House Corrections and Juvenile Justice Committee
House Bill No. 2388
Testimony of Debra J. Wilson
Opponent
March 14, 2013

I am employed as a public defender and work in the Capital Appeals and Conflicts Office. I handle a wide variety of felony appeals in the Kansas appellate courts, including death penalty appeals.

House Bill No. 2388 would restrict the existing scope of appellate review in death penalty cases. There are two problematic aspects of the proposed amendments to K.S.A. 2012 Supp. 21-6619:

> I. Limiting appellate review of unpreserved error in death penalty cases runs contrary to the mandate of the United States Supreme Court that procedures in capital proceedings "aspire to a heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 411, 91 L.Ed.2d 335, 106 S.Ct. 2595 (1986) *citing* Spaziano v. Florida, 468 U.S. 447, 456, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984). It may be found to violate the Eighth and Fourteenth Amendments to the United States Constitution.
>
> II. Limiting appellate review of unpreserved error in death penalty cases to the manifest injustice standard included in the proposed amendments provides the defendant sentenced to death less opportunity for appellate review than the ordinary criminal defendant, who may now obtain review of unpreserved error by meeting one of several less stringent standards. To single out those sentenced to death for disparate treatment on appeal may be found to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I

In its current form, K.S.A. 2012 Supp. 21-6619 recognizes and effectuates the constitutional requirements for capital proceedings set out by the United States Supreme Court. That Court has found that the Constitution requires that capital defendants receive special protection because the death penalty is a "uniquely severe punishment that must be reserved from only those who are 'most deserving of execution.'" Graham v. Florida, ___U.S. ___, 176 L.Ed.2d 825, 130 S.Ct. 2011 (2010) *citing* Atkins v. Virginia, 536 U.S. 304, 153 L.Ed.2d 335, 122 S.Ct. 2242 (2002). Indeed, the idea that "death is different" undergirds much of our Supreme Court's Eighth Amendment jurisprudence: "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any

decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357-358, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977).

The profound difference in severity and finality of a sentence of death is the basis for requiring protections in capital proceedings that the Constitution nowhere else provides. Harmelin v. Michigan, 501 U.S. 957, 993-994, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991). "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases" Ake v. Oklahoma, 470 U.S. 68, 87, 84 L.Ed.2d 53,105 S.Ct. 1087 (1985) (Burger, C.J., concurring in judgment). The Court has recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" California v. Ramos, 463 U.S. 992, 998-999, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983).

The explicit provisions for close appellate review contained in the current statute are an important part of a capital sentencing scheme designed to withstand constitutional challenge. The Supreme Court has recognized that "[M]eaningful appellate review" in capital cases, "serves as a check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, 428 U.S. 153, 195, 206, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). It is therefore an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980).

It appears that the original drafters of K.S.A. 2012 Supp. 21-6619 were mindful of the holdings of the United States Supreme Court that death is different and that death penalty proceedings require a heightened level of scrutiny. Weakening the provisions for close appellate scrutiny of death penalty proceedings would invite a constitutional challenge.

II

While the United States Supreme Court has insisted on more procedural safeguards for the capital defendant, because "death is different," the proposed amendments to the statute deny appellate review to capital defendants that could be obtained by defendants without sentences of death. Singling out this group of criminal defendants for less legal protection than others may be found to violate the Equal Protection Clause of the Fourteenth Amendment.

The general rule is that the Kansas appellate courts do not review issues that were not properly preserved below by way of a timely and a specific objection. State v. McCaslin, 291 Kan. 697, 697, 245 P.3d 1030, 1033 (2011); K.S.A. 60–404. Our Supreme Court has deemed the contemporaneous objection rule a "salutary procedural tool" that gives the district court "the opportunity to conduct the trial without using ... tainted evidence, and thus avoid possible reversal and a new trial." State v. King, 288 Kan. 333, 341-342, 204 P.3d 585 (2009) *citing* Baker v. State, 204 Kan. 607, 611, 464 P.2d 212 (1970).

However, there are instances in which a criminal defendant may obtain review of trial error for the first time on appeal. For example, generally appellate courts do not address constitutional issues for the first time on appeal. But there are three recognized exceptions to the general rule: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. State v. Gomez, 290 Kan. 858, 862, 235 P.3d 1203 (2010). The defendant requesting review of his or her constitutional issue for the first time on appeal is not currently required to show that he or she is probably innocent or that the trial court error shocks the conscience, both much higher hurdles than are currently in place for any litigant.

Another example concerns the issue of prosecutorial misconduct. Currently, the appellate courts may review claims of prosecutorial misconduct for the first time on appeal. The court determines if the comments were improper, if so, then the court determines if the comments constituted constitute plain error. Plain error occurs if the comments prejudiced the defendant and denied him or her a fair trial. State v. Burnett, 293 Kan. 840, 850, 270 P.3d 1115 (2012). In this case is well, the defendant is not required to meet the higher standard of probable innocence or an error that shocks the conscience to obtain appellate review of an unpreserved issue.

In State v. Holmes 272 Kan. 491, 497-498, 33 P.3d 856 (2001) the Supreme Court noted that the federal plain error rule is incorporated into K.S.A. 60-261. The federal plain error rule, FRCP 51(b) states: "(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." There is no requirement that the defendant prove he or she is probably innocent, or that the error shocks the conscience. Rather, the United States Supreme Court has explained that the error must be plain, that is obvious or clear and it must be prejudicial- it must have likely affected the outcome of the case. United States v. Olano, 507 U.S. 725, 734-735, 123 L.Ed.2d 508, 113 S.Ct. 1770 (1993).

Although not designated "plain error" review, the Kansas appellate courts may also reach an issue not preserved or unassigned error "when necessary to serve the interests of justice or prevent a denial of fundamental rights." State v. Puckett, 230 Kan. 596, 596, 640 P.2d 1198 (1982). This standard does not require a showing of probable innocence or error shocking to the conscience.

A criminal defendant can obtain review of unpreserved instructional error under a "clearly erroneous" standard of review. State v. Martinez, 288 Kan. 443, 451, 204 P.3d 601 (2009). Under this standard, unpreserved instructional error requires reversal if the appellate court is firmly convinced the jury would have reached a different verdict had the error not

occurred. State v. Williams, 295 Kan. 506, 515–16, 286 P.3d 195 (2012). This is an area where the "probable innocence" standard is particularly problematic because the issue for the jury might not be guilt or innocence, but might be whether the defendant is guilty of a greater or a lesser crime. Additionally, in a death penalty proceeding, serious instructional error could occur in the sentencing phase, where guilt or innocence is no longer a consideration.

In Evitts v. Lucey, 469 U.S. 387, 393, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985) the United State Supreme Court held that if a State has created appellate courts as an integral part of its system for finally adjudicating the guilt or innocence of a defendant, the procedures employed in the appeal process must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. Currently, all defendants, whether sentenced to death or not, have avenues available for review of some unpreserved, or in some cases, unassigned, trial error. Those avenues have standards of review which look to the prejudicial effect of the asserted trial error – its likely effect on the outcome of the trial. None of those standards require that the defendant convince the reviewing court that he or she is probably innocent, and none of those standards require error so egregious that it shocks the conscience. The proposed amendments to K.S.A 2012 Supp. 22-6619 set a different, higher bar to obtaining appellate review of unpreserved or unassigned error for the defendant sentenced to death. This implicates the provisions of the Equal Protection Clause of the Fourteenth Amendment which demands that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws" and requires that similarly situated individuals should be treated alike. State v. Gaudina, 284 Kan. 354, 372, 160 P.3d 854 (2007).

The proposed amendments run contrary to the United States Supreme Court mandate that death penalty proceedings aspire to a heightened standard of reliability. They run contrary to the Constitutional mandate that similarly situated individuals be treated alike under the law. For those reasons, I oppose House Bill No. 2388.

Sincerely,
Debra J. Wilson
DebWilson88@hotmail.com
(785)691-8203