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## CENTER FOR INTEGRITY IN FORENSIC SCIENCES

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Forensic science evidence is becoming an increasingly important tool for successfully prosecuting criminal cases. At the same time, in the last 10-15 years forensic science has come under intensified scrutiny, and at times criticism, as both its strengths and its weaknesses have been recognized and explored. In this environment, adherence to best practices in forensic science work is more important than it has ever been, both to ensure that the evidence used to prosecute criminal cases is as reliable and accurate as possible, and to ensure that it can withstand the challenges and cross-examination from opposing counsel and opposing experts that are becoming increasingly common and intense.

Unfortunately, Senate Bill No. 2131 does not improve the validity and effectiveness of forensic science evidence. It does not enhance the ability of forensic scientists to weather the storm of courtroom challenges. Rather, the bill would move North Dakota in the opposite direction—against national trends and recognized best scientific practices—and thereby make criminal prosecutions in this State more prone to error, and prosecution evidence more vulnerable to challenge in the courtroom.

I write on behalf of the Center for Integrity in Forensic Sciences (CIFS), a non-profit organization based in Madison, Wisconsin, that works to improve the scientific foundations and the reliability of forensic science evidence used in criminal cases. CIFS is committed to enhancing the criminal justice system's ability to find the truth, both in the interest of crime victims and the community *and* to protect those who might be wrongly accused of crimes they did not commit. We know now that flawed forensic science evidence is a leading contributor to wrongful convictions, present in over half the cases in which DNA has exonerated a wrongly convicted individual. This is deeply problematic both because in those cases an innocent person was wrongly convicted and because in almost every such case the actual perpetrator remained free to victimize others.

Moreover, we now know from extensive research, including a game-changing report in 2009 by the National Academy of Sciences (NAS)—the pre-eminent scientific authority in this country—that many of the traditional forensic disciplines, particularly the “pattern matching” or “individualization” disciplines, are vulnerable to challenges that they lack a solid scientific foundation, lack appropriate standards and established protocols, and rely extensively on subjective human interpretation of ambiguous data, not objective scientific testing methodologies. In the NAS Report, *Strengthening Forensic Science in the United States: A Path Forward*, the NAS not only identified these and other challenges facing the forensic sciences in this country, but recommended reforms that can improve the standing and reliability of these disciplines. The importance of this Report and its recommendations cannot be overstated.

One of the central recommendations of the NAS Report was that forensic laboratories should be removed from administrative control of law enforcement. The NAS wrote:

Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.

The national trend now is to move toward that kind of independence. In my own state of Wisconsin, for example, a 2018 needs assessment conducted by Florida International University for the Wisconsin State Crime Laboratories recommended such independence. The needs assessment recognized that, while the Crime Lab at the time was its own Bureau within the Department of Justice,

decisions impacting scientific operations are influenced by law enforcement. This can be perceived as impacting the impartiality of the laboratory, with potential for creating bias and conflicts of interests. Per the National Academy of Science Report on Forensic Science “...The potential for conflicts of interest between the needs of law enforcement and the needs of forensic science are too great ...”

Accordingly, on April 9, 2019, the Governor of Wisconsin approved a plan to make the Wisconsin State Crime Laboratory Bureau its own division, independent of the law enforcement investigative and prosecution divisions, albeit still within the Department of Justice. As the Administrator and Deputy Administrator of the new Division of Forensic Sciences wrote in a memo in May 2020, “Under the reorganization, the division has a direct workflow path for purchasing and procurement, hiring authority, and partner divisions and AG Executive decision makers. This pathway makes for a more collaborative and cohesive agency overall. Further, the movement to a division has ensured and solidified the concept that the forensic science

laboratory in the state is performing its scientific work with impartiality and with no question of bias for the people of Wisconsin.”

North Dakota was nearly two decades ahead of Wisconsin in making this move, when it adopted Section 54-12-24 of the North Dakota Century Code in 2003 to provide: “The state crime laboratory must be administratively separated from the bureau of criminal investigation.”

The 2009 NAS Report goes further now and recommends removal of crime labs from *all* law enforcement administrative control, which would mean moving the crime laboratory out of the Attorney General’s Office altogether. Senate Bill 2131 would do the opposite—consolidate administrative control with law enforcement. The bill would move North Dakota backwards, repealing the provisions of 54-12-24 that made the crime laboratory independent of the bureau of criminal investigation.

To understand why this is such a bad idea, one must understand why the NAS strongly recommends administrative independence from law enforcement. The rationale is not based on lack of trust in or respect for the integrity of police or lab analysts. While misconduct has indeed occurred in crime laboratories across the country on occasion, the real problem is more subtle but also more problematic because it is more ubiquitous. The overriding concern is based on recognition of fundamental human nature and our universal susceptibility to cognitive biases or distortions, even when we mean well, which make scientific independence essential to good scientific work. Objectivity and independence are principles that guide scientific work throughout all of science outside the criminal justice world, and which are all-the-more critical when the science moves into the criminal justice arena where liberty, life, and public safety are all at stake. Independence is based not so much on concerns that unethical police or laboratory analysts will cheat, but on the reality that even the most ethical and well-intentioned individuals cannot avoid the kinds of cognitive biases and distortions that can lead to error.

The cognitive distortions at work include well-researched and universally recognized phenomena such as confirmation bias (the tendency to seek and interpret information in ways that support pre-existing conclusions), context biases (exposure to contextual but unscientific case evidence), and importantly here, role effects (the tendency that one’s role—e.g., as part of a law enforcement team—can lead even supposedly objective analysts to interpret evidence in ways that favor their team). Each of these biases, which can arise whenever an analyst is exposed to non-scientific case evidence or even the theories or conclusions of others, or intuitively perceives their role to be to advance any particular conclusion, can lead an analyst to unwittingly interpret data in skewed ways. This happens at the subconscious level, so even deliberate attempts to will away such biases are almost always ineffectual when the analyst is exposed to biasing conditions. These biases are particularly problematic when a discipline relies on subjective assessments—as do most of the forensic disciplines. Even among solidly objective laboratory sciences, these biases are so widely recognized that scientists in all other domains go to great lengths to insulate themselves from exposure to all potential biasing influences. There simply is no reason to exempt forensic scientists from such protective measures.

If the concern that drives SB 2131 is backlogs and delays in processing forensic evidence, this bill is not the solution. Providing more resources for the lab is the way to address that problem, so the lab can hire the personnel needed to process evidence. Giving police administrative authority over lab scientists cannot improve turnaround time, unless the plan is for police to dictate how the analysts do their scientific work, which would be an invitation to undermine the scientific objectivity, and hence reliability, of the enterprise.

Ironically, SB 2131 will not facilitate the use of forensic science evidence in North Dakota. It will instead render such evidence less scientific, more prone to error, more vulnerable to attack, and in the end, therefore, less useful to the criminal justice system.