse or via mail to the district court clerk.⁵³ If a petitioner cannot afford the \$195 docket fee, they may submit a Poverty Affidavit with the required detailed information.⁵⁴

After submitting their Petition and Criminal Cover Sheet and paying the \$195 filing fee, the petitioner must contact the clerk of the court to request an expungement hearing.⁵⁵ The petitioner must request the date, time, division, and room number of the hearing.⁵⁶ The petitioner must then complete the Notice of Hearing form and file it – along with two additional copies – to the district court clerk.⁵⁷ Thus, at this juncture, the petitioner must obtain from and submit back to the court, not historical information that might require a record look-up, but freshly generated information.

D. Hearing

After receiving an expungement petition, the court notifies the prosecutor and arresting law enforcement agency.⁵⁸ In some jurisdictions, courts may grant expungements without a hearing, particularly if no government agency objects.⁵⁹ In Kansas, however, according to the law, the court must hold a hearing for each expungement,⁶⁰ and the petitioner must attend.⁶¹ The petitioner must bring with them the completed Order of Expungement of

⁴⁹ See *supra* note 30.

⁵⁰ See *id.*

⁵¹ Kan. Stat. Ann. § 21-6614(g)(2). This amount is specified by the Kansas Supreme Court and is uniform across counties.

⁵² An individual may obtain a money order by going in person to a U.S. post office, a Western Union, or a large retailer such as Walmart. Money orders can be paid for with cash or a debit card and typically cost a small fee (i.e. \$1-\$5). See Margarete Burnette, *How Money Orders Work: What You Should Know*, NerdWallet (Oct. 15, 2020), <https://www.nerdwallet.com/article/banking/money-orders>.

⁵³ See Expungement, Johnson County District Attorney, <https://da.jocogov.org/expungement> (last visited Oct. 17, 2021).

⁵⁴ See *supra* note 42.

⁵⁵ See *supra* note 30.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ Kan. Stat. Ann. § 38-6614(g)(1).

⁵⁹ In Massachusetts, for example, the Commissioner of Probation seals a criminal record via mail, without a hearing. See Greater Boston Legal Services, *Sealing my CORI*, Mass Legal Help (Jul. 2019), <https://www.masslegalhelp.org/cori/sealing>.

⁶⁰ Kan. Stat. Ann. § 38-6614(g)(1).

⁶¹ See *supra* note 30.

Conviction Cover Sheet, the Order for Expungement of Conviction, and the Order Denying Expungement of Conviction.⁶²

While it is somewhat of a known and common practice for an attorney to submit proposed orders, even proposed orders denying the request sought by the attorney – such seems foreign to an unrepresented petitioner to create a proposed order and potentially demeaning to create one denying the requested relief. Presumably the purpose of a proposed order is to reduce the burden on the court and the court staff to draft and mail an order after the hearing. It allows the order to be signed, copied, and served immediately and then allows someone (sometimes even one of the parties) to walk it to the clerk of court that day for filing. Presumably for attorneys the strategy is to draft an order that encompasses the whole of the relief requested and create an easy path to victory. These advantages may not be apparent to the unrepresented.

At the hearing, the court will inquire into the background of the petitioner and may have access to any reports or records on file with the prisoner review board.⁶³ Any individual with relevant information about the petitioner may testify as well.⁶⁴

Kansas Legal Services informs us that, despite the statutory requirement for a hearing, some local practices allow for the prosecutor to indicate agreement by executing the proposed order without a hearing. When this occurs, that proposed order executed by the prosecutor is transmitted to the Judge who can then choose to forego a hearing by also executing the order for expungement.⁶⁵ It is unlikely for an unrepresented petitioner to know they may not need to attend a hearing as this practice is outside of that prescribed by Kansas law.⁶⁶ It seems unlikely an unrepresented person would intuit this on their own after going through the process of calling the Clerk's office to obtain a hearing date.⁶⁷ If the idea of attending a hearing seems daunting to an unrepresented individual, it is possible this requirement, which may not actually be a requirement in practice, could dissuade the individual from undertaking the process at all.

E. Decision

The presiding judge orders the expungement of a conviction 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 against the petitioner; (2) the circumstances and behavior of the petitioner warrant the expungement; and (3) the expungement is consistent with the public welfare.⁶⁸

⁶² *Id.*

⁶³ Kan. Stat. Ann. § 38-6614(g)(3).

⁶⁴ *Id.* The “consistent with public welfare” requirement adds a layer of uncertainty to this process because it allows judges to exercise discretion in granting or denying expungements.

⁶⁵ *See*, E-mail from Marilyn Harp, Exec. Dir. (ret.), Kansas Legal Serv., to Renee Danser, Assoc. Dir. Of Rsch., A2J Lab (Mar. 7, 2023, 15:12 EST) (on file with author).

⁶⁶ *See supra* note 58.

⁶⁷ *See supra* note 30.

⁶⁸ Kan. Stat. Ann. § 38-6614(h)(1-3).

The clerk sends a certified copy of the order of expungement to the KBI.⁶⁹ Once the certified order of expungement is received, it takes approximately two to four weeks for the KBI to process the expungement and update the individual's criminal record history.⁷⁰ The KBI will notify the FBI, the Kansas Secretary of Corrections, and any Kansas law enforcement agencies that were involved with the individual's conviction.⁷¹ The KBI does not, however, notify private record check agencies of an expungement,⁷² so these databases may continue to include inaccurate information on the conviction.⁷³ The petitioner must contact private record check agencies, and indeed any Kansas agencies involved in the record-clearing process, to assure that the court-ordered remedy was in fact implemented.

F. Impact

After obtaining an expungement in Kansas, a person "shall be treated as not having been arrested, convicted or diverted of the crime."⁷⁴ An expunged conviction may, however, be considered for sentencing purposes if the individual is convicted of a subsequent crime.⁷⁵ An individual is also required to disclose an expunged arrest or conviction in a variety of circumstances, including application for admission to the Kansas Bar, application for employment as a law enforcement officer, or application for a license to carry a concealed weapon.⁷⁶ Other than in the aforementioned statutorily specified circumstances, an individual may respond that they have not been arrested or convicted in response to questions on applications for license, housing, employment, or other benefits.⁷⁷

⁶⁹ Kan. Stat. Ann. § 38-6614(i).

⁷⁰ Expungement of Criminal History Records, Kansas Bureau of Investigation (Sept. 2011), <https://www.kansas.gov/kbi/info/docs/pdf/Fact%20Sheet%20-%20Expungement.pdf>.

⁷¹ Kan. Stat. Ann. § 38-6614(i).

⁷² See *supra* note 62.

⁷³ The presence of incorrect information in official reports has led to the filing of several Fair Credit Reporting Act (FCRA) actions, some of which have reached the Supreme Court. See *e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).

⁷⁴ Kan. Stat. Ann. § 21-6614(i).

⁷⁵ Kan. Stat. Ann. § 21-6614(i)(1). Belying the definition of expungement of a deletion or destruction of a criminal record.

⁷⁶ Kan. Stat. Ann. § 21-6614(i)(2)(A-L). A full list of circumstances requiring disclosure of an expunged arrest or conviction includes the following: application for licensure as a private detective, private detective agency, or certification as a firearms trainer; application for admission to the practice of law; application for employment with the Kansas lottery; application for employment with the Kansas racing and gaming commission; application for a commercial driver's license; application for employment with the state gaming agency; application for employment with the tribal gaming commission; application for registration as a broker-dealer, agent, investment adviser or investment adviser representative; application for employment as a law enforcement officer; application for a licensure to carry a concealed weapon pursuant to the personal and family protection act; application for a license to act as a bail enforcement agent.

⁷⁷ Kan. Stat. Ann. § 21-6614(j).

III. Overview of the Record Clearing Process

We provide the steps involved in summary form. As Section I outlines in detail, an expungement petitioner must successfully complete each of the following actions to obtain an expungement in the state of Kansas:

- Wait until at least two years have elapsed since they completed the sentence or probation for their last convicted felony;
- Wait the applicable waiting period (either three or five years) since they completed the sentence or probation for the offense they seek to expunge;
- Obtain copies of at least six different multi-page forms (an additional form is required if the petitioner requires a waiver of the \$195 filing fee);⁷⁸
- Acquire the information necessary to complete the forms, including:
 - The arresting officer name and badge number;
 - The petitioner's Kansas Disposition Report (KDR) transaction number;
 - The petitioner's social security number;
 - The date of the violation; and
 - The date of the conviction.
- Once all relevant information has been acquired, complete the six requisite forms;
- Submit two of the six forms (the Petition and Criminal Cover Sheet) to the clerk's office in person or via mail;
- Pay a \$195 docket fee by money order or submit a fee waiver, the latter of which requires documentation of the petitioner's employment, income, and assets;
- Contact the clerk's office to request a hearing and obtain the relevant information (date, time, location) regarding the hearing;
- Use the obtained information to complete the Notice of Hearing form;
- Submit the Notice of Hearing form to the clerk's office in person or via mail; and
- Appear at the hearing and bring the three remaining forms (Order of Expungement of Conviction Cover Sheet, Order for Expungement of Conviction, and Order Denying Expungement of Conviction).

It is perhaps unsurprising that the Kansas Judicial Council, contrary to the inference one might draw from the sentiments of the members of the Kansas Bar referred to in this article's Introduction, explicitly recommends that expungement petitioners seek the advice of legal counsel in preparing these forms.⁷⁹

IV. Conclusions

We disagree that it is straightforward and simple to obtain an expungement in Kansas. Section II summarizes eleven individual steps, one with five subcomponents. We cannot characterize this, on its face, as simple. Even if there were fewer steps, some of the

⁷⁸ Accurate completion of these forms requires knowledge of various pieces of information that the petitioner may not readily have or be able to find, including: the arresting officer's name, the arresting officer's badge number, the conviction date, and the matter number.

⁷⁹ See *supra* note 30.

information required by law is difficult to obtain. We draw little comfort from the apparent fact that some such information in practice is not in fact required. To the contrary, the presence of such mandatory-in-law-and-in-public-statements-but-ignored-in-practice requirements strikes us as further evidence against the simplicity of the process.

However, even if we agreed it was simple and straightforward, there are some improvements that could be made. With regard to forms, for example, if Kansas will continue to require six separate forms, these forms could be rewritten with plain language principles in mind. Kansas could remove requirements to complete information on these forms that are, in practice, not actually required and are difficult (or impossible) to find. Kansas could remove requirements to complete information on these forms that is already in the court's possession beyond what is needed to identify the conviction that is the subject of the petition. Kansas could remove the requirement that a petitioner file a separate set of forms for each conviction. Finally, Kansas could remove requirements designed only to reduce burden on the court (shifting the burden from the petitioner to the court to complete the court's administrative tasks). Short of automating this process, which may serve to remove barriers from both the petitioners and the courts and justice-system actors, any and all of these changes would be a step on the path to simplicity.