STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of House Bill 2502

Presented to the House Judiciary Committee
By Lee J. Davidson, Assistant Attorney General

February 10, 2016

Chairman Barker and Members of the Committee, thank you for this opportunity to testify in support of HB 2502.

A writ of habeas corpus is an order commanding one to bring a party in that person's custody before the court to determine if the restraint or detention is unlawful. Black's Law Dictionary, 709 (6th Ed. 1990). The Kansas Constitution Bill of Rights guarantees that "the right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Kan. Const. Bill of Rights, §8.

In Kansas, one of the contexts where the writ comes into play is after an incarcerated criminal defendant has completed the "direct" appeal process. At that point, they may file a "collateral" challenge to their conviction and sentence by filing a motion in the same court where they were convicted. This collateral review is a separate civil proceeding and is not a continuation of the direct review process. These actions are governed by K.S.A. 60-1507.

In 2003, the legislature passed and the governor signed into law Senate Bill 206 which added a requirement that any action brought under K.S.A. 60-1507 must be filed within one year of the conclusion of the direct appeal process. This time limitation could be extended by the court only to prevent a "manifest injustice."

In *Toney v. State*, 39 Kan.App.2d 944, 187 P.3d 122 *rev. denied* 287 Kan. 769 (2008), the prisoner appealed the trial court's ruling that his 60–1507 motion was untimely, arguing that the appellate court should remand for a full evidentiary hearing because a manifest injustice would result if the trial court never considered the merits of his claims. The *Toney* court rejected this argument, finding that under this reasoning, every time a trial court denied a 60–1507 motion as untimely, the appellate court would be required to remand the case for an evidentiary hearing. Under that result, the one–year time limitation provided by K.S.A. 60–1507(f)(1) would effectively be rendered meaningless. The *Toney* court instead focused its inquiry on whether the prisoner had asserted any circumstances that had prevented him from presenting his claim before the passing of the one–year time limitation. Finding that he had failed to do so, the *Toney* court affirmed the trial court's judgment. 39 Kan.App.2d at 947.

Toney remained largely undisturbed until it was seemingly overruled by our Supreme Court in *Vontress v. State*, 299 Kan. 607, 325 P.3d 1114 (2014). In *Vontress*, the Court directed courts conducting a manifest injustice inquiry under K.S.A. 60–1507(f)(2) to consider the totality of the circumstances, including whether "the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration." 299 Kan. at 616.

As foreseen by the *Toney* court, under *Vontress*, the exception to the time limitation has effectively swallowed the rule as courts must consider the merits of the prisoner's claims in determining whether a manifest injustice would result by enforcing the one–year time limitation. In practice, this has resulted in courts holding evidentiary hearings on out-of-time motions to determine whether the issues have merit in order to determine whether a manifest injustice would result by applying the time limitation.

The Attorney General's Office believes that the legislative intent of 2003 Senate Bill 206 was to promote judicial efficiency and accuracy by requiring the resolution of issues while the record is fresh, to conserve judicial resources, and to lend finality to convictions within a reasonable time. By allowing prisoners with meritorious issues to sit and wait for witnesses to die and evidence to disappear and degrade before filing their collateral challenge, the practical effect of *Vontress* undercuts those goals.

HB 2502 refocuses the manifest injustice inquiry on the reasons the prisoners failed to file their motion within the one–year time limit.

Thank you for your consideration. I stand for questions.

###