Testimony of Phillips, Cateforis, Craig
Opponent
House Bill 2190
February 8, 2021

House Corrections and Juvenile Justice Committee
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Testimony of Jean Phillips
on behalf of Kansas Association of Criminal Defense Lawyers
Opponent

Dear Chairman Jennings and Members of the Committee:

We are writing in our personal capacities and on behalf of the Kansas Association of Criminal Defense Lawyers to express our strong opposition to HB 2190. This bill contains changes that are unnecessary and have a real possibility of preventing persons with valid claims and/or who are wrongfully convicted from obtaining relief. As the attorneys in the Paul E. Wilson Project for Innocence and Post-Conviction Remedies, an organization that focuses exclusively on seeking post-conviction relief for persons incarcerated in Kansas, we are in a unique position to express our concern about the proposed changes.

Five years ago, we stood before the House Judiciary Committee to oppose what was then HB2502. That bill sought to amend K.S.A. 60-1507 by changing the standard for manifest injustice and tightening the one-year statute of limitations. Part of our concern then was the difficulty of meeting a one-year statute of limitations. We argued that there must be a safety value for persons who maintain they are innocent. A regrettable and profound reality is that innocent people are convicted, and, currently, it takes an average of 14 years to litigate successfully a claim of actual innocence. The Legislature understood the gravity of the issue and included a safety valve for persons who had colorable claims of actual innocence but were outside the one-year statute of limitations.

HB2109 now threatens that safety valve for no apparent reason. The proposed amendments will not stop incarcerated persons from filing petitions. Instead, the restrictions to new evidence and the changes to successive motions will only prevent meritorious constitutional claims and claims of actual innocence from being fully heard.

Restrictions on New Evidence:
Currently, K.S.A. 60-1507(f)(2)(A) provides an exception to the one-year statute of limitations to prevent a manifest injustice, which is defined as a colorable claim of actual innocence based on new evidence. The proposed amendment seeks to define new evidence in a manner that will prevent an innocent person from obtaining relief. The amendment states: “Evidence shall not be considered new if the prisoner previously based a claim on such evidence but failed to present evidence in support of the prisoner’s claim or withdrew the claim.” This definition would prohibit persons who have colorable claims of actual innocence from filing petitions based on the same claim, even if the district court did not hear the new evidence set out an earlier petition.

The amendment ignores and exacerbates the difficulties inherent in litigating innocence claims. Incarceration makes finding evidence, obtaining resources, and litigating claims daunting for pro se petitioners. In fact, it is daunting for lawyers. It often takes a team of lawyers and investigators to develop and to litigate meritorious claims, especially claims of actual innocence. Many litigants, however, file petitions pro se because they do not have monetary resources and do not know how to obtain assistance. Pro se petitioners frequently do not properly fill out the forms, and as a result, counsel is not appointed, and a hearing is not granted. And, even if counsel is appointed, the litigation of meritorious claims is expensive and time consuming. Appointed counsel often does not have the resources for investigators or forensic testing that is necessary to fully present a claim.

Frequently, by the time a client contacts our office or another innocence organization, a colorable claim of actual innocence has already been denied in a previously filed K.S.A. 60-1507 petition and must be re-litigated. There are times when an issue was not properly litigated the first time, and there are times when all the new evidence is not presented. Such was the case for the Lamonte McIntyre. In 1997, he filed a 1507 petition based on new evidence. The petition was not successful. Years later, the same claim was raised, relying in part on some of the same evidence. It took the resources and dedication of multiple attorneys and the Midwest Innocence Project to present all the new evidence to establish that Mr. McIntyre was innocent.

Mr. McIntyre's case is not unique. The need to litigate the same claim frequently occurs. Currently, we have a case in the Project where the ballistics examiner testified that the bullets in the client's possession case 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. 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."[1] He filed a pro se petition alleging erroneous ballistics testimony. As an incarcerated layperson, he was not able to present the new evidence or even a copy of the FBI letter. His petition was denied without an evidentiary hearing. We did not become aware of the case until after the petition was dismissed. Under HB2190, we would be prohibited from presenting the evidence of the clearly erroneous ballistics evidence to establish his innocence.

This very limited definition of newly discovered evidence is not justified.The amendment will not stop those who are incarcerated from repeatedly filing petitions. Litigation will simply become one of procedure over substance, and in the process, meritorious claims will be dismissed. K.S.A. 60-1507(c) already states that a district court may dismiss a second or successive petition. Because each criminal case is unique, our statutes and case law intentionally leave discretion with the courts who have heard the witnesses, evaluated the evidence, and know the parties involved. Those judges are in the best position to decide when the remedy is being abused by repeat filers and when a petition is worthy of an evidentiary hearing. There is no

[1] https://www.scribd.com/doc/264411906/FBI-May-6-Letter

reason to further restrict the application of K.S.A. 60-1507(f)(2)(A). Limiting a court's ability to consider every colorable claim of actual innocence, or meritorious successive petition, creates the very real possibility that an innocent person will be not have a colorable claim of actual innocence heard on its merits, effectively barring the petitioner from obtaining relief for a wrongful conviction.

Defining Successive Motions

We also oppose amending the long-standing provision of judicial discretion for second and successive petitions. The proposed change to K.S.A. 60-1507(c) significantly limits the ability to file a successive petition, and when compounded with the amendment to the safety valve provision, the proposed definition of a successive motion unacceptably impacts the ability of persons to obtain relief.

The proposed amendment states that a motion is successive if it "raises issues that were previously raised…. or issues that could have been raised." This proposed procedural bar ignores the reality of litigating meritorious post-conviction claims. As discussed above, filing 1507 petitions is a daunting task for attorneys, let alone persons who are incarcerated, without counsel, and resources. To hold that a second petition could never be filed simply because a pro se petitioner did not understand what issues to include in the first petition holds laypersons to an unconscionable standard.

That unconscionable standard is compounded when there is a claim of actual innocence. Take the case of our client convicted based upon faulty ballistics testimony. He was unsuccessful in his attempt to challenge the flawed testimony. Under the proposed amendments, not only would our office be prohibited from presenting the evidence in a subsequent petition, but we would also not be able to add additional issues that the client, as a pro se litigant, did not realize were issues. It would not matter is if the issues were meritorious and would prove his innocence.

There is no need for the proposed amendment. The current statute gives the courts the power to serve as a gatekeeper, stating that the court is not required to entertain a second or successive motion. Additionally, Supreme Court Rule 183(d)(3) (2018 Kan. S. Ct. R. 225) directs that "a sentencing court may not consider a second or successive motion" if the claim was already determined adversely, the prior determination was on the merits, and justice would not be served by reaching the merits of the petition.

Courts are in the best position to determine whether justice would be served and whether a second or successive petition should be permitted. Given all the variables that can affect post-conviction litigation, the discretion to accept or reject a second or successive petition should not be foreclosed by statute. Any perceived gain in stopping petitioners who abuse the remedy is outweighed by those whose convictions are unconstitutional and/or who are innocent.

Changes to the Statute of Limitations

Finally, the proposed amendment to the statute of limitations is superfluous. The current statute already provides that a one-year statute of limitations that begins when the conviction becomes final. Any petition filed outside the one-year deadline must be evaluated through K.S.A. 60-1507(f)(2). The new subsection (f)(1)(c) does not appear to change what is already the law, and only adds confusion. District courts can already dismiss an untimely petition.

Unconstitutional and wrongful convictions hurt everybody. Individual lives are torn apart and there is no justice for the victims. There can be no place in our criminal justice for laws that prohibit persons from presenting meritorious claims, and it is imperative that avenues of relief not be foreclosed. K.S.A. 60-1507 is the primary statute through which a convicted person can challenge the constitutionality of their sentence and conviction and assert their innocence. The proposed amendments unnecessarily and unfairly limit access to the courts. The current statute protects incarcerated persons' rights while balancing the need for finality. The proposed amendments upset that balance and should not be adopted.

Respectfully,

Jean Phillips

Elizabeth Cateforis

Alice Craig