## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3/7/00

BILL NO. AB 497
or
SUBJECT

John Pray U.W Law School
(NAME)

975 Bascom Mall
(Street Address or Route Number)

Madison WI 53706
(City and Zip Code)

(Representing)

Speaking in Favor: ☑

Speaking Against: ☐

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☐

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State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-00

BILL NO. 497
or
SUBJECT

Keith Findley
(NAME)

975 Bascom Mall
(Street Address or Route Number)

Madison WI 53705
(City and Zip Code)

UW Law School Innocence Proj.
(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☒

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State Capitol - B35 South
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Madison, WI 53707-7882

## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 03/07/00

BILL NO. 497
or
SUBJECT time limits for prosecution of certain sexual assault.

(NAME)
Marlene Tuma

(Street Address or Route Number)
N5731 Cemetery Rd

(City and Zip Code)
Ladysmith WI

(Representing)

Speaking in Favor: ☒

Speaking Against: ☐

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☐

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## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-00

BILL NO. AB 497
or
SUBJECT

Christopher Ahmuty
(NAME)

207 E. Buffalo St.
(Street Address or Route Number)

Milwaukee WI
(City and Zip Code)

ACLU of Wisconsin
(Representing)

Speaking in Favor: ☐

Speaking Against: ☒

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☐

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## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-00

BILL NO. AB 497
or
SUBJECT

Cheri Ouvrier
(NAME)

600 Williamson St.
(Street Address or Route Number)

Madison, WI 53703
(City and Zip Code)

WI Coalition Against Sexual Assault
(Representing)

Speaking in Favor: ☒

Speaking Against: ☐

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☐

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## SENATE HEARING SLIP

(Please Print Plainly)

DATE: March 7, 2000

BILL NO.
or
SUBJECT AB 497

Rep. Mark Gundrum
(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor: ☒

Speaking Against: ☐

Registering in Favor:
but not speaking: ☐

Registering Against:
but not speaking: ☐

Speaking for information
only; Neither for nor against: ☐

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Madison, WI 53707-7882

## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-2000

BILL NO. AB497

or

SUBJECT

Rep. Scott Walker

(NAME)

(Street Address or Route Number)

(City and Zip Code)

LEAD

(Representing)

Speaking in Favor: ☒

Speaking Against: ☐

Registering in Favor: but not speaking: ☐

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

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Madison, WI 53707-7882

## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-00

BILL NO. AB497

or

SUBJECT DNA Evidence

Ray DALL'OSTO

(NAME)

(Street Address or Route Number)

State Bar of WI

(City and Zip Code)

Criminal Law Section

(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

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State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

## SENATE HEARING SLIP

(Please Print Plainly)

DATE: 3-7-00

BILL NO. AB 497

or

SUBJECT

Julie Braun

(NAME)

DOJ / OCVS 123 W. Wash

(Street Address or Route Number)

Madison

(City and Zip Code)

Wisconsin Crime Victims Council

(Representing)

Speaking in Favor: ☐

Speaking Against: ☐

Registering in Favor: but not speaking: ☒

Registering Against: but not speaking: ☐

Speaking for information only; Neither for nor against: ☐

Please return this slip to a messenger PROMPTLY

Senate Sergeant-At-Arms
State Capitol - B35 South
P.O.Box 7882
Madison, WI 53707-7882

# Vote Record

## Senate - Committee on Judiciary and Consumer Affairs

Date: 3/27/2000

Moved by: George

Seconded by: Clausing

Clearinghouse Rule:

Appointment:

Other:

AB: 497 SB:

AJR: SJR:

AR: SR:

A/S Amdt:

A/S Amdt: to A/S Amdt:

A/S Sub Amdt:

A/S Amdt: to A/S Sub Amdt:

A/S Amdt: to A/S Amdt: to A/S Sub Amdt:

Be recommended for:

- ☐ Passage
- ☐ Introduction
- ☐ Adoption
- ☐ Rejection
- ☐ Indefinite Postponement
- ☐ Tabling
- ☒ Concurrence as amended
- ☐ Nonconcurrence
- ☐ Confirmation

| Committee Member | Aye | No | Absent | Not Voting |
|---|---|---|---|---|
| Sen. Gary George, Chair | ☒ | ☐ | ☐ | ☐ |
| Sen. Fred Risser | ☒ | ☐ | ☐ | ☐ |
| Sen. Alice Clausing | ☒ | ☐ | ☐ | ☐ |
| Sen. Joanne Huelsman | ☒ | ☐ | ☐ | ☐ |
| Sen. Gary Drzewiecki | ☒ | ☐ | ☐ | ☐ |
| Totals: | 5 | 0 | | |

☒ Motion Carried ☐ Motion Failed

# Vote Record

## Senate - Committee on Judiciary and Consumer Affairs

Date: 3/27/2000

Moved by: George

Seconded by: Risser

Clearinghouse Rule:

Appointment:

Other:

AB: 497 SB:

AJR: SJR:

AR: SR:

A/S Amdt:

A/S Amdt: to A/S Amdt:

A/S Sub Amdt: LRB 0375/4

A/S Amdt: to A/S Sub Amdt:

A/S Amdt: to A/S Amdt: to A/S Sub Amdt:

Be recommended for:

- ☐ Passage
- ☒ Introduction
- ☒ Adoption
- ☐ Rejection

- ☐ Indefinite Postponement
- ☐ Tabling
- ☐ Concurrence
- ☐ Nonconcurrence
- ☐ Confirmation

| Committee Member | Aye | No | Absent | Not Voting |
|---|---|---|---|---|
| Sen. Gary George, Chair | ☑ | ☐ | ☐ | ☐ |
| Sen. Fred Risser | ☑ | ☐ | ☐ | ☐ |
| Sen. Alice Clausing | ☑ | ☐ | ☐ | ☐ |
| Sen. Joanne Huelsman | ☑ | ☐ | ☐ | ☐ |
| Sen. Gary Drzewiecki | ☑ | ☐ | ☐ | ☐ |
| Totals: | 5 | 0 | | |

☒ Motion Carried ☐ Motion Failed

*Wisconsin Coalition Against Sexual Assault*

**Testimony on AB 497**

Presented to the Senate Committee on Judiciary and the Consumer Affairs

March 7, 2000

Good morning Chairperson George, and other members of the committee. My name is Cheri Dubiel and I am the Policy Specialist for the Wisconsin Coalition Against Sexual Assault (WCASA). WCASA is a statewide coalition of 36 community-based sexual assault service providers working to end sexual violence in Wisconsin. I am here to represent our coalition in testifying in support of AB 497.

Being the victim of a sexual assault is, arguably, the most traumatic ordeal a person can survive in their lifetime. According to the Office of Justice Assistance, an estimated 6056 sexual assaults were reported to law enforcement in Wisconsin in 1998. We should note, though, that few rapes are reported to the police for a number of reasons. WCASA supports AB 497 because it acknowledges the reality of the experience victims of sexual assault face following a sexual assault.

As a representative of the anti-sexual assault movement, one of the questions I am asked most often is why sexual assault victims do not report the crimes committed against them. Many victims see their assault, unlike other violent crimes, as a personal matter. Our sexual selves are our most private and personal parts of who we are. A violation of that part of our self has psychological, emotional, and sometimes physical effects that cannot be compared. Sexual assault victims face the fear and shame at the thought of their stories becoming public as the result of coming forward to press charges. Victims are forced to recount humiliating and traumatic events to complete strangers, using words we are taught to be ashamed to say.

Contrary to popular belief, the majority of sexual assaults are perpetrated by somebody known to the victim. Based on reports made to Wisconsin law enforcement in 1998, 93% of all sexual assaults were perpetrated by someone known to the victim. 58% of assaults took place in either the victim or offender's home (Wisconsin Office of Justice Assistance). Imagine the compounded fear and confusion a victim may face when their perpetrator is a father, sister, uncle, or husband and their repeated abuse is taking place in their own home. Most often, perpetrators make threats of reprisal if the victim reports the assault. It may, in fact, be perceived by survivors as more dangerous to come forward and report the crime, than to continue to be a victim of it.

The National Center for Victims of Crime and Crime Victims Research and Treatment Center estimate that nearly one-third of all sexual assault victims experience post-traumatic stress disorder, which symptoms include denial, psychological numbing, social withdrawal, and exaggerated psychological response. As a reaction to protect them, their minds may shut down memories of the event and in effect, repress them. Often, it takes a great deal of time and healing for a victim of a sexual assault to feel safe enough to come forward to report their crimes.

Because of post-traumatic stress disorder, some victims of sexual assault may not remember the events surrounding their assault until much later in life, especially when their victimization took place as children. Many children who are sexually assaulted do not have the sophistication of knowledge about sex to even be able to identify their experiences as a crime. It may take a change in circumstances, like the perpetrator no longer having a significant role in the victim's life, or a child victim growing up and moving away from home, in order for her or him to feel safe enough, physically, to bring charges forward.

It is also important to mention, that victims of sexual assault not only face the fears of making their experience public, but they also face the fears of dealing with an often hostile and antagonistic criminal justice system. Many survivors are not equipped to face the re-victimization that often takes place in trying to get the criminal justice system to take their claims seriously.

As a statewide coalition that answers technical assistance calls from victims and workers at sexual assault service providers around the state, some of the most common legal technical assistance questions we receive are related to inquiries about statutes of limitations. Sadly, often there is nothing we can do to help because their statute of limitations have already run out. Passing AB 497 will provide hope in at least of few of these cases.

The passage of the Victim Rights Amendment has made Wisconsin a leader in our commitment to victims of crime. We urge the committee to continue this commitment by passing AB 497.

STATE BAR
of WISCONSIN

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

# MEMORANDUM

**To:** Members of the Senate Committee on Judiciary and Consumer Affairs

**From:** Ray Dall'Osto, State Bar of Wisconsin Criminal Law Section Chair

**Date:** March 6, 2000

**Re:** AB497—DNA evidence in certain crimes

---

The State Bar of Wisconsin Criminal Law Section supports AB497, which would allow action to commence at any time in cases of rape. DNA evidence has surpassed the law in its ability to identify the true guilty party in certain crimes, and the Criminal Law Section believes that the law should recognize these changes.

The Section is seeking several amendments:

- Prosecution on DNA evidence should be clarified to mean the following "Prosecution that substantially relies on DNA genetic identification evidence implicating a defendant may be commenced at any time." There has also been talk of limiting this language to be more specific in its scope, specifically regarding evidence left by the perpetrator of the crime. The Criminal Law Section is open to those changes.
- The Section has serious concerns about the reliability of fingerprint evidence, and would advise against including that kind of evidence in this bill.
- DNA evidence should also be used to clear people of crimes for which they have been convicted. The Section is actively reviewing and enthusiastic about Laws already set forth in Illinois and New York, as well as The Innocence Protection Act introduced in the U.S. Senate. Attached you will find language the Section recommend on that language.

The Section looks forward to working with Senator George and the rest of the members of this committee as well as those affiliated with the Innocence Project at the UW Law School on seeking a bipartisan agreement on this bill.

*If you have any questions or concerns you would like to address to our membership (which includes prosecutors, judges, and defense attorneys) feel free to contact Cory Mason, Government Relations Coordinator at the State Bar of Wisconsin at 1-800/444-9404 x6128, email at 'cmason@wisbar.org', or Attorney Ray Dall'Osto, Chair of the Criminal Law Section at 414'271-1440, email at 'dallosto@execpc.com.'*

# AMENDMENT FOR AB497

974.07 Motion for Fingerprint or Forensic DNA Testing

(1) At any time after conviction, a defendant in custody under sentence of a court may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that:

(a) Is related to the investigation or prosecution that resulted in the judgment of conviction;
(b) Is in the actual or constructive possession of any government agencies (local, state or federal); and
(c) Was not previously subjected to fingerprint or forensic DNA testing, or can be subjected to retesting with new scientific techniques that provide a reasonable likelihood of more accurate and probative results.

(2) Reasonable notice of a motion brought under this section shall be served upon the State by defendant. The court shall notify the State of any application or motions made under this section and shall afford the State an opportunity to respond.

(3) Upon receiving notice of an application or motion under this subsection, the State shall take such steps as are necessary to ensure that any remaining fingerprint evidence or biological materials that were secured in connection with the case by local, state or federal government agencies is preserved pending the completion of the proceedings under this section.

(4) The court shall order fingerprint or forensic DNA testing pursuant to an application or motion made under this section if it determines that:

(a) The defendant presents a prima facie case that:

(1) Testing may produce noncumulative, exculpatory evidence relevant to the claim of the defendant that he or she was wrongfully convicted or sentenced;

(2) Identity was an issue in the investigation, trial or disposition of the case;

(3) The evidence to be tested has been subject to a chain of custody reasonably sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(b) The result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence or wrongful conviction;

(c) The testing requested employs a scientific method generally accepted within the relevant scientific community.

(5) The court may impose reasonable conditions on any testing ordered which protects the State's interest in the integrity of the evidence and the testing process. When appropriate and upon the stipulation of the defendant and the State, the State Crime Laboratory pursuant to sec. 165.75, .83 and .84 can do the testing ordered.

(6) The cost of the fingerprint or forensic DNA testing that is ordered by the court shall be borne by the State or the defendant, as the court may order in the interests of justice, if it is shown that the defendant is not indigent and possesses the means to pay for the testing.

(7) A court considering a motion brought under this section may refer the defendant to the State Public Defender for an indigency evaluation and consideration of appointment of counsel under sec. 977.08(4)(j).

# LEGISLATIVE PROPOSAL FOR INNOCENCE PROTECTION

The Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School

Keith Findley and John Pray, Co-Directors
Cari Anne Renlund and Ted Wisnefski, Law Students

# SUMMARY

In the last decade, new DNA testing has exonerated at least 64 people in the United States who were wrongly convicted of serious crimes. These DNA exonerations have highlighted as never before that our criminal justice system does make mistakes. And they have demonstrated the necessity of having mechanisms for preserving and testing biological evidence even after conviction, and for raising claims of actual innocence long beyond the current time limits for seeking a new trial based on newly discovered evidence. Because the truth-finding function of the criminal justice system should always be paramount, the Innocence Project of the Frank J. Remington Center at the University of Wisconsin Law School proposes legislative improvements to assist in this process.

We suggest legislation that will achieve four primary objectives at this time:

1. Mandate preservation of biological evidence in criminal cases.

2. Create a statutory procedure for obtaining DNA testing of biological evidence in postconviction cases, without regard for the defendant's ability to pay, where the testing might prove innocence.

3. Eliminate the current one-year statute of limitations for seeking a new trial based on newly discovered evidence.

4. Update the wrongful conviction compensation statute, which presently caps compensation at $5,000 per year up to total of $25,000, by increasing the compensation caps.

Wisconsin statutes currently allow a convicted individual just one year from the date of conviction to challenge that conviction on the basis of newly discovered evidence. *See* Wis. Stat. § 805.16(4). New evidence, however, is almost never discovered within this time limit. New advances in DNA technology that enhance the ability to obtain DNA evidence

have and will likely continue to be developed years after conviction. Additionally, Wisconsin does not mandate the preservation of biological evidence in criminal cases, and our statutes do not provide a method for the convicted to obtain access to biological evidence after conviction.

Both New York and Illinois have responded to the need for postconviction DNA testing by enacting appropriate legislation. Both states have adopted statutes that eliminate time restrictions for producing DNA evidence after a conviction, and provide that the state must allow—and, in cases of indigents, pay for—postconviction DNA testing if the testing might prove innocence.

Federal legislation also has recently been proposed by Senatory Leahy, and cosponsored by Senator Feingold and others, that addresses all four of those objectives. The federal Innocence Protection Act of 2000 allows a convicted individual to test and present, at government expense if indigent, noncumulative, exculpatory, biological evidence at any time after conviction, thus eliminating an unduly restrictive time bar. The bill also provides for mandatory preservation of biological evidence upon request of the defendant. The government can destroy the evidence only upon notice to the defendant. The legislation also conditions federal grant money to the states on state adoption of similar rules for obtaining, testing, and presenting without time limitation new evidence that proves innocence. Finally, the statute increases compensation for wrongful convictions to $50,000 per year.

We would like to see legislation in Wisconsin, which is similar to the pending federal legislation. Attached is a brief explanation of our objectives and possible legislation.

# TABLE OF CONTENTS

# I. Objectives

The following are four primary goals we seek to achieve through appropriate legislation in Wisconsin:

1. Mandate preservation of biological evidence in criminal cases.

2. Create a statutory procedure for obtaining DNA testing of biological evidence in postconviction cases, without regard to the defendant's ability to pay, where the testing might prove innocence.

3. Eliminate the current one-year statute of limitations for seeking a new trial based on newly discovered evidence.

4. Update the wrongful conviction compensation statute, which presently caps compensation at $5,000 per year up to total of $25,000, by increasing the compensation caps.

# II. Reasons for these objectives

The development of DNA (deoxyribonucleic acid) as a forensic tool over the last decade has demonstrated the need for improved mechanisms for responding to the wrongful conviction of the innocent. Our goals seek to provide better opportunities for the truly innocent to prove their innocence. Consistent with these goals is the state's interest in securing the incarceration of the true perpetrators of crimes. Thanks to DNA testing, we now have the ability to do just that. In recent years DNA testing has become an increasingly reliable tool for convicting criminal perpetrators and exonerating those wrongfully convicted. And DNA testing methods continue to improve; methods now exist to obtain highly discriminating results from degraded, contaminated, or minute biological samples where just a few years ago such results were impossible.

Wisconsin lacks an adequate statutory method for providing postconviction relief in cases of newly discovered evidence involving DNA. Wisconsin also lacks a statutory method for providing testing and retesting of biological material with newer, more powerful DNA testing procedures. There is no statutory provision in Wisconsin that mandates the preservation of such biological evidence so that it is available to those who may have been wrongfully convicted. Hence, our state needs statutory methods for utilizing this advanced technology to provide expanded postconviction relief and to assist the state in finding the true perpetrators of crime.

**A. Wrongful convictions**

The general presumption that convictions are correct has been weakened significantly. In the last ten years, the United States and Canada have exonerated more that 65 individuals with the use of DNA testing. *See* S. 2073, 106th Cong. § 101(a)(5) (2000). It is simply a fact that innocent people are convicted of crimes far too often. Since 1989, DNA testing at the FBI crime lab excluded the primary suspect in 25% of sexual assaults. *See* Richard C. Dieter, Esq., "*Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*" (1997). If 25% of the accusations in sexual assaults where DNA was available were wrong, it is frightening to think how many actual convictions may be wrong, as well.

The reasons for wrongful accusations and convictions are many. They include: erroneous eyewitness identifications; poor representation and limited resources of defense attorneys; false and coerced confessions; racial prejudice; prosecutorial and police misconduct stemming from the overwhelming pressure to secure convictions; false

testimony by informants; and laboratory errors. Although eyewitness testimony and confessions are generally perceived as the most persuasive forms of evidence, their unreliability has long been well-known, and many of the DNA exonerations have come in cases in which convictions rested upon these forms of evidence.

**B. Accuracy and availability of DNA testing**

If done properly, DNA testing can provide powerful evidence of guilt or unassailable proof of innocence. DNA testing, however, was not widely used prior to 1994. *See* S. 2073, 106th Cong. § 101 (3). Additionally, as DNA testing advances, the possibility of testing much smaller DNA samples with more discriminating power is currently available. Hence, retesting of DNA samples that may have been inconclusive in previous years may produce conclusive results now. *See* National Commission on the Future of DNA Evidence, U.S. Dep't of Justice, "Postconviction DNA Testing: Recommendations for Handling Requests" (1999); S. 2073, 106th Cong. § 101 (3). Due to the advancing technology, DNA testing can be performed with accurate results on biological evidence that is decades old. *See id.*

**C. Relief in Wisconsin is procedurally limited**

Wisconsin requires that motions for new trials based on newly discovered evidence be made within one year of conviction. *See* Wis. Stat. § 805.16(4); *but see State v. Bembenek*, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1997) (recognizing that in some cases due process may require courts to consider newly discovered evidence outside the one-year window). This largely eliminates the opportunity for redress to those convicted of crimes before DNA testing was widely available.

Alternatively, under Wisconsin law, courts may have the authority to grant a new trial "in the interest of justice" under Wis. Stat. § 805.15. But relief under this statute is highly discretionary, and the statute does not make clear that courts must consider claims of actual innocence based upon new DNA evidence.

Wisconsin does have a statute that allows for postconviction relief at any time after conviction, but this statute is only available for bringing constitutional or jurisdictional claims. *See* Wis. Stat. § 974.06(1). Thus, defendants who may wish to have biological evidence tested in Wisconsin must somehow "constitutionalize" their claims in order to be heard longer than one year after their convictions. This can be a very difficult task considering that a criminal defendant does not have a statutory or constitutional right to DNA testing in Wisconsin.

Additionally, the Wisconsin statutes that provide for postconviction relief are based upon the premise that the petitioner has the newly discovered evidence in hand. In the case of DNA testing of biological samples, however, a defendant may have no means of getting access to the evidence, which is generally in the possession of a prosecutor or law enforcement agency. The Wisconsin Supreme Court has established general rules for postconviction discovery, but no statute or rule clearly provides that a defendant must be allowed access to biological evidence for DNA testing where the testing might prove innocence. *See State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). Although the National Commission on the Future of DNA Testing strongly encourages that prosecutors and defense attorneys work together to further justice in such cases, such cooperation is not uniform, and gaining access to biological evidence after a conviction can be

extremely difficult.

Moreover, even if a mechanism exists for obtaining access to biological evidence, that mechanism is of no use if the evidence is destroyed or lost before testing is requested. Wisconsin does not mandate the preservation of biological material that may serve to exonerate one who has been wrongfully convicted, even upon request. No statute or other uniform rule governs the preservation of biological evidence. The experience varies widely from jurisdiction to jurisdiction; some Wisconsin police agencies preserve biological evidence indefinitely, while in other cases the evidence is destroyed even before the direct appeal process is concluded. Once such evidence is destroyed a prisoner's ability to prove his or her innocence may be lost. Concomitantly, once the evidence is destroyed the state loses the ability to use this powerful DNA evidence to find and convict the true perpetrator. Additionally, once such evidence has been destroyed it becomes the defendant's burden to establish that the evidence was destroyed in bad faith in order to obtain judicial relief. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). Again, this is a nearly impossible burden.

**D. Wisconsin's wrongful conviction compensation statute is inadequate.**

Wis. Stat. § 775.05 provides a procedure for a wrongly convicted innocent person to seek compensation from the state. The statute, however, is rarely used (in its history, the state claims board has only awarded compensation twice), and the compensation caps are pitifully low. The statute provides for a maximum of $5,000 compensation per year of wrongful imprisonment, not to exceed a total of $25,000. This cap is woefully inadequate to compensate for the significant losses occasioned by a wrongful convic.

# III. Legislative Proposals for Achieving these Goals

Although we have not written model legislation to assist Wisconsin in addressing our concerns, we can point legislators to at least three proposals or statutes enacted in other jurisdictions. Only two states provide statutory processes for DNA testing after a conviction has been secured. Those two states are Illinois and New York. We can also provide the recommendations made by the National Commission on the Future of DNA Testing.

### A. Proposed federal legislation

Senator Leahy, together with Senators Feingold, Levin, Moynihan, and Akaka, have recently introduced a bill which seeks to address claims of innocence, known as the Innocence Protection Act of 2000. It does so by providing expanded postconviction relief in cases of newly discovered evidence. The bill allows the convicted person to petition the court for DNA testing of biological evidence at any time after conviction. *See* S. 2073, 106th Cong. § 102, ch. 156, sec. 2291 (a). The petitioner can seek both testing of that which has never been tested before and the retesting of DNA that may benefit from new testing techniques. *See id.*

The bill also provides for mandatory preservation of biological evidence upon request of the defendant. The government must preserve any biological material in its possession once it has received notice from the defendant that he/she will be seeking testing. *See* S. 2073, 106th Cong. § 102, ch. 156, sec. 2291 (b)(2). In addition, the government is required to preserve any biological material it obtained during a criminal case which led to a conviction as long as the defendant remains incarcerated. *See* S.

2073, 106th Congress § 102, ch. 156, sec. 2292. If the government wishes to destroy the evidence before that time, it may do so only by giving notice to the person incarcerated and affording the person an opportunity to request that the evidence be preserved. *See id.*

The bill also seeks to disallow the government from denying a convicted person's request for DNA testing. It provides that the government may disallow such request only if it finds that the testing would not result in noncumulative, exculpatory evidence. *See id.* It also provides that no person shall be time-barred from presenting the results of DNA evidence in court. *See id.*

The proposed legislation also provides that the cost of such DNA testing will be borne by either the government or the petitioner. The court is given the authority to order the government to pay for the testing when the applicant is indigent or otherwise cannot pay for it. *See id.* Due to the decreasing cost of DNA testing and the relatively few cases in which the testing of such biological evidence is feasible, this cost is not expected to be great. *See* S. 2073, 106th Cong. § 101 (12).

**B. New York legislation**

New York has adopted a statute that guarantees DNA testing in cases in which the testing might prove innocence. The statute provides no time limitation for obtaining postconviction DNA testing. The statute requires a showing by the defendant that there is a reasonable probability that the verdict would have been more favorable to the defendant if the evidence had already been tested and used at trial. The statute also provides that the state will pay for the testing when the applicant is indigent and has met particular evidentiary standards. *See* N.Y. Crim. Proc. Law Sec. 440.30(1-a). (McKinney 1999).

### C. Illinois legislation

Illinois has also enacted a statute that authorizes postconviction DNA testing, which has been made all the more significant in light of its alarming death row exoneration rate. Under the Illinois law, the applicant must show that test results would produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. Upon such showing, a court must allow the testing to proceed. *See* 725 Ill. Comp. Stat. 5/116-3(a) (1998). The state will also pay for the testing if the applicant is indigent and has met certain evidentiary standards. Again, there is no time limitation to bringing a motion for such testing.

### D. National Commission on the Future of DNA Testing

After becoming alerted to the increasing number of convictions proved by DNA testing to be erroneous, Attorney General Janet Reno established a National Commission on the Future of DNA. The commission is chaired by The Honorable Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court. Professor Michael Smith of the University of Wisconsin Law School, and Milwaukee County Assistant District Attorney Norm Gahn also sit on the Commission, along with police, prosecution, and other criminal justice experts from around the country. Among its many projects, the Commission has published a manual of findings and recommendations entitled, "Postconviction DNA Testing: Recommendations for Handling Requests." The report is exhaustive and contains a thoughtful framework for analysis, a detailed look into DNA testing and procedures, and guidance for prosecutors, law enforcement agencies, defense counsel and members of the judiciary who must deal with biological evidence. The

Commission the importance of procedures for using DNA to establish innocence after conviction.

## IV. Conclusion

For these reasons, we believe that the state of Wisconsin needs to adopt legislation eliminating the one-year time limit on seeking a new trial based on newly discovered evidence, mandating the preservation of biological evidence in all criminal cases, enacting a method of obtaining testing of biological evidence in postconviction cases, and increasing the cap on compensation awards for the wrongly convicted. We believe this legislation is necessary for addressing the increasing numbers of wrongful convictions established by DNA testing. We recommend enacting legislation similar to the federal "Innocence Protection Act of 2000," which has been proposed by Senator Leahy and the statutes enacted in New York and Illinois. We also strongly encourage the committees to consult the findings of the National Commission on the Future of DNA Evidence when considering such legislation.

OFFICE OF SENATOR PATRICK LEAHY

# INNOCENCE PROTECTION ACT OF 2000
# SECTION-BY-SECTION SUMMARY

## OVERVIEW

The Innocence Protection Act of 2000 is a comprehensive package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Most urgently, the bill would (1) ensure that convicted offenders are afforded an opportunity to prove their innocence through DNA testing; (2) help States to provide competent legal services at every stage of a death penalty prosecution; (3) enable those who can prove their innocence to recover some measure of compensation for their unjust incarceration; (4) provide the public with more reliable and detailed information regarding the administration of the nation's capital punishment laws.

## TITLE I—EXONERATING THE INNOCENT THROUGH FEDERAL POST-CONVICTION REVIEW

**Sec. 101. Findings and purposes.** Legislative findings and purposes in support of this title.

**Sec. 102. DNA testing in Federal criminal justice system.** Establishes rules and procedures governing applications for DNA testing by convicted offenders in the Federal system. An applicant must allege that evidence to be tested (1) is related to the investigation or prosecution that resulted in the applicant's conviction; (2) is in the government's actual or constructive possession; and (3) was not previously subjected to DNA testing, or to the form of DNA testing now requested. The court may, in its discretion, appoint counsel for an indigent applicant.

Because access to DNA testing is of no value unless evidence containing DNA has been preserved, this section also prohibits the government from destroying any biological material in a criminal case while any person remains incarcerated in connection with that case, unless such person is notified of the government's intent to destroy the material, and afforded at least 90 days to request DNA testing under this title.

**Sec. 103. DNA testing in State criminal justice system.** Conditions receipt of Federal grants for DNA-related programs on an assurance that the State will adopt adequate procedures for preserving biological material and making DNA testing available to its inmates.

**Sec. 104. Prohibition pursuant to section 5 of the 14th amendment.** Prohibits States from (1) denying requests for DNA testing that could produce new exculpatory evidence, or (2) denying inmates a meaningful opportunity to prove their innocence using the results of DNA testing. Creates an authority to sue for declaratory or injunctive relief to enforce these prohibitions.

**Sec. 105. Severability.** Provides that if any provision of this title or any amendment made by this title is held to be unconstitutional, the remainder of the provisions and amendments shall not be affected.

## TITLE II—ENSURING COMPETENT LEGAL SERVICES IN CAPITAL CASES

**Sec. 201. Amendments to Byrne grant programs.** Conditions Federal funding under the Byrne grant programs – when such funding equals or exceeds an amount that is $50 million greater than the amount appropriated for such programs in FY2000 – on certification that the State has established and maintains an "effective system" for providing competent legal services to indigent defendants at every stage of a death penalty prosecution, from pre-trial proceedings through post-conviction review. The Director of the Administrative Office of the United States Courts is charged with specifying the elements of an "effective system," which must include a centralized and independent authority for appointing attorneys in capital cases, and adequate compensation and reimbursement of such attorneys.

**Sec. 202. Effect on procedural default rules.** Provides that certain procedural barriers to Federal habeas corpus review shall not apply if the State failed to provide the petitioner with adequate legal services.

**Sec. 203. Capital representation grants.** Amends the Criminal Justice Act, 18 U.S.C. §3006A, to make more Federal funding available to public agencies and private non-profit organizations for purposes of enhancing the availability and competence of counsel in capital cases, encouraging the continuity of representation in such cases, decreasing the cost of providing qualified death penalty counsel, and increasing the efficiency with which capital cases are resolved.

## TITLE III—COMPENSATING THE UNJUSTLY CONDEMNED

**Sec. 301. Increased compensation in Federal cases.** Raises the total amount of damages that may be awarded against the United States in cases of unjust imprisonment from $5,000 to $50,000 a year in a non-death penalty case, or $100,000 a year in a death penalty case. Identifies factors for court to consider in assessing damages.

**Sec. 302. Compensation in State death cases.** Encourages States to permit any person who was unjustly convicted and sentenced to death to be awarded reasonable damages, upon substantial proof of innocence and formal exoneration, by adding a new condition for Federal funding to assist in construction of correctional facility projects.

## TITLE IV—MISCELLANEOUS

**Sec. 401. Accommodation of State interests in Federal death-penalty prosecutions.** Protects the interests of States (including the District of Columbia and any commonwealth, territory or possession of the United States) by limiting the Federal government's authority to seek the death penalty in States that do not permit the imposition of such penalty. Department of Justice guidelines provide that in cases of concurrent jurisdiction, "a Federal indictment for an offense subject to the death penalty will be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities." Section 401 builds on that principle by requiring the Attorney General or her designee to certify that (1) the State does not have jurisdiction or refuses to assume jurisdiction over the defendant; (2) the State has requested that the Federal government assume jurisdiction; or (3) the offense charged involves genocide; terrorism; use of chemical weapons or weapons of mass destruction; destruction of aircraft, trains,

# TITLE I—EXONERATING THE INNOCENT THROUGH DNA TESTING

## SEC. 101. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress makes the following findings:

(1) Over the past decade, deoxyribonucleic acid testing (referred to in this section as "DNA testing") has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene.

(2) Because of its scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant. In other cases, DNA testing may not conclusively establish

or other instrumentalities or facilities of interstate commerce; hostage taking; torture; espionage; treason; the killing of certain high public officials; or murder by a Federal prisoner.

Sec. 402. **Alternative of life imprisonment without possibility of release.** Provides juries in Federal death penalty prosecutions brought under the drug kingpin statute, 21 U.S.C. §848(l), the option of recommending life imprisonment without possibility of release. This amendment brings the drug kingpin statute into conformity with the more recently-enacted death penalty procedures in title 18, which govern most Federal death penalty prosecutions. See 18 U.S.C. §3594.

**Sec. 403. Right to an informed jury.** Conditions Federal truth-in-sentencing grants upon certification that, in any capital case in which the jury has a role in determining the defendant's sentence, the defendant has the right to have the jury informed of all statutorily-authorized sentencing options in the particular case, including applicable parole eligibility rules and terms. The purpose is to give full effect to the due process principles underlying the Supreme Court's decision in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), which held that a defendant who has been convicted of a capital offense is entitled to an instruction informing the sentencing jury that he is ineligible for parole under State law.

**Sec. 404. Annual reports.** Directs the Justice Department to prepare an annual report regarding the administration of the nation's capital punishment laws. The report must be submitted to Congress, distributed to the press and posted on the Internet.

**Sec. 405. Discretionary appellate review.** Respects State procedural rules by allowing Federal habeas corpus petitioners to raise claims that State courts discouraged them from raising when seeking discretionary review in the State's highest court. Responds to the Supreme Court's decision in *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), which held that a State prisoner must present his claims to a State supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement of 28 U.S.C. §2254(b)(1), (c).

**Sec. 406. Sense of the Senate regarding the execution of juvenile offenders and the mentally retarded.** Expresses the sense of the Senate that the death penalty is disproportionate and offends contemporary standards of decency when applied to juvenile offenders and the mentally retarded.

guilt or innocence, but may have significant probative value to a finder of fact.

(3) While DNA testing is increasingly commonplace in pretrial investigations today, it was not widely available in cases tried prior to 1994. Moreover, new forensic DNA testing procedures have made it possible to get results from minute samples that could not previously be tested, and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. Consequently, in some cases convicted inmates have been exonerated by new DNA tests after earlier tests had failed to produce definitive results.

(4) Since DNA testing is often feasible on relevant biological material that is decades old, it can, in some circumstances, prove that a conviction that predated the development of DNA testing was based upon incorrect factual findings. Uniquely, DNA evidence showing innocence, produced decades after a conviction, provides a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing, therefore, can and has resulted in the post-conviction exoneration of innocent men and women.

(5) In the past decade, there have been more than 65 post-conviction exonerations in the United States and Canada based upon DNA testing. At least 8 individuals sentenced to death have been exonerated through post-conviction DNA testing, some of whom came within days of being executed.

(6) The 2 States that have established statutory processes for post-conviction DNA testing, Illinois and New York, have the most post-conviction DNA exonerations, 14 and 7, respectively.

(7) The advent of DNA testing raises serious concerns regarding the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness identification testimony. According to a 1996 Department of Justice study entitled "Convicted by Juries, Exonerated by Science: Case Studies of Post-Conviction DNA Exonerations", in approximately 20 to 30 percent of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have been wrongfully convicted.

(8) Laws in more than 30 States require that a motion for a new trial based on newly discovered evidence of innocence be filed within 6 months or

less. These laws are premised on the belief—inapplicable to DNA testing—that evidence becomes less reliable over time. Such time limits have been used to deny inmates access to DNA testing, even when guilt or innocence could be conclusively established by such testing. For example, in Dedge v. Florida, 723 So.2d 322 (Fla. Dist. Ct. App. 1998), the court without opinion affirmed the denial of a motion to release trial evidence for the purpose of DNA testing. The trial court denied the motion as procedurally barred under the 2-year limitation on claims of newly discovered evidence established by the State of Florida, which has since adopted a 6-month limitation on such claims.

(9) Even when DNA testing has been done and has persuasively demonstrated the actual innocence of an inmate, States have sometimes relied on time limits and other procedural barriers to deny release.

(10) The National Commission on the Future of DNA Evidence, a Federal panel established by the Department of Justice and comprised of law enforcement, judicial, and scientific experts, has issued a report entitled "Recommendations For Handling Post-Conviction DNA Applications" that urges post-conviction DNA testing in 2 carefully defined cat-

egories of cases, notwithstanding procedural rules that could be invoked to preclude such testing, and notwithstanding the inability of the inmate to pay for the testing.

(11) The number of cases in which post-conviction DNA testing is appropriate is relatively small and will decrease as pretrial testing becomes more common and accessible.

(12) The cost of DNA testing has also decreased in recent years. The typical case, involving the analysis of 8 samples, currently costs between $2,400 and $5,000, depending upon jurisdictional differences in personnel costs.

(13) In 1994, Congress authorized funding to improve the quality and availability of DNA analysis for law enforcement identification purposes. Since then, States have been awarded over $50,000,000 in DNA-related grants.

(14) Although the Supreme Court has never announced a standard for addressing constitutional claims of innocence, in Herrera v. Collins, 506 U.S. 390 (1993), a majority of the Court expressed the view that, "a truly persuasive demonstration of 'actual innocence'" made after trial would render imposition of punishment by a State unconstitutional.

(15) If biological material is not subjected to DNA testing in appropriate cases, there is a significant risk that persuasive evidence of innocence will not be detected and, accordingly, that innocent persons will be unconstitutionally incarcerated or executed.

(16) To prevent violations of the Constitution of the United States that the Supreme Court anticipated in Herrera v. Collins, it is necessary and proper to enact national legislation that ensures that the Federal Government and the States will permit DNA testing in appropriate cases.

(17) There is also a compelling need to ensure the preservation of biological material for post-conviction DNA testing. Since 1992, the Innocence Project at the Benjamin N. Cardozo School of Law has received thousands of letters from inmates who claim that DNA testing could prove them innocent. In over 70 percent of those cases in which DNA testing could have been dispositive of guilt or innocence if the biological material were available, the material had been destroyed or lost. In two-thirds of the cases in which the evidence was found, and DNA testing conducted, the results have exonerated the inmate.

(18) In at least 14 cases, post-conviction DNA testing that has exonerated a wrongly convicted person has also provided evidence leading to the apprehension of the actual perpetrator, thereby enhancing public safety. This would not have been possible if the biological evidence had been destroyed.

(b) PURPOSES.—The purposes of this title are to—

(1) substantially implement the Recommendations of the National Commission on the Future of DNA Evidence in the Federal criminal justice system, by ensuring the availability of DNA testing in appropriate cases;

(2) prevent the imposition of unconstitutional punishments through the exercise of power granted by clause 1 of section 8 and clause 2 of section 9 of article I of the Constitution of the United States and section 5 of the 14th amendment to the Constitution of the United States; and

(3) ensure that wrongfully convicted persons have an opportunity to establish their innocence through DNA testing, by requiring the preservation of DNA evidence for a limited period.

SEC. 102. DNA TESTING IN FEDERAL CRIMINAL JUSTICE SYSTEM.

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by inserting after chapter 155 the following:

## "CHAPTER 156—DNA TESTING



### "§ 2291. DNA testing

"(a) APPLICATION.—Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court established by an Act of Congress may, at any time after conviction, apply to the court that entered the judgment for forensic DNA testing of any biological material that—

"(1) is related to the investigation or prosecution that resulted in the judgment;

"(2) is in the actual or constructive possession of the Government; and

"(3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

"(b) NOTICE TO GOVERNMENT.—

"(1) IN GENERAL.—The court shall notify the Government of an application made under subsection (a) and shall afford the Government an opportunity to respond.

"(2) PRESERVATION OF REMAINING BIOLOGICAL MATERIAL.—Upon receiving notice of an application made under subsection (a), the Government shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section.

"(c) ORDER.—The court shall order DNA testing pursuant to an application made under subsection (a) upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the applicant that the applicant was wrongfully convicted or sentenced.

"(d) COST.—The cost of DNA testing ordered under subsection (c) shall be borne by the Government or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the means to pay.

"(e) COUNSEL.—The court may at any time appoint counsel for an indigent applicant under this section.

"(f) POST-TESTING PROCEDURES.—

"(1) PROCEDURES FOLLOWING RESULTS UNFAVORABLE TO APPLICANT.—If the results of DNA testing conducted under this section are unfavorable to the applicant, the court—

"(A) shall dismiss the application; and

"(B) in the case of an applicant who is not indigent, may assess the applicant for the cost of such testing.

"(2) PROCEDURES FOLLOWING RESULTS FAVORABLE TO APPLICANT.—If the results of DNA testing conducted under this section are favorable to the applicant, the court shall—

"(A) order a hearing, notwithstanding any provision of law that would bar such a hearing; and

"(B) enter any order that serves the interests of justice, including an order—

"(i) vacating and setting aside the judgment;

"(ii) discharging the applicant if the applicant is in custody;

"(iii) resentencing the applicant; or

"(iv) granting a new trial.

"(g) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit the circumstances under

which a person may obtain DNA testing or other post-conviction relief under any other provision of law.

**"§ 2292. Preservation of biological material**

"(a) IN GENERAL.—Notwithstanding any other provision of law and subject to subsection (b), the Government shall preserve any biological material secured in connection with a criminal case for such period of time as any person remains incarcerated in connection with that case.

"(b) EXCEPTION.—The Government may destroy biological material before the expiration of the period of time described in subsection (a) if—

"(1) the Government notifies any person who remains incarcerated in connection with the case, and any counsel of record or public defender organization for the judicial district in which the judgment of conviction for such person was entered, of—

"(A) the intention of the Government to destroy the material; and

"(B) the provisions of this chapter;

"(2) no person makes an application under section 2291(a) within 90 days of receiving notice under paragraph (1) of this subsection; and

"(3) no other provision of law requires that such biological material be preserved.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 155 the following:

**"156. DNA Testing ..... 2291".**

**SEC. 103. DNA TESTING IN STATE CRIMINAL JUSTICE SYSTEMS.**

(a) DNA IDENTIFICATION GRANT PROGRAM.—Section 2403 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796kk–2) is amended—

(1) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking "shall" and inserting "will";

(B) in subparagraph (C), by striking "is charged" and inserting "was charged or convicted"; and

(C) in subparagraph (D), by striking "and" at the end;

(2) in paragraph (3)—

(A) by striking "shall" and inserting "will"; and

(B) by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(4) the State will—

"(A) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(B) make DNA testing available to any person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to any person convicted in a court established by an Act of Congress.".

(b) DRUG CONTROL AND SYSTEM IMPROVEMENT GRANT PROGRAM.—Section 503(a)(12) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3753(a)(12)) is amended—

(1) in subparagraph (B)—

(A) in clause (iii), by striking "is charged" and inserting "was charged or convicted"; and

(B) in clause (iv), by striking "and" at the end;

(2) in subparagraph (C), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) the State will—

"(i) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(ii) make DNA testing available to a person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to a person convicted in a court established by an Act of Congress.".

(c) PUBLIC SAFETY AND COMMUNITY POLICING GRANT PROGRAM.—Section 1702(c) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd–1(c)) is amended—

(1) in paragraph (10), by striking "and" at the end;

(2) in paragraph (11), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(12) if any part of funds received from a grant made under this subchapter is to be used to develop or improve a DNA analysis capability in a forensic laboratory, or to obtain or analyze DNA samples for inclusion in the Combined DNA Index System (CODIS), certify that—

"(A) DNA analyses performed at such laboratory will satisfy or exceed the current standards for a quality assurance program for DNA analysis, issued by the Director of the Federal Bureau of Investigation under section 210303 of the DNA Identification Act of 1994 (42 U.S.C. 14131);

"(B) DNA samples and analyses obtained and performed by such laboratory will be accessible only—

"(i) to criminal justice agencies for law enforcement purposes;

"(ii) in judicial proceedings, if otherwise admissible under applicable statutes and rules;

"(iii) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection

with the case in which the defendant was charged or convicted; or

"(iv) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes;

"(C) the laboratory and each analyst performing DNA analyses at the laboratory will undergo, at regular intervals not exceeding 180 days, external proficiency testing by a DNA proficiency testing program that meets the standards issued under section 210303 of the DNA Identification Act of 1994 (42 U.S.C. 14131); and

"(D) the State will—

"(i) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(ii) make DNA testing available to any person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to a person convicted in a court established by an Act of Congress.".

**SEC. 104. PROHIBITION PURSUANT TO SECTION 5 OF THE 14TH AMENDMENT.**

(a) REQUEST FOR DNA TESTING.—

(1) IN GENERAL.—No State shall deny a request, made by a person in custody resulting from a State court judgment, for DNA testing of biological material that—

(A) is related to the investigation or prosecution that resulted in the conviction of the person or the sentence imposed on the person;

(B) is in the actual or constructive possession of the State; and

(C) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

(2) EXCEPTION.—A State may deny a request under paragraph (1) upon a judicial determination that testing could not produce noncumulative evidence establishing a reasonable probability that the person was wrongfully convicted or sentenced.

(b) OPPORTUNITY TO PRESENT RESULTS OF DNA TESTING.—No State shall rely upon a time limit or procedural default rule to deny a person an opportunity to present noncumulative, exculpatory DNA results in court, or in an executive or administrative forum in which a decision is made in accordance with procedural due process.

(c) REMEDY.—A person may enforce subsections (a) and (b) in a civil action for declaratory or injunctive relief, filed either in a State court of general jurisdiction or in a district court of the United States, naming either the State or an executive or judicial officer of the State as defendant. No State or State executive or judicial officer shall have immunity from actions under this subsection.

# TITLE II—ENSURING COMPETENT LEGAL SERVICES IN CAPITAL CASES

## SEC. 201. AMENDMENTS TO BYRNE GRANT PROGRAMS.

(a) CERTIFICATION REQUIREMENT; FORMULA GRANTS.—Section 503 of title I of the Omnibus Crime

court, the organized bar, and the defense bar of the jurisdiction to be served by the recipient of the grant or contract.".

# TITLE III—COMPENSATING THE UNJUSTLY CONDEMNED

**SEC. 301. INCREASED COMPENSATION IN FEDERAL CASES.**

Section 2513 of title 28, United States Code, is amended by striking subsection (e) and inserting the following:

"(e) DAMAGES.—

"(1) IN GENERAL.—The amount of damages awarded in an action described in subsection (a) shall not exceed $50,000 for each 12-month period of incarceration, except that a plaintiff who was unjustly sentenced to death may be awarded not more than $100,000 for each 12-month period of incarceration.

"(2) FACTORS FOR CONSIDERATION IN ASSESSING DAMAGES.—In assessing damages in an action described in subsection (a), the court shall consider—

"(A) the circumstances surrounding the unjust conviction of the plaintiff, including any misconduct by officers or employees of the Federal Government;

"(B) the length and conditions of the unjust incarceration of the plaintiff; and

"(C) the family circumstances, loss of wages, and pain and suffering of the plaintiff.".

**SEC. 302. COMPENSATION IN STATE DEATH PENALTY CASES.**

(a) CRIMINAL JUSTICE FACILITY CONSTRUCTION GRANT PROGRAM.—Section 603(a) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3769b(a)) is amended—

(1) in paragraph (5), by striking "and" at the end;

, (2) in paragraph (6), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(7) reasonable assurance that the applicant, or the State in which the applicant is located—

"(A) does not prescribe, authorize, or permit the penalty of death for any offense; or

"(B)(i) has established and maintains an effective procedure by which any person unjustly convicted of an offense against the State and sentenced to death may be awarded reasonable damages upon substantial proof that the

person did not commit any of the acts with which the person was charged; and

"(ii)(I) the conviction of that person was reversed or set aside on the ground that the person was not guilty of the offense or offenses of which the person was convicted;

"(II) the person was found not guilty of such offense or offenses on new trial or rehearing; or

"(III) the person was pardoned upon the stated ground of innocence and unjust conviction.".

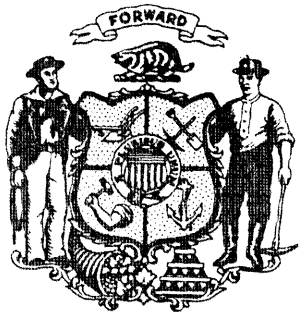
(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to any application submitted on or after the date that is 1 year after the date of enactment of this Act.

# TITLE IV—MISCELLANEOUS PROVISIONS

## SEC. 401. ACCOMMODATION OF STATE INTERESTS IN FEDERAL DEATH PENALTY PROSECUTIONS.

(a) RECOGNITION OF STATE INTERESTS.—Chapter 228 of title 18, United States Code, is amended by adding at the end the following:

WISCONSIN
STATE
ASSEMBLY




SHELDON
WASSERMAN
STATE REPRESENTATIVE

January 20, 2000

Senator Gary George, Chair
Senate Committee on Judiciary and Consumer Affairs
Room 118-South, State Capitol

Dear Senator George:

I am writing regarding a proposal that I feel should be scheduled for a public hearing as soon as possible. Assembly Bill 497, relating to time limits for prosecution of certain crimes of sexual assault, was referred to the Committee on Judiciary and Consumer Affairs on November 4, 1999.

Assembly Bill 497 is of particular importance to me personally. In my job as a physician, I commonly encounter and counsel women who have been sexually assaulted. Studies have documented that rape causes life-long complications in victims, ranging from chronic pain to increased incidence of surgeries to a host of deep psychological problems. It is one of the most heinous and most rapidly growing crimes in our society. We must do everything we can to strengthen our laws and use every technological advance to help rape victims bring their attackers to justice.

One way that we in Wisconsin can assist in making this possible is by passing Assembly Bill 497. In its current form, it would remove the statute of limitations on the admission of DNA evidence in cases of sexual assault. DNA evidence is 99.99% reliable; it must be collected within one or two days; and it provides irrefutable proof against rapists who may now escape prosecution due to the current 6-year statute of limitations.

Wrongly accused criminals are being released from prison based on DNA test results with no statute of limitations on the admission of evidence. We must also extend this option to victims whose assailants cannot be apprehended within a given period of time. If DNA evidence is present and conclusive, regardless of how long ago a rape occurred, then we must legally have the ability to convict the offender.

I respectfully ask that Assembly Bill 497 be placed on the calendar for the public hearing that you have scheduled for January 25, 2000. I urge swift deliberation and a committee vote.

Thank you for your consideration. Please feel free to contact me anytime should you have questions or comments.

Sincerely,

Sheldon A. Wasserman, M.D.
State Representative
22nd Assembly District

SW/so

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# WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Email: leg.council@legis.state.wi.us

DATE: March 24, 2000

TO: SENATOR GARY R. GEORGE

FROM: Ronald Sklansky, Senior Staff Attorney

SUBJECT: Senate Substitute Amendment __ (LRBs0375/4) to 1999 Assembly Bill 497, Relating to Time Limits for Prosecution of Certain Crimes of Sexual Assault and Post Conviction Motions for Testing of Certain Evidence

This memorandum, prepared at your request, summarizes the major substantive provisions of Senate Substitute Amendment __ (LRBs0375/4) to 1999 Assembly Bill 497, relating to preservation and maintenance of certain evidence, time limits for prosecution of certain crimes of sexual assault and post conviction motions for testing of certain evidence.

## *A. STATUTE OF LIMITATION*

### *1. Current Law*

Section 939.74 (1), Stats., generally provides that, after the commission of a misdemeanor or after the commission of a felony, a criminal prosecution must begin within three years or six years, respectively. Exceptions to this general rule include the following:

a. A prosecution may begin at any time for the crime of first-degree intentional homicide, first-degree reckless homicide or felony murder.

b. When a person lawfully has obtained possession of property and then misappropriated it, a prosecution may begin within one year after discovery of the loss by the victim, but in no case may the general statute of limitation be extended by more than five years.

c. A prosecution for the following crimes must begin before the victim reaches the age of 31 years: sexual assault of a child, engaging in repeated acts of sexual assault of the same child, intentionally causing great bodily harm to a child, sexual exploitation of a child, incest with a child, various forms of child enticement, soliciting a child for prosecution and sexual assault of a student by a school instructional staff person.

d. A prosecution for the following crimes must begin before the victim reaches the age of 26 years: intentionally causing bodily harm to a child, intentionally causing bodily harm to a child by conduct which creates a high probability of great bodily harm, causing mental harm to a child and causing bodily or mental harm to a child through child enticement.

e. A criminal prosecution for racketeering activity may begin at any time within six years after the criminal violation terminates or the cause of action accrues.

[See s. 939.74 (1) and (2), Stats.]

***2. The Substitute Amendment***

The substitute amendment amends current law by providing that, after the general time periods for beginning a misdemeanor or felony prosecution have expired, the state may use DNA evidence of a perpetrator of certain crimes to begin a criminal prosecution under certain circumstances. The substitute amendment's provisions apply in a case of first- or second-degree sexual assault against an adult or child, or in a case of repeated acts of sexual assault of the same child, in which DNA evidence of the perpetrator did not result in a probable identification of the perpetrator prior to the time in which a prosecution should have been commenced. The substitute amendment provides that in such a situation the state may, before the prosecutorial time periods have expired, request the circuit court in the county in which the violation is believed to have been committed to determine whether there is probable cause to believe that the DNA evidence is evidence of the identification of the perpetrator. The request for a hearing and the hearing itself must be *ex parte*. The court must make a written record of the proceeding that will remain secret unless a prosecution for the violation is begun, in which case the record will be made available to the state and any defendant in the prosecution.

The substitute amendment further provides that if the state has DNA evidence and a court has found that there is probable cause to believe that the evidence will identify the perpetrator of the specified crime, a prosecution for the violation may be commenced within one year after a comparison of the DNA evidence relating to the violation results in a probable identification of the person.

***B. PRESERVATION OF EVIDENCE***

The substitute amendment generally provides that the state crime laboratories, the courts, law enforcement agencies and district attorneys must preserve physical evidence that includes any biological material collected in connection with a criminal action or a juvenile delinquency proceeding until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date. The term "custody" is defined to mean actual custody of a person under a sentence of imprisonment; custody of a probationer, parolee or person on extended supervision; actual or constructive custody of a person under a juvenile dispositional order; supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order; and supervision of a sexually violent offender under ch. 980, Stats. The term "discharge date" means the date on which a person is released or discharged from custody including release from custody under all consecutive sentences of imprisonment.

When the district attorney first receives notice of the motion, he or she must take all actions necessary to ensure that all biological material collected in connection with the investigation or prosecution of the case and that remains in actual or constructive custody of a government agency is preserved pending completion of the proceedings relating to the motion.

*2. Judicial Procedure*

A court in which the motion is made must order forensic DNA testing if all of the following apply:

a. The person making the motion claims that he or she is innocent.

b. The court determines either that the chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody cannot establish the integrity of the evidence, that the testing itself can establish the integrity of the evidence.

c. The court determines that the testing may produce noncumulative evidence that is relevant to the person's assertion of actual innocence.

If the court does not order testing, it must determine the disposition of the evidence that the motion seeks to have tested and, if the evidence is to be preserved, by whom and for how long. Similarly, the court also must determine the disposition of the evidence if the testing is unfavorable to the person making the motion. However, if the results of the testing are favorable to the person making the motion, the court must schedule a hearing to determine the appropriate relief to be granted. The court may enter any order that serves the interests of justice, including any of the following:

a. An order setting aside or vacating the judgment.

b. An order granting a new trial or fact-finding hearing.

c. An order granting the person a new sentencing hearing, commitment hearing or dispositional hearing.

d. An order discharging the person from custody.

e. An order specifying the disposition of any evidence that remains after the completion of testing.

If a person has been committed after serving a sentence for the commission of certain sexually violent acts, and the criminal judgment is reversed, set aside or vacated, the committed person may make a motion for post conviction relief. If the sexually violent offense was the only reason for the commitment, the court must vacate the commitment or discharge the person. In all other cases (other convictions stand or other reasons for the commitment exist), the court must determine whether a new commitment trial should be held because the result of the trial probably would be changed.

Biological material may be destroyed before the release from custody if all of the following apply:

1. Notice of intent to destroy is sent to all persons who remain in custody and to either the attorney of record for each person in custody or the state public defender.

2. A notified person, within 90 days after receiving the notice, does not file a motion for testing of the biological material or submits a written request to preserve the evidence.

3. No other provision of federal or state law requires preservation of the biological material.

If the holder of the biological material receives a written request to preserve the evidence, the evidence must be preserved until the discharge date of the person who made the request.

## *C. MOTION FOR POST CONVICTION DNA TESTING OF CERTAIN EVIDENCE*

### *1. Making the Motion*

Current statutes impose various time limits on post conviction motions and appeals of criminal convictions. The substitute amendment creates a special provision for a motion for post conviction DNA testing of evidence. At any time after being convicted of a crime, adjudicated delinquent or found not guilty by reason of mental disease or defect, a person may make a motion in the court where the judgment was rendered for an order requiring forensic DNA testing of evidence to which all of the following apply:

a. The evidence is relevant to the investigation or prosecution that resulted in the judgment.

b. The evidence is in the actual or constructive possession of a government agency.

c. The evidence has not previously been subjected to forensic DNA testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

The person who makes the motion for testing must notify the district attorney's office and, in turn, the court in which the motion is made also must notify the district attorney's office. However, failure by a person making the motion to notify the district attorney's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion. Further, the clerk of the circuit court must send a copy of the motion and a notice of hearing on the motion to the victim of the crime.

***3. Indigency***

A court considering a motion for forensic DNA testing by a person who is not represented by counsel must, if the person claims or appears to be indigent, refer the person to the state public defender for determination of indigency and appointment of counsel. If the court determines that a person is indigent, the court must order the costs of testing to be paid for from an appropriation created in the substitute amendment. (No dollar amounts are placed in this appropriation line.) A court must find indigency if any of the following apply:

a. The person was referred to the state public defender and was found to be indigent.

b. The person was referred to the state public defender but was found not to be indigent, and the court determines that the person does not possess the financial resources to pay the costs of testing.

c. The person was not referred to the state public defender and the court determines that the person does not possess the financial resources to pay the costs of testing.

If I can be of any further assistance in this matter, please feel free to contact me.

RS:wu:jal;rv;wu

Recommendations:

1. Take Executive Action on AB 497, AB 174 before the hearing starts so I can begin the paperwork. (These two bills are going to be amended so they need to go back to the Assembly.)

2. Hold public hearing on SB 491 (police technology) next.

3. Take Executive Action on SB 491 so I can begin the paper work.

4. Hold the hearing on the appointments (It is my understanding that only Roberta Harris will be able to appear today)

5. Hold the hearing on the bills.

All the other bills not listed in #1 and #2 do not need to be rushed. They are <u>not</u> going to be amended so they can go on Wednesday's calendar.

***Pat Essie has asked that we not take Executive Action on AB 185.
***The Municipal Judges Association opposes AB 846 but will not be able send anyone to testify.

## Rossmiller, Dan

**From:** Walker, Scott
**Sent:** Tuesday, January 11, 2000 11:38 AM
**To:** George, Gary; Sen.George
**Cc:** Rossmiller, Dan; Gilbert, Melissa
**Subject:** Committee hearing on 01/25/2000

**Importance:** High

TO: Senator Gary George
Chair, Judiciary and Consumer Affairs Committee

FR: Representative Scott Walker
Chair, Corrections and the Courts Committee

DT: January 11, 2000

RE: Committee meeting on January 25, 2000

As I understand, the Senate Committee on Judiciary and Consumer Affairs will be holding a meeting at 8:00 a.m. on Tuesday, January 25, 2000. Looking at the agenda, I did not see **Assembly Bill 497** as part of the public hearing. As you know, Attorney General Doyle has expressed his support for this bill. AB 497 passed on a vote of 96 to 0 on November 3, 1999 and was referred to your committee on November 4, 1999. I hope that you will consider amending your notice and adding this important bill to the public hearing.

In addition, I hope that you might add **Assembly Bill 355** to your executive session. AB 355 passed on a voice vote on June 23, 1999. A public hearing was held on this bill on October 11, 1999. The bill has support from both Republicans and Democrats.

Thank you for your attention to these important matters.