

SESSION OF 2014

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR
HOUSE BILL NO. 2389**

As Recommended by Senate Committee on
Judiciary

Brief*

Senate Sub. for HB 2389 would amend procedures for death penalty appeals and collateral motions attacking a prisoner's sentence (known as "KSA 60-1507 motions"), as described below.

Death Penalty Appeals

The bill would add the following provisions with regard to death penalty appeals:

- The rules of appellate practice would govern unless otherwise provided;
- Execution would be stayed once a notice of appeal is filed until appellate proceedings are complete;
- The record on appeal would be required to be compiled within 30 days of notice that an appeal has been docketed;
- Transcripts would be required to be completed within 90 days of service of request of the transcript, with extensions granted only for exceptional circumstances;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- All documents filed in the trial court and transcripts would be required to be included in the record on appeal;
- The deadline for the appellant's brief would be 120 days after service of the certificate of filing of the transcript, with the appellee's brief due 120 days after service of the appellant's brief. Any reply brief would be due 60 days after service of the brief to which the reply is being made. Extensions to these deadlines would be granted only for exceptional circumstances, for no more than 90 days. Parties would be limited to two such extensions, but could obtain further extensions in 30-day increments upon showing unique and extraordinary circumstances. A request that would cause the brief filing date to extend beyond 270 days from the initial due date could be granted only after a hearing before the full Supreme Court where counsel would explain the unique and extraordinary circumstances justifying the extension. No extensions of time to file a reply brief would be permitted;
- Briefs would be limited in length to 100 pages, not including cover, table of contents, appendix, and certificate of service. Reply briefs would be limited to 30 pages. No exceptions would be permitted;
- Death penalty appeals would take precedence over all other appeals, and an attorney's drafting of a death penalty brief would be considered by the appellate court as an exceptional circumstance warranting extensions of time in all other non-capital appeals in which the attorney is lead counsel, upon the request of counsel;
- The Supreme Court would be required to hear oral arguments within six months of the filing of the final reply brief of the appellant;

- The Supreme Court would be required to issue a written decision within six months of oral argument;
- Beyond consideration of the sentence, the scope of review would be limited in accordance with the rules of appellate procedure governing issue preservation and applicable standards of review. Unassigned sentencing errors could be considered only if they involved a question of law arising on proved or admitted facts and the ends of justice would be served thereby. Review of unassigned sentencing errors would be limited to a plain error standard of review, and the Supreme Court would be required to notify parties of such issues at least 60 days before oral argument, allowing supplemental briefs of no more than 20 pages to be submitted by the parties on the issue. The Supreme Court would be prohibited from considering any unassigned sentencing errors that are not identified and brought to the parties' attention prior to 60 days before oral argument; and
- Issuance of the mandate affirming a death sentence would be automatically stayed until the deadline for filing a petition for writ of *certiorari* to the U.S. Supreme Court has expired, or until the clerk of the appellate courts has been notified that such a petition has been denied.

These provisions would be applied to all pending and future appeals, except that the briefing page limits, deadline for oral argument, and deadline for issuing a written decision would be advisory instead of obligatory in appeals that have been fully briefed on or before the effective date of the act.

KSA 60-1507 Motions

The bill would add the following provisions with regard to second or successive KSA 60-1507 motions:

- Second or successive KSA 60-1507 motions would be prohibited unless the Kansas Court of Appeals authorizes such a motion;
- Authorization for a second or successive motion would be permitted only where the claim relies on a new, retroactive rule of constitutional law that was previously unavailable, or the facts underlying the claim could not have been discovered previously and would be sufficient to establish, by clear and convincing evidence, that no reasonable fact finder would have found the prisoner guilty, but for constitutional error;
- Any claim in an authorized KSA 60-1507 motion not meeting these standards would be dismissed by the district court;
- Authorization would be granted or denied within 30 days after the filing of a motion for authorization and would not be appealable or subject to rehearing or a petition for review;
- There would be no right to counsel for second or successive KSA 60-1507 motions; and
- Ineffectiveness or incompetence of counsel in a prior KSA 60-1507 motion or other collateral proceeding would not be a ground for relief in a second or successive KSA 60-1507 motion.

With regard to the time limitations under KSA 60-1507, the bill would:

- Require a court making a finding of manifest injustice (justifying an extension of time) to state the factual and legal basis for the finding in writing and serve this on the parties;
- Clarify that the court's sole inquiry in determining whether manifest injustice exists is to determine why the prisoner failed to file the motion within the time limitation;
- Require the court to dismiss a motion as untimely filed if the court's inspection reveals the time limitations have been exceeded and dismissal would not equate with manifest injustice; and
- Clarify the state is not deemed to have waived the time limitation unless it does so expressly.

Finally, the bill would establish the following provisions for KSA 60-1507 motions by prisoners under sentence of death:

- For a first KSA 60-1507 motion, counsel would be appointed and notice provided to the prosecuting attorney's office. A status conference would be held within 30 days, where the court would determine whether further briefing or an evidentiary hearing is required. The prisoner would not be required to attend the status conference;
- Generally, motions and responses would be limited to one-half the page limits for briefs in direct appeals in death penalty appeals as otherwise established in this bill;
- Execution of sentence would be stayed during the pendency of a first KSA 60-1507 motion, including appeal;

- The court would be allowed to decide the motion without an evidentiary hearing. The court would be required to issue a written decision or hold an evidentiary hearing within 180 days after the status conference. If an evidentiary hearing is held, the court would be required to issue a decision within 180 days after the hearing;
- The court would be required to address all properly presented claims, with particular findings of fact and conclusions of law as necessary; and
- Any appeal of a motion in such a case would take precedence over other appeals and be expedited by the appellate courts in the manner established for death penalty cases elsewhere in this bill.

The bill would be in effect upon publication in the *Kansas Register*.

Background

As introduced by the 2013 House Committee on Federal and State Affairs and recommended by the 2013 House Committee on Corrections and Juvenile Justice, HB 2389 would have amended law concerning notice of intent to seek the death penalty. The original provisions were incorporated into the conference committee report on Senate Sub. for HB 2043 and were enacted in 2013.

The 2014 Senate Committee on Judiciary recommended a substitute bill be passed, containing language modified from SB 257.

Background of SB 257

The bill was introduced by the Senate Judiciary Committee at the request of the Office of the Attorney General. In the Committee, representatives of the Attorney

General's Office and the Kansas County and District Attorneys Association testified in support of the bill. Attorneys employed as public defenders, representatives of the Kansas Coalition Against the Death Penalty and the Midwest Innocence Project, and private citizens testified in opposition to the bill. Written testimony opposing the bill was received from Chief Judge Thomas Malone of the Kansas Court of Appeals and a law professor at Washburn University.

The Senate Committee modified the language of SB 250 to clarify that advances in science and technology can be facts used to avoid the dismissal of a claim presented in a second or successive KSA 60-1507 motion. The Committee recommended this language be adopted as a substitute bill for HB 2387.

According to the fiscal note prepared by the Division of the Budget on SB 257, as introduced, the Board of Indigents' Defense Services estimates the bill would require 19 additional staff, increasing operating costs by \$660,507 in FY 2014 and \$1,778,319 in FY 2015, all from the State General Fund.

The Office of Judicial Administration indicates the expedited time frame could require additional justices and staff, as well as additional time for the Court of Appeals to authorize KSA 60-1507 motions. However, until the courts have an opportunity to operate with the provisions of the bill in place, the Judicial Branch cannot provide an accurate estimate of the fiscal effect.

Any fiscal effect associated with the bill is not reflected in *The FY 2015 Governor's Budget Report*.