

## Senate Substitute for HOUSE BILL No. 2389

By Committee on Judiciary

1-28

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1 AN ACT concerning crimes, punishment and criminal procedure; relating  
2 to review and appeal of convictions resulting in a sentence of death;  
3 limitations and procedure for motions to correct sentence; amending  
4 K.S.A. 60-1507 and K.S.A. 2013 Supp. 21-6619 and repealing the  
5 existing sections.  
6

7 *Be it enacted by the Legislature of the State of Kansas:*

8 Section 1. K.S.A. 2013 Supp. 21-6619 is hereby amended to read as  
9 follows: 21-6619. (a) A judgment of conviction resulting in a sentence of  
10 death shall be subject to automatic review by and appeal to the supreme  
11 court of Kansas in the manner provided by the applicable statutes and rules  
12 of the supreme court governing appellate procedure. The review and  
13 appeal shall be expedited in every manner consistent with the proper  
14 presentation thereof and given priority pursuant to the statutes and rules of  
15 the supreme court governing appellate procedure, *and in accordance with*  
16 *the following provisions:*

17 (1) *When a notice of appeal is filed in a criminal case in which a*  
18 *sentence of death has been imposed, the rules relating to appellate*  
19 *practice shall govern except where otherwise provided by this section.*

20 (2) *Upon the filing of a notice of appeal, the execution of a death*  
21 *sentence shall be stayed until the appellate proceedings are concluded.*

22 (3) *Within 30 days after notice from the clerk of the appellate courts*  
23 *that the appeal has been docketed, the clerk of the district court shall*  
24 *compile the record on appeal.*

25 (4) *A transcript shall be prepared of all proceedings reported by a*  
26 *court reporter or which have otherwise been recorded. The transcript*  
27 *shall be completed within 90 days after service of the request for*  
28 *transcript. Extensions of time shall not be granted, except for exceptional*  
29 *circumstances.*

30 (5) *All documents filed in the trial court and all transcripts of the*  
31 *proceedings shall be included in the record on appeal.*

32 (6) *The appellant's brief shall be filed not later than 120 days after*  
33 *service of the certificate of filing of the transcript in accordance with*  
34 *supreme court rule 3.03. The appellee's brief shall be filed not later than*  
35 *120 days after service of the appellant's brief. A reply brief, if any, shall be*  
36 *filed not later than 60 days after service of the brief to which the reply is*

1 *made. Extensions of time to file primary briefs shall not be granted, except*  
2 *for exceptional circumstances, and for no more than 90 days. No party*  
3 *shall be granted more than two such extensions, except upon a showing of*  
4 *unique and extraordinary circumstances, and then only in 30-day*  
5 *increments. No request for additional time that will cause the brief filing*  
6 *date to extend beyond 270 days from the initial filing due date may be*  
7 *granted without a hearing before the full supreme court in which counsel*  
8 *shall explain the unique and extraordinary circumstances justifying*  
9 *additional time to the court's satisfaction. Extensions of time to file a reply*  
10 *brief shall not be granted.*

11 *(7) The length of briefs, exclusive of cover, table of contents,*  
12 *appendix and certificate of service, shall not exceed the following: Brief of*  
13 *appellant, 100 pages; brief of appellee, 100 pages; reply brief, 30 pages.*  
14 *Exceptions to the page limit shall not be granted.*

15 *(8) Death penalty appeals shall take precedence over all other*  
16 *appeals. The fact that an attorney is engaged in drafting a brief in a*  
17 *pending death penalty appeal shall be considered by the appellate courts*  
18 *of Kansas as an exceptional circumstance warranting extensions of time to*  
19 *file briefs or other documents in all other non-capital appeals in which*  
20 *counsel is also engaged as lead counsel, upon the request of counsel.*

21 *(9) Oral arguments in death penalty appeals shall be heard by the*  
22 *supreme court no later than six months after the filing of the final reply*  
23 *brief of the appellant.*

24 *(10) The supreme court shall issue a written decision no later than*  
25 *six months after oral argument.*

26 *(b) The supreme court of Kansas shall consider the question of*  
27 *sentence as well as any errors asserted in the review and appeal ~~and~~ in*  
28 *accordance with the rules of appellate procedure governing issue*  
29 *preservation and applicable standards of review. The court shall be*  
30 *authorized to notice unassigned sentencing errors appearing of record if*  
31 *such errors involve only a question of law arising on proved or admitted*  
32 *facts and if the ends of justice would be served thereby. Review of*  
33 *unassigned sentencing errors shall be limited to a plain error standard of*  
34 *review. If the court determines that it will consider an unassigned*  
35 *sentencing error, it must notify the parties of the particular issue no later*  
36 *than 60 days prior to the scheduled oral argument, and shall allow the*  
37 *parties to submit supplemental briefs on the matter prior to oral argument.*  
38 *Such supplemental briefs shall be limited to no more than 20 pages. The*  
39 *court shall not consider any unassigned sentencing errors that are not*  
40 *identified and brought to the parties' attention prior to 60 days before oral*  
41 *argument.*

42 *(c) With regard to the sentence, the court shall determine:*

43 *(1) Whether the sentence of death was imposed under the influence of*

1 passion, prejudice or any other arbitrary factor; and

2 (2) whether the evidence supports the findings that an aggravating  
3 circumstance or circumstances existed and that any mitigating  
4 circumstances were insufficient to outweigh the aggravating  
5 circumstances.

6 (d) *Issuance of the mandate in capital cases which affirm a death*  
7 *sentence shall be automatically stayed until the time for filing a petition*  
8 *for writ of certiorari to the United States supreme court has expired or, in*  
9 *a case in which a petition for writ of certiorari has been filed, until the*  
10 *clerk of the appellate courts is notified by the United States supreme court*  
11 *that the petition has been denied.*

12 (d) (e) The court shall be authorized to enter such orders as are  
13 necessary to effect a proper and complete disposition of the review and  
14 appeal.

15 (f) *The amendments to this section by this act, being procedural in*  
16 *nature, shall apply to all pending and future appeals, except in pending*  
17 *appeals the requirements of subsections (a)(7), (a)(9) and (a)(10) shall be*  
18 *advisory rather than obligatory for those appeals that have been fully*  
19 *briefed on or before the effective date of this act.*

20 Sec. 2. K.S.A. 60-1507 is hereby amended to read as follows: 60-  
21 1507. (a) *Motion attacking sentence.* A prisoner in custody under sentence  
22 of a court of general jurisdiction claiming the right to be released upon the  
23 ground that the sentence was imposed in violation of the constitution or  
24 laws of the United States, or the constitution or laws of the state of Kansas,  
25 or that the court was without jurisdiction to impose such sentence, or that  
26 the sentence was in excess of the maximum authorized by law, or is  
27 otherwise subject to collateral attack, may, pursuant to the time limitations  
28 imposed by subsection (f), move the court which imposed the sentence to  
29 vacate, set aside or correct the sentence.

30 (b) *Hearing and judgment.* Unless the motion and the files and  
31 records of the case conclusively show that the prisoner is entitled to no  
32 relief, the court shall cause notice thereof to be served upon the county  
33 attorney, grant a prompt hearing thereon, determine the issues and make  
34 findings of fact and conclusions of law with respect thereto. The court  
35 may entertain and determine such motion without requiring the production  
36 of the prisoner at the hearing. If the court finds that the judgment was  
37 rendered without jurisdiction, or that the sentence imposed was not  
38 authorized by law or is otherwise open to collateral attack, or that there has  
39 been such a denial or infringement of the constitutional rights of the  
40 prisoner as to render the judgment vulnerable to collateral attack, the court  
41 shall vacate and set the judgment aside and shall discharge the prisoner or  
42 resentence said prisoner or grant a new trial or correct the sentence as may  
43 appear appropriate.

1 (c) *Successive motions.* The sentencing court shall not be required to  
2 entertain a second or successive motion for similar relief on behalf of the  
3 same prisoner.

4 (1) *No second or successive motion under this section may be filed in*  
5 *the district court absent an order from the Kansas court of appeals*  
6 *authorizing such motion.*

7 (A) *Before a second or successive motion under this section may be*  
8 *filed in the district court, the prisoner shall move in the Kansas court of*  
9 *appeals for an order authorizing the district court to consider the second*  
10 *or successive motion.*

11 (B) *The court of appeals may authorize the filing of a second or*  
12 *successive motion only if it determines that the motion makes a prima*  
13 *facie showing that it satisfies the requirements of either subsection (c)(3)*  
14 *(A) or (c)(3)(B).*

15 (C) *The court of appeals shall grant or deny the authorization to file*  
16 *a second or successive motion not later than 30 days after the filing of the*  
17 *motion for authorization to do so.*

18 (D) *The grant or denial of an authorization by the court of appeals to*  
19 *file a second or successive motion shall not be appealable and shall not be*  
20 *the subject of a petition for rehearing or a petition for review.*

21 (2) *A claim presented in a second or successive motion that was*  
22 *presented in a prior motion shall be dismissed.*

23 (3) *A claim presented in a second or successive motion that was not*  
24 *presented in a prior motion shall be dismissed unless:*

25 (A) *The prisoner shows that the claim relies on a new rule of*  
26 *constitutional law, made retroactive to cases on collateral review by the*  
27 *United States supreme court that was previously unavailable; or*

28 (B) *the factual predicate for the claim could not have been discovered*  
29 *previously through the exercise of due diligence and the facts underlying*  
30 *the claim, including, but not limited to, advances in science and*  
31 *technology, if proven and viewed in light of the evidence as a whole, would*  
32 *be sufficient to establish by clear and convincing evidence that, but for*  
33 *constitutional error, no reasonable factfinder would have found the*  
34 *prisoner guilty of the underlying offense.*

35 (4) *A district court shall dismiss any claim presented in a second or*  
36 *successive motion that the court of appeals has authorized to be filed*  
37 *unless the prisoner shows that the claim satisfies the requirements of*  
38 *either (c)(3)(A) or (c)(3)(B).*

39 (5) *There is no right to counsel in a second or successive motion*  
40 *brought under this section.*

41 (6) *The ineffectiveness or incompetence of counsel during a prior*  
42 *motion under this section or other collateral post-conviction proceedings*  
43 *shall not be a ground for relief in a second or successive motion.*

1 (d) *Appeal*. An appeal may be taken to the appellate court as provided  
2 by law from the order entered on the motion as from a final judgment on  
3 application for a writ of habeas corpus.

4 (e) *Exclusiveness of remedy*. An application for a writ of habeas  
5 corpus in behalf of a prisoner who is authorized to apply for relief by  
6 motion pursuant to this section, shall not be entertained if it appears that  
7 the applicant has failed to apply for relief, by motion, to the court which  
8 sentenced said applicant, or that such court has denied said applicant relief,  
9 unless it also appears that the remedy by motion is inadequate or  
10 ineffective to test the legality of said applicant's detention.

11 (f) *Time limitations*. (1) Any action under this section must be  
12 brought within one year of:

13 (i) (A) The final order of the last appellate court in this state to  
14 exercise jurisdiction on a direct appeal or the termination of such appellate  
15 jurisdiction; or

16 (ii) (B) the denial of a petition for writ of certiorari to the United  
17 States supreme court or issuance of such court's final order following  
18 granting such petition.

19 (2) The time limitation herein may be extended by the court only to  
20 prevent a manifest injustice.

21 (A) *If the court makes a manifest-injustice finding, it must state the*  
22 *factual and legal basis for such finding in writing with service to the*  
23 *parties.*

24 (B) *For purposes of finding manifest injustice under this statute, the*  
25 *court's sole inquiry is to determine why the prisoner failed to file the*  
26 *motion within the one-year time limitation.*

27 (3) *If the court, upon its own inspection of the motions, files and*  
28 *records of the case, determines the time limitations herein have been*  
29 *exceeded and that the dismissal of the motion would not equate with*  
30 *manifest injustice, the district court must dismiss the motion as untimely*  
31 *filed.*

32 (4) *The state is not deemed to have waived the time limitation unless*  
33 *the state, through counsel, expressly waives the requirement.*

34 (g) *Additional procedures for prisoners under sentence of death. (1)*  
35 *Except as otherwise provided in this subsection, all general provisions of*  
36 *this section apply to motions filed by prisoners under a sentence of death.*

37 (2) *If a prisoner under a sentence of death files a motion for post-*  
38 *conviction relief pursuant to this section and it is the first such motion, the*  
39 *district court shall appoint counsel unless the prisoner already has*  
40 *counsel, and shall cause notice thereof to be served upon the prosecuting*  
41 *attorney's office. The district court shall take up such motion and hold a*  
42 *status conference within 30 days of its filing. At the status conference, the*  
43 *court shall determine whether further briefing from the parties is required,*

1 *whether to hold an evidentiary hearing, and may make any other*  
2 *determinations necessary for the resolution of the case. Production of the*  
3 *prisoner is not required at the status conference.*

4 (3) *As a general rule, motions and responses filed under this section*  
5 *should not exceed 1/2 of the page limit for briefs in direct appeals in death*  
6 *penalty cases as set forth in K.S.A. 2013 Supp. 21-6619, and amendments*  
7 *thereto.*

8 (4) *During the pendency of a first motion filed under this section, the*  
9 *execution of a death sentence shall be stayed until the proceedings, to*  
10 *include appeal, are concluded.*

11 (5) *The court may decide the motion without holding an evidentiary*  
12 *hearing. If the court determines the motion can be resolved without an*  
13 *evidentiary hearing, the court shall issue a written decision within 180*  
14 *days after the status conference.*

15 (6) *If the court determines an evidentiary hearing is necessary, it*  
16 *shall hold the hearing within 180 days after the status conference.*

17 (7) *If an evidentiary hearing is held, the court shall issue a written*  
18 *decision with 180 days after the evidentiary hearing.*

19 (8) *The court's written decision shall address all of the prisoner's*  
20 *properly presented claims, setting forth with particularity necessary*  
21 *findings of fact and conclusions of law.*

22 (9) *Any appeal from the granting or denial of a motion pursuant to*  
23 *this section in a death penalty case shall take precedence over other*  
24 *appeals and shall be expedited by the appellate courts in the same manner*  
25 *as a direct appeal as set forth in K.S.A. 2013 Supp. 21-6619, and*  
26 *amendments thereto.*

27 Sec. 3. K.S.A. 60-1507 and K.S.A. 2013 Supp. 21-6619 are hereby  
28 repealed.

29 Sec. 4. This act shall take effect and be in force from and after its  
30 publication in the Kansas register.