STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of House Bill 2388
Presented to the House Committee on Corrections and Juvenile Justice
By Kris Ailslieger, Deputy Solicitor General

March 14, 2013

Chairman Rubin and Members of the Committee,

I appear today on behalf of Attorney General Derek Schmidt in support of HB 2388. This bill is intended to return K.S.A. 21-6619(b) to its original intent when it was enacted. This provision was intended to include a safety net in death penalty cases to ensure that in the extremely rare circumstance where an egregious trial error occurred but was not noticed by the litigants, the Supreme Court had a mechanism to correct it. But in the recent decision of *State v. Cheever*, the Kansas Supreme Court interpreted K.S.A. 21-6619(b) to allow broad review by the Court, regardless of the other rules of appellate procedure.

Under this interpretation, the Court is not bound by traditional rules of issue preservation and is unconstrained by any requirement that its review of unpreserved and unassigned errors be limited by the ends of justice, even though the statute currently includes that limitation. Thus, there is no requirement – and indeed, no motivation – for defense counsel in death penalty cases to raise timely and specific objections at trial to preserve issues for appeal. This, in turn, deprives the district courts of the opportunity to address objections and correct potential errors during trial. Such a circumstance undermines the trial process and greatly increases the possibility of reversal on appeal by unreasonably tilting the playing field against the State.

This bill seeks to return the equilibrium of well-established appellate practice to death penalty litigation while preserving the originally intended safety net.

The specific language defining manifest injustice that allows the Court to consider issues not properly preserved or raised, is drawn from case law. The language in subsection (b)(1) that "The error more probably than not resulted in the conviction of an innocent person," comes from the United States Supreme Court decision of *Murray v. Carrier*, 477 U.S. 478 (1986) where the court defined the "miscarriage of justice" exception to federal procedural default rules. This language protects against the exceedingly unlikely circumstance that a potentially innocent person has been convicted.

The “shocking to the conscience” or “obviously unfair” language of subsection (b)(2) comes from our own Court of Appeals in describing what is meant by “manifest injustice.” In *Ludlow v. State*, 37 Kan. App. 2d 676 (2007), and other cases, the court has used this language, and it protects against obvious arbitrary, capricious, and unfair practices in the legal process.

This bill does not break any new ground or establish any radical changes to the rules of trial or appellate practice. Rather, it restores the traditional rules of appellate practice to death penalty litigation, while protecting the rights of defendants and maintaining the safety net to prevent unjust imposition of the death penalty that was originally conceived by the legislature. It will ensure that death penalty cases still receive the appropriate level of appellate scrutiny without unfairly tipping the scales against the State and risking unwarranted reversals by the appellate courts.

Accordingly, the Attorney General strongly urges passage of this bill.