Case No. 05-94207-A

IN THE SUPREME COURT

OF THE

STATE OF KANSAS

NATHANIEL SWENSON,

Petitioner/Appellant

-vs-

THE STATE OF KANSAS,

Respondent/Appellee.

PETITION FOR REVIEW

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Prayer for Review

Mr. Swenson, the petitioner, respectfully asks this Court to grant his petition for review and declare the findings of the Kansas Court of Appeals to be incorrect as related to his K.S.A. 60-1507 petition and the findings of the district court.

Date of Court of Appeals Decision

The Court of Appeals decided this case on May 19, 2006.

Issues On Which Review Is Sought

DID THE KANSAS COURT OF APPEALS ERR BY FINDING THAT MR. SWENSON HAD NO GROUNDS FOR RELIEF REGARDING THE INVESTIGATION AND CONFIRMATION OF INFORMATION BY HIS FAMILY MEMBERS?

DID THE KANSAS COURT OF APPEALS ERR IN FINDING THAT MR. SWENSON WAS NOT PREJUDICED BY THE DEFECTIVE COMPLAINT OMITTING "PREMEDITATION?

DID THE KANSAS COURT OF APPEALS ERR BY FINDING THAT MR. SWENSON INCURRED NO PREJUDICE BY THE FAILURE OF APPELLATE COUNSEL TO FILE A TIMELY PETITION FOR REVIEW.

Facts of the Case

The facts as enunciated in the Court of Appeals decision are sufficient.

Argument: Why This Court Should Review This Case.

The Court of Appeals found that Mr. Swenson's claim that trial counse failed to utilize evidence from his family regarding untrue statements made by witness Hooks because Mr. Swenson failed to provide a supporting affidavit from his mother regarding what her testimony would have been. (Slip Op. at 22). The Court of Appeals found it was Mr. Swenson's burden to prove his 60-1507 motion warranted an evidentiary hearing by including facts and evidence to support his motion. Id.

The problem with this finding by the Court of Appeals was that it is completely

unwarranted and without the support of any law whatsoever. There has never been a requirement that a petition must be supported by sworn testimony in order to warrant review. The Court of Appeals created a standard of proof that was not only unduly burdensome, but was unfair and unsupported by the laws of the State of Kansas.

The standard of review for 60-1507 petitions is quite clear. Upon the filing of a 60-1507 motion, an evidentiary hearing should be granted, unless, the motion, files and record conclusively show movant is entitled to no relief. See Van Bebber v. State, 220 Kan. 3, 4, 551 P.2d 878 (1976). If a movant alleges a factual basis which, if true, would support a claim for relief, then movant is entitled to an evidentiary hearing. See Sullivan v. State, 222 Kan. 222, 223-24, 564 P.2d 455 (1977).

Nowhere has it ever been asserted that the allegations of a petitioner must be supported by proven facts or sworn testimony. As noted in this Court's decision in State v. Holmes, 278 Kan. 603, 629 (2004), if the motion alleges facts not in the original record that would, if true, entitle the movant to relief, and *if readily available witnesses are identified* whose testimony would support those facts, it is error for the district court to summarily deny the motion without holding an evidentiary hearing. Thus, this Court has never required sworn, supporting documentation for the granting of an evidentiary hearing. Mr. Swenson met this Court's requirement of identifying a readily available witness whose testimony supported the facts asserted.

The Court of Appeals grossly erred in placing exceptional requirements on Mr. Swenson's pleadings and denying him an additional witness who could support his claims of attorney incompetence.

As to the issue of the failure of the complaint to apprize Mr. Swenson of the

premeditation element of the attempted first degree murder charge, the Court of Appeals held that trial counsel was obviously aware of the premeditation issue based upon a singular reference to the element in closing argument.(Slip Op. at 24-25).

However, trial counsel's lone statement to the jury that they couldn't assume premeditation does not show that counsel understood the term, the basis of the charge nor that he had taken any efforts to present any sort of defense to premeditation. Further, it is a bit ludicrous to use a singular statement in closing argument that mentions premeditation as an assertion that counsel was "well aware of the premeditation element" as found by the Court of Appeals at page 25 of the opinion. The instructions had already been drafted and read to the jury prior to argument and trial counsel had most likely (hopefully) heard the term mentioned at that time. This does not mean that counsel knew of the element prior to the time of the jury trial conference, as nothing else in the record supports any awareness of the element by trial counsel.

The Court of Appeals made a factual finding without support in the record and denied Mr. Swenson review based upon that faulty finding. As such, this matter should be reviewed by this Court.

As to the issue of the lack of prejudice to Mr. Swenson because of the failure to file a Petition for Review in a timely manner, a recent unpublished Court of Appeals opinion reveals a differing view on the matter by a different panel of appellate judges.

The Court of Appeals in the instant case found that Mr. Swenson showed no prejudice to the failure of appellate counsel to file a timely petition for review because he could not show that his arguments would have been successful if review had been granted. (Slip Op. at 30-31).

In State v. Kargus, No. 92,432, June 2006, a different panel of the Court of Appeals found that Mr. Kargus did suffer prejudice by the failure of his counsel to file a petition for review

because the filing of a petition for review "would have been successful at least to the extent of exhausting State remedies and thereby preserving the issue for federal habeas review." Kargus Slip Op. at 3.

As there currently exists a rift between the panels of the Court of Appeals as to the resolution of this issue and it is a matter of statewide importance, this Court should grant review on this issue.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

This is to certify that one true and correct copies of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

David Lowden
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Appellate Division
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this ____ of June, 2006.

_____
Michael P. Whalen

APPENDIX