2013 SENATE JUDICIARY

SB 2227

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2227
2/5/2013
Job #18287

☐ Conference Committee

Committee Clerk Signature

Minutes: *Attached testimony*

Relating to limitations & summary disposition for post-conviction relief proceedings

Senator David Hogue - Chairman

Senator Ron Carlisle - District 30 - Introduces the bill. Explains that bill seeks to limit repetitive unproductive attempts by convicts to have their convictions reviewed. Those convicted of crimes will still have the right to have their cases reviewed on appeal but they won't be able to keep trying to bring their cases over and over again.

Justice Dale Sandstrom - Justice of the Supreme Court - See written testimony (1)

Senator Hogue - Asks him if the defendant at some point jump over to Federal District Court.

Justice Sandstrom- Replies it is possible that after a state's rights have been exhausted they could seek review. He goes on to explain how this would be done.

Senator Hogue - Asks if the same district court judge review that as sat on the council that was deemed ineffective.

Justice Sandstrom - Replies it is the same district judge in most cases.

Senator Sitte - Wonders how wide spread this issue is.

Justice - Explains it is wide spread and takes up a lot of time and resources.

Senator Armstrong - Asks how the mechanics of filing after one year works.

Justice Sandstrom - Replies there is different levels of incompetency and explains how it could be handled. He says the bill does put the burden on the petitioner to establish that they have suffered a disability that precluded timely assertion.

Senator Armstrong - Asks how many are filed from people out of custody.

Justice Sandstrom - Said some are and some aren't. He said someone can file years afterwards which causes problems. He said most of them are still incarcerated. He goes on to explain the mandatory reviews in a death case.

Rosa Larson - States Attorney, Ward County - In support of this bill. She gives an example of someone filing appeals and said he has gone through 19 court appointed attorneys. She believes one year is plenty of time. She said the appeals are becoming the rule not the exception and they are continuous and repetitive.

Birch Burdick - Cass County State's Attorney, Fargo - See written testimony (2) He says the stories shared by Ms. Larson are not unique to Minot. He says no one is looking to get rid of post-conviction relief; this bill does not get rid of it in anyway.

Jonathan Byers - Attorney General's Office - Offering support for this bill. He said this is the right time for this. He explains the number of these appeals is on the rise and quite a bit more of a problem than it was 10 years ago.

Opposition

Jean Delaney - Deputy Director of the Commission on Legal Counsel for Indigents - See written testimony (3)

Erica Shibley - ND Association of Criminal Defense Lawyers - She said they have the same concerns as Ms. Delaney for the amendments regarding DNA testing. She believes an amendment should be added to this bill for that. She goes on to say that mistakes are made and lawyers are people and they also make mistakes. She relates her story of an over turned conviction.

Senator Armstrong - Asks about multiple claims made.

Shibley - Said there is a possibility there is new information that wasn't made in the first claim.

Senator Hogue - Asks how to reduce the workload of these appeals without affecting her clients due process rights.

Shibley - Replies through the statute of limitations. They want to discourage the committee from removing the ability to make an ineffective assistance of council claim.

Neutral - none

Close 2227

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2227
2/11/2013
Job #18815

☐ Conference Committee

Committee Clerk Signature

Minutes: *Vote*

Senator David Hogue - Chairman

Committee work
Committee discusses amending Sub-section two. Committee discusses the Delaney amendment and adding DNA evidence.

Senator Sitte moves to adopt the amendment
Senator Armstrong seconded
Verbal vote - all yes

Senator Hogue discusses the second amendment

Senator Sitte moves the amendment to delete Sub-section Two, lines 19-22
Senator Armstrong seconded

Discussion
Senator Hogue mentions that the court is already entertaining the right to deny a meritless application. He said two is redundant. Committee discusses Section Two. Senator Sitte says this allows some civil protection and is comfortable in leaving it.

Vote on amendment
Vote 2 yes, 4 no
Motion fails

Senator Berry moves a do pass as amended
Senator Grabinger seconded
Vote - 6 yes, 1 no
Senator Lyson will carry

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2227
2/12/2013
Job #18827

☐ Conference Committee

Committee Clerk Signature 

Minutes: *Reconsider vote*

Senator Hogue - Chairman

Committee work
Senator Hogue explains new information that has come from Justice Sandstrom. He speaks of re-amending the bill. They discuss DNA evidence. Justice Sandstrom comes in to explain that a much shorter amendment would take care of Ms. Delaney's concern with the DNA evidence.

Senator Sitte moves to reconsider the earlier vote on 2/11/2013
Senator Lyson seconded
Verbal vote - 6 yes, 1 no

Senator Sitte moves the Sandstrom amendment
Senator Berry seconded
Verbal vote 4 yes, 3 no
Motion passes

Senator Sitte moves a do pass as amended
Senator Berry seconded
Vote 6 yes, 1 no
Motion passes
Senator Lyson will carry

13.0668.01002
Title.03000

Adopted by the Judiciary Committee

February 13, 2013

2-13-13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2227

Page 2, line 17, replace "that" with ", including DNA evidence, which"

Page 3, remove lines 19 through 22

Page 3, line 23, replace "3." with "2."

Page 3, line 27, replace "4." with "3."

Renumber accordingly

Date: 2/11/13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number —

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Sitte Seconded By S. Armstrong

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue	1		Senator Carolyn Nelson		
Vice Chairman Margaret Sitte	1		Senator John Grabinger	1	
Senator Stanley Lyson	1				
Senator Spencer Berry	1				
Senator Kelly Armstrong					

Total (Yes) _____ No _____

Absent _____

Floor Assignment Verbal - all yes

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

Date: 2/11/13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number delete Subsection Two Amend.

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Sitte Seconded By S. Armstrong

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue		X	Senator Carolyn Nelson	—	
Vice Chairman Margaret Sitte	X		Senator John Grabinger		X
Senator Stanley Lyson		X			
Senator Spencer Berry		X			
Senator Kelly Armstrong	X				

Total (Yes) 2 No 4

Absent 1A Motion Fails

Floor Assignment

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

Date: 2/11/13
Roll Call Vote #: 3

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Berry Seconded By S. Grabinger

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue	X		Senator Carolyn Nelson	X	
Vice Chairman Margaret Sitte	X		Senator John Grabinger	X	
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong		X			

Total (Yes) 6 No 1

Absent _____

Floor Assignment S. Lyson

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

Date: 2/12/13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number Reconsider

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☒ Reconsider

Motion Made By S Sitte Seconded By S Lyson

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue	1		Senator Carolyn Nelson	1	
Vice Chairman Margaret Sitte	1		Senator John Grabinger	1	
Senator Stanley Lyson	1				
Senator Spencer Berry	1				
Senator Kelly Armstrong		1			

Total (Yes) 6 No

Absent Verbal - 6 yes, 1 nay

Floor Assignment

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

Date: 2/12/13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number Sandstrom

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Sitte Seconded By S. Berry

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue			Senator Carolyn Nelson		
Vice Chairman Margaret Sitte			Senator John Grabinger		
Senator Stanley Lyson					
Senator Spencer Berry					
Senator Kelly Armstrong					

Total (Yes) No

Absent Verbal 4 - 3

Floor Assignment

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

Date: 2/12/13
Roll Call Vote #: 3

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2227

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sitte Seconded By Berry

Senators	Yes	No	Senator	Yes	No
Chariman David Hogue	X		Senator Carolyn Nelson	X	
Vice Chairman Margaret Sitte	X		Senator John Grabinger	X	
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong		X			

Total (Yes) 6 No 1

Absent

Floor Assignment S. Lyson

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

REPORT OF STANDING COMMITTEE

SB 2227: Judiciary Committee (Sen. Hogue, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2227 was placed on the Sixth order on the calendar.

Page 2, line 17, replace "that" with ", including DNA evidence, which"

Page 3, remove lines 19 through 22

Page 3, line 23, replace "3." with "2."

Page 3, line 27, replace "4." with "3."

Renumber accordingly

2013 HOUSE JUDICIARY

SB 2227

2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2227
March 20, 2013

20268
☐ Conference Committee

Relating to limitations and summary disposition for post-conviction relief proceedings.

Minutes: Testimony 1, 2,3,4

Chairman Kim Koppelman: Opens SB 2227.

Vice Chairman Larry Klemin: SB 2227 relates post-conviction relief reform. This is a procedure to which the defendants seek to reopen a file or criminal judgment after the appeal is over.

Judge David Reich, District Court Judge: Testimony of Dale Sandstrom (1:31-10:00 see attached #1) Cutting off repetitive, stale, and meritless claims will not only benefit prosecutors, indigent defense counsel, and the courts, it will also serve the penological purpose if having inmates face the reality of their convictions instead of holding out endless hope they are still going to somehow beat the rap.

Rep. Lois Delmore: you talked about the safety valves you that they need to be brought within a specified reasonable time. What is that time link?

Judge David Reich: One year of the date they are discovered.

Rep. Kathy Hogan: Is this law modeled after other states?

Judge David Reich: It is part of the uniform Post-Conviction Relief Act. Uniforms laws seem to attract changes in federal law.

Rep. Bill Kretschmar: Would it be possible for the Supreme Court to do this by regular court?

Judge David Reich: I think this would be substance of law and not procedural.

Chairman Kim Koppelman: What would be other examples that things that could not have been brought up at the initial preceding that would be raised at a post-conviction?

Judge David Reich: It could be any type of newly discovered evidence. DNA is one kind of evidence that has been accepted.

Chairman Kim Koppelman: How would appeals preceding assess the varsity of a claim verses something that could have been raised at the initial proceeding when a convicted individual is claiming ineffective counsel?

Judge David Reich: I that is always an issue in these appeals. Generally the state will respond and to that and then it is the courts duty to evaluate that and how much weight to give to that argument.

Chairman Kim Koppelman: The unreasonableness that every counsel that was not successful was ineffective and therefore that a point that can be raised.

Judge David Reich: I don't think as a judge they may not upheld the standards of their profession which is what the claim is with these cases.

Vice Chairman Larry Klemin: These claims that are ineffective assistance of counsel in the previous proceeding the court is there to observe what is going on and if there is a problem the court can see you are not going to sit back and let someone make a lot of mistakes.

Judge David Reich: There is a point related to the attorneys to try a case and if they need to make an adjustment to an obvious error than the court has to step in. At some point there has to be a record on the proceeding and that means we get to review that record and that is one of the principal pieces of evidence to look at to see if that attorney met the standard.

Chairman Kim Koppelman: What would be required for a demo or a review of a case verses looking at somebody's specific questions?

Judge David Reich: I suppose that would be what would happen if the council was ineffective the decision would be thrown out.

Jim Sorenson, Attorney General's Office: Time on tape 19:00 to 21:26. (See attachment 2) SB 2227 tailors the timeframes within which to file claims, while continuing to provide safety valves on time when warranted. That tailoring allows sufficient time to file valid claims, but eliminates unwarranted delays.

Rep. Gary Paur: In this overview that I am looking at it says" prior to enactment of the anti-terrorism an effective death penalty act the most recent substantial recasting for federal habeas corpus law the supreme case is that immediately proceeded it was said that federal habeas corpus was the most controversial and friction producing issue in the relation between federal and state courts." The concern and part of the reform that led to the anti-terrorism and the effective death penalty act and the spike ------- that applies to all federal habeas cases whereas there were a model the federal courts that were making their own decisions as to how state courts should handle the matters and not respecting the sovereignty of the state courts.

Jim Sorenson: That statement was correct. There was a lot of friction there.

Chairman Kim Koppelman: Ineffective counsel claims that are brought; Are they a safe guard that we say we have because it sounds good but in the real world is never is granted?

Jim Sorenson: We don't see it that much in North Dakota and almost every case that I take over in the federal court system that comes from the state courts involves assistants of council of some sort.

Jackson Loftgren, Morton County States Attorney: We have talked about this bill with the States Attorney's Association. This bill fixes a lot of problems that exist mostly in N.D. because of our system of allowing repetitive legislation we give public defenders and all these cases.

Rep. Gary Paur: The current federal law operates under the premise that there are exceptions like prisoners challenging?

Jackson Loftgren: That is correct with certain safeguards. The way the bill is written if DNA evidence comes out or new evidence if found within a year of finding that person you can move a Post-Conviction Relief but you can't wait 5 years wait until all the witnesses against you are dead and then file your application for Post-Conviction Relief. You have to do it within a year.

Rep. Laning: (Testimony #3) I am here to support this bill I would like to propose an amendment. 27:40 to 32:04. Ineffective assistance is a reality especially in some instances of state provided counsel. Does this paragraph remove that option for an inmate? If so this paragraph should be removed. There are definitely cases of ineffective legal assistance.

I have witnessed ineffective assistance and don't believe in that case he did any more than read the charges.

Chairman Kim Koppelman: In your printed amendment does it include does it include the second thing that we talked about?

Rep. Laning: The amendment does not include paragraph 2 subsection 2.

Judge Reich: The one year period is consistent with the federal habeas corpus law. It is a one year from the final conviction. What that means is if somebody is convicted and they have a light sentence they have 30 from the date of sentencing to appeal.

Rep. Laning: If the case is not appealed then is the conviction date in court?

Judge Reich: No if it is not appealed they have 30 days under the rules of criminal procedure to appeal under a criminal judgment.

Vice Chairman Larry Klemin: At the time of conviction is the defendant advised of that right?

Judge Reich: I assume that the attorney would be advising them.

Jim Sorenson: We are required to advise them of the right to appeal and the right to counsel on appeal.

Vice Chairman Larry Klemin: The time for the appeal of the conviction to the N.D. Supreme Court expires in 30 days.

Jim Sorenson: Correct.

Vice Chairman Larry Klemin: B. If an appeal was taken to the Supreme Court the time for the petition in the United States Supreme Court for review expires when?

Jim Sorenson: I don't know.

Judge Reich: There is a 90 day period for filing a petition for ------- of the Supreme Court for the final judgment of any state appealed court and 90 days also applies under federal laws. So that is a year and three months if there has been a direct appeal.

Page 3 subsection 2 post-conviction proceedings

Vice Chairman Larry Klemin: Under B the time for petitioning the United States Supreme Court review is one year and 3months?

Jim Sorenson: Since of the petition in the U.S. Supreme Court judicial is 90 days from the date the state's highest appellate court issues its decision. Under the Supreme Court rules the date of the highest appellate court decision is considered the final judgment of the state court and then they have 90 days from that date to petition judicial so with the one year limitation they effectively have one year and 90 days.

Vice Chairman Larry Klemin: So it is one year under this bill plus 90 days under the Supreme Courts rules.

Jim Sorenson: On page 3 subsection 2 it states an applicant may not claim constitutional effective assistance of post-conviction count. That follows the federal constitutional law as well.

Vice Chairman Larry Klemin: In North Dakota when we have a trial and there is an appeal and it is to a point of counsel is it correct that the appeal counsel is a different attorney?

Jim Sorenson: I see it both ways. I see both; the trial counsel having a case on appeal and also separate appellate counsel.

Vice Chairman Larry Klemin: If you have the trial counsel and also the appeal counsel they will probably not going to saying "there was ineffective assistance of counsel at the trial"

-

Jim Sorenson: The N.D. Supreme Court does not like claims of ineffective assistance of counsel ---------- (in audio) they would want to look at the record before the court instead of developing an effective assistance of counsel claiming post-conviction proceedings.

Vice Chairman Larry Klemin: That of that will happen if it is the same attorney.

Jim Sorenson: It may be that those attorneys will not bring a petition for an ineffective post-conviction Relief assistance counsel.

Jean Delaney, Deputy Director of the Commission on Legal Counsel for Indigent: (Testimony #4) Time on tape 40:54 to 47:46. We also want to state that we support the new subsection 1 under section 29-32.1-09. As mentioned earlier, we do get a fair number of cases that involve repeat or frivolous claims.

Vice Chairman Larry Klemin: We have made a couple of requests for this bill and I am wondering if you would put that in writing so that we don't have to try and figure out what you are asking.

Jean Delaney: I can get that to you tomorrow morning.

Rep. Diane Larson: Since we don't meet as a committee in the morning there isn't an urgency to get it done in the morning; you can get it to us in the next couple of days.

Chairman Kim Koppleman: We will close the hearing on SB 2227.

2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2227
April 2, 2013
Job 20759

☐ Conference Committee

Jocelyn Gallagher

Relating to limitations and summary disposition for post-conviction relief proceedings.

Minutes:

Chairman Kim Koppelman: Opens SB 2227 for committee work. I believe Rep. Laning's suggested amendment was to change one year to two years in page 2 in line 8 and 28.

(2:03)
Rep. Delmore: I think this is another bill that was suggested because it is more convenient for some people with their work load. It takes a look at the rights of people. I don't know if amended or not I can support it. I would move a do not pass on it.

(3:49)
Chairman Koppelman: Members of the committee this was a little confusing too, there was an amendment here in addition to Rep. Lanings proposed amendment. This amendment here does not have a name on it, just says proposed amendments to engrossed SB 2227 and it begins with replacing petition with applicant and deleting including DNA evidence and so on.

(4:13)
Discussion follows on amendments to this bill.

(5:52)
Take a look at SB 2319. What is being passed around are two sheets; one is an email from Justice Sandstrom, commenting on proposed amendments from Ms. Delany and those amendments are the other sheet being passed around. Those amendments have not been moved. These are the Delany amendments. We have those two recommended sets of amendments, the Delany amendments and the Laning amendments, neither have been moved. What are your feelings on the Laning amendment?

(7:30)
Rep. Andy Maragos: made a motion to move the most recent ones, Delany amendments.

(8:10)
Chairman Koppelman: Is there a second, seeing no second that motion does not prevail. Anyone wish to make a motion on the Laning amendments.

(8:22)
Rep. Gary Paur: Made a motion to adopt Rep. Lanings proposed amendments .04001.

Rep. Kathy Hogan: second the motion

(8:39)
Chairman Koppelman: explained the amendment and discussion that went with it.

(9:30)
Rep. Diane Larson: Both subsection 2 on page 3 and the one year time frame match federal law and that's the reason Chief Justice Sandstrom wanted to leave it the way it was.

Rep. Paur: Isn't that addressed in Sandstrom's email?

Chairman Koppelman: Motion before us is the written Laning amendment which is the replacing the one year with two years on page 2, line 8 and page 2, line 28.
Voice vote, motion carries. The bill is amended.

Chairman Koppelman: Is there a motion on the amended bill?

Rep. Andy Maragos: I move a do pass on engrossed SB 2227 as amended.

Chairman Koppelman: Moved by Rep. Maragos, **second by Rep. Hanson** for a do pass on engrossed SB 2227 as amended.
9-5-0 motion prevails, Rep. Kretschmar will carry the bill.

VI
4/2/13

13.0668.04001
Title.05000

Prepared by the Legislative Council staff for
Representative Laning
March 13, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2227

Page 2, line 8, replace "one year" with "two years"

Page 2, line 28, replace "one year" with "two years"

Renumber accordingly

Date: 4-2-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB2227

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0668.04001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Paur Seconded By Rep. Hogan

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman			Rep. Lois Delmore		
Vice Chairman Lawrence Klemin			Rep. Ben Hanson		
Rep. Randy Boehning			Rep. Kathy Hogan		
Rep. Roger Brabandt					
Rep. Karen Karls					
Rep. William Kretschmar					
Rep. Diane Larson					
Rep. Andrew Maragos					
Rep. Gary Paur					
Rep. Vicky Steiner					
Rep. Nathan Toman					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice vote - carried

Date: 4-2-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB2227

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Maragos Seconded By Rep. Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman	✓		Rep. Lois Delmore		✓
Vice Chairman Lawrence Klemin	✓		Rep. Ben Hanson		✓
Rep. Randy Boehning	✓		Rep. Kathy Hogan	✓	
Rep. Roger Brabandt	✓				
Rep. Karen Karls	✓				
Rep. William Kretschmar	✓				
Rep. Diane Larson	✓				
Rep. Andrew Maragos		✓			
Rep. Gary Paur	✓				
Rep. Vicky Steiner		✓			
Rep. Nathan Toman		✓			

Total (Yes) 9 No 5

Absent 0

Floor Assignment Rep. Kretschmar

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

REPORT OF STANDING COMMITTEE

SB 2227, as engrossed: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2227 was placed on the Sixth order on the calendar.

Page 2, line 8, replace "one year" with "two years"

Page 2, line 28, replace "one year" with "two years"

Renumber accordingly

2013 CONFERENCE COMMITTEE

SB 2227

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2227
4/16/2013
Job #21171

☒ Conference Committee

Committee Clerk Signature

Minutes:

Conference committee on SB2227

Senators - Berry, Sitte, Nelson
Representatives - Kretschmar, Boehning, Hogan

Senator Berry asks the House members to explain their amendments to which Rep. Kretschmar responds that they changed one year to two years. The committee heard testimony from Rep. Laning who related a story of someone who could not complete the paperwork that needs to be filed in one year. Supreme Court Judge Dale Sandstrom explains that they have 3 years for newly discovered evidence and then one year after they have found it. He believes one year is ample time to start the process, and reiterates it is one year to start the process; it doesn't need to be finished in the one year time frame. The committee continues to discuss what the 1 year limitations are.

Senator Sitte moves the Senate accede to House amendments
Rep. Kretschmar seconded

Vote - 4 yes, 2 no
Motion passes

Conference committee adjourned

Date 4-16-13

Roll Call Vote # 1

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 2227 as (re) engrossed

Senate Judiciary **Committee**

Action Taken

☒ SENATE accede to House Amendments

☐ SENATE accede to House Amendments and further amend

☐ HOUSE recede from House amendments

☐ HOUSE recede from House amendments and amend as follows

☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: S Sitte Seconded by: Rep. Kretschmar

Senators	4/16			Yes	No	Representatives	4/16			Yes	No
Berry	X			X		Kretschmar	X			X	
Sitte	X			X		Boehning	X			X	
Nelson	X				X	Hogan	X				X
Total Senate Vote				2	1	Total Rep. Vote				2	1

Vote Count Yes: 4 No: 2 Absent: 0

Senate Carrier S Berry House Carrier Rep Kretschmar

LC Number _____ . _____ of amendment

LC Number _____ . _____ of engrossment

REPORT OF CONFERENCE COMMITTEE

SB 2227, as engrossed: Your conference committee (Sens. Berry, Sitte, Nelson and Reps. Kretschmar, Boehning, Hogan) recommends that the **SENATE ACCEDE** to the House amendments as printed on SJ page 1093 and place SB 2227 on the Seventh order.

Engrossed SB 2227 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

SB 2227

2227 (1)

Senate Bill 2227
Senate Judiciary Committee
Testimony of Justice Dale Sandstrom
February 5, 2013

Mr. Chairman and members of the committee, I'm Dale Sandstrom, a Justice of the Supreme Court. I'm here in my capacity as chair of the committee on legislation of the North Dakota Judicial Conference. The Judicial Conference is a statutory body which includes all Supreme Court Justices, all District Judges, all Surrogate Judges, the Attorney General, the Dean of the Law School, the Clerk of the Supreme Court, two Municipal Judges, and five members of the Bar engaged in the practice of law. One responsibility of the Judicial Conference is evaluating legislation and making recommendations for the improvement of the administration of justice.

I'm here to express our support of Senate Bill 2227. We appreciate the efforts of Senator Ron Carlisle and the other sponsors of this legislation. The need for the legislation was identified by the Judicial Conference, which voted unanimously to seek its introduction. Our Court has also identified the problem of convicts who seek to have their convictions reviewed over and over and over again.

Senate Bill 2227 relates to post-conviction relief. After a person has been found guilty or pled guilty to a crime and has lost his direct appeal or allowed the direct appeal time to run without appealing, the North Dakota Century Code provides the possibility of seeking post-conviction relief. The North Dakota statutory post-conviction relief process serves a purpose similar to federal habeas corpus. Reforms in this legislation parallel Congressional reforms to habeas corpus.

I view this bill as comprehensive post-conviction relief reform. The goal is not to preclude truly meritorious claims. The goal is to cut off repetitive, stale, and meritless

claims that chew up the time and resources of prosecutors, indigent defense counsel, and the courts.

In the eyes of the law, a criminal defendant is innocent until proven guilty beyond a reasonable doubt, or until the criminal defendant pleads guilty. A criminal defendant has a wide range of constitutional rights, including the right to legal counsel. If incarceration is a possibility, a person who cannot afford a lawyer will be provided with one. A defendant who pleads guilty waives many rights, including the right to appeal unless the guilty plea has been "conditionally entered," reserving the right to appeal certain matters.

A criminal defendant who goes to trial is entitled to a fair trial, not a perfect trial. In most cases, a party has to object during trial to preserve an issue for appeal. Normally, a mistake during trial has to have made a difference if a defendant is to get relief on appeal. A party is generally entitled to "effective assistance of counsel" at trial.

"Ineffective assistance of counsel" is one of the most common claims of inmates. Truly ineffective assistance of counsel can result in a new trial. While I don't want to be overly cynical, it appears that inmates at the penitentiary believe a truly effective lawyer gets you off regardless of the law and regardless of the facts, and being in the penitentiary, therefore, is proof you have had ineffective assistance of counsel. That, however, is not the legal standard. Under the standards set by the U.S. Supreme Court, a claim of ineffective assistance of counsel faces the "heavy burden" of proving counsel's representation fell below an objective standard of reasonableness **and** counsel's deficient performance affected the outcome. Courts considering ineffective assistance of counsel claims apply a strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance."

Convicted criminal defendants are entitled to a direct appeal as a matter of right. This is the time to raise trial errors. Our Court has noted that a post-conviction relief proceeding is usually needed to address the issue of ineffective assistance of trial counsel, through an evidentiary hearing.

Generally, our Court has said that claimed errors that could and should have been brought up in a previous proceeding can't be brought up in a subsequent proceeding. If an issue could have been brought up on direct appeal, it is precluded on post-conviction relief. If something could have been brought up in a first post-conviction relief proceeding, it is precluded from being brought up in a second post-conviction relief proceeding. While this legal principle should end most criminal cases after one post-conviction relief proceeding at most, something has happened. Those convicted claim that all their lawyers in the direct appeal and all the preceding post-conviction relief proceedings were ineffective and therefore they can bring up what all those lawyers missed in another post-conviction relief proceeding. Sometimes it is all the lawyers in the three, four, five, six or more previous post-conviction relief proceedings who were allegedly ineffective.

But the U.S. Supreme Court has said there is no right to effective assistance of counsel in a post-conviction relief proceeding. While North Dakota statutory law can give rights greater than the constitutional right to counsel, we believe that in this area it should not. This bill would explicitly provide that post-conviction relief cannot be based on ineffective assistance of post-conviction relief counsel.

While so far I have focused on repetitive ineffective assistance of counsel claims, there are other problems as well.

In some cases, post-conviction relief proceedings are filed years or even decades after the alleged error. As time passes, it becomes increasingly difficult to establish what happened or why it happened years ago. This is the same rationale for statutes of limitations in other kinds of proceedings. This bill would establish statutes of limitations requiring post-conviction relief to be filed within a reasonable time.

In other cases, post-conviction relief proceedings are filed that raise the same issue which had already been decided in previous proceedings. This bill would provide that in such cases the district court can summarily dismiss the case without requiring filings and briefing by the State. A court could also summarily dismiss post-conviction relief proceedings where the statute of limitations has run, and when from the face of the post-conviction relief filing—even if what is alleged is true—it wouldn't be a basis to grant post-conviction relief.

It is important to note that this bill does provide important safety valves for various legitimate claims that could not have been brought before:

- Cases of newly discovered evidence establishing actual innocence.
- Cases when the petitioner suffered from a physical disability or mental disease preventing timely application for post-conviction relief.
- Cases of a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a North Dakota appellate court that retroactively applies to the petitioner's case.

These claims that could not have been brought before would need to brought within a specified reasonable time.

Cutting off repetitive, stale, and meritless claims will not only benefit prosecutors, indigent defense counsel, and the courts, but it will also serve the penological purpose

of having inmates face the reality of their convictions instead of holding out endless hope that they are still going to somehow beat the rap.

I would be happy to respond to any questions.

2227 (2)

Testimony to the
SENATE JUDICIARY COMMITTEE
Prepared on February 5, 2013 by
Birch Burdick, Cass County State's Attorney

Chairman Hogue and members of the Committee, I am here today in support of Senate Bill No. 2227.

The Uniform Postconviction Procedure Act, N.D.C.C. Chapter 29-32.1, provides a mechanism for additional court review of the circumstances underlying criminal convictions. This is available to a defendant in addition to opportunities for relief by direct review of the criminal conviction by the North Dakota Supreme Court, state habeas corpus relief under N.D.C.C. Chapter 32-22 (which is treated similar to a post-conviction action), federal habeas corpus relief and opportunities to correct or reduce a sentence under Rule 35 of the North Dakota Rules of Criminal Procedure.

Senate Bill No. 2227 does not eliminate an opportunity for post-conviction relief. Rather it seeks to place some reasonable limits on misuse of post-conviction relief. Let me offer you some examples of actual situations:

- Defendant 1: Convicted in 2002 of gross sexual imposition (forcible rape). The district court denied his subsequent efforts at relief in his criminal case and he lost his appeals on those rulings in 2003, 2005 and 2010. He filed six different post-conviction cases between 2002 and 2010. He was denied relief on all cases, and was denied relief by the ND Supreme Court on the two post-conviction relief cases which he appealed. He tried on multiple occasions to appeal to the United States Supreme Court, to no avail. As an aside, for good measure, he separately sued me and various members of the ND Department Corrections and Rehabilitation on multiple occasions.
- Defendant 2: He pled guilty in 2002 to theft and insurance fraud. He did not appeal this conviction. In 2006 he was found guilty of murder. The ND Supreme Court upheld his murder conviction. In 2008 he filed post-conviction claims, but the district court him relief. The ND Supreme Court upheld that denial. In 2012 he again filed post-conviction claims on his murder conviction and the district court denied him relief. That is currently on appeal. In 2012 he also filed post-conviction claims on his 2002 conviction (to which he pled guilty). The district court denied him relief and it appears he is appealing that ruling as well.
- Defendant 3: He pled guilty in 1983 to criminal trespass and theft. He filed post-conviction claims in 2009, looking to overturn his 26-year old conviction. The attorney who represented the defendant had long-since destroyed his file and barely remembered his client. The prosecutor who handled the case left public service long ago and the prosecution file had been destroyed in a routine manner. The detective who investigated the case had not only retired, but had died. The district court denied him any relief.
- Defendant 4: He pled guilty in 2007 in multiple cases to disorderly conduct, violation of a domestic violence protection order and theft. Five years later, in

2012, he filed 4 different cases of post-conviction claims which he could have brought long ago, all of which the district court denied.

These are just four examples of defendants who filed post-conviction claims, and sometimes multiple claims, long after their criminal convictions. Post-conviction cases are not exclusively, but are most frequently, based upon claims of ineffective assistance of criminal trial counsel. The facts regarding their legal representation at trial are unchanging with time.

Defendants also claim the law or constitution, as it applies to their case, was violated. That claim can often be handled in their direct criminal appeal. If not, those kind of claims do not require the passage of long periods of time – years and sometimes decades – to articulate. Legal interpretations of the law and constitution, as it may pertain to their case, rarely change with time. Accordingly, the one year limitations window after a "conviction becomes final", as proposed in this bill, provides a defendant ample opportunity to submit his/her post-conviction claims. The one year limitations provision is akin to a similar limitations period in federal habeas corpus cases. In the very rare circumstances in which the law substantively changes and the change is retroactively applicable, Senate Bill No. 2227 provides a relief valve on the limitations time. It also provides a relief valve on the limitations time for circumstances where a defendant has suffered physical or mental disabilities precluding a timely assertion of a claim and for the existence of newly discovered evidence.

Senate Bill No. 2227 also gives the courts express authority to unilaterally deal with meritless cases and repetitive claims. Furthermore, although the bill maintains the ability to claim ineffective assistance of *trial* counsel, it eliminates claims of ineffective assistance of *post-conviction* counsel. The ND Supreme Court has said that ineffective assistance of counsel claims often warrant evidentiary hearings. Those hearings can take considerable time and resources. If a defendant can claim ineffective assistance of post-conviction counsel, conceivably there is no end to his post-conviction cases - an unhappy defendant could perpetually claim poor legal representation at the previous post-conviction proceeding. This change in our law would reflect the same exclusion found in the federal habeas corpus law.

The post-conviction relief statutes, as currently enacted, provide criminal defendants a near-endless opportunity to file frivolous post-conviction claims that burden prosecutors, appointed defense counsel and courts. Senate Bill No. 2227 does not eliminate post-conviction remedies. Rather the bill tailors the timeframes within which to file claims, while continuing to provide a relief valve on time when warranted. That tailoring allows sufficient time to file valid post-conviction claims, but eliminates an unwarranted delay in dealing with such claims.

For these reasons I ask your support of Senate Bill No. 2227. Thank you.

(3)

SENATE BILL 2227

Testimony by Commission on Legal Counsel for Indigents
Senate Judiciary Committee, February 5, 2013

Good Morning. My name is Jean Delaney, and I am the Deputy Director of the Commission on Legal Counsel For Indigents. The Commission provides legal services for indigent parties in criminal and juvenile matters in district and appellate courts in North Dakota. The Commission provides attorneys for persons who wish to contest their criminal convictions by way of filing an "application for post-conviction relief" under NDCC Chapter 29-31.1. This often occurs after an appeal to the North Dakota Supreme Court was unsuccessful.

Defendants are filing more post conviction relief petitions under Chapter 29-32.1 of the Century Code each year. Most of them are indigent, and the Commission will end up providing attorneys to them. Our case numbers show that in 2011, for example, we had 64 post conviction case assignments. In 2012, we had 74, which is approximately a fourteen percent increase. We anticipate these numbers will continue to rise.

We do get a fair number of cases that involve repeat or frivolous claims – claims that have been made and ruled on before by the court and denied, or claims that involve patently frivolous allegations.

Our mission is to provide quality legal services to the indigent clientele at a reasonable cost. We want to protect the rights of the indigent client, and believe we do that. We also recognize that frivolous post conviction filings results in a financial strain on budgets and cause an emotional strain on attorneys taking on the cases when they know there is no real basis for the client's claim.

We understand the impetus behind the proposal to amend the statute as suggested by the Supreme Court. However, we want to insure, as much as humanly possible, that a person, whether indigent or not, has a right to contest a wrongful or flawed conviction without unnecessary limitations.

We are proposing some changes to the bill that we believe will further insure a

defendant has a reasonable opportunity to adequately contest a wrongful or flawed conviction.

The first change we propose involves the issue of scientific evidence, including, but not limited to, DNA testing. There are concerns that in the future, there may be types of testing of evidence not available now or when the trial was held, and that this new type of testing could exonerate an individual convicted of a crime. We are concerned that the such evidence might not fall under "newly discovered" as set forth in 3 (a) (1), as the evidence itself, might not be considered "newly discovered." Therefore, we are proposing that under §29-32.1-01(3) (a), on page 2 of the bill, that there be a fourth reason a court may consider an application for relief brought outside the statute limitations. The language we are proposing for this additional sub-section is:

> 4. That the application (petition) alleges that scientific testing and subsequent results, including, but not limited to, forensic DNA testing, if proved and viewed in light of the evidence as a whole, would establish that the applicant (petitioner) did not engage in the criminal conduct for which the applicant (petitioner) was convicted.

The second change we propose is to delete the new subsection 2 under section 29-32.1-09 (on page 3 of the bill). In order to prevail on a claim of ineffective assistance of counsel, the applicant must prove that the attorney's performance was deficient – that is that the representation fell below an objective standard of reasonableness, and that deficient performance prejudiced the client. If there is a right to counsel, shouldn't that right be to counsel whose performance isn't so deficient as to prejudice the client? The Commission works hard to make sure its attorneys are well trained and provide appropriate representation. We would rather that the representation provided by our attorneys and by privately retained attorneys would never be so deficient as to prejudice the client. But if it ever is, we hope that there would be a remedy for the client.

We also want to state that we support the new subsection 1 under section 29-32.1-09. As mentioned earlier, we do get a fair number of cases that involve repeat or frivolous claims.

We would be happy to work with the bill sponsors to modify the language of the bill. I am happy to answer any of your questions.

Dated this 5th day of February

H. Jean Delaney, Deputy Director
Commission on Legal Counsel For Indigents
P.O. Box 149, Valley City, ND 58072
701 845-8632
jedelaney@nd.gov

Re: S.B. 2227 – Relating to comprehensive post-conviction relief

Senator Sitte,

I am sending this email message to you and the other members of the Senate Judiciary Committee.

We want to provide information that was requested, respond to some comments made at the hearing, and suggest an amendment in response to testimony.

2012 Appeals

The Supreme Court Clerk's office reports that post-conviction relief appeals were filed in 49 cases in 2012. In 2012, the North Dakota Supreme Court issued 25 formal opinions relating to post-conviction relief. The difference reflects that some of the 2012 opinions would be in cases filed in 2011 while some of the 2012 filed cases will be decided in 2013. Also some opinions dealt with more than one case, and occasionally a party filing an appeal with fail to proceed or will ask that an appeal be dismissed.

Of the 25 formal opinions, 23 affirmed the dismissal of the application for post-conviction relief by the district court. One opinion sent a case back for the district court to make an additional finding and one sent a case back for clarification of the decision. None of those opinions reflected post-conviction relief having been actually granted.

Follow-up Points from the Hearing

- One speaker expressed concern about the statute of limitations in the bill cutting off review of an illegal sentence. While review of a claimed illegal sentence could take place under the post-conviction relief statute, North Dakota Rules of Criminal Procedure, Rule 35(a)(1), will continue to provide that an illegal sentence may be corrected at any time.

- As for ineffective assistance of counsel, the bill would not preclude such claims relating to trial counsel or relating to the direct-appeal counsel. The bill would preclude ineffective assistance of counsel claims relating to previous post-conviction relief counsel. Claiming all previous post-conviction relief counsel have been ineffective is the bootstrap for repetitive, abusive, and ultimately unproductive proceedings.

- The safety valve provision relating to physical disability or mental disease that precluded timely post-conviction relief application is not in the federal habeas corpus law. The provision was suggested by a North Dakota state's attorney. If the provision remains in the bill, the standard would presumably be similar to the standard for whether a person is competent to stand trial.

- We have no objection to an amendment to make clear the recent DNA test results would be considered newly discovered evidence. We are offering a suggested amendment language.

Proposed Amendment

Here is our proposed amendment that we are also sending to your committee on paper:

PROPOSED AMENDMENT TO SENATE BILL NO. 2227

Page 2, line 17, after "evidence" insert ", including DNA evidence,"

Renumber accordingly

Please let me know if further information is needed.

Thank you.

Dale Sandstrom, Chair, Judicial Conference Committee on Legislation

(1)

Hogue, David J.

From: Sandstrom, Justice Dale V. <DSandstrom@ndcourts.gov>
Sent: Tuesday, February 12, 2013 12:58 PM
To: Hogue, David J.
Subject: RE: S.B. 2227 – Relating to comprehensive post-conviction relief

Importance: High

Senator Hogue,

Thank you very much.

Please let me know if you would like me to come down.

Dale

From: Hogue, David J. [mailto:dhogue@nd.gov]
Sent: Tuesday, February 12, 2013 12:57 PM
To: Sandstrom, Justice Dale V.
Subject: RE: S.B. 2227 – Relating to comprehensive post-conviction relief

Ok. We did add the proposed subsection 4 as an additional exception to the one year statute. The amendment is contained in the testimony of Ms. Delaney. We'll try to revisit this issue this afternoon.

David Hogue

From: Sandstrom, Justice Dale V. [mailto:DSandstrom@ndcourts.gov]
Sent: Tuesday, February 12, 2013 9:40 AM
To: Hogue, David J.
Subject: S.B. 2227 – Relating to comprehensive post-conviction relief

Re: S.B. 2227 – Relating to comprehensive post-conviction relief

Senator Hogue,

I am sending this email message to you and the other members of the Senate Judiciary Committee.

We want to provide information that was requested, respond to some comments made at the hearing, and suggest an amendment in response to testimony.

2012 Appeals

Senate Bill 2227
House Judiciary Committee
Testimony of Justice Dale Sandstrom
March 20, 2013

Mr. Chairman and members of the committee, I'm Dale Sandstrom, a Justice of the Supreme Court. I regret that I can't be present to personally testify before you in my capacity as chair of the committee on legislation of the North Dakota Judicial Conference. The Judicial Conference is a statutory body which includes all Supreme Court Justices, all District Judges, all Surrogate Judges, the Attorney General, the Dean of the Law School, the Clerk of the Supreme Court, two Municipal Judges, and five members of the Bar engaged in the practice of law. One responsibility of the Judicial Conference is evaluating legislation and making recommendations for the improvement of the administration of justice.

I wish to express our support of Senate Bill 2227. We appreciate the efforts of Senator Ron Carlisle and the other sponsors of this legislation. The need for the legislation was identified by the Judicial Conference, which voted unanimously to seek its introduction. Our Court has also identified the problem of convicts who seek to have their convictions reviewed over and over and over again.

Senate Bill 2227 relates to post-conviction relief. After a person has been found guilty or pled guilty to a crime and has lost his direct appeal or allowed the direct appeal time to run without appealing, the North Dakota Century Code provides the possibility of seeking post-conviction relief. The North Dakota statutory post-conviction relief process serves a purpose similar to federal habeas corpus. Reforms in this legislation parallel Congressional reforms to habeas corpus.

I view this bill as comprehensive post-conviction relief reform. The goal is not to preclude truly meritorious claims. The goal is to cut off repetitive, stale, and meritless

claims that chew up the time and resources of prosecutors, indigent defense counsel, and the courts.

In the eyes of the law, a criminal defendant is innocent until proven guilty beyond a reasonable doubt, or until the criminal defendant pleads guilty. A criminal defendant has a wide range of constitutional rights, including the right to legal counsel. If incarceration is a possibility, a person who cannot afford a lawyer will be provided with one. A defendant who pleads guilty waives many rights, including the right to appeal unless the guilty plea has been "conditionally entered," reserving the right to appeal certain matters.

A criminal defendant who goes to trial is entitled to a fair trial, not a perfect trial. In most cases, a party has to object during trial to preserve an issue for appeal. Normally, a mistake during trial has to have made a difference if a defendant is to get relief on appeal. A party is generally entitled to "effective assistance of counsel" at trial.

"Ineffective assistance of counsel" is one of the most common claims of inmates. Truly ineffective assistance of counsel can result in a new trial. While I don't want to be overly cynical, it appears that inmates at the penitentiary believe a truly effective lawyer gets you off regardless of the law and regardless of the facts, and being in the penitentiary, therefore, is proof you have had ineffective assistance of counsel. That, however, is not the legal standard. Under the standards set by the U.S. Supreme Court, a claim of ineffective assistance of counsel faces the "heavy burden" of proving counsel's representation fell below an objective standard of reasonableness **and** counsel's deficient performance affected the outcome. Courts considering ineffective assistance of counsel claims apply a strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance."

Convicted criminal defendants are entitled to a direct appeal as a matter of right. This is the time to raise trial errors. Our Court has noted that a post-conviction relief proceeding is usually needed to address the issue of ineffective assistance of trial counsel, through an evidentiary hearing.

Generally, our Court has said that claimed errors that could and should have been brought up in a previous proceeding can't be brought up in a subsequent proceeding. If an issue could have been brought up on direct appeal, it is precluded on post-conviction relief. If something could have been brought up in a first post-conviction relief proceeding, it is precluded from being brought up in a second post-conviction relief proceeding. While this legal principle should end most criminal cases after one post-conviction relief proceeding at most, something has happened. Those convicted claim that all their lawyers in the direct appeal and all the preceding post-conviction relief proceedings were ineffective and therefore they can bring up what all those lawyers missed in another post-conviction relief proceeding. Sometimes it is all the lawyers in the three, four, five, six or more previous post-conviction relief proceedings who were allegedly ineffective.

But the U.S. Supreme Court has said there is no right to effective assistance of counsel in a post-conviction relief proceeding. While North Dakota statutory law can give rights greater than the constitutional right to counsel, we believe that in this area it should not. This bill would explicitly provide that post-conviction relief cannot be based on ineffective assistance of post-conviction relief counsel.

While so far I have focused on repetitive ineffective assistance of counsel claims, there are other problems as well.

In some cases, post-conviction relief proceedings are filed years or even decades after the alleged error. As time passes, it becomes increasingly difficult to establish what happened or why it happened years ago. This is the same rationale for statutes of limitations in other kinds of proceedings. This bill would establish statutes of limitations requiring post-conviction relief to be filed within a reasonable time.

In other cases, post-conviction relief proceedings are filed that raise the same issue which had already been decided in previous proceedings. This bill would provide that in such cases the district court can summarily dismiss the case without requiring filings and briefing by the State. A court could also summarily dismiss post-conviction relief proceedings where the statute of limitations has run, and when from the face of the post-conviction relief filing—even if what is alleged is true—it wouldn't be a basis on which to grant post-conviction relief.

It is important to note that this bill does provide important safety valves for various legitimate claims that could not have been brought before:

- Cases of newly discovered evidence establishing actual innocence, including DNA evidence.
- Cases when the petitioner suffered from a physical disability or mental disease preventing timely application for post-conviction relief.
- Cases of a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a North Dakota appellate court that retroactively applies to the petitioner's case.

These claims that could not have been brought before would need to brought within a specified reasonable time.

Cutting off repetitive, stale, and meritless claims will not only benefit prosecutors, indigent defense counsel, and the courts, but it will also serve the penological purpose of having inmates face the reality of their convictions instead of holding out endless hope that they are still going to somehow beat the rap.

Thank you.

#2

North Dakota 63rd Legislative Assembly
HOUSE JUDICIARY COMMITTEE
Hon. Rep. Kim Koppelman, Chair
Hearing on March 20, 2013

Re: Testimony in Support for Senate Bill 2227

Chairman Koppelman and members of the Committee, I am Birch Burdick, Cass County State's Attorney. I support Senate Bill No. 2227.

The Uniform Postconviction Procedure Act, N.D.C.C. Chapter 29-32.1, provides a mechanism for additional court review of the circumstances underlying criminal convictions. This mechanism is in addition to a defendant's opportunity to appeal the criminal conviction to the North Dakota Supreme Court, state habeas corpus relief under N.D.C.C. Chapter 32-22 (which is treated similar to a post-conviction action), federal habeas corpus relief and applying to correct or reduce a sentence under Rule 35 of the North Dakota Rules of Criminal Procedure.

Senate Bill No. 2227 does not eliminate post-conviction relief. Rather it places reasonable limits on misuse of the process by setting time limits within which defendants may bring a claim. In so doing, it removes the near-endless opportunity for defendants to file frivolous post-conviction claims that burden prosecutors, appointed defense counsel and courts.

- Current misuse of the process: Numerous defendants file for post-conviction relief many years after their underlying criminal conviction. I have provided four Cass County examples in Attachment A (in one case the defendant waited 26 years to make the claim).

- Ineffective assistance of trial counsel: Post-conviction cases are not exclusively, but are most frequently, based upon a claim of ineffective assistance of their trial counsel. The facts regarding their legal representation at trial do not change with time. They do not require years to develop. To the contrary, the details of that representation tend to become less clear as time passes.

- Safety valves in the law: Defendants sometimes claim the law or constitution, as applied to their case, was violated. That claim can often be handled in their direct criminal appeal. If not, the claim does not require the passage of long periods of time – years and sometimes decades – to articulate. Legal interpretations of the law and constitution, as it may pertain to their case, rarely change with time. Accordingly, the one year limitations window after a "conviction becomes final", as proposed in this bill, provides a defendant ample opportunity to submit his/her post-conviction claims. The one year limitations provision is akin to a similar limitations period in federal habeas corpus cases. But there are also *safety valves* in the bill. In the very rare circumstance in which the law substantively changes and the change is retroactively applicable, Senate

Bill No. 2227 allows a defendant to raise that claim after the 1-year period. It also provides a *safety valve* where a defendant has suffered physical or mental disabilities precluding the timely assertion of a claim and for the existence of newly discovered evidence.

- Meritless and repetitive claims: Senate Bill No. 2227 gives courts express authority to unilaterally deal with meritless cases and repetitive claims.

- Eliminates one type of claim: Senate Bill No. 2227 maintains the ability to claim ineffective assistance of *trial* counsel, but eliminates claims of ineffective assistance of *post-conviction* counsel. The ND Supreme Court has said that ineffective assistance of counsel claims often warrant evidentiary hearings. Those hearings can take considerable time and resources. If a defendant can claim ineffective assistance of post-conviction counsel, conceivably there is no end to his post-conviction cases - an unhappy defendant could perpetually claim poor legal representation at the previous post-conviction proceeding. This change in our law would reflect the same exclusion found in the federal habeas corpus law.

Senate Bill No. 2227 tailors the timeframes within which to file claims, while continuing to provide safety valves on time when warranted. That tailoring allows sufficient time to file valid claims, but eliminates unwarranted delays.

For these reasons I ask your support of Senate Bill No. 2227. Thank you.

Attachment A

Here are four examples from Cass County where defendants have filed post-conviction claims long after their convictions.

- Defendant 1: Convicted in 2002 of gross sexual imposition (forcible rape). The district court denied his subsequent efforts at relief in his criminal case and he lost his appeals on those rulings in 2003, 2005 and 2010. He filed six different post-conviction cases between 2001 and 2010. He was denied relief on all cases, and was denied relief by the ND Supreme Court on the two post-conviction relief cases which he appealed. He tried on multiple occasions to appeal to the United States Supreme Court, to no avail. As an aside, for good measure, he separately sued me and various members of the ND Department Corrections and Rehabilitation on multiple occasions.

- Defendant 2: He pled guilty in 2002 to theft and insurance fraud. He did not appeal this conviction. In 2006 he was found guilty of murder. The ND Supreme Court upheld his murder conviction. In 2008 he filed post-conviction claims, but the district court him relief. The ND Supreme Court upheld that denial. In 2012 he again filed post-conviction claims on his murder conviction and the district court denied him relief. That is currently on appeal. In 2012 he also filed post-conviction claims on his 2002 conviction (to which he pled guilty).

- Defendant 3: He pled guilty in 1983 to criminal trespass and theft. He filed post-conviction claims in 2009, looking to overturn his 26-year old conviction. The attorney who represented the defendant had long-since destroyed his file and barely remembered his client. The prosecutor who handled the case left public service long ago and the prosecution file had been destroyed in a routine manner. The detective who investigated the case had not only retired, but had died. The district court denied him any relief.

- Defendant 4: He pled guilty in 2007 in multiple cases to disorderly conduct, violation of a domestic violence protection order and theft. Five years later, in 2012, he filed 4 different post-conviction cases, all of which he could have brought long ago, all of which the district court denied.

3-20-13 - #3

Chairman Koppelman and members of the Judiciary committee, I am Rep. Vernon Laning from District 8.

I'm here today to propose an amendment to SB 2227 dealing with post-conviction proceedings.

The specific amendment as I handed out, would change the one year term on lines 8 and 28 of page 2 to a two year term for a post-conviction application.

My wife and I have a friend presently incarcerated at the James Valley Correctional Facility in Jamestown and attempting to go through this very process. I only mention that to state we have been observing how long this process requires. First of all an inmate will probably not even consider the application for several months after he has been locked up. Then it can require several more months to request and receive the necessary legal counsel to carry the case forward. Requesting and receiving the necessary documentation to justify his request for a new hearing can then require more months.

My intention here is to point out, that a one year time frame may not be a realistic time frame for a legitimate request.

However, at this point I would need to ask several questions of a legal nature. I truly believe a bill of this type of bill is necessary but I question the time element. There needs to be a practical end to appeals to avoid wasting the time of legal resources. Under section 1 sub-para 2.a I am unaware of the Supreme Court appeal time frame. It's possible my concern may already be addressed. I had an email from Justice Sandstrom regarding this but I'm not sure of the applicability. Secondly Section 2 sub- para 2 which has been in and out of this bill is a second question of applicability. Ineffective assistance is a reality especially in some instances of state provided counsel. Does this paragraph remove that option for an inmate? If so, this paragraph should again be removed. There are definitely cases of ineffective legal assistance.

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4

SENATE BILL 2227

Testimony by Commission on Legal Counsel for Indigents
House Judiciary Committee, March 20, 2013

Good Morning. My name is Jean Delaney, and I am the Deputy Director of the Commission on Legal Counsel For Indigents. The Commission provides legal services for indigent parties in criminal and juvenile matters in district and appellate courts in North Dakota. The Commission provides attorneys for indigent persons who wish to contest their criminal convictions in "applications for post-conviction relief" under NDCC Chapter 29-32.1.

Defendants are filing more post conviction relief petitions under Chapter 29-32.1 each year. Most of them are indigent, and the Commission will end up providing attorneys to them. Our case numbers show that in 2011, for example, we had 64 post conviction case assignments. In 2012, we had 74, which is approximately a fourteen percent increase. We anticipate these numbers will continue to rise.

We do get a fairly large number of cases that involve repeat or frivolous claims – claims that have been made and ruled on before by the court and denied, or claims that involve patently frivolous allegations.

Our mission is to provide quality legal services to our clients at a reasonable cost. We want to protect the rights of the indigent client, and believe we do that. We also recognize that frivolous post conviction filings result in a financial strain on budgets and cause an emotional strain on attorneys taking on the cases when they know there is no real basis for the client's claim.

We understand the impetus behind the proposal to amend the statute, and have no objection to a large portion of the bill. However, we want to insure that a person, whether indigent or not, has a right to contest a wrongful conviction.

The bill imposes a statute of limitations on which the application for relief may be brought. There are several exceptions to the statute of limitations,

including when "[t]he petition alleging the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." An application alleging this must be filed within one year of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence...."

When this bill was initially before the Senate Judiciary Committee, it did not include the phrase, "including DNA evidence" in the newly discovered evidence exception (lines 17-18 on Page 2 of the engrossed bill). I testified in support of adding an additional subsection, a whole additional exception to the statute of limitations for allegations regarding DNA and other scientific evidence. It was, and still is, a concern that a court might not consider this evidence to be "newly discovered" and thus not considered by a court to be under the exception to the statute of limitations under section 29-32.1-01 (3) (a). Will DNA evidence be considered "newly discovered" if DNA testing was done on the evidence prior to trial, and now more sensitive testing can be done on the same evidence? If it will not, I would respectfully request that an additional exception be added to subsection (3), permitting the court to consider an application for relief when the application alleges that scientific testing establishes that the applicant did not engage in the criminal conduct for which the applicant was convicted.

An additional concern was recently brought to our attention by the Innocence Project. The Innocence Project is a national organization which was founded to assist wrongfully convicted individuals who could be proven innocent through DNA testing. Its goal is not to get people off on technicalities, but rather to exonerate innocent persons. The concern raised has to do with the requirement that an application alleging that DNA evidence exonerates a person must be brought within one year of the date the petitioner "discovers or reasonably should have discovered" the existence of the new evidence. Should there be any time limit on bringing forth newly discovered evidence which

conclusively shows the defendant did not commit the crime? Lisa Burger, of the Innocence Project of Minnesota, told us that an exoneree will spend, on average, 13.6 years in prison before being found innocent. When should that inmate "reasonably discover" advances in the technology surrounding DNA evidence?

When this bill was initially before the Senate Judiciary Committee, I testified in support of deleting the new subsection 2 under section 29-32.1-09 (on page 3 of the engrossed bill), which deals with claims of ineffective assistance of post-conviction counsel. In order to prevail on a claim of ineffective assistance of counsel, the applicant must prove that the attorney's performance was deficient – that is that the representation fell below an objective standard of reasonableness, and that deficient performance prejudiced the client. If there is a right to counsel, shouldn't that right be to counsel whose performance isn't so deficient as to prejudice the client? The Commission works hard to make sure its attorneys are well trained and provide appropriate representation. We would rather that the representation provided by our attorneys and by privately retained attorneys would never be so deficient as to prejudice the client. But if it ever is, we hope that there would be a remedy for the client, at least being able to bring such a claim within the statute of limitations.

We also want to state that we support the new subsection 1 under section 29-32.1-09. As mentioned earlier, we do get a fair number of cases that involve repeat or frivolous claims.

Thank you for your time. I stand available to answer any of your questions.

Dated this 20th day of March, 2013

H. Jean Delaney, Deputy Director
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S.B. 2227 – Relating to comprehensive post-conviction relief

Sandstrom, Justice Dale V. [DSandstrom@ndcourts.gov]
Sent: Monday, April 01, 2013 10:44 AM
To: Delmore, Lois M.

Re: S.B. 2227 – Relating to comprehensive post-conviction relief

Representative Delmore,

I am sending this email message to you and the other members of the House Judiciary Committee.

We are not seeking to preclude legitimate applications for things like actual innocence. We are trying to stop repetitive, burdensome, and ultimately unproductive claims that chew up the resources of prosecutors, defense lawyers, and the courts.

I would like to offer our comments on the amendments I understand have been suggested by Jean Delaney. Most of the proposed amendments were considered and rejected by the Senate Judiciary Committee.

- We have no objection to the technical changes relating to the variations on "petitioner" versus "applicant." We oppose the other proposed amendments.
- We are concerned that proposed changes would potentially open the door to "junk science" and eliminate the requirement that those claiming new evidence must seek relief promptly after discovering it. As was recently noted during oral argument at the United States Supreme Court, there is a substantial difference between actual innocence and claims of actual innocence. Those claiming new evidence should not be able to sit on the claimed new evidence until those who could disprove the claim are dead or unavailable.
- The greatest area of abuse under post-conviction relief proceedings is claims that all prior post-conviction relief lawyers were ineffective. The statute should clearly provide the ability of the court to summarily dismiss such claims. Although striking the sentence "An applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter." would not create a constitutional right where none exists, the deletion would be confusing.

We also believe that the one-year period from the various triggering events is reasonable and most adequate.

- This one-year period parallels the period adopted in federal habeas corpus reform.
- Once we get beyond the initial period (as reflected by the proposed statutes of limitations), post-convictions relief filings are seldom ultimately productive.
- The statutes of limitation are important here as in other cases because as time goes by memories fade and witnesses become unavailable.

No one wants an actually innocent person to sit in prison. That's why our Court recently adopted a rule placing a burden on prosecutors to undo convictions when there is clear and convincing evidence of innocence.

If your committee would like me to appear, I am available anytime today—and would seek to be available any other time.

Thank you for your consideration.

Dale Sandstrom, Chair, Judicial Conference Committee on Legislation