Tricia Rojo Bushnell
Executive Director, Midwest Innocence Project
Testimony In Opposition to HB 2129
Kansas House Judiciary Committee
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My name is Tricia Rojo Bushnell and I am the Executive Director of the Midwest Innocence Project (MIP), which works to exonerate individuals convicted of crimes they did not commit in Kansas, Missouri, Iowa, Nebraska and Arkansas, and to enact policies to prevent wrongful convictions in the first place. Together with our partners, MIP has represented Floyd Bledsoe, Richard Jones, Lamonte McIntyre, and Olin "Pete" Coones, Jr., in the cases that ultimately resulted in their exonerations. Combined, they served over 67 years for crimes they did not commit. Like hundreds of other individuals around the country, Floyd Bledsoe's conviction was ultimately overturned due to DNA testing–testing he secured pursuant to K.S.A. 21-2512. Such testing is a critical aspect of ensuring Kansas has a system of justice that allows for the wrongful conviction of an innocent person to be corrected and simultaneously ensures that the public can retain confidence in the reliability of convictions in Kansas. HB 2129, in its current state, however, would make it harder for wrongfully convicted individuals access to postconviction DNA testing that could prove their innocence and undermine its very purpose. For these reasons, the Midwest Innocence Project opposes HB 2129.

HB 2129 increases the standard an innocent defendant must meet to secure testing. The changes outlined on page 1, line 19 and 34-35 increase the burden a defendant must meet to secure DNA testing and would prevent the exoneration of innocent defendants. Among these changes, the bill would require that a defendant prove the evidence he or she seeks to be tested would be material *to the prosecution*, rather than being related to the investigation or prosecution of the case. This means that only evidence the prosecutor has used at trial would be available to be tested – an important note as potentially exculpatory evidence is unlikely to have been used in their prosecution at all.

Take for example the case of Joseph Frey,[1] my former client, who was exonerated in Wisconsin in 2013. Mr. Frey was convicted of sexual assault based upon an eyewitness identification made by the victim after a series of suggestive lineups. At the time of trial, DNA testing of semen found on the victim's sheet excluded Mr. Frey, however, the prosecution alleged it may have been there from a

[1] *Joseph Frey*, National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4179

prior consensual sexual encounter. That evidence was not used to prove his guilt and certainly was not material to his prosecution. Nonetheless, in 2013, Mr. Frey was exonerated after we re-tested that evidence and it was uploaded into CODIS and matched to the true perpetrator. Additional investigation revealed the true perpetrator was not known to the victim, that he had previously confessed to committing that crime, and that he had gone on to sexually assault others, including two children. Under the standard proposed in HB 2129, however, Mr. Frey would never have been able to secure testing and would still be incarcerated today.

HB 2129 inappropriately limits the time a defendant may present the results of DNA testing and subsequent investigation to a court. As drafted, the bill includes a new arbitrary 180-day deadline to resolve the case once DNA testing occurs. While everyone, including an innocent defendant, wants a case resolved as quickly as possible, sometimes additional work is necessary to understand the DNA test results. In the case of Joe Frey, discussed above, the DNA testing concluded in 2012. But it took an additional seven (7) months of investigation, by both the State and the defense, to obtain the information about the real perpetrator that led to the judge overturning Mr. Frey's conviction. Moreover, sometimes testing leads to additional testing - whether that be DNA or other forensic testing. Adding a deadline to terminate the proceeding does not serve the purpose of the statute or the judicial system generally.

It is unclear if the goal of this provision was instead to put all parties on notice of the results of the testing. If that is the case, one substitute may be to require the results of the testing be filed with the parties, as required in other states, such as Iowa. In that regard, the proceeding could continue on whatever timeline is necessary, but the parties would be advised as to the results. The purpose of postconviction DNA testing has been a truth seeking function, and that can be accommodated without putting a timeline on justice.

Finally, HB 2129 also requires innocent defendants to remain unjustly incarcerated for additional time before they can access postconviction DNA testing. HB 2129 changes the time during which a defendant may file a motion for DNA testing from post*conviction* to post*sentencing*. Everyone agrees no innocent person should remain incarcerated, and requiring such a delay, would prevent an innocent defendant from bringing the process to prove their innocence as quickly as possible.

While we respect the goal of timely DNA results, HB2129 does not serve the interest of justice or the wrongfully convicted currently serving sentences for crimes they did not commit. The Midwest Innocence Project would welcome the opportunity to work with bill sponsors to address issues they have identified regarding testing. But as drafted, the Midwest Innocence Project opposes HB 2129.