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on behalf of Kanas Association of Criminal Defense Attorneys
Testimony in Opposition to SB60
Kansas Senate Judiciary Committee
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I am writing in my personal capacity, and on behalf of the Kansas Association of Criminal Defense Attorneys, to express my strong opposition to SB 60. I have spent the last 26 years litigating 1507 claims throughout Kansas as the director of the Paul E. Wilson Project for Innocence and Post-Conviction Remedies, an organization that focuses exclusively on providing post-conviction relief to persons incarcerated in Kansas. I have reviewed hundreds of cases for potential 1507 litigation and have represented dozens of people. I have worked with clients who are innocent and clients whose fundamental constitutional rights were violated. Because of my work and the work of others in the field, over 20 people have been exonerated in Kansas since 2004. SB60 jeopardizes the continued work to correct injustices and free the wrongfully incarcerated.

Our criminal justice system must be built on truth, accuracy, and fairness. To meet these goals, there must be a process in place to correct errors. K.S.A. 60-1507 is that process. Under the proposed legislation, however, discretion is removed from the district court, incarcerated persons are dramatically limited in filing second or successive petitions, and the ability to litigate that 1507 counsel was ineffective would be prohibited. These changes will deny a remedy to individuals who are innocent or were denied a fair trial and will sacrifice truth and accuracy in exchange for finality.

Removes discretion from district courts.

Amending the long-standing provision on judicial discretion for second and successive petitions is not justified. Currently, when a person files a second or successive petition, the district court reviews that petition. If the district court determines there is no credible issue presented, the court denies the petition. The State has no obligation to respond and may not be aware of the multiple petitions filed. The only time that the State becomes involved is when the district court determines there is an issue that merits review. By acting as a gate keeper, the trial court prevents resources being spent on frivolous cases.

The gatekeeping function is important. District courts are in the best position to determine if the second or successive petition merits review. Because each criminal case is unique, our statutes and case law intentionally leave discretion with the courts. Judges who have heard witnesses testify, looked at the evidence, and know the parties involved are in the best position to decide when the remedy is being abused by repeat filers, and when a petition is worthy of a hearing.

SB60 would tie the hands of the district courts. Regardless of the merits of the second or successive petition and regardless of the innocence of the petitioner, the district court would be prohibited from holding a hearing and ruling on the merits of the petition, truth and accuracy will out.

Limits to second or successive petitions will result in the continued incarceration of innocent people.

SB60 not only prohibits district courts from exercising discretion, but very narrowly defines those persons who are able to file a second or successive petition by redefining what constitutes new evidence. First, SB60 would prohibit a person from filing a second or successive petition unless the underlying facts in the petition could not have been discovered with due diligence. Currently, K.S.A. 60-1507 defines newly discovered evidence as evidence that was not presented previously. By prohibiting the admission of evidence that "could have been discovered previously," an innocent person would be denied relief if the facts were available but not presented because of attorney error.

Second, the proposed language ties newly discovered evidence to a constitutional error. In other words, unless the petitioner could establish that there is an underlying constitutional violation, new evidence of innocence would not be sufficient to overturn the conviction. Innocence alone would not be enough.

Third, SB60 increases the evidentiary bar that a petitioner must meet. Currently, manifest injustice requires a person to "show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." SB60 would require that the new evidence establish innocence by clear and convincing evidence, a standard higher substantially higher than a reasonable probability under the manifest injustice standard.

The proposed changes to SB60 would result in the continued incarceration of innocent people. In fact, Lamonte McIntrye would still be incarcerated for crimes he did not commit.

In 1994, Lamonte was 17 years old when he was charged and then convicted of two counts of first-degree murder, The police investigation was startling in its brevity, lasting just a few hours. Police interviewed witnesses, but never searched for the weapon, the shooter's clothing, or a single item of physical evidence that would have linked the assailant with the crime. Although police collected physical evidence from the crime scene, they never subjected it to any further examination or analysis. The evidence used against Lamonte was fabricated and the result of witness intimidation, all at the hands of Roger Golubski. After serving 23 years in prison for crimes he did not commit, Lamonte was finally exonerated and released.

During those 23 years, three 60-1507 petitions were filed. It was not until the third petition, when Lamonte was represented by dedicated counsel who understood 1507 litigation, that it was finally established Lamonte was innocent. The evidence presented at the hearing was evidence that existed from the time of trial. The witnesses presented and forensic evidence were available prior to trial and at the time that the two previous 1507 petitions were filed.

Under the proposed changes in SB 60, the evidence that established the truth about Lamonte's innocence could not have been presented. The evidence would have failed to meet the standard new evidence to permit relief on a second petition because the evidence could have been presented previously, the new evidence was not tied to an underlying constitutional claim, and it was Lamonte's third petition. Under SB 60, Lamonte would still be incarcerated.

And Lamonte's case is not the only one. In May of 2013, the FBI issued a letter stating "[t]he science regarding firearms examinations does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all other guns in the world." I represented a client where the ballistics examiner testified at trial that the bullets came from the murder weapon to exclusion of all other guns in the world. There was scant other evidence, and the defendant was convicted based almost exclusively on the then-expert testimony. The client filed a pro se petition alleging erroneous ballistics testimony. I did not become involved in the litigation until after the petition was already filed and dismissed. Under SB60, I would not be able to present the evidence of erroneous ballistics evidence to establish his innocence because the that claim was previously raised and denied. It would not matter that the client was potentially innocent.

Petitioners must be provided effective 1507 counsel.

In addition to severely restricting the ability to file a second or successive claim, SB60 would prevent a petitioner from arguing ineffective assistance of 1507 counsel. Under the proposed language, if the court appoints an attorney to the first 1507 petition, and that attorney failed to adequately represent the petitioner, the petitioner would be prohibited from filing a second petition on the grounds that 1507 counsel was ineffective. Such a result would make the appointment of counsel meaningless.

In Kansas, if the district court cannot resolve the issues raised in a K.S.A. 60-1507 petition from the trial record, counsel must be appointed. S.Ct. Rule 183. Under Kansas case law, that counsel must be competent, otherwise the right to appointed counsel is meaningless. *Brown v. State*, 278 Kan. 481 (1998). There must be a remedy to correct errors in the criminal justice system. If K.S.A. 60-1507 is the remedy, then counsel who litigates the 60-1507 motion, must also be effective, or as the *Brown* court held, competent. Prohibiting a petitioner from arguing that his 1507 counsel was ineffective, not only thwarts finding the truth, it results in innocent people remaining incarcerated.

Lamonte's case is a perfect example. The district court, in the first 1507 petition, appointed an attorney to represent Lamonte. That attorney never met with or communicated with Lamonte. The hearing on the 1507 motion lasted less than 30 minutes. Lamonte was not at the hearing and no evidence was presented. The court ruled from the bench and dismissed Lamonte's claims. Under SB60, Lamonte could not file a second petition arguing that his appointed counsel failed to adequately represent him. He would be left with no recourse. The remedy in place to correct erroneous convictions, and provide for truth and accuracy, would become meaningless.

Unfortunately, Lamonte's case is not the only one. In my 26 years of post-conviction litigation, too often appointed counsel fails to understand how to properly litigate 1507 petitions. The right to the effective assistance of counsel is critical to the ability of our adversarial system of justice to produce just results. In *Stickland v. Washington*, 466 U.S. 668, 686 (1984), the United States Supreme Court held that the benchmark for judging a claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same holds true for 1507 petitions. Because effective counsel is critical to finding the truth, the1507 procedures in place must allow the failures of 1507 counsel to be corrected. That is the purpose of K.S.A. 60-1507.

SB60 ignores the inherent difficulties in litigating K.S.A. 60-1507 claims. Confinement, by its very nature, makes finding resources and litigating claims daunting for those who are incarcerated. Many people file petitions pro se because they do not have resources and do not know how to obtain assistance. For a myriad of reasons, petitions are denied. By the time some client contact me, evidence needs to be presented, and the colorable claim of actual innocence needs to be relitigated. The provisions of SB60 will make that impossible.

SB 60 threatens the ability of the system to correct errors to ensure there is truth and accuracy in the criminal justice system. Finality cannot, and must not, be the overriding goal of justice. I urge you to reject SB60.