

**House Judiciary Committee
February 10, 2016
House Bill 2502**

**Testimony of the
Kansas Association of Criminal Defense Lawyers
Opponent**

Dear Chairman Barker and Members of the Committee:

The Kansas Association of Criminal Defense Lawyers is a 350+ member organization dedicated to ensuring justice and due process for people accused of crimes and other wrongdoing. **We oppose 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.**

Current law

K.S.A. 60-1507(a) provides:

A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may, pursuant to the time limitations imposed by subsection (f), move the court which imposed the sentence to vacate, set aside or correct the sentence.

Under current law, there is a one-year time period in which a defendant can file a motion under K.S.A. 60-1507. That one-year time period “may be extended by the court only to prevent a manifest injustice.” K.S.A. 60-1507(f)(2). The burden of proving manifest injustice is on the defendant. The manifest injustice standard is the totality of the circumstances, and factors to consider in reaching that determination include whether:

(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

¹ *Vontress v. State*, Appellate Case No. 102,904, decided by the Kansas Supreme Court on 5/30/14. <http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2014/20140530/102904.pdf> Vontress lost his case, as did the defendant in *Aguilera v. State*, Case No. 112,929, decided by the Kansas Court of Appeals on 1/22/16 (citing *Vontress*). <http://www.kscourts.org/cases-and-opinions/Opinions/Unpublished/Ctapp/2016/20160122/112929.pdf>

What HB 2502 would change

HB 2502 would change the manifest injustice standard from the totality of the circumstances to “the sole inquiry is to determine why the prisoner failed to file the motion within the one-year time limitation.” In other words, the new standard would look something like this:

Does the movant provide persuasive reasons or circumstances that prevented him/her from filing the 60-1507 motion within the one-year time limitation?

A district court would not be allowed to consider whether a defendant’s claim raises substantial issues of law or fact. A district court would not be allowed to consider whether a defendant presents a colorable claim of actual innocence. Instead, “[f]or purposes of finding manifest injustice under this section, the court’s sole inquiry is to determine why the prisoner failed to file the motion within the one-year time limitation.”

While I have not seen any proponent testimony (nor do I know who the proponent(s) is/are), I anticipate that a proponent might argue that the federal law version of K.S.A. 60-1507 does not provide for manifest injustice in considering the one-year time limitation. Our response would be while it is true that 28 U.S.C. § 2255 and 28 U.S.C. § 2244 do not have manifest injustice provisions, federal caselaw provides for “equitable tolling” of the one-year period and other “equitable exceptions.” (See *Vontress v. State*, p. 12-13, link in footnote 1).

Furthermore, I suspect a proponent might say that the totality of the circumstances standard is “court-made law” and the Legislature should say for itself what it means by manifest injustice. Our response would be 1) it is federal court decisions that provide exceptions under the federal law version of K.S.A. 60-1507 and 2) it is not good policy to drastically narrow the definition of what constitutes manifest injustice. For example, it would preclude actual innocence claims from being raised through an untimely motion under K.S.A. 60-1507.

Points on other provisions of HB 2502

HB 2502 also includes new language that “[i]f the court makes a manifest-injustice finding, it must state the factual and legal basis for such finding in writing with service to the parties.”

In that case, HB 2502 should also provide that the court state factual and legal bases for NOT making a manifest-injustice finding. (K.S.A. 60-1507 already requires a district court to “determine the issues and make findings of fact and conclusions of law with respect thereto” so making the court reduce to writing its findings regarding manifest injustice is consistent with the statute overall.)

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In addition, HB 2502 provides that “[i]f the court, upon its own inspection of the motions, files and records of the case, determines the time limitations under this section have been exceeded and that the dismissal of the motion would not equate with manifest injustice, the district court must dismiss the motion as untimely filed.” This is new language as well. It seems there should be some sort of notice or opportunity for the movant/defendant to respond to why the time limitations were exceeded and how that constitutes manifest injustice. There could be language added to K.S.A. 60-1507 that makes clear that a movant has to include this information in his/her pleading.

Conclusion

The provisions in HB 2502 will choke off the ability for a defendant to argue manifest injustice outside of the reason for his/her late filing. While those defendants will be rare, the opportunity must be left open. If a defendant seeks relief through federal court (because there is no longer an avenue through K.S.A. 60-1507) and prevails, it will be our state that is on the hook for the consequences.

Thank you for your consideration,



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