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TO: Legislative Council Special Committee on Expunction of Criminal Records

FROM: Bob Andersen Bob Andersen
Sheila Sullivan

RE: Proposed Legislation for December 19, 2006 Meeting

DATE: December 4, 2006

We want to thank you again for allowing Legal Action of Wisconsin, Inc. to testify before your committee and to express our appreciation for the members' interest and the fairness and efficiency of the proceedings. We are submitting this memorandum, in addition to our original written comment, because members of your committee have invited testifying witnesses to provide feedback on the proposals now under consideration.

SUMMARY OF RESPONSES TO PROPOSED LEGISLATION FOR THE DECEMBER 19, 2006 MEETING

Legal Action of Wisconsin recommends that the committee supplement legislation with provisions that would address critical problems not resolved by Judge Carlson's proposal:

Problem:

Conflicting CIB and CCAP policies have created a situation in which criminal history information must, by law, be removed from one public-access database system, while remaining available on the other public-access data base system, negating existing statutory protections.

Proposal:

Require CCAP to remove arrest information from its public-access database when a charge is dismissed or not prosecuted just as the CIB is required to do. Require the CIB to remove expunged convictions from its public-access database just as CCAP is required to do. Require the CIB and CCAP to remove information about dismissed/not prosecuted civil forfeiture cases from their public-access information data bases.

Problem:

The criminal history records produced by the CIB in response to public background check requests are incomplete and inaccurate in large part because dispositions are incomplete and inaccurate.

Proposal:

Require district attorneys to report all decisions not to prosecute within a fixed period of time.

We also recommend that, in addition to expanding the conditional discharge statute and relocating it in Chapter 973 of the statutes, the proposed legislation be revised

Proposal:

To include Class E felonies or lower level felonies relating to property damage.

Proposal:

Not to require defendants to plead guilty before being eligible. A plea of no contest should be sufficient.

Proposal:

To require removal of arrest and conviction information from the CCAP and CIB public-access databases when a defendant has successfully completed the conditions imposed by the court.

Finally, we recommend that the committee not repeal the expunction statute at this time. Deferred prosecution legislation is proactive, aimed at preventing the continued growth of a recognized problem. Expunction is a policy tool designed to address convictions after they have occurred. That distinction, recognized by almost all states' laws, is an important one, and should not abandoned without careful consideration given the number of Wisconsin citizens for whom any change in the deferred prosecution statute will come too late.

RATIONALE

We regret that the committee has had so little time to address the many problems raised at its first meeting; but we understand that the duration of the committee's activities was limited from the outset. Given the time constraints under which the committee was operating, Judge Carlson should be applauded for presenting a proposal that attempts to resolve some of the problems that exist under current law. Nevertheless, we want to remind the committee that Judge Carlson's proposal does not address, and therefore cannot solve, several fundamental problems. Changes in the deferred prosecution statute will do nothing either to resolve conflicting CIB and CCAP policies on removing information from public-access databases or to ensure the accuracy of the information that appears on those databases. Equally, importantly, Judge Carlson's proposal provides no relief for the many Wisconsin citizens with existing arrest and conviction records, the very group whose problems inspired the committee's work.

Prefatory Remarks

The Director of State Courts, John Voelker, told the committee that the WCCA oversight committee initially approached the legislature to address [1] whether CCAP information should be continued (because of its profound effect on employment, housing, "nosey neighbors," etc.); [2] whether information could be made to be more accurate (again with the same considerations in mind); and [3] whether a new mechanism should be created to allow information to be removed from the data base.

Mike Roberts, Administrator, Division of Law Enforcement Services, Wisconsin Department of Justice, identified another problem during his testimony. The current expunction law requires CCAP to remove information about an expunged conviction from its public-access database.

Under current CIB policy, however, information about that conviction remains available to the general public through a public criminal history report request. Similarly, the CIB has a procedure by which records of arrests that do not result in convictions can be removed from the public-access database, but CCAP does not have a parallel procedure. Thus CCAP could continue to provide information about a non-prosecuted offense to employers and the general public even after that arrest information has been removed from the CIB public-access database. Roberts and other witnesses recognized the problem created by these conflicting policies, suggesting that legislative action was required to reconcile the systems, and to ensure a coherent state policy on removing criminal record information from the CIB and CCAP public-access databases.

I. RECONCILING CCAP & CIB

A. Reporting Dismissal of Criminal Charges for CIB

As Mr. Roberts indicated, fingerprint cards are pulled from the CIB records system, though retained in law enforcement files, and destroyed once the CIB is informed a case has been dismissed. We believe the CIB's policy, fixed by statute, both protects criminal justice interests and is consistent with the fundamental principle that a person is innocent until proven guilty. The policy also recognizes, and helps protect against, the harm that a false or misleading record can have on a person. Wisconsin Stat. s. 165.84 provides that "any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in conjunction therewith returned upon request." Enacted before internet access or public-access commuters, the stature reflects a clear legislative intent to not have dismissed arrests "count against" individuals during background checks and employment history inquiries.

Unfortunately, the protections intended to be secured by Wis. Stat. s. 165.84 are illusory for several reasons. First, because few citizens know about the law or have the resources to check and correct their own records. Second, disposition reporting has historically been slower than offense reporting, and many dispositions are never reported at all. Law enforcement makes an arrest and the district attorney's office decides whether to follow through with the charges or not. Either or both parties might report a disposition, dismissal, or no prosecution to the CIB, but there is no penalty for not reporting such decisions promptly. Worse, no one seems to agree whose responsibility it is to make such a report. We have been told by a district attorney that this is a law enforcement problem. We suspect law enforcement will tell us that they have no way of telling what has happened because they do not hear from the district attorney. As a result of this organizational problem, thousands of landlords, employers, and others are making critical decisions each year based on inaccurate criminal history records. ***A system that automatically reports information on all persons who are arrested must find a way to automatically report that charges have been dismissed. To ensure that happens, someone, either the district attorney or the police, must be directed by Wis. Stat. § 165.84 to report to the CIB that the case has been dismissed or not prosecuted.***

B. Reporting Dismissal of Criminal Charges to CCAP

To harmonize the CIB and CCAP systems, CCAP policy also must be changed. ***When a criminal case, or a municipal forfeiture case that is being conducted in circuit court, is dismissed or not prosecuted, CCAP must be informed and required to remove case information from its public-access database.*** That report would probably be required of the district attorneys or the municipal attorneys who are conducting the cases, but might come from law enforcement or the clerk's offices.

These changes are, we believe, necessary to maintaining the fundamental principal that a person *is* innocent until proven guilty. This concept is not confined to the criminal law; it applies to the civil realm as well. Some critics will respond that all someone has to do is read the full CCAP record and they will find out what really occurred. But the question is not whether they know about an outcome, but rather that they know about the arrest itself. Others will say that the new CCAP summaries "solve" this problem. But the exact opposite is true. The fact that CCAP was compelled to place a summary in front of its own internet records explaining the assumption of innocence demonstrates what everyone in the system already knows: people are misusing arrest information, making assumptions about guilt and danger based on presumptions about what arrest signifies.

By law, an arrest does not make guilt or innocence an open question. In America, a person ***is*** innocent, until he or she is proven guilty. Wisconsin Stat. § 111.31 reflects our commitment to that principal, making it illegal for an employer to ***ask about an arrest record***, unless the charge on the arrest is still pending. Representative Voss raised an interesting question in this context: "Shouldn't I as a landlord have the right to know about a prospective tenant who was charged with arson, but the charges were dropped?" Landlords would certainly be interested in that information. What, however, if the accusation was fabricated by a landlord who wanted to get the tenant out of his apartment building so he could rent the unit to his sister? CCAP records will almost never provide enough information to allow anyone to determine why a charge was dismissed or an individual acquitted.

Like wrongful convictions, wrongful arrests are caused by sloppy police work, error, and sometimes even deliberate falsification – especially in cases that have obtained some celebrity, or in cases where other motives exist for the police. Thus, while Representative Voss is right that landlords may be interested in knowing whether a prospective tenant had an arrest record, that interest cannot override one of the fundamental tenets of our society – that a person is innocent until proven guilty. This is not the only area where the public's right to know is offset by the individual's right to privacy or right to be free from defamation. And the public right to know what is happening in a courtroom cannot be generalized to a right to unlimited internet access to false information.

C. Reporting Dismissal of Civil Actions to CCAP

Civil actions that are dismissed should also be reported to CCAP and removed from CCAP's public-access database. While there is no presumption of innocence in civil cases, the public interest in knowing details of private disputes must be balanced against the even greater

possibility of abuse. ***Any individual can file a civil case for any reason.*** In criminal and municipal forfeiture case, an elected or appointed official authority must be involved at the beginning of the action. In a civil action, by contrast, an individual could begin an action precisely because he or she wants to embarrass the victim by having the case posted on CCAP. Of course, there are penalties for frivolous actions, but how many times are those applied in venues such as small claims court?

If a judgment entered is entered in a case, that judgment has some significance. But, if the case never got past a motion to dismiss because it is so ridiculous – or in the case of certain creditors – because it was meant only to harass a debtor, its significance is drastically reduced and the harm caused by publishing that information on a public-access data base dramatically increased.

II. JUDGE CARLSON'S PROPOSAL

A. Expanding the Conditional Discharge Statute

Misdemeanors

Judge Carlson's proposal would expand the conditional discharge statute and relocate it in Chapter 973 of the statutes. Under his proposal, a guilty plea in a misdemeanor case would, in the proper circumstances, not be entered as a judgment after a defendant completed court-imposed conditions. Such conditional discharges opportunities would be offered on a one time only basis. The question is whether new conditional discharge legislation should be confined only to misdemeanors. ***There are now five different classes of felonies, and many of those new felonies were misdemeanors a short time ago.*** New felonies of this class include:

> operating a vehicle without the consent of the driver; removal of a part of a vehicle without the owner's consent; issuance of a check for more than $1,000 with insufficient funds in an account; forgery; property damage to a public utility; threat to accuse another of a crime; theft of property in excess of $1,000; threat to communicate derogatory information; receiving or forwarding a bet; receiving or concealing stolen property of a value in excess of $1,000; conducting an unlawful lottery; cohabitation with another by a married person; failure to pay child support for 120 days; action by a public official to take advantage of office to purchase property at less than full value; interference with the custody of a child for more than 12 hours; perjury; false swearing; destruction of public documents subject to subpoena; fraud on a hotel or restaurant owner in excess of $1,000; theft of library materials of a value in excess of $1,000; criminal slander of title of real or personal property; retail theft of a value in excess of $1,000; intentional failure of a public official to perform a ministerial duty; and providing false information to an officer of the court.

These are all bad acts. But the question is whether anything sufficiently distinguishes these acts from many acts now characterized as misdemeanors to justify excluding them from the proposal. ***We would recommend that Class E felonies or lower level felonies relating to property damage should be included in the proposal for a one time only discharge.***

Guilty Plea
This is a very difficult problem for four reasons: (1) without a guilty plea, an offender can presumably run out the one year period for the case to be discharged, not comply with the order, and then make the prosecution prove a case that is a year old; (2) with a guilty plea, defendants will not know what the difference is between pleading guilty and not being convicted, when it comes time to apply for a job or an apartment; (3) with a guilty plea, the same is true for employers or landlords; (4) defendants will be urged to plead guilty, even though they are innocent; (5) prosecutors will be urged to routinely use this as a bargaining tool to avoid trial.

This should be a no contest plea. Under current deferred prosecution agreements, defendants are not required to plead guilty. Requiring a guilty plea will actually increase discrimination in employment and housing for defendants who otherwise would have benefited from deferred prosecution agreements– exactly the opposite effect of what is intended. A no contest plea falls in the middle between what happens now in a deferred prosecution agreement and what happens in a guilty plea.

The Public's Right to Have Conditional Discharges Posted on the Internet
The statute relied upon says that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Section 19.31. This legislative statement is far too vague to say that it guarantees a right to the public to have all details of all judicial actions posted on the internet. This information will be available at the courthouse.

The Prospect that Other Vendors will Simply Post this Information on the Internet for a Fee
In order for a vendor to duplicate the statewide data base that is offered by CCAP, the vendor would have to regularly travel to every county courthouse to record the information and to publish it over its internet site. Of course, vendors could operate only within one county – Milwaukee County, for example – or even a few counties. But that vendor would still have to regularly travel to those court houses to collect all that information. Then, of course, the vendor would not have information on the defendant in all the other counties. The idea that vendors could easily duplicate what CCAP does is not true. Furthermore, it is unlikely that ordinary employers or landlords will be willing to pay a regular fee (especially a high fee associated with collecting information from several counties). On the other hand, free access to CCAP on the internet invites participation. Because it does, it carries with it an enormous responsibility. That is why the WCCA oversight committee submitted this weighty determination to the legislature.

Purpose of the Conditional Discharge is to Give the Person a Chance
If this information stays on CCAP, the purpose for creating this conditional discharge will have been defeated. The goal here is to give a person a one time chance after the conditions have been satisfied and the case is discharged. Under current law, deferred prosecution agreements that have been successful should not appear on CCAP. Similarly, for these conditional discharges, the information should be removed from CCAP as soon as the conditions are satisfied.

B. Repeal of the Expunction Statute

The idea for addressing the growing problems faced by society began with a consideration of what to do about the millions of people now leaving, or about to leave, the nation's prisons and jails. Statistics show an enormous explosion of the prison population over the past several years. Some might say that a conditional discharge statute relates to a somewhat different purpose – which is to provide an alternative for the prosecution of criminal justice. New conditional discharge legislation will have a ***preventive*** effect, but it is not really what society is attempting to accomplish through the federal and state laws that are now being adopted and grants that are now being made for expunction, offender rehabilitation, and anti-discrimination.

Put more simply, Wisconsin needs an expunction statute to provide relief for the thousands of ex offenders for whom this proposal does not apply. The impetus for this is not simply charitable. It is to provide housing, employment, child support, relief from public assistance, family integrity, and relief from crime in order to make this a more efficient and productive society.