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Testimony in Support of House Bill 2190
Clarifying successive motions, new evidence and time limitations for habeas corpus claims.

Presented to the House Corrections and Juvenile Justice Committee
By Assistant Solicitor General Natalie Chalmers

February 8, 2021

Chairman Jennings and Members of the Committee:

Thank you for the opportunity to provide testimony in support of HB 2190 on behalf of Attorney General Derek Schmidt.

This bill has three goals. The primary purpose of the bill is to close an inadvertent loophole created when the statute was amended in 2016. In that amendment, this Legislature made it clear that the district court did not have to reach the merits of an untimely K.S.A. 60-1507 motion unless the petitioner could provide justifications for the untimely filing or had a viable claim of actual innocence. However, after petitioners are unable to obtain success on their first K.S.A. 60-1507, many file a second K.S.A. 60-1507 motion claiming their counsel's ineffectiveness on their first K.S.A. 60-1507 motion was the reason they lost. Because that claim could not have been raised in the first K.S.A. 60-1507 motion, it is currently unclear if any time limit applies to those claims. To remedy that lack of clarity, subsection (f)(C) provides that those motions must be filed within one year of the completion of the first K.S.A. 60-1507 motion and its state appeal process. Its language differs slightly from K.S.A. 60-1507(f)(A) and (B) in order to mirror time calculations in the federal habeas process.

The second goal of the bill is to clarify what constitutes a successive K.S.A. 60-1507 motion and whether multiple successive motions can be litigated while another motion is pending. It first clarifies that a motion is successive if the issues were raised or could have been raised in a prior K.S.A. 60-1507. While the State believes the language in subsection (c), which plainly bars successive motions in their entirety, should be sufficient to dismiss the motion as successive, that bar's interaction with Kansas Supreme Court Rule 183(d) has posed some difficulty for courts.¹ Thus, this language merely attempts to reassert the original intent of the bar on successive claims by clarifying that a claim that was previously raised or could have previously been raised is

¹ E.g. *Littlejohn v. State*, 310 Kan. 439, 445-46, 447 P.3d 375 (2019) (reversing the Court of Appeals misapplication of its precedent and interpretation of the plain language of Kansas Supreme Court Rule 183(d)).

successive. The modification also clarifies that a successive K.S.A. 60-1507 motion cannot be filed while an appeal on a previous K.S.A. 60-1507 motion is pending.

Finally, the bill seeks to clarify that evidence is not “new” for the purpose of establishing actual innocence if the petitioner previously relied on the evidence, but then failed to present such evidence at an evidentiary hearing or withdrew the claim. One purpose of this provision is to protect victims from having to face those that abused them because the offender falsifies an affidavit of innocence and then never actually presents the person claiming he or she was innocent in court when given the opportunity to do so.

As an example, the Kansas Supreme Court required an evidentiary hearing on a defendant’s claim of actual innocence well over a decade after the defendant alleged the victim recanted the fact that he raped her. Although he had the opportunity to present the victim at an earlier hearing shortly after the affidavit came into existence, he failed to do so.² Then, at the required evidentiary hearing, the victim was called to testify and asserted that she never signed such an affidavit, and that, in fact, the defendant had raped her. Other victims should simply not be similarly traumatized by again facing their attackers when the defendant had a previous opportunity to litigate the issue.

For the above reasons, the Office of the Attorney General supports this Committee adopting this bill. Thank you for your time.

² *Beauclair v. State*, 308 Kan. 284, 304-05, 419 P.3d 1180 (2018).