

House Corrections and Juvenile Justice Committee
House Bill No. 2388
Testimony of Sarah Ellen Johnson
Opponent
March 14, 2013

I am employed as a public defender at the Capital Appellate Defender Office. I handle direct appeals of death penalty cases in the Kansas appellate courts.

House Bill No. 2388 is an attempt to fix a problem that does not exist. Indeed, the fix would make the state's death penalty scheme more vulnerable to appeal, not less.

This legislature was careful when it first reinstated capital punishment in 1994. Recognizing the federal constitutional requirements of heightened scrutiny in capital cases, recognizing that "death is different," this body passed a thoughtful statute that took into account the need for the state appellate courts to have the ability to correct errors. This legislative body should not retreat from that provision which can help our courts to process capital cases as efficiently and effectively as possible. Furthermore, the proposed legislation may actually run afoul of the Eighth Amendment mandates of heightened scrutiny as it places more procedural hurdles for review of issues in capital appeals than exist in non-capital appeals.

Using procedural bars to prevent a defendant from having meritorious claims heard as quickly as possible will only cost this state time and money, valuable resources we can't afford to squander. Where an error is plain on the record and will result in a conviction being set aside for a new trial, there is no reason to make everyone wait several years for the next round of litigation before a court will acknowledge that plain error.

All criminal cases involve three possible levels of review. First, there is the direct appeal, which is the stage this proposed legislative amendment addresses. Second, the defendant whose direct appeal has been denied files a motion pursuant to K.S.A. 60-1507 at the district court and can appeal that. This is the first stage at which the defendant can allege a violation of his Sixth Amendment right to the effective assistance of counsel. Finally, the defendant who does not prevail on that state habeas motion can file a motion in federal district court pursuant to the federal habeas statute. By preventing the state Supreme Court from considering a meritorious but improperly preserved issue on direct appeal, we are only kicking the can down the road because the issue will be litigated eventually. For example, when an evidentiary issue has been raised and all the necessary facts are on the record, an appellate court considering the initial direct appeal should not be barred from considering the issue because a defense attorney in the heat of trial either forgot to object at the right time or failed to use the right words in that objection. This proposed statutory change would tell the Supreme Court not to address such an issue at that stage, even though all involved would know that the issue would then properly be raised as a claim of ineffective assistance of counsel in a later motion pursuant to K.S.A. 60-1507. Requiring the Court to delay addressing the error would only result in a longer gap of time between the crime and the subsequent retrial, which benefits no one.

Length of the appellate process is one of the biggest concerns the public has about the death penalty. Implementing this proposed change in the law will only increase the length of time appeals take rather than promoting judicial economy. Nationwide, reversal rates on cases involving death sentences are extraordinarily high. A 2004 study found that of death sentence cases whose appeals had concluded, 87% of those cases were reversed at some stage, whether it was direct appeal, state habeas, or federal habeas. "*A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*," Andrew Gelman, James S. Liebman, Valerie West, and Alexander Kiss, *Journal of Empirical Legal Studies*, Vol. 1, Issue 2, 209-261, July 2004. This is because our federal constitutional standards for scrutiny of capital cases are so high and because our Eighth Amendment jurisprudence tolerance for error in capital cases is so low. Identifying and correcting errors must happen in death sentence cases. The earlier those errors can be identified and corrected, the better and faster our system will be.

The goal should be to eliminate errors, not to eliminate the Supreme Court's ability to correct errors.

By allowing our Court to identify and correct errors as early in the process as possible, our current system demonstrates understanding of and respect for the heightened scrutiny the Eighth Amendment to the United States Constitution demands in death penalty cases. The proposed changes are contrary to the mandates of the United States Supreme Court and would only extend death penalty litigation. For these reasons, I oppose House Bill No. 2388.

Sincerely,

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