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Honorable Jeff King Chair
Senate Judiciary
Kansas Statehouse, Topeka, Kansas

Re: House Bill 2502 & amendment to K.S.A. 60-2001

Members of the Committee:

On May 30, 2014, the Kansas Supreme Court, in *Vontress v. State*, 299 Kan. 607, 325 P.3d 1114, found that K.S.A. 60-1507(f)(2) (time limitation may be extended to prevent manifest injustice) was not limited to the reason for the delay in filing the petition, but that a court should also consider "(2) whether the merits of the prisoner's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) whether the prisoner sets forth a colorable claim of actual innocence."

I do not believe this was the legislature's intent in enacting K.S.A. 60-1507(f)(2). House Bill 2502 will correct this misunderstanding by the Kansas Supreme Court. It will clearly and unequivocally explain that, when addressing an out-of-time K.S.A. 60-1507 petition, "the court's sole inquiry is to determine why the prisoner failed to file the motion within the one-year time limitation." It will also be helpful, in that it will require the district court to place, on the record, its basis for finding that manifest injustice has been established.

Modification of K.S.A. 60-2001

I also support the Kansas County and District Attorney Association's proposal that amends K.S.A. 60-2001 to include language that, when an inmate has filed three or more "successive, time barred, frivolous, malicious, or fails to state a claim upon which relief may be granted," he or she is no longer allowed to bring another civil action unless the inmate "is under imminent danger of serious physical injury."

Courts have repeatedly discouraged successive K.S.A. 60-1507 petitions, even requiring that the defendant establish exceptional circumstance. But there are still many frivolous successive petitions being filed, that only wastes judicial time and resources.

As an example, over the last 17 years, Patrick Lynn, has filed, at a minimum, 13 cases in the Johnson County District Court and 38 cases in the appellate courts (all of which had to have started in a district court in Kansas). In response to Lynn's litigiousness, in 1997, Judge Hill set down specific parameters that Lynn was required to follow in order to get any subsequent petitions filed. The requirements included, among other things, a copy of the judge's petition, a list of all his lawsuits, a copy of the proposed petition, and a notarized statement that the claims were not made in bad faith and comply with civil procedure. The district judge, prior to filing, was required to look at the submission and determine if it was proper. Thirty-one of the appeals, and five of the Johnson County District Court cases were filed after the 1997 parameters were put into place.

Lynn filed his last Johnson County petition in 14CV7663. After the court allowed him to file the petition, defense counsel had to be appointed, the State was required to file a motion to dismiss, an evidentiary hearing was held, and a written order was handed down, finding that Lynn failed to establish manifest injustice to file the claim. This was a waste of time and resources.

As another example, Terry Walling has been in prison, off and on, since 1984. Since his most recent convictions in 2011, he has filed five K.S.A. 60-1507 petitions in Johnson County. I know that he has also filed a number of additional K.S.A. 60-1501 petitions in Leavenworth County, all dealing with the same issues. Walling has no limitation on the filing of petitions, but the last few that I have dealt with required the appointment of counsel, a motion to dismiss by the State, and court time, only to be dismissed because the issues have already been considered.

The addition of K.S.A. 60-2001 language will limit the amount of frivolous petitions that are filed by inmates and, hopefully, discourage said inmates from filing frivolous petitions, as they may lose access to the courts if they do have a valid issue.

Respectfully Submitted:

/s/ Shawn E. Minihan

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Shawn E. Minihan

Limit successive motions

Explanation: *Enact a provision similar to 28 USC §1915(g) that has a "3 strikes" provision that prohibits indigent inmates from filing successive frivolous civil suits (e.g. 60-1501, 60- 1507) in forma pauperis. The provision was designed to filter out the bad claims and facilitate consideration of the good. Insert new language in KSA 60-2001 as follows:*

(a) Docket fee. Except as otherwise provided by law, no case shall be filed or docketed in the district court, whether original or appealed, without payment of a docket fee in the amount of $173 on and after July 1, 2014, to the clerk of the district court. Except as provided further, the docket fee established in this subsection shall be the only fee collected or moneys in the nature of a fee collected for the docket fee. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee. On and after July 1, 2015, through June 30, 2017, the supreme court may impose an additional charge, not to exceed $22 per docket fee, to fund the costs of non-judicial personnel.

(b) Poverty affidavit in lieu of docket fee. (1) Effect. In any case where a plaintiff by reason of poverty is unable to pay a docket fee, and an affidavit so stating is filed, no fee will be required. An inmate in the custody of the secretary of corrections may file a poverty affidavit only if the inmate attaches a statement disclosing the average account balance, or the total deposits, whichever is less, in the inmate's trust fund for each month in: (A) The six-month period preceding the filing of the action; or (B) the current period of incarceration, whichever is shorter. Such statement shall be certified by the secretary. On receipt of the affidavit and attached statement, the court shall determine the initial fee to be assessed for filing the action and in no event shall the court require an inmate to pay less than $3. The secretary of corrections is hereby authorized to disburse money from the inmate's account to pay the costs as determined by the court. If the inmate has a zero balance in such inmate's account, the secretary shall debit such account in the amount of $3 per filing fee as established by the court until money is credited to the account to pay such docket fee. Any initial filing fees assessed pursuant to this subsection shall not prevent the court, pursuant to subsection (d), from taxing that individual for the remainder of the amount required under subsection (a) or this subsection.

(2) Form of affidavit. The affidavit provided for in this subsection shall set forth a factual basis upon which the plaintiff alleges by reason of poverty an inability to pay a docket fee, including, but not limited to, the source and amount of the plaintiff's weekly income. Such affidavit shall be signed and sworn to by the plaintiff under oath, before one who has authority to administer the oath, under penalty of perjury, K.S.A. 2014 Supp. 21–5903, and amendments thereto. The form of the affidavit shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

(3) Court review; grounds for dismissal; service of process. The court shall review any petition authorized for filing under this subsection. Upon such review, if the court finds that the plaintiff's allegation of poverty is untrue, the court shall direct the plaintiff to pay the docket fee or dismiss the petition without prejudice. Notwithstanding K.S.A. 60–301, and amendments thereto, service of process shall not issue unless the court grants leave following its review.

(4) Limitation. In no event shall an inmate bring a civil action or appeal a judgment in a civil action or proceeding under this subsection if the inmate has, on three or more prior occasions, while incarcerated or detained in any facility or while otherwise under any other restraint of liberty, brought an action or appeal in a Kansas district court that was dismissed or denied on the grounds that it is successive, time barred, frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the inmate is under imminent danger of serious physical injury.

(5) As used in this subsection, the term "inmate" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, postrelease supervision, probation, pretrial release, or diversionary program.