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MIDWEST INNOCENCE PROJECT

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Tricia Bushnell, Midwest Innocence Project Legal Director
House Committee on Judiciary on House Bill 2502
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The Midwest Innocence Project is non-profit that works to exonerate the wrongfully convicted in Kansas, Arkansas, Iowa, Missouri and Nebraska. We wholeheartedly oppose House Bill 2502 as it would have chilling effect on wrongful conviction cases involving non-DNA evidence, and would enact further procedural hurdles for innocent individuals seeking release.

Currently, it is already very difficult to bring claim supporting innocence in Kansas: Petitioners only have one year after the final order of direct appeal to file the claim and cannot file successive petitions. That one-year time period "may be extended by the court only to prevent a manifest injustice.," which is determined by examining the totality of circumstances including: if there is persuasive reasons why the petitioner was prevented from raising the claim with the year time limit, the merits of the claim raise substantial issues of law or fact, and if there is a claim of actual innocence. K.S.A. 60-1507(f)(2).

This bill restricts what the court may consider "manifest injustice" to only why he or she has not filed within the 1-year time limit. In other words, the Court could only consider why the petition is filed late—not the merits of the claims. Such a new standard would do nothing to reduce the number of appeals filed in a year and would only serve to penalize innocent prisoners. Even if they could prove they were innocent on the merits of the claim, the defendant would be prevented from raising it if he or she could not explain why they missed the deadline. This is remarkably short-sighted and unfounded. Indeed, one must ask, why would anyone ever be against correcting a manifest injustice?

Further, a review of the nature and role of innocence in postconviction litigation exposes the unfounded nature that a manifest injustice exception leads to frivolous claims. As it stands, the current "manifest injustice" exception brings Kansas law in line with United States Supreme Court precedent which finds that, in terms of finality and procedural bar, cases that involve colorable claims of actual innocence are viewed by courts as fundamentally different. While repetitive litigation by guilty prisoners is burdensome to the courts, an innocent prisoner can never abuse the appellate process because innocence is "the ultimate equity on the prisoner's side" that trumps all barriers. *Schlup v. Delo,* 513 U.S. 298, 342 (1995), *citing Withrow v. Williams,* 507 U.S. 680, 700 (1994) (O'Connor, J., concurring in part, dissenting in part). The doctrine of procedural bar is driven by concerns that a prisoner will "sandbag" the courts—withhold a claim or evidence in the hopes of raising it at a later time. However, the United States Supreme Court has rejected this notion: When then-Missouri Attorney General Jeremiah W. Nixon raised the issue of sandbagging in the oral argument in *Schlup*, Justice John Paul Stevens replied, "I thought . . . sandbagging referred to a tactical decision by a lawyer not to use evidence of innocence because he wants to use it later, and I just don't think it happens." Oral Argument, *Schlup v. Delo*, OYEZ, CHICAGO KENT COLLEGE OF LAW (Oct. 3, 1994), available online at https://www.oyez.org/cases/1994/93-

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7901. When pressed by the Court, Attorney General Nixon could not name a single case in which a prisoner withheld or concealed evidence of his own innocence, *id*., and none has been found since. Truthfully, the fear of sandbagging by an innocent prisoner is absurd. Any lawyer who would knowingly withhold evidence that his client is innocent should be disbarred, and any prisoner who would purposefully leave out such evidence is arguably not in possession of his full mental faculties.

The need for the manifest injustice exception is further borne out in the nature of the appeals raised by innocent defendants, which are often successive in nature. Often innocent defendants will file an appeal as soon as any new piece of evidence supporting their innocence emerges. And it is no wonder—they are fighting to regain lives wrongfully taken from them. But there is another practical concern unique to innocence cases that justify thorough, unfettered postconviction review: evidence of true innocence grows over time.

As seen in the Floyd Bledsoe case, additional evidence can arise years after the crime. Although significant evidence of Mr. Bledsoe's innocence was available at the time of trial, it wasn't until new evidence in the form of DNA testing and a confession from the real perpetrator emerged that he was released. But most wrongful convictions are not overturned with DNA evidence. According to the National Registry of Exonerations 1,740 Americans have been wrongfully convicted. 55% of those cases do not involve DNA evidence. Here in Kansas 4 of 7 wrongful conviction cases did not involve DNA. And as new information about the flaws in forensic sciences emerge, that number will only grow. For example, the Midwest Innocence Project has currently undertaken a review of cases involving microscopic hair comparisons, a forensic field wherein the FBI now admits significant error in testimony and reporting exceeding the bounds of science. A joint review by the FBI, DOJ, Innocence Project and National Association of Criminal Defense Lawyers reveal an error rate of 90% in the testimony involving hair comparison by the FBI, but these cases are only now getting reviewed – far beyond the one-year statute of limitation for a postconviction appeal.

Removing the manifest injustice exception would bar innocent individuals from raising their claims and would prevent exonerations of the innocent. As we have seen in exonerations in our neighboring state of Missouri, there is a pattern of cases being filed successively over time, where each defendant was denied relief until evidence of innocence reached a critical tipping point in subsequent litigation. Such exonerations include Ellen Reasonover,[1] Joe Amrine,[2] Mark Woodworth,[3] Ryan Ferguson[4] and Dale Helmig[5]. Each of these cases

[1] *Compare* the body of evidence discussed in *State v. Reasonover*, 714 S.W.2d 706 (Mo. Ct. App. 1986), and *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D.Mo. 1999).
[2] *See State v. Amrine*, 741 S.W.2d 665 (Mo. 1987) (rejecting the recantation of one witness); *Amrine v. State*, 785 S.W.2d 531 (Mo. 1990) (rejecting the recantation of a second witness); *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001) (rejecting the recantation of a third witness);*State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (finding the three recantations together established Amrine's innocence by clear and convincing evidence.).
[3] *See State v. Woodworth,* 941 S.W.2d 679 (Mo. Ct. App. 1997) (granting a new trial when the trial court excluded evidence implicating another person in the crime); *State v. Woodworth*, 55 S.W.3d 865 (Mo. Ct. App. 2001) (affirming

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was litigated far beyond a year after direct appeal, and with no way to overcome the procedural bar but for the "manifest injustice" that could be seen from the proof of their innocence.

We oppose this bill. If the goal is to reduce the number of petitions filed, this bill will not accomplish that because petitioners will still file regardless of whether or not they meet the standard, and courts will instead spend their time reviewing whether it meets the "manifest injustice" exception to the time limit when it could be reviewing the merits of the case. By narrowing the definition of "manifest injustice" to issues of time, this legislation could result in continued injustice for the wrongfully convicted and would erect further barriers to their release.

Woodworth's conviction on retrial after the state presented evidence of the alternative suspect's alibi); *State ex rel*. *Woodworth v*. *Denney*, 396 S.W.3d 330 (Mo. 2013) (granting habeas corpus relief for misconduct by the State that included, but was not limited to, falsifying an alibi for the alternative suspect).

[4] *See State v*. *Ferguson*, 229 S.W.3d 612 (Mo. Ct. App. 2007) (affirming conviction for murder based on the testimony of his co-defendant); *Ferguson v*. *State*, 325 S.W.3d 400 (Mo. Ct. App. 2010) (rejecting on procedural grounds co-defendant's recantation); *Ferguson v*. *Dormire*, 413 S.W.3d 40 (Mo. Ct. App. 2013) (granting habeas corpus relief based on the State's failure to disclose evidence impeaching its only witness corroborating the co-defendant's confession).

[5] *See State v*. *Helmig*, 950 S.W.2d 649 (Mo. Ct. App. 1997) (rejecting Helmig's claim that the evidence was sufficient to convict); *Helmig v*. *State*, 42 S.W.3d 658 (Mo. Ct. App. 2001) (rejecting Helmig's evidence implicating another person in the crime and undermining the State's circumstantial case); *Helmig v*. *Kemna*, 461 F.3d 960 (8th Cir. 2006) (reversing based on procedural restrictions a federal district court order granting habeas corpus relief based on evidence of jury tampering); *State ex rel*. *Koster v*. *McElwain*, 340 S.W.3d 221 (Mo. Ct. App. 2011) (granting habeas corpus relief due to the State's failure to disclose exculpatory evidence and use of perjured testimony to convict).