

**REPORT OF THE JUDICIAL
COUNCIL DEATH PENALTY
ADVISORY COMMITTEE**

Approved by the Judicial Council
December 4, 2009

BACKGROUND

On May 4, 2009, Senator Tim Owens requested that the Kansas Judicial Council review 2009 Senate Bill 208, which would abolish the death penalty in Kansas. Senator Owens asked that the Council draft a workable bill to address the technical problems that were apparent when the bill was debated by the Senate earlier in 2009. In addition, Senator Owens asked the Council to review questions of cost, constitutionality and the effect of repeal. At its June 2009 meeting, the Judicial Council agreed to undertake the study and assigned the study to its Death Penalty Advisory Committee.

COMMITTEE MEMBERSHIP

The following persons served on the Judicial Council Death Penalty Advisory Committee during the study:

Hon. Donald R. Noland, Chair, Girard, District Court Judge in 11th Judicial District.

Ron Evans, Topeka, Chief Defender, Kansas Death Penalty Defense Unit.

Jeffrey D. Jackson, Lawrence, Professor at Washburn University School of Law and former consultant on death penalty issues to the Kansas Supreme Court.

Michael Kaye, Topeka, Professor at Washburn University School of Law.

Stephen Morris, Hugoton, State Senator from the 39th District and Senate President.

Steven Obermeier, Olathe, Assistant District Attorney in Johnson County.

Thomas (Tim) Owens, Overland Park, State Senator from the 8th District, Chair of the Senate Judiciary Committee and member of the Judicial Council.

Kim T. Parker, Wichita, Deputy District Attorney in Sedgwick County.

Patricia Scalia, Topeka, Executive Director of Kansas Board of Indigents' Defense Services.

Jason Thompson, Topeka, Assistant Revisor of Statutes.

Ron Wurtz, Topeka, Deputy Federal Public Defender and former Chief Defender, Kansas Death Penalty Defense Unit.

SUMMARY

The Death Penalty Advisory Committee's primary assignment was to review and make recommendations on 2009 SB 208 (Appendix A). The Committee agreed that SB 208 presented a number of technical problems which could not be resolved simply by amending the bill. Instead, the Committee drafted a new bill, which is attached to this report as Appendix B. A discussion of the issues identified and resolved in the redraft of the bill is contained in Section I of this report.

In addition to reviewing SB 208, Senator Owens asked the Advisory Committee to review any constitutional questions relating to those currently awaiting execution versus those convicted of the same offense after abolition of the death penalty. The Committee concluded that prospective repeal of the death penalty would not violate equal protection or the prohibition against ex post facto laws. These issues are addressed in Section II and Appendix D of this report.

Finally, Senator Owens asked the Advisory Committee to review the cost of a death sentence compared to the cost of life in prison without parole. Costs are discussed in Section III of this report.

I. Review and Redraft of SB 208

In reviewing 2009 SB 208 (see Appendix A), the Advisory Committee acknowledged that its role was not to make a policy recommendation about whether the death penalty should be repealed. Rather, the Committee's role was to draft a workable bill that would effectively repeal the death penalty if the legislature decides that is the appropriate policy.

The Committee first reviewed 2009 SB 208, its fiscal note, and written testimony from both proponents and opponents that was submitted during legislative hearings on the bill, including testimony offered by the Attorney General. The Committee also reviewed correspondence from Senator Derek Schmidt setting out his concerns about the bill. A copy of Senator Schmidt's letter and the Committee's specific responses to questions and issues he raised are attached as Appendix C.

The Committee identified a number of technical problems with SB 208 which it attempted to address by drafting a new bill, which is attached to this report as Appendix B. What follows is a discussion of how those technical problems were resolved in the new bill and a description of those issues which present a policy choice for the legislature.

Effective Date of Repeal: New bill, New Section 1.

The Committee believes that, as originally drafted, Section 1 of 2009 SB 208 is problematic because it would make the effective date of the death penalty repeal dependent on the date of sentencing rather than the date the offense was committed. In other words, if a person has been convicted of capital murder but not yet sentenced before the bill's effective date, that person could not be sentenced to death. Under this framework, a judge would have a great deal of discretion to determine whether a case was death penalty eligible, simply by setting the date of the sentencing hearing. Also, there would inevitably be legal maneuvering by both the prosecution and defense about setting that date.

For these reasons, in the redraft, the Committee changed Section 1 to make the date of the offense the controlling date. This is consistent with the historical practice of making new sentencing laws applicable only to crimes committed on or after their effective date. Under this approach, defendants who are already under a death sentence will remain under a death sentence. In addition, any defendant who is charged with capital murder occurring before July 1, 2010, will still be eligible to receive a death sentence.

New crime of “aggravated murder”: New bill, New Section 2.

The primary concern expressed in Senator Schmidt’s letter was that SB 208 repeals the capital murder statute but fails to clearly define when a defendant may be sentenced to life imprisonment without the possibility of parole. The Committee’s redraft of the bill solves this problem by defining the new crime of “aggravated murder” for which the penalty is imprisonment for life without the possibility of parole. The definition of aggravated murder in Section 2 is identical to the current definition of capital murder found in K.S.A. 21-3439. This means that any crime which was eligible for the death penalty prior to July 1, 2010, would carry a penalty of life imprisonment without the possibility of parole if committed after July 1, 2010.

Multiplicity and *State v. Scott*: New bill, New Section 2

In drafting Section 2, the Committee included language which is intended to directly address the Kansas Supreme Court’s decision in *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008). In that case, the court held that two convictions arising out of a double homicide, one for capital murder for the intentional and premeditated killing of more than one person, and the other for premeditated first-degree murder, were improperly multiplicitous. In other words, a defendant could not be convicted of capital murder on the basis of multiple victims and also convicted of first-degree murder for one or more of those multiple victims.

The *Scott* court based its holding on the lack of declared legislative intent to authorize cumulative punishment for multiple victim murders. *Scott*, 286 Kan. at 65-68. If the legislature does intend to authorize cumulative punishment in such a case, the Committee’s recommended language will make that clear. The language is found in Section 2, subsection (c) and reads as follows, “Notwithstanding subsections (2)(a) or (b) of K.S.A. 21-3107, and amendments thereto, when the same conduct of a defendant may establish the commission of aggravated murder and the commission of another crime under the laws of this state, the defendant may be prosecuted and sentenced for each of such crimes.”

This amendment makes clear that the legislature intends cumulative punishment under Section 2. For example, if a defendant commits an intentional and premeditated double homicide, the defendant may be charged with and sentenced for both aggravated murder under Section 2(a)(6) (intentional and premeditated killing of more than one person) and first degree murder. As another example, if a defendant commits an intentional and premeditated murder in the course of a kidnapping for ransom, the defendant may be charged with and sentenced for both aggravated murder under Section 2(a)(1) (intentional and premeditated killing in commission of kidnapping for ransom) and the underlying kidnapping.

On the other hand, if the legislature agrees with the outcome of the *Scott* decision and does not wish to authorize cumulative punishment as described above, subsection (c) of Section 2 should be deleted.

Definition of Life Without Parole: New bill, New Section 3.

As originally drafted, 2009 SB 208 would repeal the current definition of life without parole. The Committee believes that the definition of life without parole should be retained, and it appears in the redraft in Section 3. The language is based on current K.S.A. 21-4624(g) and 21-4638.

Governor's Commutation Powers: New bill, Section 12 amending K.S.A. 22-3705.

The Committee's redraft amends K.S.A. 22-3705 to clarify the governor's commutation powers where the original sentence is death, life without the possibility of parole, or some other term of imprisonment. The amendments do not significantly change current law, but assume that the governor's power to commute a sentence of life without the possibility of parole should be limited in the same way as the power to commute a sentence of death is limited.

Under the amendments, the governor has the power to commute a death sentence to life imprisonment without parole or any other term of imprisonment not less than 10 years. The governor may commute a

sentence of life imprisonment without parole to a sentence of life or any other term of imprisonment not less than 10 years.

The Committee noted that life imprisonment means something different now than it did when K.S.A. 22-3705 was enacted in 1970. Then, life imprisonment meant parole eligibility after 15 years. K.S.A. 22-3717(b)(3). Now, life imprisonment means parole eligibility after 25 years. K.S.A. 22-3717(b)(1). In addition there is now the possibility of a Hard 40 or Hard 50 sentence. K.S.A. 21-4635.

Conforming Amendments: New bill, Sections 4 through 11 and 13 through 23

The majority of the amendments contained in the redraft are conforming amendments which strike references to capital murder or the death penalty, change some of those references to "capital murder before its repeal," and add new references to "aggravated murder." The effect of these changes is to ensure that the new crime of aggravated murder will be treated in the same manner as capital murder before its repeal. For example, under current law a defendant convicted of capital murder cannot have the conviction of capital murder expunged, is subject to Alexa's Law, and must register under the Offender Registration Act. Under the redraft, a defendant convicted of aggravated murder is subject to exactly the same requirements and limitations. These changes resolve issues 1 through 4 listed on pages 1-2 of Senator Schmidt's letter.

II. Constitutionality of Repeal

As part of its review of 2009 SB 208, Senator Owens asked the Advisory Committee to review any constitutional questions relating to those currently awaiting execution versus those convicted of the same offense after abolition of the death penalty. The Committee concluded there are no constitutional obstacles to a prospective repeal of the death penalty.

The Committee concluded that prospective repeal of the death penalty does not constitute an arbitrary classification or deny a criminal

defendant equal protection of the law. The Committee also concluded that prospective repeal of the death penalty does not violate the prohibition against ex post facto laws, because the Ex Post Facto Clause is implicated only where a law alters the definition of criminal conduct or increases the penalty retroactively. A more detailed discussion of these issues is included in the memorandum attached as Appendix D.

III. Costs of the Death Penalty

Senator Owens asked the Advisory Committee to review the cost of a death sentence compared to the cost of life in prison without parole. First, some background on why death penalty cases are so costly may be helpful.

General Background on Death Penalty Costs

Death penalty cases are more expensive than non-death prosecutions for many reasons, including higher trial costs, higher appeal costs, potential retrial costs, and lost opportunity costs. The capital case consumes more trial court time and attorney time than the non-capital case beginning with pre-trial preparation. A capital case often takes a full year to come to trial. Even before the prosecutor has given notice that he or she will seek the death penalty, experienced defense counsel have begun preparing the defense. Both prosecution and defense must prepare for two separate trials: a trial to determine guilt and a trial to determine the appropriate penalty.

At the earliest stages of the capital case, competent defense counsel must engage the costly services of investigators, psychological evaluators, and a mitigation specialist. The mitigation specialist is a forensic researcher who will develop an exhaustive "social history" of the defendant. This history will be useful to the defense in both the trial phase and the penalty phase. The United States Supreme Court has ruled that compiling a social history is a requirement of competent representation in death penalty mitigation proceedings, and that a capital defense lawyer who does not have such a report prepared must show that the report would not have

aided in the case or the case may be reversed and a new trial on penalty ordered. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003). Furthermore, a defendant has an absolute right to present mitigation evidence relevant to leniency in sentencing during the penalty hearing. See *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978).

The capital case requires more lawyers on both the prosecution and defense teams, more experts on both sides, more pre-trial motions, longer jury selection time, and a longer trial. Researchers at Duke University found that a capital murder case takes more than three times longer to try than a non-capital murder case. See P. Cook, "The Costs of Prosecuting Murder Cases in North Carolina," Duke University, Terry Sanford Institute of Public Policy (May 1993). Some consider the capital trial the single most costly element of the capital punishment legal process that extends from arrest through trial to sentencing and possible execution.

The post-conviction process is a long process even with changes in federal law intended to streamline it. The process after trial includes direct appeal to the state supreme court and petition for review to the U.S. Supreme Court. Following denial of Supreme Court review, the inmate may seek state habeas corpus relief. The inmate can then appeal a denial of state habeas relief to the state Supreme Court and to the U.S. Supreme Court. After state proceedings are completed, the inmate may then seek federal habeas corpus relief, and appeal the federal trial court decision to the U.S. Circuit Court of Appeals and the U.S. Supreme Court. If evidentiary hearings are required to decide the issues in the case, the case can be litigated for years.

After an inmate is denied federal habeas corpus relief in the U.S. Supreme Court, and upon issuance of a state death warrant, the inmate may again initiate state or federal court proceedings to avoid execution. The courts may delay an execution to evaluate the new claims. The inmate may also seek clemency or commutation of the death sentence from the governor.

The post-conviction process involves difficult and time-consuming legal and factual issues. There is a nationwide reversal rate of more than

two out of three capital judgments due to serious error. See J. Leibman, *et al.*, "Capital Attrition: Error Rates in Capital Cases 1973-1995," 78 Texas Law Review 1839 (2000). The Leibman study also found that when the cases were retried, over 80% of the defendants received a sentence less than death.

Death penalty costs also impact the courts. State criminal justice systems are run economically. Salaries of those working in the criminal justice system are often modest. Jurors are paid a token sum for their service. Court facilities are usually not elaborate. The cost of the death penalty can weigh heavily on this system and weaken it. Courts at the trial and appellate level may become so busy with capital litigation matters that other court business suffers potential neglect due to lack of time and personnel.

The death penalty process combines high costs of trial, investigation, and appeals. Yet a death penalty proceeding may, and often does, result in a sentence of life in prison rather than the death sentence, either because the judge or jury imposes a sentence less than death or because the death sentence is not carried out. When this happens, taxpayers pay for not only a more costly criminal trial and appeals process, they also pay for years of incarceration in maximum security.

It may take ten to twelve years from conviction for an execution. Kansas has yet to execute a capital defendant since the death penalty was reinstated in 1994.

The more reliable the procedures are that are used by the state to seek and to impose the death penalty, the higher the costs incurred. Higher legal standards for death penalty defense at trial, on appeal, and in post-conviction proceedings, higher pay for lawyers, more time spent by prosecutors to respond to the defense case, and more thorough review by the appellate courts add to the cost. However, these higher legal standards are necessary to insure that an innocent person is not put to death. If they are ignored, the result is likely to be a reversal on appeal and a costly retrial.

The ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, revised edition (February 2003), are recommended national standards of practice developed to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. The United States Supreme Court reaffirmed in *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), that its standard of effective assistance of counsel under the 6th Amendment in death penalty cases is influenced by local community standards and the ABA Guidelines. State lawmakers must be aware of Supreme Court case law and the ABA standards when they enact capital legislation.

The standards contained in the ABA Guidelines apply once a person is taken into custody and extend to all stages of every case in which the state or federal government may seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation. In February 2003, these standards were revised upward. They now require membership on the defense team of “at least one mitigation specialist.”

The Guidelines also require “high quality representation” in defense of death penalty cases. This is a more demanding standard than the former Guideline standard: “effective assistance.” The same standards apply whether the capital defense counsel is appointed or retained. The Guidelines seek to apply at “the moment the client is taken in to custody” in a death eligible case, and funding should begin at this time. At the outset of representation a team of two attorneys, and an investigator, and a mitigation specialist should be assembled. One member of the team should be qualified to screen for mental retardation and mental illness. If counsel is retained and lacks funds to hire such assistants, funds should be supplied by the court. All members of the team, including the non-lawyers, must receive death penalty specific training at least every other year.

So that clients get the necessary quality of representation, the Guidelines recommend that attorneys and other team members should receive “full” funding. Public defenders must receive comparable salaries to the prosecutors’ salaries. For private practitioners, the hourly rate

should be the market rate for retained lawyers doing similar work. The commentary to the Guidelines points out that in the criminal justice system, "you get what you pay for" and, therefore, discourages flat fees, caps, and other cost saving methods that could hinder quality representation. The commentary to the Guidelines encourages periodic payment to lawyers rather than requiring counsel to wait until the case is concluded.

Death Penalty Costs in Kansas

In considering the question of death penalty costs, the Advisory Committee reviewed its own previous January 2004 report on costs as well as Post Audit's December 2003 Performance Audit Report, "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections." In its 2004 report, the Advisory Committee concluded that the best information relating to what the death penalty costs in Kansas could be obtained from the Post Audit Report.

The Advisory Committee did not have the time or resources to conduct a complete update of either report; however, the Committee was able to obtain some figures that are more current. The 2003 Post Audit report projected costs in three kinds of cases: seven cases where the death penalty was sought and imposed; seven cases where the death penalty was sought but not imposed; and eight first degree murder cases where the death penalty was not sought. At the time of the Post Audit report, actual cost figures did not exist. However, there are now some estimated figures available as to defense costs that have been actually incurred so far.

Committee member Patricia Scalia, Executive Director of the Board of Indigents' Defense Services, provided information about estimated defense costs incurred in the seven cases where the death penalty was sought but not imposed and the eight cases where the death penalty was not sought. See the chart attached as Appendix E. (The cases listed on the chart are the same ones used in the 2003 Post Audit report.) The chart demonstrates that death penalty cases in Kansas have proven more expensive to defend at trial and on appeal than non-death cases.

The figures in the chart at Appendix E were based on the 2003 Post Audit estimates and then adjusted up or down to reflect defense costs incurred between 2003 and October 8, 2009. Defense costs include defense investigators' and attorney' hourly pay, based upon their estimates of the hours they worked on each death case. Defense costs do not include administrative costs. Two of the defendants in death cases, Marsh and Elms, have entered into plea agreements and received life sentences; thus, those cases are completed and no additional costs other than incarceration are likely to be incurred. The other five cases, however, are ongoing and costs will continue to accrue.

Incarceration Costs

The Committee invited Secretary of Corrections Roger Werholtz to attend a meeting to discuss the difference in cost between incarcerating an inmate for life versus putting that inmate to death. A copy of Secretary Werholtz' memorandum regarding operating cost information is attached as Appendix F.

Secretary Werholtz explained that one can calculate the cost of incarcerating an inmate either by looking at the average annual cost per inmate (which includes DOC operating costs) or the marginal cost per inmate. The average annual per capita cost to house an inmate is approximately \$25,000. However, the marginal cost to house one additional inmate is \$2,400 per year. He suggested the latter cost figure is the most realistic one.

Inmates who are under a sentence of death are housed in administrative segregation; there is no separate "death row." Because it is more labor intensive, housing an inmate in administrative segregation costs approximately \$1,000 more per year than housing that inmate in the general population. If an inmate is sentenced to life without parole, even if that inmate was previously sentenced to death, the inmate would be housed in the general population unless the DOC determined that a security concern required the inmate to be housed in administrative segregation.

Post Audit's projected incarceration/execution costs were based in part on the DOC's average annual per capita cost to house an inmate. Secretary Werholtz stated that, while those numbers are not inaccurate, they do not represent the true difference between incarcerating an inmate for life versus putting that inmate to death.

Given the small number of Kansas inmates currently sentenced to death, housing those inmates makes little or no difference to the Department of Corrections' budget. Only if the inmate population increased by a significant amount would the DOC reach a "tipping point" where construction of new bed space would be required.

Conclusion re Costs

If the death penalty were repealed in Kansas pursuant to the bill drafted by the Advisory Committee, it is expected that the state would realize cost savings. However, the Committee recognizes that cost savings alone are not the only consideration in determining whether to repeal the death penalty, and the Committee expresses no opinion regarding whether the death penalty should be repealed.

*As Amended by Senate Committee**Session of 2009***SENATE BILL No. 208**

By Committee on Ways and Means

2-4

10 AN ACT concerning abolition of the death penalty; amending K.S.A. 21-
 11 3105, 21-4364, 21-4634, 21-4635, 21-4706, 22-3405, 22-3705, 22-3717,
 12 22-4210, 22-4505 and 22-4506 and K.S.A. 2008 Supp. 21-4619, 22-
 13 4902, 38-2255, 38-2271, 38-2312, 38-2365, 39-970, 65-5117 and 75-
 14 52,148 and repealing the existing sections; also repealing K.S.A. 21-
 15 3439, 21-4622, 21-4623, 21-4624, 21-4627, 21-4629, 21-4630 and
 16 22-3704.

17
 18 WHEREAS, Kansas reenacted the death penalty in 1994; and
 19 WHEREAS, ~~Ten inmates~~ **Inmates** in Kansas are currently under sen-
 20 tence of death; and

21 WHEREAS, Kansas has not carried out an execution since 1965; and

22 WHEREAS, The estimated median cost of a case in which the death
 23 sentence was given was approximately 70% more than the median cost
 24 of a non-death penalty murder case: Now, therefore,

25

26 *Be it enacted by the Legislature of the State of Kansas:*

27 New Section 1. (a) No person shall be sentenced to death after July
 28 1, 2009.

29 (b) Any person who has been sentenced to death before July 1, 2009,
 30 may be put to death pursuant to the provisions of article 40 of chapter
 31 22 of the Kansas Statutes Annotated, and amendments thereto.

32 (c) The provisions of article 40 of chapter 22 of the Kansas Statutes
 33 Annotated, and amendments thereto, shall apply only to persons who
 34 have been sentenced to death before July 1, 2009.

35 Sec. 2. K.S.A. 21-3105 is hereby amended to read as follows: 21-
 36 3105. (a) A crime is an act or omission defined by law and for which,
 37 upon conviction, ~~a sentence of death~~, imprisonment or fine, or both im-
 38 prisonment and fine, is authorized or, in the case of a traffic infraction or
 39 a cigarette or tobacco infraction, a fine is authorized.

40 (b) Crimes are classified as felonies, misdemeanors, traffic infractions
 41 and cigarette or tobacco infractions.

42 (1) A felony is a crime punishable ~~by death or~~ by imprisonment in
 43 any state correctional institution or a crime which is defined as a felony

1 by law.

2 (2) A traffic infraction is a violation of any of the statutory provisions
3 listed in subsection (c) of K.S.A. 8-2118 and amendments thereto.

4 (3) A cigarette or tobacco infraction is a violation of subsection (m)
5 or (n) of K.S.A. 79-3321 and amendments thereto.

6 (4) All other crimes are misdemeanors.

7 Sec. 3. K.S.A. 2008 Supp. 21-4619 is hereby amended to read as
8 follows: 21-4619. (a) (1) Except as provided in subsections (b) and (c),
9 any person convicted in this state of a traffic infraction, cigarette or to-
10 bacco infraction, misdemeanor or a class D or E felony, or for crimes
11 committed on or after July 1, 1993, nondrug crimes ranked in severity
12 levels 6 through 10 or any felony ranked in severity level 4 of the drug
13 grid, may petition the convicting court for the expungement of such con-
14 viction or related arrest records if three or more years have elapsed since
15 the person: (A) Satisfied the sentence imposed; or (B) was discharged
16 from probation, a community correctional services program, parole, post-
17 release supervision, conditional release or a suspended sentence.

18 (2) Except as provided in subsections (b) and (c), any person who has
19 fulfilled the terms of a diversion agreement may petition the district court
20 for the expungement of such diversion agreement and related arrest re-
21 cords if three or more years have elapsed since the terms of the diversion
22 agreement were fulfilled.

23 (b) Except as provided in subsection (c), no person may petition for
24 expungement until five or more years have elapsed since the person sat-
25 isfied the sentence imposed, the terms of a diversion agreement or was
26 discharged from probation, a community correctional services program,
27 parole, postrelease supervision, conditional release or a suspended sen-
28 tence, if such person was convicted of a class A, B or C felony, or for
29 crimes committed on or after July 1, 1993, if convicted of an off-grid
30 felony or any nondrug crime ranked in severity levels 1 through 5 or any
31 felony ranked in severity levels 1 through 3 of the drug grid, or:

32 (1) Vehicular homicide, as defined by K.S.A. 21-3405, and amend-
33 ments thereto, or as prohibited by any law of another state which is in
34 substantial conformity with that statute;

35 (2) driving while the privilege to operate a motor vehicle on the public
36 highways of this state has been canceled, suspended or revoked, as pro-
37 hibited by K.S.A. 8-262, and amendments thereto, or as prohibited by
38 any law of another state which is in substantial conformity with that
39 statute;

40 (3) perjury resulting from a violation of K.S.A. 8-261a, and amend-
41 ments thereto, or resulting from the violation of a law of another state
42 which is in substantial conformity with that statute;

43 (4) violating the provisions of the fifth clause of K.S.A. 8-142, and

1 amendments thereto, relating to fraudulent applications or violating the
2 provisions of a law of another state which is in substantial conformity with
3 that statute;

4 (5) any crime punishable as a felony wherein a motor vehicle was
5 used in the perpetration of such crime;

6 (6) failing to stop at the scene of an accident and perform the duties
7 required by K.S.A. 8-1602, 8-1603 or 8-1604, and amendments thereto,
8 or required by a law of another state which is in substantial conformity
9 with those statutes;

10 (7) violating the provisions of K.S.A. 40-3104, and amendments
11 thereto, relating to motor vehicle liability insurance coverage; or

12 (8) a violation of K.S.A. 21-3405b, prior to its repeal.

13 (c) There shall be no expungement of convictions for the following
14 offenses or of convictions for an attempt to commit any of the following
15 offenses: (1) Rape as defined in K.S.A. 21-3502, and amendments thereto;
16 (2) indecent liberties with a child as defined in K.S.A. 21-3503, and
17 amendments thereto; (3) aggravated indecent liberties with a child as
18 defined in K.S.A. 21-3504, and amendments thereto; (4) criminal sodomy
19 as defined in subsection (a)(2) or (a)(3) of K.S.A. 21-3505, and amend-
20 ments thereto; (5) aggravated criminal sodomy as defined in K.S.A. 21-
21 3506, and amendments thereto; (6) indecent solicitation of a child as
22 defined in K.S.A. 21-3510, and amendments thereto; (7) aggravated in-
23 decent solicitation of a child as defined in K.S.A. 21-3511, and amend-
24 ments thereto; (8) sexual exploitation of a child as defined in K.S.A. 21-
25 3516, and amendments thereto; (9) aggravated incest as defined in K.S.A.
26 21-3603, and amendments thereto; (10) endangering a child as defined
27 in K.S.A. 21-3608, and amendments thereto; (11) abuse of a child as
28 defined in K.S.A. 21-3609, and amendments thereto; (12) capital murder
29 as defined in K.S.A. 21-3439, and amendments thereto prior to its repeal;
30 (13) murder in the first degree as defined in K.S.A. 21-3401, and amend-
31 ments thereto; (14) murder in the second degree as defined in K.S.A. 21-
32 3402, and amendments thereto; (15) voluntary manslaughter as defined
33 in K.S.A. 21-3403, and amendments thereto; (16) involuntary manslaugh-
34 ter as defined in K.S.A. 21-3404, and amendments thereto; (17) invol-
35 untary manslaughter while driving under the influence of alcohol or drugs
36 as defined in K.S.A. 21-3442, and amendments thereto; (18) sexual bat-
37 tery as defined in K.S.A. 21-3517, and amendments thereto, when the
38 victim was less than 18 years of age at the time the crime was committed;
39 (19) aggravated sexual battery as defined in K.S.A. 21-3518, and amend-
40 ments thereto; (20) a violation of K.S.A. 8-1567, and amendments thereto,
41 including any diversion for such violation; (21) a violation of K.S.A. 8-
42 2,144, and amendments thereto, including any diversion for such viola-
43 tion; or (22) any conviction for any offense in effect at any time prior to

1 the effective date of this act, that is comparable to any offense as provided
2 in this subsection.

3 (d) When a petition for expungement is filed, the court shall set a
4 date for a hearing of such petition and shall cause notice of such hearing
5 to be given to the prosecuting attorney and the arresting law enforcement
6 agency. The petition shall state: (1) The defendant's full name;

7 (2) the full name of the defendant at the time of arrest, conviction or
8 diversion, if different than the defendant's current name;

9 (3) the defendant's sex, race and date of birth;

10 (4) the crime for which the defendant was arrested, convicted or
11 diverted;

12 (5) the date of the defendant's arrest, conviction or diversion; and

13 (6) the identity of the convicting court, arresting law enforcement
14 authority or diverting authority. There shall be no docket fee for filing a
15 petition pursuant to this section. All petitions for expungement shall be
16 docketed in the original criminal action. Any person who may have rel-
17 evant information about the petitioner may testify at the hearing. The
18 court may inquire into the background of the petitioner and shall have
19 access to any reports or records relating to the petitioner that are on file
20 with the secretary of corrections or the Kansas parole board.

21 (e) At the hearing on the petition, the court shall order the peti-
22 tioner's arrest record, conviction or diversion expunged if the court finds
23 that:

24 (1) The petitioner has not been convicted of a felony in the past two
25 years and no proceeding involving any such crime is presently pending
26 or being instituted against the petitioner;

27 (2) the circumstances and behavior of the petitioner warrant the
28 expungement; and

29 (3) the expungement is consistent with the public welfare.

30 (f) When the court has ordered an arrest record, conviction or diver-
31 sion expunged, the order of expungement shall state the information re-
32 quired to be contained in the petition. The clerk of the court shall send
33 a certified copy of the order of expungement to the Kansas bureau of
34 investigation which shall notify the federal bureau of investigation, the
35 secretary of corrections and any other criminal justice agency which may
36 have a record of the arrest, conviction or diversion. After the order of
37 expungement is entered, the petitioner shall be treated as not having been
38 arrested, convicted or diverted of the crime, except that:

39 (1) Upon conviction for any subsequent crime, the conviction that
40 was expunged may be considered as a prior conviction in determining the
41 sentence to be imposed;

42 (2) the petitioner shall disclose that the arrest, conviction or diversion
43 occurred if asked about previous arrests, convictions or diversions:

- 1 (A) In any application for licensure as a private detective, private
2 detective agency, certification as a firearms trainer pursuant to K.S.A.
3 2008 Supp. 75-7b21, and amendments thereto, or employment as a de-
4 tective with a private detective agency, as defined by K.S.A. 75-7b01, and
5 amendments thereto; as security personnel with a private patrol operator,
6 as defined by K.S.A. 75-7b01, and amendments thereto; or with an insti-
7 tution, as defined in K.S.A. 76-12a01, and amendments thereto, of the
8 department of social and rehabilitation services;
- 9 (B) in any application for admission, or for an order of reinstatement,
10 to the practice of law in this state;
- 11 (C) to aid in determining the petitioner's qualifications for employ-
12 ment with the Kansas lottery or for work in sensitive areas within the
13 Kansas lottery as deemed appropriate by the executive director of the
14 Kansas lottery;
- 15 (D) to aid in determining the petitioner's qualifications for executive
16 director of the Kansas racing and gaming commission, for employment
17 with the commission or for work in sensitive areas in parimutuel racing
18 as deemed appropriate by the executive director of the commission, or
19 to aid in determining qualifications for licensure or renewal of licensure
20 by the commission;
- 21 (E) to aid in determining the petitioner's qualifications for the fol-
22 lowing under the Kansas expanded lottery act: (i) Lottery gaming facility
23 manager or prospective manager, racetrack gaming facility manager or
24 prospective manager, licensee or certificate holder; or (ii) an officer, di-
25 rector, employee, owner, agent or contractor thereof;
- 26 (F) upon application for a commercial driver's license under K.S.A.
27 8-2,125 through 8-2,142, and amendments thereto;
- 28 (G) to aid in determining the petitioner's qualifications to be an em-
29 ployee of the state gaming agency;
- 30 (H) to aid in determining the petitioner's qualifications to be an em-
31 ployee of a tribal gaming commission or to hold a license issued pursuant
32 to a tribal-state gaming compact;
- 33 (I) in any application for registration as a broker-dealer, agent, in-
34 vestment adviser or investment adviser representative all as defined in
35 K.S.A. 17-12a102, and amendments thereto;
- 36 (J) in any application for employment as a law enforcement officer as
37 defined in K.S.A. 22-2202 or 74-5602, and amendments thereto; or
- 38 (K) for applications received on and after July 1, 2006, to aid in de-
39 termining the petitioner's qualifications for a license to carry a concealed
40 weapon pursuant to the personal and family protection act, K.S.A. 2008
41 Supp. 75-7c01 et seq., and amendments thereto;
- 42 (3) the court, in the order of expungement, may specify other cir-
43 cumstances under which the conviction is to be disclosed;