



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**2017 Senate Bill 492**

**Senate Amendment 2**

*Memo published:* February 7, 2018

*Contact:* David Moore, Senior Staff Attorney

2017 Senate Bill 492 creates a procedure for a defendant to seek discovery of a crime victim's mental health treatment records. Under the bill, a defendant may file a motion to seek discovery of the records, and the court may review the records in camera to determine whether to disclose the records using factors outlined in the bill. A victim may refuse to consent to disclosure of the records.

Senate Amendment 2 makes changes to bill provisions relating to: (1) the definition of "necessary to any articulated defense"; (2) the motion for discovery of records; (3) notification of the victim; (4) in camera review of records; (5) disclosure of records; and (6) the effective date of the bill, if enacted.

### **DEFINITION OF "NECESSARY TO ANY ARTICULATED DEFENSE"**

#### **The Bill**

Under the bill, "necessary to any articulated defense" means that the evidence supports any articulated defense by tending to create reasonable doubt that would not otherwise exist.

#### **The Amendment**

The amendment replaces the phrase "necessary to any articulated defense" with "necessary to an articulated theory of defense." Under the amendment, "necessary to an articulated theory of defense" means that the evidence is necessary to a determination of guilt or innocence by tending to create reasonable doubt that would not otherwise exist.

## MOTION FOR DISCOVERY OF MENTAL HEALTH TREATMENT RECORDS

### The Bill

Under the bill, a defendant seeking discovery of a victim's records must file a motion at least 45 days before trial. In the motion, the defendant must submit a good faith offer of proof and a supporting affidavit from someone with personal knowledge that indicates all of the following:

- The specific information that is sought from the records.
- There are records that are reasonably likely to contain the specific information sought.
- The specific information sought is necessary to any articulated defense.
- The records are the only source for the information sought.
- The information sought is not cumulative to evidence already available.

Under the bill, the following offers of proof alone are not sufficient to determine whether the defendant has met the burden of proof to obtain records: (1) the victim reported or failed to report a victimization; (2) the victim sought or received counseling or mental health treatment for a prior or current victimization; and (3) the victim received counseling or mental health treatment to address personal or family issues.

### The Amendment

The amendment changes the time period to file a motion from 45 days before trial to **60 days** before trial. It also requires the defendant's good faith offer of proof be **fact specific**. Finally, the amendment modifies the offers of proof that, alone, are not sufficient to determine whether the defendant has met the burden in two ways. First, it clarifies that **each** of the items listed above, **considered alone**, is not sufficient to determine whether the defendant has met the burden. Second, it provides that an offer of proof that the victim may have made an inconsistent statement about the offense is not, when considered alone, sufficient to determine whether the defendant has met the burden of proof.

## NOTIFICATION OF THE CRIME VICTIM

### The Bill

The bill requires the prosecuting attorney to notify a victim whose records are being sought that a motion has been filed requesting the records. Under the bill, the victim has the right to counsel, and the court may appoint counsel upon the victim's request. In addition, if the victim is a child, the court must appoint a guardian ad litem (GAL) in certain circumstances, and the GAL must be an advocate for the best interests of the child.

### **The Amendment**

The amendment specifies that: (1) a court may appoint counsel upon the victim's request **regarding access to and disclosure of the privileged health care records**; and (2) a GAL must be an advocate for the best interests of the child **regarding access to and disclosure of the privileged health care records**.

### **IN CAMERA REVIEW OF MENTAL HEALTH TREATMENT RECORDS**

#### **The Bill**

Under the bill, if the court concludes by a preponderance of the evidence both that the defendant has made the necessary showing in his or her motion for discovery and that the potential benefit to the defendant from disclosure outweighs the harm to the victim from disclosure, the court must inquire as to whether the victim consents to an in camera review of the records by the court.

If the victim consents to an in camera review, the court must examine the records in camera for the presence of any evidence that is necessary to any articulated defense. If the victim does not consent, the court must: (1) abide by the declination of the victim; (2) permit the victim to testify at the trial; (3) inform the jury that the victim declined to disclose records for inspection by the court and that the victim has the right to decline an in camera review of the records; and (4) permit comment on the declination by the victim and allow the defendant to draw any reasonable inference therefrom.

### **The Amendment**

The amendment deletes the "preponderance of the evidence" standard. The amendment also requires the court to provide an additional item of information to the jury if the victim declined to consent to an in camera inspection of the record. Under the amendment, in addition to informing the jury the defendant declined to disclose records for inspection by the court and that the victim has the right to decline an in camera review of the records, the court must also inform the jury that the defendant filed a motion for discovery of mental health treatment records that met the requirements for an in camera review. Additionally, the amendment provides that the court must provide this information to the jury immediately following the testimony of the crime victim and before jury deliberations.

### **DISCLOSURE OF MENTAL HEALTH TREATMENT RECORDS**

#### **The Bill**

The bill provides that following an in camera review of the records, the court may order the disclosure of the relevant records only if the court determines by clear and convincing evidence that: (1) the information in the records is necessary to any articulated defense and the benefit to the defendant from disclosure outweighs the harm to the victim from disclosure; or

(2) the information in the records is exculpatory by tending to create reasonable doubt that would not otherwise exist.

Under the bill, if the court determines that the records are eligible for disclosure, the victim must indicate whether he or she consents to the disclosure of the records. If the victim consents, the court must order disclosure of the records that are necessary to any articulated defense or are otherwise exculpatory. If the victim does not consent, the court must prohibit the victim from testifying at the trial and the court may not order disclosure of the records.

### **The Amendment**

Under the amendment, the court may order the disclosure of the relevant records only if the court determines that: (1) the information in the records is necessary to **an articulated theory of defense** and the benefit to the defendant from disclosure outweighs the harm to the victim from disclosure; or (2) the information in the records is exculpatory **because it is necessary to the determination of guilt or innocence** by tending to create reasonable doubt that would not otherwise exist. With respect to the first finding, the amendment deletes the clear and convincing evidence standard provided under the bill.

### **EFFECTIVE DATE**

#### **The Bill**

The bill contains an effective date of October 1, 2017.

#### **The Amendment**

The amendment deletes the effective date. Thus, under the amendment, the effective date is the day after the bill, if enacted, is published.

### **BILL HISTORY**

Senator Petrowski offered Senate Amendment 2 to 2017 Senate Bill 492 on February 2, 2017. On February 6, 2017, the Senate Committee on Judiciary and Public Safety voted unanimously to recommend adoption of the amendment. The committee then voted to recommend passage of the bill, as amended, on a vote of Ayes, 4; Noes, 1.

DM:jal