

March 11, 2013

Kansas House Committee on
Corrections and Juvenile Justice
300 SW 10th Ave.
Topeka, KS 66612-1504

RE: Opposition to SB40, Amending provisions relating to DNA evidence

Society's most basic expectation of the criminal justice system is that it reliably distinguish between the innocent and the guilty. DNA testing is a powerful tool to ensure, in both the trial setting and in post-conviction litigation, that this fundamental distinction is correctly made. K.S.A. 21-2512, as initially enacted, gave a significant, if limited, number of incarcerated citizens the opportunity to establish their innocence through post-conviction testing.

As currently enacted, the statute strikes an appropriate balance between protecting both the innocent and society's interest in the finality of criminal investigations. K.S.A. 21-2512 vests discretion in the trial court to determine if the DNA evidence is of such significance to warrant relief. As with other evidentiary issues, it is the original trial judge who heard the case that is in the best position to evaluate how DNA results affect the weight of the evidence used to determine guilt. The amendment proposed in SB40 upsets the balance struck in the current statute and, more significantly, undermines the criminal justice system's ability to distinguish between the guilty and the innocent.

The proposed amendment could prohibit relief for any person, regardless of the results. The amendment states that the DNA testing must exonerate the petitioner. Exoneration is defined as "conclusively establish that the petitioner did not engage in the conduct." This outcome determinative requirement places a higher burden on the defendant than the burden he or she must bear to obtain relief from constitutional violations. It is also higher than the burden placed on the State to convict the defendant.

Depending upon the facts of the individual case, results of DNA testing will have differing exculpatory weight. DNA testing reveals the personal identity of biological material. This information, however, must be evaluated with the other evidence in the case. Even in a case that was tried as a single perpetrator rape, if DNA testing reveals the presence of a third party, the State may still attempt to deny its exculpatory power and change its theory of the case.

Take, for example, the case of Roy Wayne Criner. He was convicted and sentenced to 99 years for the 1986 rape and murder of a 16-year-old girl in Montgomery County, Texas. In 1997, DNA testing established that the semen found in the victim did not belong to Mr. Criner. Additional testing revealed that the DNA on the cigarette butt found at the scene was also Mr. Criner's. According to the prosecution, however, the absence of Mr. Criner's DNA, did not conclusively establish he did not participate in the crime. Although the prosecution did not argue at trial that two people were involved in the rape and murder of the victim, subsequent to the DNA testing, the prosecution asserted that the

DNA evidence only established that the victim had come into contact with two men, one of whom was not Mr. Criner. The Texas Criminal Court of Appeals agreed. It was not until August of 2000, when then-Governor George W. Bush granted a pardon on the grounds "that credible new evidence raises substantial doubt about the guilt of Roy Criner," that Mr. Criner was released

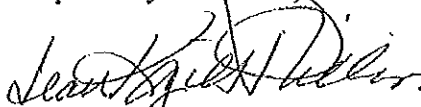
The failure of the prosecution and courts to acknowledge that the DNA results created "substantial doubt" as to Mr. Criner's guilt not only resulted in an innocent person being incarcerated, but also resulted in the failure to punish the perpetrator of the crime. Removing the trial court's ability to weigh the results of DNA testing, along with the rest of the evidence produced at trial, results in guilty persons escaping punishment. Based on the tireless efforts of the Innocence Project in New York, 302 innocent persons have been released from prison and 125 actual perpetrators have been identified. Those persons who initially escaped punishment went on to commit an additional 130 crimes, including 70 sexual assaults and 32 murders.

The experience of organizations across the county is that DNA evidence alone cannot conclusively exonerate an innocent person. DNA testing can shed new light on a conviction and can lead to additional evidence, that, when evaluated on a whole and weighed against the original theory of the prosecution, can substantially call into the question the legitimacy of the conviction. It can also lead to the apprehension of the actual perpetrator. Prosecutions are complex. DNA evidence is complex. Trial courts must be given the flexibility to address those complexities to obtain just results.

We respectfully request that the Legislature reject SB40 and retain K.S.A. 21-2512 in its current form to ensure fair access to testing, relief to those whose convictions are undermined, and punishment for those who might otherwise escape justice.

Thank you for your consideration. If you have any further questions, please do not hesitate to contact us.

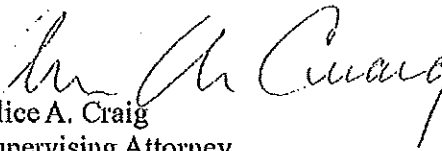
Respectfully Submitted,



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