JERRY PETROWSKI
WISCONSIN STATE SENATOR

SB 492: Mental Health Records Protection for Crime Victims
Sen. Petrowski Testimony
Senate Committee on Judiciary and Public Safety

Good morning, Mr. Chairman and members of the committee, and thank you for the opportunity to provide testimony today on Senate Bill 492.

Under Wisconsin law, a patient's mental and physical health care records are privileged and confidential. There are many compelling reasons for protecting these types of records – perhaps at the top of the list is the need to ensure that a patient feels they can freely and candidly discuss medical and mental health concerns with their providers without fear that those most private of conversations could become public without their consent. However, there is a line of case law that has developed over the years that allows a criminal defendant to seek the mental health records of their victims and, unfortunately, the circumstances under which these motions are granted vary widely and have exceeded prior Supreme Court precedent.

When a defendant requests a victim's privileged mental health records there are two competing interests. On one hand, there is the defendant's right to due process, in particular the right to present a meaningful and complete defense. On the other hand, there is the victim's privacy interest and the victim's right to protect their privileged records. We worked hard to try and strike a balance in this bill – vigorous protection of a victim's rights without depriving defendants of theirs. We also needed to make sure that we created a clear process that judges could follow when reviewing these types of motions.

Now, one thing you will not hear me say today is that this is a simple bill. This is not a simple bill because this is not a simple issue. It is complex and there was a lot of case law and competing interests to consider. Thankfully, we had a lot of help from experts and legal practitioners at the Department of Justice who are not only familiar with this issue but see the problems and confusion created by these motions in their daily practice. This bill is a product of three years of work to create a product that provides clear guidance for courts and fair treatment for all parties involved.

These motions are most often filed by the defense in sexual assault and domestic violence cases. Victims of these violent crime often seek out counseling to try and heal and move forward after such a traumatic event. Not only do these motions have a chilling effect on a victim's participation in the criminal justice system, they make it difficult for a therapist to provide effective counseling to these individuals. Inconsistent case law has left us with a process that is

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time consuming, yields uncertain results and challenges prosecutors to provide accurate information to crime victims.

This bill, largely a product of controlling Wisconsin case law, provides a clear procedure for all parties to follow when seeking access to a crime victim's private mental health care records. It clarifies the required burden defendants must meet in order to obtain an in camera review of the records and keeps the victim in control of whether their private records will be released to the court.

After the bill was introduced and circulated more widely among District Attorney's we were made aware of a few changes that could be made to better protect victims. Specifically, the amendment clarifies that information contained in a victim's mental health records must be so compelling as to be necessary to the determination of guilt or innocence in order for it to be deemed necessary to the defense. In doing so I believe we are scaling back these motions so they only apply in the types of scenarios for which they were originally intended.

Thank you again for the opportunity to speak on this important bill. I know there are several others here today who can speak to the technical aspects of this bill and issue, but I would be happy to answer any questions you may have.

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PREPARED TESTIMONY OF ATTORNEY GENERAL BRAD D. SCHIMEL

Senate Committee on Judiciary and Public Safety
Thursday, January 4th, 2018

Good morning, Chairman Wanggaard and committee members. Thank you for the opportunity to testify on Senate Bill 492.

To illustrate the necessity and importance of SB 492, I want to take a few minutes and tell you a story about a criminal case involving a girl that I will refer to as "Kristy." When Kristy was 13 years old, she disclosed that she was repeatedly sexually assaulted by her mother's boyfriend over the course of the prior year. He forced her to have vaginal and oral intercourse.

Tragically, Kristy had previously been sexually assaulted by two family members when she was younger. Both were convicted and sent to prison for assaulting her. Not surprisingly, Kristy needed considerable counseling to try to heal emotionally and psychologically from these prior sexual assaults.

Based upon what Kristy revealed when she was 13, Kristy's mother's boyfriend, a repeat child sex offender, was charged with four counts of Sexual Assault of a Child. Following the preliminary hearing in the case, the defendant (Kristy's mother's boyfriend), filed a motion for an *in camera* inspection of Kristy's privileged mental health records. That means the defendant wanted the judge to go through Kristy's private and extraordinarily personal counseling records relating to her PRIOR sexual abuse to decide whether to turn those records over to the defendant to use against her. Imagine if any of our most personal thoughts and anxieties were threatened to be exposed to someone who wanted to use them to embarrass or attack us.

In support of his motion, the defendant pointed out that Kristy had difficulty testifying at the preliminary hearing, needed a comfort item with her, and requested that her mother sit close to her. Does that seem abnormal? The defendant then asserted that since Kristy had been sexually assaulted by two other individuals previously and had been involved in extensive counseling prior to and subsequent to the alleged assaults in his case, the court should look and see if there is anything in the counseling records that could be useful to the defense.

The defendant told the court he ***believed*** an examination of her psychiatric records was essential to his defense in order to attack her credibility.

Following a hearing, the circuit court **granted** the defendant's motion and ordered Kristy to consent to an *in camera* inspection of **FIVE YEARS** of Kristy's counseling records. The court said this was to see if there were any issues of truthfulness and whether Kristy had a history of providing incorrect information or making other complaints that were found to be untruthful, despite **having no basis** to believe Kristy's mental health records contained any such information. That is what we call a "fishing expedition" and it is wrong to intimidate a victim of an assault and give them **only two terrible choices**: consent to an invasion of their most private feelings or give up on their effort to seek justice.

Because Kristy was only 13 years old, her mother needed to consent to release of her counseling records for an *in camera* inspection. In an effort to protect Kristy, Kristy's mother did NOT consent.

As a quick note, Kristy was not entitled to an advocate to help her make her own decision. Imagine if the parent making the decision was interested in protecting the offender. SB 492 fixes that and gives victims the right to an attorney to advise them and represent their interests. Federal grant money will cover the costs of those attorneys, and DOJ already has advocacy organizations lined up to take on this responsibility. Neither the counties nor the Public Defender will bear any costs for these attorneys.

Because Kristy's mom refused to allow access to the counseling records, Kristy was banned from testifying at the jury trial. There were no other witnesses. There rarely are. Thus, the State had no choice but to ultimately dismiss the case. That means the offender got away with it with no jury ever hearing the facts.

I want to make one other point about Kristy's case: the trial court ordered the inspection of her records for reasons unsupported by Wisconsin case law! This has become a common occurrence as trial courts struggle to interpret the Wisconsin Supreme Court ruling in the *Green* case from 15 years ago. Kristy's story is one that happens all too often in our criminal justice system in Wisconsin.

You will hear more about the offender who got away with assaulting Kristy from one of the most respected criminal prosecutors in our state, Michelle Viste. She is currently our Director of the State Office of Crime Victim Services, and is a former Deputy District Attorney from the Dane County DA's Office. What she will tell you might bring you to tears.

Victim participation in the criminal justice system is critical. Offenders cannot be

held accountable and prevented from victimizing again if victims do not participate in the justice system. A victim should not be forced to choose between seeking treatment and seeking justice. Motions seeking the release of privileged records have a chilling effect on a victim's participation in the criminal justice system.

It is important to begin by making clear that in almost all other circumstances, the law provides **an absolute privilege of confidentiality** in mental health records. A defendant accused of a crime has an absolute privilege to refuse to reveal counseling records, and a prosecutor may not violate that privilege under any circumstance. Unless a criminal tells their medical professional about a plan to commit a future crime, we can never force them or their counselor to share what they said in counseling.

The protections we give to criminal defendants are appropriate. **We are not here asking for the same protections for innocent crime victims**. Under SB 492, a defendant's right to a fair trial will still trump a crime victim's privacy, but only when the defendant makes a proper showing that access to counseling records will provide information that is crucial to a fair trial. SB 492 does not infringe upon a defendant's right to a fair trial. It just sets clear standards that restore some degree of dignity to victims.

Defendants most often file motions seeking access to victim mental health records in sexual assault and domestic violence cases, however, these are the exact types of crimes that often cause victims to seek mental health treatment in the first place. Additionally, the potential that these records may be revealed to the offender adversely impacts a therapist's ability to provide effective counseling in what should be a confidential setting.

I sincerely applaud the work done for the past three years by Senator Petrowski, Representative Spiros, and my team at the Department of Justice to address this injustice. This bill before the committee represents the voice of judges, defense attorneys, prosecutors, therapists, and victim advocacy groups. While the bill may not have full-throated support of all who came to the table, it is intended to strike the proper balance between a victim's privacy interests and a defendant's right to present a defense.

It is important to note that **other states and the federal system provide an absolute privilege** against release of private mental health records, and those laws have been upheld as constitutional. **I cannot emphasize enough that this bill does not go that far**, but, again, simply attempts to strike a balance and create a clear standard.

Unfortunately, as it stands now, the circumstances under which these motions are granted vary widely, and frequently exceed prior Supreme Court precedent. Presently, there is no clear and consistent test for determining whether a defendant

has made a sufficient preliminary showing for courts to order *in camera* inspections. The last two cases to reach the Wisconsin Supreme Court seeking clarification of just what is required to justify an examination of a victims healthcare records have resulted in a failure to provide clear guidance to trial judges and litigants. That's why this legislation is needed. In the absence of any clear test or procedure, courts will often err on the side of granting the motion, and then require the victim to consent to release, or be barred from testifying.

SB 492, while rooted in the strongest aspects of controlling case law, necessarily goes much further to protect the privacy rights of victims. AB570:

- Prevents "fishing expeditions" into a victim's most intimate and privileged mental health records;
- Provides a clear procedure for all parties to follow when seeking access to a crime victim's private mental health care records;
- Clarifies the required burden defendants must meet in order to obtain an in camera review of the records;
- Provides for specific victim notification;
- Gives guidance to all parties during these proceedings;
- Gives the victim the right to actually see what the court is planning to turn over before deciding whether to consent; and
- Perhaps most importantly, provides victims ultimate control in the review and disclosure of their records.

Although these things might seem to be the least we can do to treat victims fairly, the current confusing state of the case law does not give them these rights. SB 492 does.

Due to a recent case in which the justices of our supreme court were unable to reach a majority decision, trial court judges are granting *in camera* reviews based on court of appeals decisions that have modified long-standing supreme court precedent. In a recent supreme court case, some justices called for the legislature to address this issue through legislation. We offer you that opportunity.

Under the bill, if a judge is satisfied that a defendant has made the necessary showing, the crime victim has the opportunity to decline to consent to the *in camera* review. If the victim declines to consent, the victim is still permitted to testify. Under current practice, the victim would be prohibited from testifying should she decline an *in camera* review and in almost every case, charges would then be dismissed.

Under SB 492, if the victim consents to an *in camera* review of her mental health records, the court will review the records to determine if they should be released. If the judge determines that the information meets the high bar for disclosure and orders the records be released to the defendant, a victim has the right to appeal this order. After the appeal, or after it is determined that there will be no appeal, a victim

again has the opportunity to decline to consent to the release of records. At this point, if a victim declines to have her records disclosed, she is not permitted to testify.

Beyond laying out a step-by-step process for a court to follow, the bill also provides clear and substantial victim notification rights, including:

- Notification that a motion has been filed;
- Notification of the right to decline consent;
- A clear statement that the victim has not waived any privilege by disclosing the records; and
- Notification of the right to counsel as to this limited issue.

The Department of Justice, through the utilization of grant funds, has already established a statewide network of attorneys who stand ready to assist victims specifically in these types of proceedings.

The bill:

- Reaffirms and provides more clarity to chapter 950, which currently provides victims standing in criminal proceedings; and
- Lays out a clear record retention policy and prohibits dissemination of the records to ensure that at the conclusion of the motion proceedings or the trial, the parties will be properly divested of these sensitive, privileged mental health records, and any records in the possession of the court are properly and securely stored to prevent duplication and dissemination to other parties.

I would like to touch briefly on Assembly Amendment 1, introduced by the authors. This amendment is a result of further input from district attorneys who practice sensitive crimes on the front lines. We had many fruitful discussions and saw significant merit in additional strengthening of the bill and protection of victims in this context.

More and more survivors of sexual assault are coming forward to demand justice, and are finding a more welcoming justice system and a more accepting societal reaction. There is no better time than now for us to do more for girls like "Kristy" and the many victims who have come before her and will come after. We must raise the threshold for access to private mental health records to prevent any intrusion into, or chilling effect on the therapist/patient relationship. This bill goes a long way to achieving those ends and protecting victims.

Thank you for the opportunity to testify on SB 492 and I look forward to your support.

If you have any additional questions please contact Lane Ruhland, Director Government Affairs at ruhlandle@doj.state.wi.us.

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January 2, 2018

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Chair Senator Wanggaard and members of the Senate Committee on Judiciary and Public Safety

On behalf of the Wisconsin Association for Marriage and Family Therapy, we would like to offer our written support of SB 492. Our association promotes the ability for victims to decline to release their healthcare information when requested by a defendant as part of a criminal case, while maintaining their ability to testify in subsequent hearings. We feel that the establishment of this procedure is a positive legislative contribution, and helps to build a foundation for the further development of laws to protect victims' mental health records.

Thank you for your consideration of this bill, and we look forward to helping support the safety of all Wisconsin residents.

Respectfully,

Christopher Wirth LMFT

President - Wisconsin Association for Marriage and Family Therapy (WAMFT)