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CRIMINAL JUSTICE REFORMS: 2005 WISCONSIN ACT 60

2005 Wisconsin Act 60, passed by the legislature and signed by Governor Doyle on December 16, 2005, makes a number of changes to the criminal justice system to reduce the likelihood of wrongful convictions.

The legislation, which was the product of the Criminal Justice Reforms Task Force, encourages the recording of police interrogations of adult felony suspects, requires law enforcement agencies to establish policies governing the use of eyewitnesses to identify suspects, sets policies for the retention of biological evidence samples, makes postconviction DNA testing a high priority for state crime laboratories, and extends the time period for commencing prosecution of crimes related to certain sexual assaults if DNA evidence is later matched to a suspect.

TASK FORCE STUDIES JUSTICE SYSTEM AND WRONGFUL CONVICTIONS

The provisions in Act 60 resulted from increasing concern nationally and in Wisconsin over the number of persons found to have been erroneously convicted of and imprisoned for serious crimes. Most of these have been proven by the increasingly widespread use of improved DNA analysis. Discussions among the Criminal Law Section of the State Bar of Wisconsin and the University of Wisconsin and Marquette University Law Schools led to calls to create a commission to study the errors that have led to the convictions of innocent persons.

The Wisconsin Innocence Project is a program associated with the UW Law School which works on behalf of selected prison inmates, primarily in Wisconsin, who claim to be innocent of the crimes for which they are incarcerated. In September 2003, the Wiscon-

sin Innocence Project's efforts resulted in the exoneration through DNA testing of Steven Avery for a rape and murder for which he had served 18 years in prison. Later that year, Representative Mark Gundrum, Chair of the Assembly Judiciary Committee, formed a task force to study cases like Avery's and to develop recommendations for reform. Chaired by Representative Gundrum, the committee was composed of members representing various sectors of the criminal justice system.

- **Legislators:** Senator Scott Fitzgerald and Representatives Garey Bies, Pedro Colón, and Tony Staskunas.
- **Judges:** Circuit Court Judges Randy Koschnick (Jefferson County), Fred Fleishauer (Portage County), and Louis Butler (Milwaukee County, appointed in 2004 to Wisconsin Supreme Court).
- **Prosecutors:** Milwaukee County Chief Deputy District Attorney Bob Donohoo, Milwaukee County Assistant D.A. Norm Gahn, La Crosse County D.A. Scott Horne, Dane County Deputy D.A. Judy Schwaemle, and Kenosha County D.A.'s office Victim/Witness Coordinator Sandra Bertelle.
- **Attorneys:** Milwaukee County Public Defender Tom Reed, and attorneys Raymond Dall'Osto (Milwaukee) and Jerome Buting (Brookfield).
- **Law Enforcement:** Waukesha County Sheriff Dan Trawicki, Merrill Police Chief Neil Strobel, and retired Milwaukee Assistant Chief of Police Ed Stenzel.
- **Academia:** Wisconsin Innocence Project Co-Director and UW Law School Professor Keith Findley.

The group was originally known as the "Avery Task Force," but when Avery was newly charged in November 2005 with a brutal murder, the study committee's recommendations were renamed the Criminal Justice Reforms Package. 2005 Assembly Bill 648 was introduced in September 2005 by a bipartisan

group of 43 legislative sponsors, and passed both the assembly and senate unanimously.

ACT 60 CRIMINAL JUSTICE REFORMS

Act 60 included the following provisions intended to enhance the reliability of the criminal justice system.

Recording Police Interrogations. In July 2005, the Wisconsin Supreme Court, in *State v. Jerrell* (269 Wis. 2d 442), exercised its supervisory authority over the court system to generally require that law enforcement agencies electronically record custodial interrogations of juveniles suspected of committing a felony or misdemeanor crime in order for any confessions resulting from such interrogations to be admissible in court proceedings.

In addition to codifying into the statutes the juvenile interrogation recording requirement, Act 60 generally provides that it is the policy of the state to record, using audio or audiovisual means, custodial interrogations of adults suspected of committing a felony. The law does not mandate recordings, but it creates a grant program to support the purchase of digital recording equipment by law enforcement agencies. The grants, administered by the Office of Justice Assistance, are financed by a 1% increase in the penalty surcharge assessed on court fines and forfeitures. As an incentive to encourage recordings, the court must, if requested by the defendant, instruct the jury of the state's policy favoring recording of interrogations and that the absence of a recorded statement may be considered when evaluating the evidence. Exceptions to the provision include equipment failure, the defendant's refusal to cooperate with the recording, or exigent public safety circumstances.

Law enforcement officers are not required to inform subjects that the recording is being made, and the recording will not be available to the public until investigations and prosecutions are concluded. These provisions, Sections 938.195, 968.073, and 972.115, Wisconsin Statutes, take effect January 1, 2007.

Eyewitness Identification Procedures.

Beginning December 1, 2006, each law enforcement agency is required to adopt and biennially review written policies designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases (Section 175.50, Wisconsin Statutes). The agencies should accurately document the procedure used and the results of each identification session, and, to the extent feasible:

- **"Double-Blind."** Have a person who does not know the identity of the suspect administer the eyewitness' viewing of individuals or visual representations so that the officer cannot, even unintentionally, cue the witness to pick the suspect.
- **Use Sequential Viewing.** Show individuals or representations to the eyewitness sequentially rather than simultaneously. This reduces the chance that the witness will falsely select the individual who best matches his or her memory of the perpetrator.
- **Minimize Influence.** Reduce factors, including verbal or nonverbal reactions of the administrator, that influence a witness to identify a suspect even if the true perpetrator is not present.

Priority of DNA Testing and Preservation of Biological Evidence.

The state crime laboratories must make postconviction DNA testing a priority, and may contract out in order to expedite appeals involving claims of innocence. The law clarifies and reduces the amount of biological evidence that law enforcement agencies must retain. It generally requires keeping a sample of biological material if it is from a crime victim or if it may reasonably be used to incriminate or exculpate a person for a crime.

Extending Prosecution Time Limits for Crimes Related to Sexual Assault.

2001 Wisconsin Act 16 had previously extended the deadline for prosecuting certain serious sex crimes if the state collected DNA evidence that enabled it to later identify the perpetrator. Act 60 extends the time limit for commencing prosecution of a crime that is related to certain sexual assaults if DNA is collected before the original statute of limitations runs out and the evidence is later matched with a suspect.