KANSAS STATE BOARD OF INDIGENTS' DEFENSE SERVICES

House Judiciary Committee
January 30, 2023

House Bill 2129
Testimony of the BIDS Legislative Committee
Presented by Clayton J. Perkins
Opponent

Chairman Patton and Members of the Committee:

For over 20 years K.S.A. 21-2512 has provided wrongfully convicted Kansans "a laudable, yet limited" mechanism "for postconviction DNA testing under narrow circumstances."[1] Given the growing ubiquity of DNA evidence, and the decreasing costs of DNA testing, it is likely long past due for this legislature to consider expanding the scope of K.S.A. 21-2512. Instead, HB 2129 would further restrict this already limited mechanism for relief. Because this bill would further prevent wrongfully convicted Kansans from receiving postconviction DNA testing and proving their exonerations, the BIDS Legislative Committee opposes this bill.

Virtually every change proposed in HB 2129 would limit access to postconviction DNA testing in various significant ways.[2] It begins on Page 1, line 10 with changing post*conviction* testing to post*sentencing*, increasing the time frame that a wrongfully convicted person has to wait to petition for testing, and furthering the risk that exonerating DNA evidence degrades before it can be tested. The Kansas Supreme Court recently noted that K.S.A. 21-2512 was originally crafted to avoid those pitfalls as "the Legislature, recognize[d] the risk that an innocent individual convicted of a crime covered by the statute could lose the ability to establish innocence via postconviction procedures due solely to the caprice of fate and time."[3] HB 2129 would create those problems, which this legislature already carefully avoided.

[1] *State v. Denney*, 283 Kan. 781, 794, 156 P.3d 1275, 1283 (2007)
[2] The only notable exception to this is the addition on Page 1, lines 14-16, which would fix a constitutional defect that was long ago recognized in *State v. Denney*, 278 Kan. 643, 101 P.3d 1257 (2004).
[3] *State v. Thurber*, 313 Kan. 1002, 1009, 492 P.3d 1185, 1189 (2021)

The changes on Page 1, lines 19 and 34-35 then increase the threshold requirements to even obtain DNA testing under the statute. Line 19, does so by requiring the tested evidence by material to the prosecution, but overlooks the fact that exonerating evidence is not typically a part of the initial prosecution, but is, rather, overlooked. Lines 34-35 then require a judge review the totality of the evidence in the case before any DNA testing is even done. Such a review at the threshold stage would waste time, expend judicial resources, and likely cost Kansas taxpayers more in litigation costs than just allowing the DNA testing to occur.

Finally the changes on Page 2, lines 8-11 and 37-39, insert an arbitrary 180-day deadline to resolve the case once DNA testing occurs. That ignores the reality that once testing occurs additional investigation is likely necessary to show how the evidence is exonerating, and the extent of that investigation varies from case to case. For example, in some cases, postconviction DNA testing may immediately show an already known alternative suspect was present at the crime scene and committed the crime. In other cases it may be the DNA testing itself which leads to the information necessary to identify an alternative suspect, requiring significant additional investigation. A district court is already well equipped to balance the needs for follow up investigation with the interest in expeditiously resolving cases. An additional deadline is simply unnecessary, and, like the other changes in HB 2129, would just serve to further limit an already restricted mechanism meant to allow wrongfully convicted Kansans to prove their innocence.

Thank you for your time.

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