House Judiciary Committee
January 30, 20213House Bill 2190
Testimony of Jean Phillips
on behalf of Kansas Association of Criminal Defense Lawyers
Opponent

I am writing in my personal capacity and on behalf of the Kansas Association of Criminal Defense Lawyers to express my strong opposition to HB 2129. I am the director of the Paul E. Wilson Project for Innocence and Post-Conviction Remedies, an organization that seeks post-conviction relief for persons incarcerated in Kansas. Together with our partners, we work to free innocent people, including Floyd Bledsoe whose conviction was overturned in 2008 based in part on DNA testing obtained under K.S.A. 21-2512.

A regrettable and profound reality is that innocent people are convicted. According to a 2018 study, approximately 6% of the state prison populations have been wrongfully convicted.[1] In Kansas, that equates to over 600 people serving sentences for crimes they did not commit.[2] Considering that for every wrongful conviction, the actual perpetrator is free to offend again, we should be striving to increase the tools available to wrongfully convicted persons, not restricting them. HB2129, however, contains changes that are unnecessary and have a real possibility of preventing innocent persons from obtaining relief.

Words matter.
Twenty years ago, the legislature understood the gravity of wrongful convictions with the passage of K.S.A. 21-2512. Since that time, the Kansas courts have interpreted the meaning of the statute and applied it to those seeking relief. When legislative changes occur, precedent no longer applies. Even changing an "or" to an "and," can significantly alter how the law is applied. Here, the proposed changes, big and small, will increase the burden on innocent persons by both increasing the standard to obtain relief, and restricting the time frame for proving innocence.

Increase the Standard to Obtain Relief
There are changes to the K.S.A. 21-2512 that will make it more difficult for innocent persons to obtain DNA testing. Page 1, line 19 changes the ability to obtain testing by requiring a person to establish that DNA testing is not only related to the investigation of the crime, but that it also was "material to the prosecution." By its very nature, post-conviction DNA testing lies outside the evidence presented by the prosecution, not material to the prosecution. In Floyd Bledsoe's case, DNA testing was not material to the prosecution. The prosecution did not test the victim's clothes, nor did it rely on testing of any bodily fluids in convicting Mr. Bledsoe. Had Mr. Bledsoe been required to prove DNA testing related to the investigation of the crime AND was material to the prosecution, he would not have met the standard and granted DNA testing. Under HB 2129, Mr. Bledsoe would still be incarcerated today.

[1] https://innocenceproject.org/research-resources/#:~:text=To%20address%20the%20frequently%20asked,best%20available%20study%20to%20date.
[2] https://www.doc.ks.gov/current_population_totals

Page 1, lines 33-36 changes the standard a trial court must use in deciding if testing is warranted. Currently, a court only decides if testing would be relevant. Under HB2129, a district court would be required to review the totality *of the available evidence* in deciding if DNA is warranted. In many instances, however, there is limited other evidence still available when DNA testing is requested.[3] There is no mandate that law enforcement or prosecutors retain evidence. In the event that little to no available non-biological evidence is left to review, DNA testing should not be precluded if biological evidence still exits.

Once testing is complete, Page 2, lines 22 and 25-26 increase the standard a person must meet to obtain relief. Lines 25-26 increases the standards for relief by requiring the petitioner prove their claim by a preponderance of the evidence. By adding "preponderance of the evidence" a person would have a higher burden than required for any other post-conviction relief. The United States Supreme Court has defined "substantial likelihood of the different result" as a "reasonable probability," which is less than a preponderance.[4] DNA evidence should not bear a higher level of proof other forms of relief.

Time Frame for Relief

There are two changes in HB2129 that adversely impact a person wrongfully convicted by establishing time constraints. First, Page 1, line 10 changes the time in which a person can seek DNA from post conviction to post sentencing. It is unclear the basis for the change. No person should have to spend even one more night incarcerated for a crime they did not commit. DNA testing should be available from the moment of conviction.

Second, HB2129 adds a 180 day time limit to the petition once DNA testing is complete. This deadline ignores that test results can be the beginning of the process, not the end. Once test results have been obtained, often additional investigation must take place to establish innocence. In Floyd Bledsoe's case, DNA testing opened the door to relief, but it took additional investigation to establish his innocence. Mr. Bledsoe may not have been released if his petition was bound by the DNA testing and a 180 deadline.

The need for finality is understandable, but it should never come at the cost of incarcerating the wrong person. Prosecutors and juries are fallible. We must strive to correct the errors, not put up unnecessary barriers. For these reasons, I personally, and the Kansas Association of Criminal Defense Attorneys oppose HB 2129.

[3] https://www.kmuw.org/news/2022-09-27/audit-criticizes-operation-of-wichita-police-departments-property-evidence-unit

[4] *Jackson v. Holland*, 542 US 649 (2004).