

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1214

2007 HOUSE JUDICIARY

HB 1214

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1214

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/24/07

Recorder Job Number: 1774

Committee Clerk Signature

*Penrose*

Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1214.

**Fritz Fremgen:** (see attached testimony). I support this bill, this bill deals with post conviction relief. It is considered a civil action to attack a criminal conviction, so that the defendant, who has been convicted, had a charge investigated and he had counsel, either retained or appointed if he wanted it, motions, preliminary hearings, trials, forensic psychiatric evaluations if he requested it and a trial or a plea of guilty. Perhaps a motion for new trial, appeal, and then they file for post conviction relief. There are six enumerated items in the statute about which somebody can apply for post conviction relief. It starts with things like a conviction was obtained in violation of the constitution. That's a pretty big door that defendant's use; ineffective counsel is a very common one; not competent to plead guilty; etc.

**Rep. Delmore:** Is this a big problem, is this prevalent. Why one year. Iowa has three, MN has two years. I understand your exceptions, but I'm not sure that they apply when you look at b underneath the restrictions on page 2.

**Fritz Fremgen:** We are not bound to one year; three, two, one. We would be happy with any of them. The real problems are the ones that go on for nine years, because of the access to records and witnesses. One problem is if they claim ineffective counsel. It is hard to try and

find the lawyer and witnesses. There are no numbers that I know of all the cases that are around. In my instance, I can think of three I am doing. Two reasons, they are typically work intensive, we like doing our jobs but this takes us away from what we're seeing are legitimate cases. We are just asking them to bring their requests on a timely basis when we can find the information and people.

**Rep. Delmore:** On page 2 of the bill, 1, 2 or 3 are not affected under (a) are not affected by (b), in that case that would be open for one of those circumstances for 30 years. If in 25 years from now, there is evidence that is compelling. I could still, because there is newly discovered evidence, I could still have the right to post conviction relief.

**Fritz Fremgen:** I'm not fully clear on your question. You're clear that 1, 2 and 3 are exceptions to the general rule.

**Rep. Delmore:** Forever?

**Fritz Fremgen:** Correct. B says that if you're saying I found new evidence, (b) says file it within a year of finding this new evidence, don't wait 12 years. Don't say I found new evidence and wait 12 years, and come back and say that you found new evidence 13 years ago. Now I'm filing my petition for post conviction relief. It makes sense. If you find new evidence, bring your application and let's have it out while the evidence is pure, fresh and have a case on it.

**Rep. Delmore:** Those are three important exceptions to me. Why do you need to add that one year of discovering that in there. I don't think it is necessary. There may be more information that needs to be gathered. I'm sure a defense attorney would have a lot of things they would want to get in the role too. I know court cases sometimes takes a lot longer than one year's time. That's a very narrow window for three very important exceptions to this rule.

**Fritz Fremgen:** I think there are a couple of things that can happen. One, if you file it within the statute of limitations, you are preserved your rights. You've said here is my application, the

state responds, then the parties say we need to develop more, we need a continuance before we have our hearing. There isn't a doubt in my mind that the capacity is there. Obviously, if a defense attorney is asking for continuance after continuance, year after year, the prosecution is most likely going to oppose some of those. The one year, if that's a concern, we're not tied to that. We're trying to stop the abuse of these 10, 20, 30 year applications. That gets them off the dime and come into court while we can still get the evidence required to answer these claims that they are making.

**Rep. Charging:** I'm sure that all inmates would say that they aren't guilty. I understand what you are saying, if they go back after 30 years; but if you find new evidence and we have it within that year, but sometimes people don't reveal themselves until years later and we've all heard of situations where the person is found to be innocent later because of new evidence.

**Fritz Fremgen:** If I'm convicted in 1990, and nine years later in 1999, new evidence shows up. This bill does not keep that person out of court. If I'm convicted in 1990, and 2015 new evidence is found. This bill does not keep that person out of court. This says the general rule is that the one year statute of limitation on post conviction relief. But, if at any time, after your conviction you find new evidence and you make a prima facie case to the judge that this is newly found evidence that is an exception to the one year statute of limitations. I was convicted in 1990, I found my evidence in 2013, I file my application and say I know there is a one year statute of limitations, but there is an exception for newly found evidence and I am claiming it. What I discussed with Rep. Delmore is that I am supposed to file my application within a year of finding that new evidence. I found it in 2013, 23 years later, I just need to file my application by 2014. Rep. Delmore asked if that were a little stiff. Maybe they want to do more investigation, I appreciate that. They would file it and ask for some continuances to get more, or if you uncomfortable closing that window within one year after finding it, we're trying

to be fair here. We're just trying to block the unfair, frivolous and abusive ones where we don't have a chance to respond, everything is gone.

**Rep. Klemin:** I have a question about how you define "newly discovered evidence". There doesn't seem to be a definition in here. There is a project where they look into sentences, and they find grounds for getting people off after years they were put in, because of a variety of reasons, some of which do not involve newly discovered evidence. I can't give you all the details on the cases, but sometimes you hear about people who were imprisoned for a crime they didn't commit, that have been in jail for 10 or 15 years. So because of a different way of analyzing existing evidence, such as with DNA evidence, this is a technological breakthrough that has come through in the past several years that they didn't have a very good handle on at one time. DNA can be used to show someone is guilty or to exonerate someone. But here we're not looking at newly discovered evidence, we're looking at a new way of analyzing existing evidence. I was wondering if the term "newly discovered evidence", is it sufficiently broad to cover a new analysis of existing evidence due to technological advances or do we need to add something to cover that situation.

**Fritz Fremgen:** I honestly don't think we do. To my point of view, and I'm not trying to close the window on these guys. I sincerely think newly discovered evidence covers it. We don't see people arguing, we thought of that exact situation with DNA. Blood evidence 30 years ago meant serology evidence, I can type it and get a couple of characteristics out of that. That's all it was as far as evidence back then. DNA developed, obviously the defense attorney is going to argue this, now has new meaning. I can make new evidence out of this. I don't see a court or prosecutor trying to step in the way of that. You have states like CA, starting their own innocence projects, to review cases; convictions to get in front of the cases where there might be a different outcome. I don't know how you would word it broadly enough to say that

scientific developments can constitute newly contested evidence. I think that's what it means and most would read it that way. People might say that there is a conspiracy to convict me. We still have Rule 35 attached on illegal sentences. Habeas corpus motions; etc. I don't think it shuts the door entirely on every claim. But I think it goes a long way towards it. Bring it to court earlier.

**Rep. Klemin:** I think when you said "most would" in your response. To me, most means not all. I think if there is a situation where a state's attorney or local judge, says to heck with it, you're too late to appeal; I don't care about new technology. I think we should make it a little more clear here that we're not only talking about newly discovered evidence but we're talking about a new way of analyzing existing evidence so that the evidence is there, but we're looking at it in a different light.

**Fritz Fremgen:** There's cases that talk about whether or not an expert can testify. There's a standard about whether or not if that is the generally accepted scientific method. Can this person come in and testify about a new advance in science.

**Rep. Delmore:** On page 2, line 10-15, what is the time to appeal a conviction to the Supreme Court, when it expires, and how long is it for the post conviction relief.

**Fritz Fremgen:** If I'm convicted, I have 30 days from the date the judgment is filed to file an appeal in a criminal case to the ND Supreme Court. This doesn't kick in until after a year passes after that; (b) if I do appeal to the ND Supreme Court and it goes on for a couple of years, and they issue their mandate saying, we're sorry, we considered your conviction, we affirmed it, you are still convicted, then the way this is worded, you have to file within one year of the time or filing a notice of appeal to the US Supreme Court. This is based on the MT statute, which is in effect. The amendment suggests that we simply say, it is based on one year from the mandate of our Supreme Court.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Aaron Birst, States Attorney Association:** Fritz took the lead on this issue because he has been working on it for a long time. I've also litigated these post conviction relief cases, and in fact, one of those cases in your handout was Gary Dean Olson. That was my case in Fargo. That was a case where there was a double homicide. He killed his wife and killed a highway patrolmen's daughter, Polly Johnson. It was a tremendous case. He wasn't taking post conviction relief on that case, but he was on his wife's case. To get to your concerns, I think the idea and the concept of this is really good. I think if there are some concerns that the language needs to define newly discovered evidence that is something that I would certainly help Fritz work on too. With regard to the Olson case, in that case, it was the early '70s, when he murdering his wife, he was convicted and appealed to the Supreme Court. Then comes 2006, he filed a post conviction relief petition, and part of the petition was that one of the informants who he basically confessed to, was found guilty of perjury in MN. That case, though, he knew that back in the early '80s. So when he sent in the paper article that said this jail house informant was found guilty of perjury, certainly that could have had something to do, if at trial, he would have known that this guy was ratting him out, that if he had a perjury conviction, you could use that for cross examination purposes. So that's good. I think what Fritz is trying to say is that in this case, if the guy knew back in the '80s after he was convicted, that he had information, he should have brought that forth. Because here is the problem, that guy is now dead. Now in 2006, he says this guy was important evidence, how can I relitigate that case, I can't. I can't go back and retry the case because that informant is gone. That's the issue. Not that when the evidence was found that you're barred, but then when you find the evidence you have some sort of statutory requirement to bring it forward. Again, as Fritz mentioned, I think it is important to note that the States Attorney's Association is certainly

willing to look at those time lines, too. I don't know of a prosecutor in the State of ND that would want to try and keep somebody from getting out of jail that shouldn't be there.

**Rep. Delmore:** That's my concern is that we make the bill not just fit these bad dudes, but everybody and some of them there is only one person that shouldn't be there. I think that's where we want to go. Too often, I think we look at these are all bad guys, they all need to be there. There are cases where someone is innocent. I think if we get too restrictive and try to make it fit that criteria, we err in a way that I prefer not to.

**Aaron Birst:** What I have always told victims when they come in to talk to me about a case. I tell them that the system designed to let 9 guilty people go, than convict 1 wrongly held person. So the system is designed for that. That's a good thing. The other thing I was going to mention is that post conviction relief, you see it with the people who are the worst of the worst, because they have been convicted of a long prison sentence. You don't see someone apply for post conviction relief if they've only received a year or two in jail; because by the time the process would work, they're out. It is the worst of the worst, but of course, they do deserve some rights and abilities to appeal and look at his post conviction. There is a saying, if a doctor screws up somebody dies, if the lawyer screws up there is always the appeal. I think that's important to note. That this bill isn't trying to stop every process. The Supreme Court has already kind of addressed this, in the case Fritz was on, where they have imposed that there are certain requirements a defendant needs to go through before bringing a post conviction relief; part of that was if they knew, or reasonably should have known that there was some evidence, they had to bring it forward. The supreme court has actually acknowledged that there has to be some limitations on this.

**Rep. Dahl:** Was that a ND Supreme Court.

**Aaron Birst:** Yes, that was one of the cases that you saw on the handout, Robert Johnson.

**Rep. Dahl:** Have these statutes been challenged in the US Supreme Court.

**Aaron Birst:** Post conviction relief statutes of limitation on them. I'm not sure, I would have to double check. I'm sure they have been. MN's have been on the books for a while.

**Rep. Charging:** When you talk about the other side of it, that burden and cost, that comes back to your office, the state's attorney, the counties, where does the cost fall when they start to initiate the process.

**Aaron Birst:** It is borne by the counties. They don't have a right on post conviction relief, necessarily to court appointed attorney, they can get it though, but it is a little different than the direct appeal system; of course, the state's attorney's time as well. We're not saying that we don't want more work that is part of our job. It just gets more frustrating and for judges too, when you get these bogus claims. You have a sense of what is a legitimate claim and can litigate those.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1214

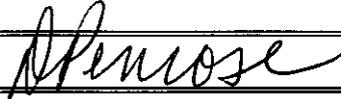
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/29/07

Recorder Job Number: 2197

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will take a look at HB 1214.

**Rep. Meyer:** Could you clarify HB 1214. How does it change from current law.

**Chairman DeKrey:** I don't think there are any limitation whatsoever now, the inmate can bring a petition to the Clerk of Court for postconviction relief. This bill wants to limit it to one year. So we are going from forever to one year.

**Rep. Koppelman:** This is the one where I was waiting for a response.

**Rep. Klemin:** In the process of doing that, I also received another provision of this statute. The one thing when I went through this bill, a-h are the reasons that you can apply for postconviction relief. Under virtually every one of them, I think it would be hard to convince me that just because one year had gone by, you couldn't bring an action. Several provisions on page 1 of this bill are also covered by page 2, but stated differently for most of these provisions.

**Rep. Meyer:** I move a Do Not Pass.

**Rep. Koppelman:** Second.

**Chairman DeKrey:** The clerk will call the roll.

12 YES 1 NO 1 ABSENT

DO NOT PASS

CARRIER: Rep. Wolf

Date: 1-29-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1214

House JUDICIARY Committee

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Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass

Motion Made By Rep. Meyer Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning			Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl		✓	Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 12 No 1

Absent 1

Floor Assignment Rep. Wolf

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
January 30, 2007 7:02 a.m.

**Module No: HR-20-1481**  
**Carrier: Wolf**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1214: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS**  
(12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1214 was placed on the  
Eleventh order on the calendar.

2007 TESTIMONY

HB 1214

**HB 1214**

To: House Judiciary Committee Members  
From: Fritz Fremgen, Jamestown, ND (701) 252-6688  
Re: HB 1214, statute of limitations on post conviction relief,  
summary of surrounding states  
Date: 24 January 2007

Some surrounding states already have statutes of limitation for their post conviction relief actions.

**Minnesota** Statute Annotated §590.01(4)(a) sets a **two** year statute of limitation on post-conviction relief applications.

**Iowa** has a **three** year statute of limitations, Iowa Code Annotated § 822.3 (unless the evidence giving rise to the petition wasn't available inside the three years.).

**Montana** has a **one** year statute of limitations (subject to recently discovered evidence exception) in Montana Statutes Annotated §46-21-102(1). HB 1214 is based on Montana's law.

**South Dakota**, having repealed its post-conviction relief chapter (South Dakota Codified Laws chapter 23A-34) in 1983, is left with the following four avenues, (1) appeal, (2) habeas corpus, (3) motion to correct illegal sentence, and (4) motion to withdraw guilty plea. *State v. Anderson*, 2005 SD 22, 24, 693 N.W.2d 675, 682.

- (1) In South Dakota, the appeal needs to be brought within 30 days after written notice of the filing of the order is provided to the defendant, SDCL 23A-32-15;
- (2) the habeas corpus petition generally needs to be brought while the defendant is imprisoned or restrained of his liberty, SDCL §21-27-1 & *Rhines v. Weber*, 608 N.W.2d 303, 306 (SD 2000);
- (3) like North Dakota's Rule 35, the motion to correct an illegal sentence does not have a statutory limitation 23A-31-1 & *State v. Morrison*, 337 N.W.2d 825 (SD 1983); and
- (4) the motion for to withdraw a guilty plea needs to be brought before imposition of sentence and is only allowed after imposition if it would cause manifest injustice to let the plea lie, SDCL 23A-27-11 & *State v. Bailey*, noting that there is no absolute right to withdraw a guilty plea and that prejudice to the State is one factor to be considered.

## HB 1214

### Scenarios

#### **Robert L. Johnson**

10 December 1996, pled guilty after forensic exam finding him fit to proceed and finding that the defense of lack of criminal responsibility due to mental disease or defect did not apply. Charge was endangering by fire for setting a building on fire.

24 June 2005, Johnson petitioned for post conviction relief claiming he was not competent to enter the guilty plea at the time.

After Johnson pled guilty, the sentencing Judge died and whereabouts of forensic psychiatrists who conducted eval are unknown. No reason given for delaying action. Original prosecutor gone.

#### **Lanny VanNatta**

14 August 1992 VanNatta was found guilty of murdering a Jamestown woman.

VanNatta appealed claiming, among others, he wasn't competent to stand trial, his confession should have been suppressed, he shouldn't have been found criminally responsible by the jury. The Supreme Court heard his appeal and affirmed his conviction. *State v. VanNatta*, 506 N.W.2d 63, 68-69 (N.D. 1993)

22 November 2002, filed for post conviction relief, 2<sup>nd</sup> psych eval not obtained, wouldn't let him testify, failed to notify him of consequences of accepting plea agreement (didn't accept plea agreement, was tried).

26 February 2004, filed again for post conviction relief, similar allegations of ineffective assist. Two applications essentially asserting the same things that were asserted in his appeal.

Both applications dismissed at district court level.

No reason given for waiting 10 years to file applications for post conviction relief. The original prosecutor had long left the state, the appellate prosecutor had become a judge.

#### **James Leroy Iverson**

1969, Iverson convicted of 1<sup>st</sup> and 2<sup>nd</sup> degree murder in 1969. Sentenced to life in prison for 1<sup>st</sup> degree murder and 29-30 for 2<sup>nd</sup> degree.

1971, Iverson appealed his conviction and it was affirmed in 1971. *State v. Iverson*, 187 N.W.2d 1, 44 (N.D. 1971).

1974, Iverson applied for post conviction relief, was denied, appealed the denial, and the ND Supreme court affirmed the denial. *State v. Iverson*, 225 N.W.2d 48, 56 (N.D. 1974).

2006, Iverson applied again for post conviction relief, wanting credit for 168 days served prior to his conviction claiming that a statute enacted in 1973 providing for credit for time served prior to

conviction should apply retroactively to his case. Supreme Court had already decided that law passed after final conviction that ameliorate the sentence do no apply retroactively. Post conviction relief denied, appealed the denial, affirmed at ND Supreme Court. State v. Iverson, 2006 ND 193.

Flood had taken place, so Grand Forks had no documents anymore. 30 year old documents were sought out from around the state, if still available.

**Gary Dean Olson**

Cass County

Convicted in 1997 of murdering his wife.

In 2006, Olson has filed for post conviction relief and the application is pending.

PROPOSED AMENDMENTS TO HOUSE BILL 1214

Page 2, line 7, after "relief" insert "brought"

Page 2, line 11, after "expires;" insert "or"

Page 2, line 12, replace "supreme court, the time for petitioning the United States supreme court for review expires; or" with "supreme court, upon the North Dakota supreme court's mandate in the matter."

Page 2, line 14, remove "c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case."

Page 2, line 17, remove the colon and insert "the petitioner establishes a prima facie showing of any of the following:"

Page 3, line 2, after "law." insert "The district court may summarily dismiss, on its own volition, the petition if the court finds the petitioner has not proved by a preponderance of the evidence that a prima facie case exists which would allow the untimely filing of the petition."