**STATE’S BRIEF ON CONSTITUTIONALITY OF STATUTE EXTENDING STATUTE OF LIMITATIONS FOR COLD HITS**

**STATE OF WISCONSIN**

**February 2003**

# INTRODUCTION

Plaintiff State of Wisconsin, by undersigned counsel, herein responds to Defendant’s motion to dismiss the Information. For purposes of this response, the State accepts the summary of facts presented by the defendant as they pertain to the chronology of events leading up to the issuance of the criminal complaint. The defendant moves the court for the entry of an order finding that Wis. Stat. Sec. 939.74(2d)(b) is unconstitutional in that the statute deprives the defendant of due process of law, and further, that the statute violates the defendant’s right to be free from ex post facto prosecutions. The State maintains that the defendant has failed to sustain his burden to prove the enactment unconstitutional. The State will proceed to affirmatively show that there are no due process or ex post facto problems with the newly enacted statute.

# DISCUSSION

Application of newly enacted Wis. Stat. Sec. 939.74(2d)(b) to the defendant does not violate either (a) due process of law or (b) the constitutional prohibition on ex post facto law. The defendant’s challenge to the constitutionality of this newly created statute must be considered by this court “with the perspective that there is a strong presumption favoring the constitutionality of a legislative enactment.” State v. Cissell, 127 Wis.2d 205, 214, 378 N.W.2d 691 (1985); See State v. Post, 197 Wis.2d 279, 301, 541 N.W.2d 115 (1995). This court must further consider that the burden is on the party challenging the constitutionality of the statute to prove the enactment unconstitutional beyond a reasonable doubt. See State v. Zarnke, 224 Wis.2d 116, 124, 589 N.W.2d 370 (1999); State v. Post, 197 Wis.2d at 301.

In his brief, the defendant has failed to overcome the presumption of constitutionality that attends the statutory provision that he attacks and has failed to prove its unconstitutionality beyond a reasonable doubt. The defendant also has failed to cite any authority, from Wisconsin or elsewhere, to support his position that the creation of this newly enacted legislation is unconstitutional. These reasons alone should be sufficient to defeat the defendant’s argument. The State will not simply rely on the defendant’s failure to sustain his burden, but will affirmatively show that there are no due process or ex post facto violations here.

1. **Due Process of Law**

 The defendant asserts a variety of so-called constitutional claims that he believes somehow fall under the protection of the due process clause. The defendant avers that there are problems with the amended statute in question because there is no time limit within which the prosecution may be commenced and that there is no due diligence on the part of the State. The defendant also seems to suggest that the issuance of a “John Doe DNA Profile Arrest Warrant” would have cured these problems. The defendant’s reasoning is flawed and misplaced. This newly enacted legislation basically carved out an exception for a DNA databank “cold hit” and allows the prosecution of “cold hit” cases despite the passage of the statute of limitations. This legislation basically codified the “John Doe Warrant” procedure.

The writer of this brief worked closely with the members of the State Legislature and knows that the issuance of “John Doe Warrants” to commence prosecution was the driving force behind the legislation to carve out exceptions to the statute of limitations for specified sexual assaults. (See attached 1999 Drafting Report). As one commentator reports, other states are considering, or have enacted, similar legislation. Amy Dunn, Criminal Law Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered them Obsolete?, U. Ark. Little Rock L. Rev. 839, 857-58. On December 11, 2000, the United States Congress passed the DNA Analysis Backlog Elimination Act of 2000, H.R. 4640, which states in Section 11, Subdivision (a)(1), that “over the past decade, deoxyribonucleic acid testing…has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene.” Furthermore, the DNA loci used to specifically identify the defendant herein are those designated by CODIS (the FBI’s combined DNA index system), a national DNA database which allows DNA laboratories nationwide to compare results for the identification of offenders. (See, e.g., NIJ Websites: <http://www.ncjrs.org/pdffiles1/nij/s1413apb.pdf> referencing National DNA Index System (NDIS) Standards for Acceptance of DNA Data (January 11, 2000), pg. 9, table 4; USA Today, “FBI Activates 50-State DNA Database Tuesday,” 1998 WL 5738654.) The Wisconsin State Crime Laboratory is a CODIS participant.

In the instant case, the evidence taken from victim R.C.H. was tested and a DNA profile at 13 specific genetic locations was developed. That 13 genetic location DNA Profile was run through the Wisconsin DNA databank indexing system and was eventually matched to the defendant, Sammy Travis. The State maintains that there was no other way in which the assailant of the victim would ever have been captured. Through the many advances of DNA technology, it is possible to match DNA profiles from crime scenes against convicted offender indices throughout the country. In other words, the matches occur with convicted offenders who are within the prison system. These individuals, having committed other crimes which have placed them in the prison system, have been removed from the public view and any chance of identifying them by any other means would be remote, if not impossible. This should not enure to the benefit of the criminal defendant. Based upon the advancements in DNA technology, law enforcement is able to identify individuals who are hidden away behind bars, out of the public view, and basically shielded from identification for other crimes. The newly enacted legislation recognizes the due diligence and persistence of law enforcement officers and the State to catch these criminals and gives law enforcement and the State the time within which to do it.

The defendant also claims that the statute fails to protect due process because there is no conclusive identification requirement, no requirement for where laboratory work is done, and no requirements for the collection, storage, and preservation of DNA evidence. The defendant, however, has failed to cite any authority, Federal or State, that views these issues as constitutionally protected fundamental rights. The State contends that these are all simply trial issues that either go to the admissibility of evidence or to the weight of evidence and in no way rise to the level of fundamental rights protected by the due process clause of the United States Constitution.

As to due process and statutes of limitations generally, the California Supreme Court’s relatively recent decision in People v. Frazer, 21 Cal. 4th 737, 982 P.2d 180 (Cal. 1999), is quite noteworthy. In Frazer, the California Supreme Court addressed a due process challenge to a new statute of limitations in California and rejected the defendant’s assumption that criminal defendants have a fundamental right to repose once such repose is achieved under the statute of limitations then in effect. The California Supreme Court quoted extensively from the United States Supreme Court Decision in Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945), which held that federal due process principles do not preclude the Legislature from making retroactive changes in the applicable limitations period detrimental to the defense. 982 P.2d at 201. Quoting from Chase, the Frazer court stated that “Chase relied on a more pragmatic view of the statute of limitations..., namely, that such laws are instruments of “public policy” existing at the will of the legislature, and that their shelter has never been viewed as a ‘fundamental’ right.” Id. at 201, [citations omitted]. Again, quoting from Chase, the Frazer Court held that “[w]hatever grievance [the defense in a criminal case] may have at the change of policy to its disadvantage, it had acquired no immunity from [prosecution] that has become a federal constitutional right” and declined to invalidate a change to the statute of limitations “based on a new constitutional right which, under Chase [citation omitted], the high court has itself refused to embrace.” Id. at 203. (brackets in original).

1. **Ex Post Facto**

The defendant also contends that application of the newly created statute of limitations that extends the period of limitations to offenses committed before the enactment of that amendment violates the constitutional prohibition on ex post facto laws. Simply stated, the defendant is wrong. Although the defendant is claiming that newly enacted Wis. Stat. Sec. 939.74(2d)(b) cannot be applied to him, the State is urging this court to simply follow what the legislature has prescribed in the initial applicability provision of 2001 Wisconsin Act 16, sec. 3936c whereby this provision “first applies to offenses not barred from prosecution on the effective date of this subsection,” which is September 1, 2001, the day after publication. See Id. at secs 9359(5) and 9400. The criminal complaint states that the sexual assault occurred on October 13, 1995. As such, this offense was not barred from prosecution on September 1, 2001. The State maintains that there is extensive authority for the proposition that the constitutional prohibition against the application of ex post facto laws does not apply to amendments which extend the statute of limitations if, at the time of the amendment, the limitation period had not expired. In this regard, a recent Wisconsin court of appeals decision addressed this issue and held that “several federal circuit courts and state courts have concluded that retroactive application of a new statute of limitations, enacted at a time when the old limitations period has not yet run, does not violate the ex post facto clause.” See, State v. Haines, 2002 WI App. 139 at 8. Although the defendant refers to this case as “superficially” controlling, the State concludes that it is absolutely controlling. See also, Ortman v. Jensen & Johnson, Inc., 66 Wis.2d 508, 225 N.W.2d 635 (1975). Equally compelling, the California Supreme Court’s decision in Frazer, supra is again most helpful. In a footnote, the court cites 21 federal and state decisions that support the proposition that an “unfavorable post-crime change in the statute of limitations involving defendants against whom the limitations period existing at the time of the crime had not run when the amendment took effect” does not violate the prohibition on ex post facto laws. 982 P.2d at 197 and footnote 25. Unless the defendant is able to cite some decision to the contrary in his reply brief, the State maintains that based upon Wisconsin law in Haines, supra, and based upon the unanimous view of the courts of this country, there is no ex post facto violation in statutory provisions that apply an amended and extended statute of limitations to criminal offenses on which the statute of limitations has not run at the time the statute of limitations is amended and extended. There is no reason not to apply this holding to the instant case.

## CONCLUSION

Based upon the above discussion, the State urges this court to deny the defendant’s motion to dismiss and to find that application of newly enacted Wis. Stat. Sec. 939.74(2d)(b) does not violate constitutional due process and ex post facto protections.

The State would note that not only did the 2001 Wis. Act 16 relax the statute of limitation in sexual assaults, but also provided for a new post-conviction statute, Wis. Stat. Sec. 974.07. This newly created statute provided criminal defendants a right of access to biological evidence for DNA testing and the right to seek post-conviction relief based on exculpatory DNA test results. This new statute also marked a significant departure from previous time limitations for seeking post-conviction relief. The new law expressly eliminated any time limitations on post-conviction motions based on DNA testing. See, Wis. Stat. Secs. 805.15(3), 938.46, 974.07(10)(b)(2001-2002). The State heartily applauds the utilization of DNA technology to free innocent prisoners and endorses lifting the restrictions on time limitations for prisoners to apply for relief. Likewise, the State heartily applauds and endorses the opportunity to identify and prosecute sexual assault offenders by the use of that same DNA technology and also not be hampered by a mere passage of time. Simply stated, by implementing these exceptions to time limitations

where DNA is available, the State Legislature has blended new technology with traditional laws to create a better criminal justice system for the state of Wisconsin.

Dated at \_\_\_\_\_\_\_\_\_\_\_\_: August 19, 2002.

Respectfully submitted,

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 Assistant District Attorney