Testimony of Jean Phillips
Opponent
House Bill 2502
February 17, 2016

House Judiciary Committee
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Dear Chairman Barker and Members of the Committee:

I am writing in my personal capacity to express my strong opposition to HB 2502 because it drastically reduces a district court's ability to consider manifest injustice claims when a defendant's 60-1507 motion was filed after the one-year deadline. As the Director of the Paul E. Wilson Project for Innocence and Post-Conviction Remedies, an organization that focuses exclusively on providing post-conviction relief to person incarcerated in Kansas, I am in a unique position to express my concern to the proposed changes.

Currently, K.S.A. 60-1507 imposes a one-year statute of limitation on defendants for the filing of petitions to challenge their conviction and sentence. That one-year statute of limitations be extended only to prevent a manifest injustice. K.S.A. 60-1507(f)(2). The manifest injustice standard is not easy to meet. The burden is on the defendant and requires:

> (1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of actual innocence, i.e., factual, not legal, innocence. All of the factors considered under the totality of the circumstances need not be given equal weight, and no single factor is dispositive.[1]

Although it may appear that the one-year statute of limitations should not be difficult to meet, such is not the case. In any given year we receive approximately 200 applications from across the state from inmates seeking assistance with post-conviction challenges to their convictions. Many of these inmates are not able to contact us until well into the one-year period. Not only do they have few resources, but many of them do not understand enough about the law to seek our assistance in a timely fashion. For those persons that we cannot assist, they are left with the daunting task of trying to fill out the required forms on their own – forms that my second and third year law students often do not understand. For these individuals, the one-year statute of limitations is already burdensome.

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[1] *Vontress v. State*, 299 Kan. 607, 325 P.3d 1114 (2014).

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The implications of HB2502 are significant. By limiting the court's manifest injustice standard solely to the inquiry of why the prisoner failed to file the motion within the one-year time limitation, it would no longer matter if the petitioner presented a meritorious claim or a colorable showing of actual innocence. Although Kansas does have a specific statute to permit the testing and litigation of DNA evidence that is not constrained by the one-year statute of limitations,[2] most claims of actual innocence do not involve DNA testing. According to the National Registry of exonerations, many cases involve false confessions, misconduct, or erroneous eye-witness identifications.

Additionally, there are constant changes in science that do not involve DNA. In May of 2013, the FBI issued a letter stating that not only is microscopic hair comparisons unreliable, but that "[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."[3] Currently, we have a case in the Project where the ballistics examiner testified that the bullets came from the murder weapon to exclusion of all other guns in the world. The defendant was convicted in 1999, but we did not become aware of the case until a year ago.

Under this new standard, a potentially innocent person would remain in jail as the only reason for the lack of timeliness was he didn't know who to turn to for help. Not only would this person be prohibited from asserting an actual innocence claim under the proposed changes, but the two-year statute of limitations for presenting newly discovered evidence found in K.S.A. 22-3501would provide no avenue for relief. It is for precisely these reasons that the current manifest injustice standard must remain as a safety value for the wrongfully convicted.

It is because of the changes in science, along with later findings of misconduct, false testimony, or false confessions, that federal courts will excuse procedural default if there is a fundamental miscarriage of justice and a claim of actual innocence. Such cases are rare and only in limited circumstances.

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity….experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence,

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[2] K.S.A. 21-2512

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

> trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial.[4]

While I have not seen any justifications offered by the proponents, there appears to be no obvious reason for the proposed change. The manifest injustice standard that currently exists was adopted by the legislature for a reason: to allow for those individuals who have meritorious claims to obtain relief. That justification is just as valid today as it was when the manifest injustice language was adopted over a decade ago. There is no identifiable harm from the current standard. The number of cases that currently meet the standard is not overwhelming and there is no discernable evidence that such cases are having a negative impact on the efficacy of the courts. Conversely, the harm that will be caused by the proposed change outweighs any purported benefit. The chance that an innocent person would be prohibited from obtaining relief violates core notions justice.

A regrettable profound reality is that innocent people are convicted. We should not foreclose what might be their only avenue of relief without the guarantee of a material benefit to our State and our court system.

Respectfully,

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[4] *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added); .