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Testimony Regarding HB 2129
Submitted by Aaron Breitenbach, Deputy District Attorney
On Behalf of Marc Bennett, District Attorney, Eighteenth Judicial District,
And the Kansas County and District Attorneys Association

Honorable Chairman Patton and Members of the House Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2129. On behalf of Marc Bennett, District Attorney of the Eighteenth Judicial District, and the Kansas County and District Attorneys Association, I come to ask you to clarify how our courts should implement K.S.A. 21-2512, which provides convicted defendants an opportunity to request additional DNA testing in pursuit of exoneration.

I begin by acknowledging the importance of this statute for creating another means by which an innocent person could continue to seek justice in the rare and tragic occurrence of a conviction. The purpose and function of the proposed amendments are not to interfere with that essential process.

Rather, HB2129 actually adds another crime for which convicted defendants may seek relief and seeks to narrow the focus of such requests to those most likely to reveal exculpatory evidence. The reality is there are a limited number of accredited DNA analysts and labs available in Kansas (and elsewhere). While the current statute attempts to limit requests for DNA testing to legitimate cases of controversy, in practice, virtually any defendant convicted of certain crimes can seek relief. As a result, unnecessary and unwarranted DNA testing is creating waste and, most importantly, potentially delaying the discovery of truly exculpatory evidence.

As an example, many sexual assault cases turn on whether a victim gave consent. The defendant admits to the sexual act but argues it was consensual (assuming the victim is of an age and otherwise capable of giving consent). In such cases, the presence of DNA (even a third party's DNA) is irrelevant to the disputed question of consent. Nevertheless, potential biological material often "is related to the investigation...is in the possession of the state...and was not previously tested." As interpreted by our courts, such a request must proceed, even if the results could not establish defendant whether wrongfully convicted.

Similarly, the current statute rightly acknowledges that DNA technology continues to improve over time by permitting the retesting of evidence. It is also true that as more people's DNA is tested and science's understanding of the prevalence of certain genetic markers develops, the statistics used to quantify the accuracy of a result evolve. As a result, defendants can routinely argue (and many courts have held) that retesting will always provide more "accurate" results, even if it just means that the likelihood of someone other than the defendant being randomly selected with the same genetic signature has grown from 1 in 6 sextillion in 2005 to 1 in 4 nonillion today (yes, that last word is a number with 30 zeros that is currently used in some DNA statistical findings).

In fairness, the current statute likely attempted to prevent unwarranted petitions from overburdening the process and delaying justice for truly innocent defendants in subjection (c). However, as recently as this past September, the Supreme Court held in *State v. Angelo*, No. 124, 071, that district courts cannot engage in any type of weighing or consideration of the true relevance of potential results prior to testing. This interpretation renders subsection (c) meaningless and leaves district courts helpless to sort deserving claims from those that are meritless.

Finally, HB2129 clarifies the process by which the courts can resolve abandoned petitions. As noted above, our district courts are required to grant many of these requests without a real expectation of meaningful results or exoneration. When results come back that are unfavorable to defendants (which is in the vast majority of cases), defendants have no incentive to share the bad news with the court, and the claims linger indefinitely awaiting further action by the petitioner. The amendments to subsection (f) require the petitioner to articulate how the results warrant further action by the court. In the absence of such, courts are directed to dismiss the petition, freeing court resources.

Neither prosecutors nor victims are served by the incarceration of the innocent. These amendments are offered to clear the path to review potential DNA evidence where it could free the innocent while also freeing limited resources from meritless claims to better serve the ends of justice.

Thank you for your time, attention, and consideration in this matter.

Respectfully submitted,

Aaron Breitenbach
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Eighteenth Judicial District