

Tricia Rojo Bushnell
Testimony in Opposition to SB60
Senate Judiciary Committee
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My name is Tricia Rojo Bushnell and I am the Executive Director of the Midwest Innocence Project, 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 represented Floyd Bledsoe, Richard Jones, Lamonte McIntyre, Olin “Pete” Coones, Jr., and Cedric Warren, who served a combined 81 years for crimes they did not commit. I am here today in opposition to Senate Bill 60 because its proposed changes will result in the continued incarceration of the innocent.

SB 60 will close the door for innocent people who received ineffective assistance of counsel, even when they can prove their innocence. Under SB 60’s proposed changes, a defendant would be unable to file a second or “successive” petition if the underlying facts in the petition could have been discovered with “due diligence,” meaning that if a defendant can now prove their innocence through evidence that was not presented at trial because his counsel was ineffective, he is precluded from raising it now. In *Schlup v. Delo*, 513 U.S. 298 (1995), the U.S. Supreme Court held that where a defendant can provide *new evidence that establishes a reasonable probability that no reasonable juror would find the defendant guilty*, a defendant may overcome any procedural bars that would keep his claim from being heard, such as bar on successive petitions. This evidence of innocence does not amount to a claim itself that will result in a defendant being released from prison, but rather offers a “gateway” innocence claim allowing the defendant to get back in court and present other constitutional claims. Currently, with the exception of the Eighth Circuit, every federal circuit including the Tenth Circuit, defines “new evidence” as evidence that was not presented at trial—*not* evidence that could not have been discovered with due diligence. This is a critical distinction that SB 60 ignores.

Take, for example, the case of Ricky Kidd, who was exonerated in Kansas City, Missouri in 2019. Ricky had been convicted of a double homicide for which he had a compelling alibi—at the time of the crime, he was in a Sheriff’s office applying for a permit. Unfortunately, Ricky’s counsel failed to adequately track down and present this information at trial, and his postconviction counsel also similarly failed to present this and other important evidence. As a result, when he made it to federal habeas, Ricky was procedurally barred from presenting his constitutional claims. And when he offered the previously unrepresented evidence to satisfy the innocence gateway claim, the Eighth Circuit foreclosed all relief because it, like this bill proposes, interprets new evidence to mean evidence that could not have been identified through the exercise of due diligence. Thus, Ricky lost in federal court, not because he was not innocent, but because he could not satisfy the due diligence standard. See *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011) (“We conclude the district court correctly interpreted *Amrine* as requiring Kidd to come forward

not only with new reliable evidence which was not presented at trial, but to come forward with new reliable evidence which was not available at trial through the exercise of due diligence.") (emphasis added). Eight years later, Ricky was exonerated only after we were able to bring his case again in Missouri state court—an option that will not be available to innocent defendants in Kansas.

Indeed, had this bill been in place, Kansas exoneree Lamonte McIntyre would still be incarcerated. Lamonte was not exonerated until a court heard his *third* successive petition, wherein we presented witnesses and forensic evidence that were *all* available at the time of trial. Under SB 60, however, it would make no difference what this evidence proved—Lamonte would have been unable to present it.

Further, SB 60 does not allow for innocence to overcome procedural bar, and if it did, the bill imposes a higher standard to establish a gateway innocence claim than that of any other jurisdiction, including other states and the federal system. Under SB 60, in order to present a successive petition, a defendant must show that: "the factual basis for the claim could not have been discovered previously through the exercise of due diligence, and such facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the prisoner guilty of the underlying offense." Thus, SB 60 requires a defendant show *constitutional error* to file a successive petition—*innocence itself is not enough*. And even if the incarceration of an innocent person were found to violate the constitution (neither the United States or Kansas Supreme Courts have yet reached that determination), this bill would require the defendant prove his innocence by "clear and convincing evidence," a significantly higher standard than the reasonable probability of a different outcome standard outlined in *Schlup*.

SB 60 also seeks to elevate finality over fairness. In addition to the issues raised above, SB 60 eviscerates the importance of a fair and equitable process in reviewing a defendant's liberty interest when it eliminates the ability of a defendant to raise ineffective assistance of postconviction counsel. By eliminating these claims, SB 60 makes clear that what is important is not that a defendant receive a fair process—wherein he was represented by competent counsel—but rather the veneer of process where the quality is of no import. The committee should reject this change, which again would result in innocent individuals like Ricky Kidd and Lamonte McIntyre from ever obtaining justice.

Finally, SB 60 will increase the length of time innocent people are incarcerated. SB 60 also requires that capital cases be expedited, meaning that innocent people will face yet another hurdle to get their case heard in a timely matter, languishing behind bars for a crime they did not commit. Every day an innocent person spends behind bars is one too many, and we oppose any bill that would unnecessarily prolong their unjust incarceration.