1999 DRAFTING REQUEST

Senate Substitute Amendment (SSA-AB497)

Received: **03/04/2000**

Received By: **olsenje**

Wanted: **03/07/2000**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Dan**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact:

Alt. Drafters: **mdsida**

Subject: **Criminal Law - procedure**
Criminal Law - sexual assault

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Time limits for sexual assault prosecutions; postconviction DNA testing; evidence preservation

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
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Senate Sub.

AB 497

a) Delete fingerprint records (AA1 to ASA1)

b) Add postconviction motion material + preservation of evidence + notice to D

c) Prob. cause hrg that Bio ev. shows DNA of D

Tells time

Upon match, 1 yr to file

w/in 6 yr S.O.L.

Also, State must show they've tried to do a match

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7 PRINTED PAGES

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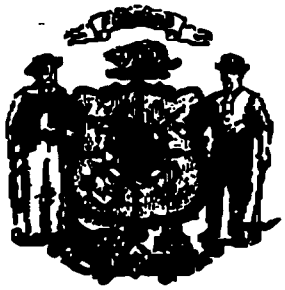

Senator Gary R. George
State of Wisconsin
Sixth Senate District

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P. O. Box 7882
Madison, WI 53707-7882
(608) 266-2500

4011 W. Capitol Drive
Milwaukee, WI 53216
(414) 445-9436
(800) 362-9472

Facsimile Cover Sheet

Please deliver to the individual named below.

To:	Jefren Olsen, Legislative Reference Bureau
Phone:	(608) 266-8906
Fax:	(608) 264-8522
From:	Dan Rossmiller, Chief of Staff
Number of pages:	3, including cover sheet
Message:	Attached is a copy of the suggested AB 497 amendment language from Ray Dall'Osto and the Criminal Law Section regarding a post-conviction motion for DNA testing. We would like to incorporate the language on preservation of biological evidence from the Leahy bill and an appropriation from DOC. Please call me (6-2500) if you have any questions. Thank you.

AMENDMENT FOR AB497

974.07 Motion for Fingerprint or Forensic DNA Testing

(1) At any time after conviction, a defendant in custody under sentence of a court may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that:

(a) Is related to the investigation or prosecution that resulted in the judgment of conviction;
(b) Is in the actual or constructive possession of any government agencies (local, state or federal); and
(c) Was not previously subjected to fingerprint or forensic DNA testing, or can be subjected to retesting with new scientific techniques that provide a reasonable likelihood of more accurate and probative results.

(2) Reasonable notice of a motion brought under this section shall be served upon the State by defendant. The court shall notify the State of any application or motions made under this section and shall afford the State an opportunity to respond.

(3) Upon receiving notice of an application or motion under this subsection, the State shall take such steps as are necessary to ensure that any remaining fingerprint evidence or biological materials that were secured in connection with the case by local, state or federal government agencies is preserved pending the completion of the proceedings under this section.

(4) The court shall order fingerprint or forensic DNA testing pursuant to an application or motion made under this section if it determines that:

(a) The defendant presents a prima facie case that:

(1) Testing may produce noncumulative, exculpatory evidence relevant to the claim of the defendant that he or she was wrongfully convicted or sentenced;

(2) Identity was an issue in the investigation, trial or disposition of the case;

(3) The evidence to be tested has been subject to a chain of custody reasonably sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(b) The result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence or wrongful conviction;

(c) The testing requested employs a scientific method generally accepted within the relevant scientific community.

(5) The court may impose reasonable conditions on any testing ordered which protects the State's interest in the integrity of the evidence and the testing process. When appropriate and upon the stipulation of the defendant and the State, the State Crime Laboratory pursuant to sec. 165.75, .83 and .84 can do the testing ordered.

(6) The cost of the fingerpr[redacted]or forensic DNA testing that is ordered by the court shall be borne by the State or the defendant, as the court may order in the interests of justice, if it is shown that the defendant is not indigent and possesses the means to pay for the testing.

(7) A court considering a motion brought under this section may refer the defendant to the State Public Defender for an indigency evaluation and consideration of appointment of counsel under sec. 977.08(4)(j).

State crime lab? clerk?

19.21 - ANNOT.

*Under sub. (1), district attorneys must **preserve** indefinitely papers of a documentary nature **evidencing** activities of prosecutor's office. 68 Atty. Gen. 17.*

165.75(3)(a)

(a) The purpose of the laboratories is to establish, **maintain** and operate crime laboratories to provide technical assistance to local law enforcement officers in the various fields of scientific investigation in the aid of law enforcement. Without limitation because of enumeration the laboratories shall **maintain** services and employ the necessary specialists, technical and scientific employes for the recognition and proper **preservation**, marking and scientific analysis of **evidence** material in the investigation and prosecution of crimes in such fields as firearms identification, the comparison and identification of toolmarks, chemistry, identification of questioned documents, metallurgy, comparative microscopy, instrumental detection of deception, the identification of fingerprints, toxicology, serology and forensic photography.

757.293(2)

(2) A member of the state bar shall **maintain** and **preserve** for at least 6 years complete records pertaining to client's funds or assets received by him or her which are required to be distributed or segregated by sub. (1). The records shall include his or her trust fund checkbooks and the stubs or copies thereof, statements of the account, vouchers and canceled checks or share drafts thereon or microfilm copies thereof and his or her account books showing dates, amounts and ownership of all deposits to and withdrawals by check or share draft or otherwise from the accounts, and all of the records shall be deemed to have public aspects as related to such member's fitness to practice law. Upon request of the board of attorneys professional responsibility, or upon direction of the supreme court, the records shall be submitted to the board for its inspection, audit, use and **evidence** under such conditions to protect the privilege of clients as the court may provide. The records, or an audit thereof, shall be produced at any disciplinary proceeding involving the attorney wherever material. Failure to produce the records shall constitute unprofessional conduct and grounds for disciplinary action.

905.10(3)(b)

(b) *Testimony on merits.* If it appears from the **evidence** in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the

judge may make an order that justice requires. **Evidence** submitted to the judge shall be sealed and **preserved** to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

908.03(7)

(7) Absence of entry in records of regularly conducted activity. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and **preserved**, unless the sources of information or other circumstances indicate lack of trustworthiness.

908.03(10)

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and **preserved** by a public office or agency, **evidence** in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

968.30(7)(a)

(a) The contents of any wire, electronic or oral communication intercepted by any means authorized by ss. 968.28 to 968.37 shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire, electronic or oral communication shall be filed with the court issuing the order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and **preserved** for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or **evidence** derived therefrom under s. 968.29 (3).

LEGISLATIVE PROPOSAL FOR INNOCENCE PROTECTION

The Wisconsin Innocence Project,
Frank J. Remington Center,
University of Wisconsin Law School

Keith Findley and John Pray, Co-Directors
Cari Anne Renlund and Ted Wisnefski, Law Students

Joint Committee Hearings
Committee on Corrections and the Courts
&
Committee on Criminal Justice

March 1, 2000

SUMMARY

In the last decade, new DNA testing has exonerated at least 64 people in the United States who were wrongly convicted of serious crimes. These DNA exonerations have highlighted as never before that our criminal justice system does make mistakes. And they have demonstrated the necessity of having mechanisms for preserving and testing biological evidence even after conviction, and for raising claims of actual innocence long beyond the current time limits for seeking a new trial based on newly discovered evidence. Because the truth-finding function of the criminal justice system should always be paramount, the Innocence Project of the Frank J. Remington Center at the University of Wisconsin Law School proposes legislative improvements to assist in this process.

We suggest legislation that will achieve four primary objectives at this time:

1. Mandate preservation of biological evidence in criminal cases.

2. Create a statutory procedure for obtaining DNA testing of biological evidence in postconviction cases, without regard for the defendant's ability to pay, where the testing might prove innocence.

3. Eliminate the current one-year statute of limitations for seeking a new trial based on newly discovered evidence.

4. Update the wrongful conviction compensation statute, which presently caps compensation at $5,000 per year up to total of $25,000, by increasing the compensation caps.

Wisconsin statutes currently allow a convicted individual just one year from the date of conviction to challenge that conviction on the basis of newly discovered evidence. *See* Wis. Stat. § 805.16(4). New evidence, however, is almost never discovered within this time limit. New advances in DNA technology that enhance the ability to obtain DNA evidence

have and will likely continue to be developed years after conviction. Additionally, Wisconsin does not mandate the preservation of biological evidence in criminal cases, and our statutes do not provide a method for the convicted to obtain access to biological evidence after conviction.

Both New York and Illinois have responded to the need for postconviction DNA testing by enacting appropriate legislation. Both states have adopted statutes that eliminate time restrictions for producing DNA evidence after a conviction, and provide that the state must allow—and, in cases of indigents, pay for—postconviction DNA testing if the testing might prove innocence.

Federal legislation also has recently been proposed by Senatory Leahy, and cosponsored by Senator Feingold and others, that addresses all four of those objectives. The federal Innocence Protection Act of 2000 allows a convicted individual to test and present, at government expense if indigent, noncumulative, exculpatory, biological evidence at any time after conviction, thus eliminating an unduly restrictive time bar. The bill also provides for mandatory preservation of biological evidence upon request of the defendant. The government can destroy the evidence only upon notice to the defendant. The legislation also conditions federal grant money to the states on state adoption of similar rules for obtaining. testing, and presenting without time limitation new evidence that proves innocence. Finally, the statute increases compensation for wrongful convictions to $50,000 per year.

We would like to see legislation in Wisconsin, which is similar to the pending federal legislation. Attached is a brief explanation of our objectives and possible legislation.

TABLE OF CONTENTS

I. Objectives

The following are four primary goals we seek to achieve through appropriate legislation in Wisconsin:

1. Mandate preservation of biological evidence in criminal cases.

2. Create a statutory procedure for obtaining DNA testing of biological evidence in postconviction cases, without regard to the defendant's ability to pay, where the testing might prove innocence.

3. Eliminate the current one-year statute of limitations for seeking a new trial based on newly discovered evidence.

4. Update the wrongful conviction compensation statute, which presently caps compensation at $5,000 per year up to total of $25,000, by increasing the compensation caps.

II. Reasons for these objectives

The development of DNA (deoxyribonucleic acid) as a forensic tool over the last decade has demonstrated the need for improved mechanisms for responding to the wrongful conviction of the innocent. Our goals seek to provide better opportunities for the truly innocent to prove their innocence. Consistent with these goals is the state's interest in securing the incarceration of the true perpetrators of crimes. Thanks to DNA testing, we now have the ability to do just that. In recent years DNA testing has become an increasingly reliable tool for convicting criminal perpetrators and exonerating those wrongfully convicted. And DNA testing methods continue to improve; methods now exist to obtain highly discriminating results from degraded, contaminated, or minute biological samples where just a few years ago such results were impossible.

Wisconsin lacks an adequate statutory method for providing postconviction relief in cases of newly discovered evidence involving DNA. Wisconsin also lacks a statutory method for providing testing and retesting of biological material with newer, more powerful DNA testing procedures. There is no statutory provision in Wisconsin that mandates the preservation of such biological evidence so that it is available to those who may have been wrongfully convicted. Hence, our state needs statutory methods for utilizing this advanced technology to provide expanded postconviction relief and to assist the state in finding the true perpetrators of crime.

A. Wrongful convictions

The general presumption that convictions are correct has been weakened significantly. In the last ten years, the United States and Canada have exonerated more that 65 individuals with the use of DNA testing. *See* S. 2073, 106th Cong. § 101(a)(5) (2000). It is simply a fact that innocent people are convicted of crimes far too often. Since 1989, DNA testing at the FBI crime lab excluded the primary suspect in 25% of sexual assaults. *See* Richard C. Dieter, Esq., "*Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*" (1997). If 25% of the accusations in sexual assaults where DNA was available were wrong, it is frightening to think how many actual convictions may be wrong, as well.

The reasons for wrongful accusations and convictions are many. They include: erroneous eyewitness identifications; poor representation and limited resources of defense attorneys; false and coerced confessions; racial prejudice; prosecutorial and police misconduct stemming from the overwhelming pressure to secure convictions; false

testimony by informants; and laboratory errors. Although eyewitness testimony and confessions are generally perceived as the most persuasive forms of evidence, their unreliability has long been well-known, and many of the DNA exonerations have come in cases in which convictions rested upon these forms of evidence.

B. Accuracy and availability of DNA testing

If done properly, DNA testing can provide powerful evidence of guilt or unassailable proof of innocence. DNA testing, however, was not widely used prior to 1994. *See* S. 2073, 106th Cong. § 101 (3). Additionally, as DNA testing advances, the possibility of testing much smaller DNA samples with more discriminating power is currently available. Hence, retesting of DNA samples that may have been inconclusive in previous years may produce conclusive results now. *See* National Commission on the Future of DNA Evidence, U.S. Dep't of Justice, "Postconviction DNA Testing: Recommendations for Handling Requests" (1999); S. 2073, 106th Cong. § 101 (3). Due to the advancing technology, DNA testing can be performed with accurate results on biological evidence that is decades old. *See id.*

C. Relief in Wisconsin is procedurally limited

Wisconsin requires that motions for new trials based on newly discovered evidence be made within one year of conviction. *See* Wis. Stat. § 805.16(4); *but see State v. Bembenek*, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1997) (recognizing that in some cases due process may require courts to consider newly discovered evidence outside the one-year window). This largely eliminates the opportunity for redress to those convicted of crimes before DNA testing was widely available.

Alternatively, under Wisconsin law, courts may have the authority to grant a new trial "in the interest of justice" under Wis. Stat. § 805.15. But relief under this statute is highly discretionary, and the statute does not make clear that courts must consider claims of actual innocence based upon new DNA evidence.

Wisconsin does have a statute that allows for postconviction relief at any time after conviction, but this statute is only available for bringing constitutional or jurisdictional claims. *See* Wis. Stat. § 974.06(1). Thus, defendants who may wish to have biological evidence tested in Wisconsin must somehow "constitutionalize" their claims in order to be heard longer than one year after their convictions. This can be a very difficult task considering that a criminal defendant does not have a statutory or constitutional right to DNA testing in Wisconsin.

Additionally, the Wisconsin statutes that provide for postconviction relief are based upon the premise that the petitioner has the newly discovered evidence in hand. In the case of DNA testing of biological samples, however, a defendant may have no means of getting access to the evidence, which is generally in the possession of a prosecutor or law enforcement agency. The Wisconsin Supreme Court has established general rules for postconviction discovery, but no statute or rule clearly provides that a defendant must be allowed access to biological evidence for DNA testing where the testing might prove innocence. *See State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). Although the National Commission on the Future of DNA Testing strongly encourages that prosecutors and defense attorneys work together to further justice in such cases, such cooperation is not uniform, and gaining access to biological evidence after a conviction can be

extremely difficult.

Moreover, even if a mechanism exists for obtaining access to biological evidence, that mechanism is of no use if the evidence is destroyed or lost before testing is requested. Wisconsin does not mandate the preservation of biological material that may serve to exonerate one who has been wrongfully convicted, even upon request. No statute or other uniform rule governs the preservation of biological evidence. The experience varies widely from jurisdiction to jurisdiction; some Wisconsin police agencies preserve biological evidence indefinitely, while in other cases the evidence is destroyed even before the direct appeal process is concluded. Once such evidence is destroyed a prisoner's ability to prove his or her innocence may be lost. Concomitantly, once the evidence is destroyed the state loses the ability to use this powerful DNA evidence to find and convict the true perpetrator. Additionally, once such evidence has been destroyed it becomes the defendant's burden to establish that the evidence was destroyed in bad faith in order to obtain judicial relief. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). Again, this is a nearly impossible burden.

D. Wisconsin's wrongful conviction compensation statute is inadequate.

Wis. Stat. § 775.05 provides a procedure for a wrongly convicted innocent person to seek compensation from the state. The statute, however, is rarely used (in its history, the state claims board has only awarded compensation twice), and the compensation caps are pitifully low. The statute provides for a maximum of $5,000 compensation per year of wrongful imprisonment, not to exceed a total of $25,000. This cap is woefully inadequate to compensate for the significant losses occasioned by a wrongful convic.

III. Legislative Proposals for Achieving these Goals

Although we have not written model legislation to assist Wisconsin in addressing our concerns, we can point legislators to at least three proposals or statutes enacted in other jurisdictions. Only two states provide statutory processes for DNA testing after a conviction has been secured. Those two states are Illinois and New York. We can also provide the recommendations made by the National Commission on the Future of DNA Testing.

A. Proposed federal legislation

Senator Leahy, together with Senators Feingold, Levin, Moynihan, and Akaka, have recently introduced a bill which seeks to address claims of innocence, known as the Innocence Protection Act of 2000. It does so by providing expanded postconviction relief in cases of newly discovered evidence. The bill allows the convicted person to petition the court for DNA testing of biological evidence at any time after conviction. *See* S. 2073, 106th Cong. § 102, ch. 156, sec. 2291 (a). The petitioner can seek both testing of that which has never been tested before and the retesting of DNA that may benefit from new testing techniques. *See id.*

The bill also provides for mandatory preservation of biological evidence upon request of the defendant. The government must preserve any biological material in its possession once it has received notice from the defendant that he/she will be seeking testing. *See* S. 2073, 106th Cong. § 102, ch. 156, sec. 2291 (b)(2). In addition, the government is required to preserve any biological material it obtained during a criminal case which led to a conviction as long as the defendant remains incarcerated. *See* S.

2073, 106th Congress § 102, ch. 156, sec. 2292. If the government wishes to destroy the evidence before that time, it may do so only by giving notice to the person incarcerated and affording the person an opportunity to request that the evidence be preserved. *See id.*

The bill also seeks to disallow the government from denying a convicted person's request for DNA testing. It provides that the government may disallow such request only if it finds that the testing would not result in noncumulative, exculpatory evidence. *See id.* It also provides that no person shall be time-barred from presenting the results of DNA evidence in court. *See id.*

The proposed legislation also provides that the cost of such DNA testing will be borne by either the government or the petitioner. The court is given the authority to order the government to pay for the testing when the applicant is indigent or otherwise cannot pay for it. *See id.* Due to the decreasing cost of DNA testing and the relatively few cases in which the testing of such biological evidence is feasible, this cost is not expected to be great. *See* S. 2073, 106th Cong. § 101 (12).

B. New York legislation

New York has adopted a statute that guarantees DNA testing in cases in which the testing might prove innocence. The statute provides no time limitation for obtaining postconviction DNA testing. The statute requires a showing by the defendant that there is a reasonable probability that the verdict would have been more favorable to the defendant if the evidence had already been tested and used at trial. The statute also provides that the state will pay for the testing when the applicant is indigent and has met particular evidentiary standards. *See* N.Y. Crim. Proc. Law Sec. 440.30(1-a). (McKinney 1999).

C. Illinois legislation

Illinois has also enacted a statute that authorizes postconviction DNA testing, which has been made all the more significant in light of its alarming death row exoneration rate. Under the Illinois law, the applicant must show that test results would produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. Upon such showing, a court must allow the testing to proceed. *See* 725 Ill. Comp. Stat. 5/116-3(a) (1998). The state will also pay for the testing if the applicant is indigent and has met certain evidentiary standards. Again, there is no time limitation to bringing a motion for such testing.

D. National Commission on the Future of DNA Testing

After becoming alerted to the increasing number of convictions proved by DNA testing to be erroneous, Attorney General Janet Reno established a National Commission on the Future of DNA. The commission is chaired by The Honorable Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court. Professor Michael Smith of the University of Wisconsin Law School, and Milwaukee County Assistant District Attorney Norm Gahn also sit on the Commission, along with police, prosecution, and other criminal justice experts from around the country. Among its many projects, the Commission has published a manual of findings and recommendations entitled, "Postconviction DNA Testing: Recommendations for Handling Requests." The report is exhaustive and contains a thoughtful framework for analysis, a detailed look into DNA testing and procedures, and guidance for prosecutors, law enforcement agencies, defense counsel and members of the judiciary who must deal with biological evidence. The

Commission the importance of procedures for using DNA to establish innocence after conviction.

IV. Conclusion

For these reasons, we believe that the state of Wisconsin needs to adopt legislation eliminating the one-year time limit on seeking a new trial based on newly discovered evidence, mandating the preservation of biological evidence in all criminal cases, enacting a method of obtaining testing of biological evidence in postconviction cases, and increasing the cap on compensation awards for the wrongly convicted. We believe this legislation is necessary for addressing the increasing numbers of wrongful convictions established by DNA testing. We recommend enacting legislation similar to the federal "Innocence Protection Act of 2000," which has been proposed by Senator Leahy and the statutes enacted in New York and Illinois. We also strongly encourage the committees to consult the findings of the National Commission on the Future of DNA Evidence when considering such legislation.

Illinois Compiled Statutes
Criminal Procedure
Code of Criminal Procedure of 1963
725 ILCS 5/

[HOME] [CHAPTERS] [PUBLIC ACTS] [SEARCH] [BOTTOM]

(725 ILCS 5/)

ARTICLE 116. POST-TRIAL MOTIONS

(725 ILCS 5/116-1)
Sec. 116-1. Motion for new trial.
(a) Following a verdict or finding of guilty the court may grant the defendant a new trial.
(b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the State.
(c) The motion for a new trial shall specify the grounds therefor.
(Source: Laws 1963, p. 2836.)

(725 ILCS 5/116-2)
Sec. 116-2. Motion in arrest of judgment. (a) A written motion in arrest of judgment shall be filed by the defendant within 30 days following the entry of a verdict or finding of guilty. Reasonable notice of the motion shall be served upon the State.
(b) The court shall grant the motion when:
(1) The indictment, information or complaint does not charge an offense, or
(2) The court is without jurisdiction of the cause.
(c) A motion in arrest of judgment attacking the indictment, information, or complaint on the ground that it does not charge an offense shall be denied if the indictment, information or complaint apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution out of the same conduct.
(Source: P.A. 86-391.)

(725 ILCS 5/116-3)
Sec. 116-3. Motion for fingerprint or forensic testing not available at trial regarding actual innocence.
(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice of the motion shall be served upon the State.
(b) The defendant must present a prima facie case that:
(1) identity was the issue in the trial which resulted in his or her conviction; and
(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

(Source: P.A. 90-141, eff. 1-1-98.)

[TOP]

§ 440.30 Motion to vacate judgment and to set aside sentence; procedure.

1. A motion to vacate a judgment pursuant to section 440.10 and a motion to set aside a sentence pursuant to section 440.20 must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

1-a. In cases of convictions occurring before January first, nineteen hundred ninety-six, where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10 or subdivision two of section 440.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

106TH CONGRESS
2D SESSION

S. 2073

IN THE SENATE OF THE UNITED STATES

Mr. LEAHY (for himself, Mr. LEVIN, Mr. FEINGOLD, Mr. MOYNIHAN, and Mr. AKAKA) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To reduce the risk that innocent persons may be executed, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Innocence Protection Act of 2000".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—EXONERATING THE INNOCENT THROUGH DNA TESTING

SEC. 101. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress makes the following findings:

(1) Over the past decade, deoxyribonucleic acid testing (referred to in this section as "DNA testing") has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene.

(2) Because of its scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant. In other cases, DNA testing may not conclusively establish

guilt or innocence, but may have significant probative value to a finder of fact.

(3) While DNA testing is increasingly commonplace in pretrial investigations today, it was not widely available in cases tried prior to 1994. Moreover, new forensic DNA testing procedures have made it possible to get results from minute samples that could not previously be tested, and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. Consequently, in some cases convicted inmates have been exonerated by new DNA tests after earlier tests had failed to produce definitive results.

(4) Since DNA testing is often feasible on relevant biological material that is decades old, it can, in some circumstances, prove that a conviction that predated the development of DNA testing was based upon incorrect factual findings. Uniquely, DNA evidence showing innocence, produced decades after a conviction, provides a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing, therefore, can and has resulted in the post-conviction exoneration of innocent men and women.

(5) In the past decade, there have been more than 65 post-conviction exonerations in the United States and Canada based upon DNA testing. At least 8 individuals sentenced to death have been exonerated through post-conviction DNA testing, some of whom came within days of being executed.

(6) The 2 States that have established statutory processes for post-conviction DNA testing, Illinois and New York, have the most post-conviction DNA exonerations, 14 and 7, respectively.

(7) The advent of DNA testing raises serious concerns regarding the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness identification testimony. According to a 1996 Department of Justice study entitled "Convicted by Juries, Exonerated by Science: Case Studies of Post-Conviction DNA Exonerations", in approximately 20 to 30 percent of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have been wrongfully convicted.

(8) Laws in more than 30 States require that a motion for a new trial based on newly discovered evidence of innocence be filed within 6 months or

less. These laws are premised on the belief—inapplicable to DNA testing—that evidence becomes less reliable over time. Such time limits have been used to deny inmates access to DNA testing, even when guilt or innocence could be conclusively established by such testing. For example, in Dedge v. Florida, 723 So.2d 322 (Fla. Dist. Ct. App. 1998), the court without opinion affirmed the denial of a motion to release trial evidence for the purpose of DNA testing. The trial court denied the motion as procedurally barred under the 2-year limitation on claims of newly discovered evidence established by the State of Florida, which has since adopted a 6-month limitation on such claims.

(9) Even when DNA testing has been done and has persuasively demonstrated the actual innocence of an inmate, States have sometimes relied on time limits and other procedural barriers to deny release.

(10) The National Commission on the Future of DNA Evidence, a Federal panel established by the Department of Justice and comprised of law enforcement, judicial, and scientific experts, has issued a report entitled "Recommendations For Handling Post-Conviction DNA Applications" that urges post-conviction DNA testing in 2 carefully defined cat-

egories of cases, notwithstanding procedural rules that could be invoked to preclude such testing, and notwithstanding the inability of the inmate to pay for the testing.

(11) The number of cases in which post-conviction DNA testing is appropriate is relatively small and will decrease as pretrial testing becomes more common and accessible.

(12) The cost of DNA testing has also decreased in recent years. The typical case, involving the analysis of 8 samples, currently costs between $2,400 and $5,000, depending upon jurisdictional differences in personnel costs.

(13) In 1994, Congress authorized funding to improve the quality and availability of DNA analysis for law enforcement identification purposes. Since then, States have been awarded over $50,000,000 in DNA-related grants.

(14) Although the Supreme Court has never announced a standard for addressing constitutional claims of innocence, in Herrera v. Collins, 506 U.S. 390 (1993), a majority of the Court expressed the view that, "a truly persuasive demonstration of 'actual innocence'" made after trial would render imposition of punishment by a State unconstitutional.

(15) If biological material is not subjected to DNA testing in appropriate cases, there is a significant risk that persuasive evidence of innocence will not be detected and, accordingly, that innocent persons will be unconstitutionally incarcerated or executed.

(16) To prevent violations of the Constitution of the United States that the Supreme Court anticipated in Herrera v. Collins, it is necessary and proper to enact national legislation that ensures that the Federal Government and the States will permit DNA testing in appropriate cases.

(17) There is also a compelling need to ensure the preservation of biological material for post-conviction DNA testing. Since 1992, the Innocence Project at the Benjamin N. Cardozo School of Law has received thousands of letters from inmates who claim that DNA testing could prove them innocent. In over 70 percent of those cases in which DNA testing could have been dispositive of guilt or innocence if the biological material were available, the material had been destroyed or lost. In two-thirds of the cases in which the evidence was found, and DNA testing conducted, the results have exonerated the inmate.

(18) In at least 14 cases, post-conviction DNA testing that has exonerated a wrongly convicted person has also provided evidence leading to the apprehension of the actual perpetrator, thereby enhancing public safety. This would not have been possible if the biological evidence had been destroyed.

(b) PURPOSES.—The purposes of this title are to—

(1) substantially implement the Recommendations of the National Commission on the Future of DNA Evidence in the Federal criminal justice system, by ensuring the availability of DNA testing in appropriate cases;

(2) prevent the imposition of unconstitutional punishments through the exercise of power granted by clause 1 of section 8 and clause 2 of section 9 of article I of the Constitution of the United States and section 5 of the 14th amendment to the Constitution of the United States; and

(3) ensure that wrongfully convicted persons have an opportunity to establish their innocence through DNA testing, by requiring the preservation of DNA evidence for a limited period.

SEC. 102. DNA TESTING IN FEDERAL CRIMINAL JUSTICE SYSTEM.

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by inserting after chapter 155 the following:

"CHAPTER 156—DNA TESTING

"§ 2291. DNA testing

"(a) APPLICATION.—Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court established by an Act of Congress may, at any time after conviction, apply to the court that entered the judgment for forensic DNA testing of any biological material that—

"(1) is related to the investigation or prosecution that resulted in the judgment;

"(2) is in the actual or constructive possession of the Government; and

"(3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

"(b) NOTICE TO GOVERNMENT.—

"(1) IN GENERAL.—The court shall notify the Government of an application made under subsection (a) and shall afford the Government an opportunity to respond.

"(2) PRESERVATION OF REMAINING BIOLOGICAL MATERIAL.—Upon receiving notice of an application made under subsection (a), the Government shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section.

"(c) ORDER.—The court shall order DNA testing pursuant to an application made under subsection (a) upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the applicant that the applicant was wrongfully convicted or sentenced.

"(d) COST.—The cost of DNA testing ordered under subsection (c) shall be borne by the Government or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the means to pay.

"(e) COUNSEL.—The court may at any time appoint counsel for an indigent applicant under this section.

"(f) POST-TESTING PROCEDURES.—

"(1) PROCEDURES FOLLOWING RESULTS UNFAVORABLE TO APPLICANT.—If the results of DNA testing conducted under this section are unfavorable to the applicant, the court—

"(A) shall dismiss the application; and

"(B) in the case of an applicant who is not indigent, may assess the applicant for the cost of such testing.

"(2) PROCEDURES FOLLOWING RESULTS FAVORABLE TO APPLICANT.—If the results of DNA testing conducted under this section are favorable to the applicant, the court shall—

"(A) order a hearing, notwithstanding any provision of law that would bar such a hearing; and

"(B) enter any order that serves the interests of justice, including an order—

"(i) vacating and setting aside the judgment;

"(ii) discharging the applicant if the applicant is in custody;

"(iii) resentencing the applicant; or

"(iv) granting a new trial.

"(g) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit the circumstances under

which a person may obtain DNA testing or other post-conviction relief under any other provision of law.

"§ 2292. Preservation of biological material

"(a) IN GENERAL.—Notwithstanding any other provision of law and subject to subsection (b), the Government shall preserve any biological material secured in connection with a criminal case for such period of time as any person remains incarcerated in connection with that case.

"(b) EXCEPTION.—The Government may destroy biological material before the expiration of the period of time described in subsection (a) if—

"(1) the Government notifies any person who remains incarcerated in connection with the case, and any counsel of record or public defender organization for the judicial district in which the judgment of conviction for such person was entered, of—

"(A) the intention of the Government to destroy the material; and

"(B) the provisions of this chapter;

"(2) no person makes an application under section 2291(a) within 90 days of receiving notice under paragraph (1) of this subsection; and

"(3) no other provision of law requires that such biological material be preserved.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 155 the following:

"156. DNA Testing ..... 2291".

SEC. 103. DNA TESTING IN STATE CRIMINAL JUSTICE SYSTEMS.

(a) DNA IDENTIFICATION GRANT PROGRAM.—Section 2403 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796kk–2) is amended—

(1) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking "shall" and inserting "will";

(B) in subparagraph (C), by striking "is charged" and inserting "was charged or convicted"; and

(C) in subparagraph (D), by striking "and" at the end;

(2) in paragraph (3)—

(A) by striking "shall" and inserting "will"; and

(B) by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(4) the State will—

"(A) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(B) make DNA testing available to any person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to any person convicted in a court established by an Act of Congress.".

(b) DRUG CONTROL AND SYSTEM IMPROVEMENT GRANT PROGRAM.—Section 503(a)(12) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3753(a)(12)) is amended—

(1) in subparagraph (B)—

(A) in clause (iii), by striking "is charged" and inserting "was charged or convicted"; and

(B) in clause (iv), by striking "and" at the end;

(2) in subparagraph (C), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) the State will—

"(i) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(ii) make DNA testing available to a person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to a person convicted in a court established by an Act of Congress.".

(c) PUBLIC SAFETY AND COMMUNITY POLICING GRANT PROGRAM.—Section 1702(c) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd–1(c)) is amended—

(1) in paragraph (10), by striking "and" at the end;

(2) in paragraph (11), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(12) if any part of funds received from a grant made under this subchapter is to be used to develop or improve a DNA analysis capability in a forensic laboratory, or to obtain or analyze DNA samples for inclusion in the Combined DNA Index System (CODIS), certify that—

"(A) DNA analyses performed at such laboratory will satisfy or exceed the current standards for a quality assurance program for DNA analysis, issued by the Director of the Federal Bureau of Investigation under section 210303 of the DNA Identification Act of 1994 (42 U.S.C. 14131);

"(B) DNA samples and analyses obtained and performed by such laboratory will be accessible only—

"(i) to criminal justice agencies for law enforcement purposes;

"(ii) in judicial proceedings, if otherwise admissible under applicable statutes and rules;

"(iii) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection

with the case in which the defendant was charged or convicted; or

"(iv) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes;

"(C) the laboratory and each analyst performing DNA analyses at the laboratory will undergo, at regular intervals not exceeding 180 days, external proficiency testing by a DNA proficiency testing program that meets the standards issued under section 210303 of the DNA Identification Act of 1994 (42 U.S.C. 14131); and

"(D) the State will—

"(i) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under section 2292 of title 28, United States Code, in the case of a person incarcerated in connection with a Federal criminal case; and

"(ii) make DNA testing available to any person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under section 2291 of title 28, United States Code, to a person convicted in a court established by an Act of Congress.".

SEC. 104. PROHIBITION PURSUANT TO SECTION 5 OF THE 14TH AMENDMENT.

(a) REQUEST FOR DNA TESTING.—

(1) IN GENERAL.—No State shall deny a request, made by a person in custody resulting from a State court judgment, for DNA testing of biological material that—

(A) is related to the investigation or prosecution that resulted in the conviction of the person or the sentence imposed on the person;

(B) is in the actual or constructive possession of the State; and

(C) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

(2) EXCEPTION.—A State may deny a request under paragraph (1) upon a judicial determination that testing could not produce noncumulative evidence establishing a reasonable probability that the person was wrongfully convicted or sentenced.

(b) OPPORTUNITY TO PRESENT RESULTS OF DNA TESTING.—No State shall rely upon a time limit or procedural default rule to deny a person an opportunity to present noncumulative, exculpatory DNA results in court, or in an executive or administrative forum in which a decision is made in accordance with procedural due process.

(c) REMEDY.—A person may enforce subsections (a) and (b) in a civil action for declaratory or injunctive relief, filed either in a State court of general jurisdiction or in a district court of the United States, naming either the State or an executive or judicial officer of the State as defendant. No State or State executive or judicial officer shall have immunity from actions under this subsection.

TITLE II—ENSURING COMPETENT LEGAL SERVICES IN CAPITAL CASES

SEC. 201. AMENDMENTS TO BYRNE GRANT PROGRAMS.

(a) CERTIFICATION REQUIREMENT; FORMULA GRANTS.—Section 503 of title I of the Omnibus Crime

Control and Safe Streets Act of 1968 (42 U.S.C. 3753) is amended—

(1) in subsection (a), by adding at the end the following:

"(13) If the State prescribes, authorizes, or permits the penalty of death for any offense, a certification that the State has established and maintains an effective system for providing competent legal services to indigents at every phase of a State criminal prosecution in which a death sentence is sought or has been imposed, up to and including direct appellate review and post-conviction review in State court."; and

(2) in subsection (b)—

(A) by striking "(b) Within 30 days after the date of enactment of this part, the" and inserting the following:

"(b) REGULATIONS.—

"(1) IN GENERAL.—The"; and

(B) by adding at the end the following:

"(2) CERTIFICATION REGULATIONS.—The Director of the Administrative Office of the United States Courts, after notice and an opportunity for comment, shall promulgate regulations specifying the elements of an effective system within the mean-

ing of subsection (a)(13), which elements shall include—

"(A) a centralized and independent appointing authority, which shall have authority and responsibility to—

"(i) recruit attorneys who are qualified to represent indigents in the capital proceedings specified in subsection (a)(13);

"(ii) draft and annually publish a roster of qualified attorneys;

"(iii) draft and annually publish qualifications and performance standards that attorneys must satisfy to be listed on the roster and procedures by which qualified attorneys are identified;

"(iv) periodically review the roster, monitor the performance of all attorneys appointed, provide a mechanism by which members of the Bar may comment on the performance of their peers, and delete the name of any attorney who fails to complete regular training programs on the representation of clients in capital cases, fails to meet performance standards in a case to which the attorney is appointed, or other-

wise fails to demonstrate continuing competence to represent clients in capital cases;

"(v) conduct or sponsor specialized training programs for attorneys representing clients in capital cases;

"(vi) appoint lead counsel and co-counsel from the roster to represent a defendant in a capital case promptly upon receiving notice of the need for an appointment from the relevant State court; and

"(vii) report the appointment, or the failure of the defendant to accept such appointment, to the court requesting the appointment;

"(B) compensation of private attorneys for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases;

"(C) reimbursement of private attorneys and public defender organizations for attorney expenses reasonably incurred in the representa-

tion of a client in a capital case, computed on an hourly basis reflecting the local market for such services; and

"(D) reimbursement of private attorneys and public defender organizations for the reasonable costs of law clerks, paralegals, investigators, experts, scientific tests, and other support services necessary in the representation of a defendant in a capital case, computed on an hourly basis reflecting the local market for such services.".

(b) CERTIFICATION REQUIREMENT; DISCRETIONARY GRANTS.—Section 517(a) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3763(a)) is amended—

(1) in paragraph (3), by striking "and" at the end;

(2) in paragraph (4), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(5) satisfies the certification requirement established by section 503(a)(13).".

(c) DIRECTOR'S REPORTS TO CONGRESS.—Section 522(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3766b(b)) is amended—

(1) in paragraph (4), by striking "and" at the end;

(2) by redesignating paragraph (5) as paragraph (6); and

(3) by inserting after paragraph (4) the following:

"(5) descriptions and a comparative analysis of the systems established by each State in order to satisfy the certification requirement established by section 503(a)(13), except that the descriptions and the comparative analysis shall include—

"(A) the qualifications and performance standards established pursuant to section 503(b)(2)(A)(iii);

"(B) the rates of compensation paid under section 503(b)(2)(B); and

"(C) the rates of reimbursement paid under subparagraphs (C) and (D) of section 503(b)(2); and".

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by this section shall apply with respect to any application submitted on or after the date that is 1 year after the date of enactment of this Act.

(2) EXCEPTION.—The amendments made by this section shall not take effect until the amount made available for a fiscal year to carry out part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 equals or exceeds an amount that is $50,000,000 greater than the amount made available to carry out that part for fiscal year 2000.

(e) REGULATIONS.—The Director of the Administrative Office of the United States Courts shall issue all regulations necessary to carry out the amendments made by this section not later than 180 days before the effective date of those regulations.

SEC. 202. EFFECT ON PROCEDURAL DEFAULT RULES.

Section 2254(e) of title 28, United States Code, is amended—

(1) in paragraph (1), by striking "In a proceeding" and inserting "Except as provided in paragraph (3), in a proceeding"; and

(2) by adding at the end the following:

"(3) In a proceeding instituted by an indigent applicant under sentence of death, the court shall neither presume a finding of fact made by a State court to be correct nor decline to consider a claim on the ground that the applicant failed to raise such

claim in State court at the time and in the manner prescribed by State law, unless—

"(A) the State provided the applicant with legal services at the stage of the State proceedings at which the State court made the finding of fact or the applicant failed to raise the claim; and

"(B) the legal services the State provided satisfied the regulations promulgated by the Director of the Administrative Office of the United States Courts pursuant to section 503(b)(2) of title I of the Omnibus Crime Control and Safe Streets Act of 1968.".

SEC. 203. CAPITAL REPRESENTATION GRANTS.

Section 3006A of title 18, United States Code, is amended—

(1) by redesignating subsections (i), (j), and (k) as subsections (j), (k), and (l), respectively; and

(2) by inserting after subsection (h) the following:

"(i) CAPITAL REPRESENTATION GRANTS.—

"(1) DEFINITIONS.—In this subsection—

"(A) the term 'capital case'—

"(i) means any criminal case in which a defendant prosecuted in a State court is

subject to a sentence of death or in which a death sentence has been imposed; and

"(ii) includes all proceedings filed in connection with the case, including trial, appellate, and Federal and State post-conviction proceedings;

"(B) the term 'defense services' includes—

"(i) recruitment of counsel;

"(ii) training of counsel;

"(iii) legal and administrative support and assistance to counsel;

"(iv) direct representation of defendants, if the availability of other qualified counsel is inadequate to meet the need in the jurisdiction served by the grant recipient; and

"(v) investigative, expert, or other services necessary for adequate representation; and

"(C) the term 'Director' means the Director of the Administrative Office of the United States Courts.

"(2) GRANT AWARD AND CONTRACT AUTHORITY.—Notwithstanding subsection (g), the Director shall award grants to, or enter into contracts with,

public agencies or private nonprofit organizations for the purpose of providing defense services in capital cases.

"(3) PURPOSES.—Grants and contracts awarded under this subsection shall be used in connection with capital cases in the jurisdiction of the grant recipient for 1 or more of the following purposes:

"(A) Enhancing the availability, competence, and prompt assignment of counsel.

"(B) Encouraging continuity of representation between Federal and State proceedings.

"(C) Decreasing the cost of providing qualified counsel.

"(D) Increasing the efficiency with which such cases are resolved.

"(4) GUIDELINES.—The Director, in consultation with the Judicial Conference of the United States, shall develop guidelines to ensure that defense services provided by recipients of grants and contracts awarded under this subsection are consistent with applicable legal and ethical proscriptions governing the duties of counsel in capital cases.

"(5) CONSULTATION.—In awarding grants and contracts under this subsection, the Director shall consult with representatives of the highest State

court, the organized bar, and the defense bar of the jurisdiction to be served by the recipient of the grant or contract.".

TITLE III—COMPENSATING THE UNJUSTLY CONDEMNED

SEC. 301. INCREASED COMPENSATION IN FEDERAL CASES.

Section 2513 of title 28, United States Code, is amended by striking subsection (e) and inserting the following:

"(e) DAMAGES.—

"(1) IN GENERAL.—The amount of damages awarded in an action described in subsection (a) shall not exceed $50,000 for each 12-month period of incarceration, except that a plaintiff who was unjustly sentenced to death may be awarded not more than $100,000 for each 12-month period of incarceration.

"(2) FACTORS FOR CONSIDERATION IN ASSESSING DAMAGES.—In assessing damages in an action described in subsection (a), the court shall consider—

"(A) the circumstances surrounding the unjust conviction of the plaintiff, including any misconduct by officers or employees of the Federal Government;

"(B) the length and conditions of the unjust incarceration of the plaintiff; and

"(C) the family circumstances, loss of wages, and pain and suffering of the plaintiff.".

SEC. 302. COMPENSATION IN STATE DEATH PENALTY CASES.

(a) CRIMINAL JUSTICE FACILITY CONSTRUCTION GRANT PROGRAM.—Section 603(a) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3769b(a)) is amended—

(1) in paragraph (5), by striking "and" at the end;

(2) in paragraph (6), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(7) reasonable assurance that the applicant, or the State in which the applicant is located—

"(A) does not prescribe, authorize, or permit the penalty of death for any offense; or

"(B)(i) has established and maintains an effective procedure by which any person unjustly convicted of an offense against the State and sentenced to death may be awarded reasonable damages upon substantial proof that the

person did not commit any of the acts with which the person was charged; and

"(ii)(I) the conviction of that person was reversed or set aside on the ground that the person was not guilty of the offense or offenses of which the person was convicted;

"(II) the person was found not guilty of such offense or offenses on new trial or rehearing; or

"(III) the person was pardoned upon the stated ground of innocence and unjust conviction.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to any application submitted on or after the date that is 1 year after the date of enactment of this Act.

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. ACCOMMODATION OF STATE INTERESTS IN FEDERAL DEATH PENALTY PROSECUTIONS.

(a) RECOGNITION OF STATE INTERESTS.—Chapter 228 of title 18, United States Code, is amended by adding at the end the following:

"§ 3599. Accommodation of State interests; certification requirement

"(a) IN GENERAL.—Notwithstanding any other provision of law, the Government shall not seek the death penalty in any case initially brought before a district court of the United States that sits in a State that does not prescribe, authorize, or permit the imposition of such penalty for the alleged conduct, except upon the certification in writing of the Attorney General or the designee of the Attorney General that—

"(1) the State does not have jurisdiction or refuses to assume jurisdiction over the defendant with respect to the alleged conduct;

"(2) the State has requested that the Federal Government assume jurisdiction; or

"(3) the offense charged is an offense described in section 32, 229, 351, 794, 1091, 1114, 1118, 1203, 1751, 1992, 2340A, or 2381, or chapter 113B.

"(b) "STATE DEFINED.—In this section, the term 'State' means each of the several States of the United States, the District of Columbia, and the territories and possessions of the United States.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 228 of title 18, United States Code, is amended by adding at the end the following:

"3599. Accommodation of State interests; certification requirement.".

SEC. 402. ALTERNATIVE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.

Section 408(*l*) of the Controlled Substances Act (21 U.S.C. 848(*l*)), is amended by striking the first 2 sentences and inserting the following: "Upon a recommendation under subsection (k) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law.".

SEC. 403. RIGHT TO AN INFORMED JURY.

(a) ADDITIONAL REQUIREMENTS.—Section 20105 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13705) is amended by striking subsection (b) and inserting the following:

"(b) ADDITIONAL REQUIREMENTS.—To be eligible to receive a grant under section 20103 or 20104, a State shall provide assurances to the Attorney General that—

"(1) the State has implemented policies that provide for the recognition of the rights and needs of crime victims; and

"(2) in any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court, at the request of the defendant, shall inform the jury of all statutorily authorized sentencing options in the particular case, including applicable parole eligibility rules and terms.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to any application for a grant under section 20103 or 20104 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13703; 13704) that is submitted on or after the date that is 1 year after the date of enactment of this Act.

SEC. 404. ANNUAL REPORTS.

(a) REPORT.—Not later than 2 years after the date of enactment of this Act, and annually thereafter, the Attorney General shall prepare and transmit to Congress a report concerning the administration of capital punishment laws by the Federal Government and the States.

(b) REPORT ELEMENTS.—The report required under subsection (a) shall include substantially the same categories of information as are included in the Bureau of Justice Statistics Bulletin entitled "Capital Punishment

1998" (December 1999, NCJ 179012), and the following additional categories of information:

(1) The percentage of death-eligible cases in which a death sentence is sought, and the percentage in which it is imposed.

(2) The race of the defendants in death-eligible cases, including death-eligible cases in which a death sentence is not sought, and the race of the victims.

(3) An analysis of the effect of Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny, on the composition of juries in capital cases, including the racial composition of such juries, and on the exclusion of otherwise eligible and available jurors from such cases.

(4) An analysis of the effect of peremptory challenges, by the prosecution and defense respectively, on the composition of juries in capital cases, including the racial composition of such juries, and on the exclusion of otherwise eligible and available jurors from such cases.

(5) The percentage of capital cases in which life without parole is available as an alternative to a death sentence, and the sentences imposed in such cases.

(6) The percentage of capital cases in which life without parole is not available as an alternative to a death sentence, and the sentences imposed in such cases.

(7) The percentage of capital cases in which counsel is retained by the defendant, and the percentage in which counsel is appointed by the court.

(8) A comparative analysis of systems for appointing counsel in capital cases in different States.

(9) A State-by-State analysis of the rates of compensation paid in capital cases to appointed counsel and their support staffs.

(10) The percentage of cases in which a death sentence or a conviction underlying a death sentence is vacated, reversed, or set aside, and the reasons therefore.

(c) PUBLIC DISCLOSURE.—The Attorney General or the Director of the Bureau of Justice Assistance, as appropriate, shall ensure that the reports referred to in subsection (a) are—

(1) distributed to national print and broadcast media; and

(2) posted on an Internet website maintained by the Department of Justice.

SEC. 405. DISCRETIONARY APPELLATE REVIEW.

Section 2254(c) of title 28, United States Code, is amended—

(1) by inserting "(1)" after "(c)"; and

(2) by adding at the end the following:

"(2) For purposes of paragraph (1), if the highest court of a State has discretion to decline appellate review of a case or a claim, a petition asking that court to entertain a case or a claim is not an available State court procedure.".

SEC. 406. SENSE OF THE SENATE REGARDING THE EXECUTION OF JUVENILE OFFENDERS AND THE MENTALLY RETARDED.

It is the sense of the Senate that the death penalty is disproportionate and offends contemporary standards of decency when applied to a person who is mentally retarded or who had not attained the age of 18 years at the time of the offense.

State of Wisconsin
1999 – 2000 LEGISLATURE

LRBs0375/1
JEO:a:...
JG

Tues 3/7 by 8:15 am

D-Note

SENATE SUBSTITUTE AMENDMENT,

TO 1999 ASSEMBLY BILL 497

gen

AN ACT ...; **relating to:** preservation and maintenance of certain evidence, time limits for prosecution of certain crimes of sexual assault and postconviction motions for testing of certain evidence.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

				1999–00	2000–01
20.410	**Corrections, department of**				
(1)	ADULT CORRECTIONAL SERVICES				
(be)	Postconviction evidence testing costs	GPR	A	–0–	–0–

SECTION 2. 20.410 (1) (be) of the statutes is created to read:

20.410 **(1)** (be) *Postconviction evidence testing costs.* The amounts in the schedule for the costs of performing fingerprint testing or forensic deoxyribonucleic acid testing for indigent persons under s. 974.07, pursuant to a court order issued under s. 974.07 (8).

SECTION 3. 165.77 (2m) of the statutes is created to read:

165.77 **(2m)** (a) If the laboratories receive biological material pursuant to the order of a court issued under s. 974.07 (6), the laboratories shall analyze the deoxyribonucleic acid in the material and submit the results of the analysis to the court that ordered the analysis.

(b) The laboratories may compare the data obtained from material received under par. (a) with data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings. In this state, the use is subject to s. 972.11 (5). The laboratories shall not include data obtained from deoxyribonucleic acid analysis of material received under this paragraph in the data bank under sub. (3). The laboratories shall destroy material obtained under this paragraph after analysis has been completed and the applicable court proceedings have concluded, unless the court that issued the order under s. 974.07 (6) provides otherwise.

(c) Paragraph (b) does not apply to specimens received under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063.

SECTION 4. 165.81 (1) of the statutes is amended to read:

165.81 **(1)** Whenever the department is informed by the submitting officer or agency that physical evidence in the possession of the laboratories is no longer needed the department may, except as provided in sub. (3) or unless otherwise provided by law, either destroy the same, retain it in the laboratories or turn it over to the University of Wisconsin upon the request of the head of any department. ~~Whenever~~ Except as provided in sub. (3), whenever the department receives information from which it appears probable that the evidence is no longer needed, the department may give written notice to the submitting agency and the appropriate district attorney, by registered mail, of the intention to dispose of the evidence. If no objection is received within 20 days after the notice was mailed, it may dispose of the evidence.

History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35).

SECTION 5. 165.81 (3) of the statutes is created to read:

165.81 **(3)** If physical evidence in the possession of the laboratories includes any biological material that was collected in connection with a criminal action or proceeding, the evidence shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The department notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person or the state public defender that the department intends to destroy the biological material unless a motion for testing of the material is filed under s. 974.06 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. 974.06 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the department to preserve the biological material.

SECTION 6. 757.54 of the statutes is renumbered 757.54 (1) and amended to read:

757.54 **(1)** ~~The~~ Except as provided in sub. (2), the retention and disposal of all court records and exhibits in any civil or criminal action or proceeding or probate proceeding of any nature in a court of record shall be determined by the supreme court by rule.

History: Sup. Ct. Order, 136 Wis. 2d xi (1987).

SECTION 7. 757.54 (2) of the statutes is created to read:

757.54 **(2)** If an exhibit in a criminal action or proceeding includes any biological material that was collected in connection with the action or proceeding, the exhibit shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The court notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person or the state public defender that the court intends to destroy the biological material unless a motion for testing of the material is filed under s. 974.06 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. 974.06 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the court to preserve the biological material.

SECTION 8. 939.74 (1) of the statutes is amended to read:

939.74 **(1)** Except as provided in ~~sub.~~ subs. (2)~~,~~ and (2d) and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269; 1993 a. 219, 227, 486; 1995 a. 456; 1997 a. 237.

SECTION 9. 939.74 (2) (c) of the statutes is amended to read:

939.74 **(2)** (c) A prosecution for violation of s. 948.02, 948.025, 948.03 (2) (a), 948.05, 948.06, 948.07 (1), (2), (3) or (4), 948.08 or 948.095 shall be commenced before the victim reaches the age of 31 years or be barred, except as provided in sub. (2d) (d).

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269; 1993 a. 219, 227, 486; 1995 a. 456; 1997 a. 237.

SECTION 10. 939.74 (2d) of the statutes is created to read:

939.74 **(2d)** (a) In this subsection, "deoxyribonucleic acid profile" has the meaning given in s. 972.11 (5) (a).

(b) In a case in which the state has evidence of a deoxyribonucleic acid profile of a person and the state believes the evidence may identify a person who committed a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025 but comparisons of the evidence to deoxyribonucleic acid profiles of known persons have not resulted in a probable identification of the person, the state may, before the expiration of the time

limit under sub. (1) or (2) (c), whichever is applicable, request the circuit court in the county in which the violation is believed to have been committed to determine whether there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed the violation. A request under this paragraph shall be made and heard ex parte. The court shall make a written record of the proceeding ~~which~~ that shall remain secret unless a prosecution for the violation is commenced, in which case the record shall be made available to both the state and any defendant in that prosecution.

(c) Notwithstanding that the time limitation under sub. (1) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 940.225 (1) or (2), a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

(d) Notwithstanding that the time limitation under sub. (2) (c) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 948.02 (1) or (2) or 948.025, a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

SECTION 11. 968.20 (1) (intro.) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(1)** (intro.) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1g), (1m) or (1r) or s. 173.12 or 173.21 (4) ~~(b)~~, returned if:

NOTE: NOTE: The bracketed language indicates the correct cross-reference. Corrective legislation is pending. NOTE:

History: 1977 c. 260, 1977 c. 449 s. 497; 1979 c. 221; 1981 c. 160; 1983 a. 189 s. 329 (3); 1983 a. 278; 1985 a. 29 ss. 2447 to 2449, 3200 (35); 1987 a. 203; 1987 a. 332 s. 64; 1993 a. 90, 196; 1996 a. 157; 1997 a. 192, 248.

SECTION 12. 968.20 (1g) of the statutes is created to read:

968.20 **(1g)** If property seized by and in the possession of a law enforcement agency or a district attorney includes any biological material that was collected in connection with a criminal action or proceeding, the biological material shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The law enforcement agency or district attorney notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person or the state public defender that the law enforcement agency or district attorney intends to destroy the biological material unless a motion for testing of the material is filed under s. 974.06 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. 974.06 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the law enforcement agency or district attorney to preserve the biological material.

SECTION 13. 968.20 (2) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(2)** Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1g), (1m) or (1r) or s. 173.12, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

History: 1977 c. 260; 1977 c. 449 s. 497; 1979 c. 221; 1981 c. 160; 1983 a. 189 s. 329 (3); 1983 a. 278; 1985 a. 29 ss. 2447 to 2449, 3200 (35); 1987 a. 203; 1987 a. 332 s. 64; 1993 a. 90, 196; 1996 a. 157; 1997 a. 192, 248.

SECTION 14. 968.20 (4) of the statutes is amended to read:

968.20 **(4)** Any property seized, other than property covered under sub. (1g), which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

History: 1977 c. 260; 1977 c. 449 s. 497; 1979 c. 221; 1981 c. 160; 1983 a. 189 s. 329 (3); 1983 a. 278; 1985 a. 29 ss. 2447 to 2449, 3200 (35); 1987 a. 203; 1987 a. 332 s. 64; 1993 a. 90, 196; 1996 a. 157; 1997 a. 192, 248.

SECTION 15. 974.07 of the statutes is created to read:

974.07 Motion for fingerprint or deoxyribonucleic acid testing of certain evidence. **(1)** In this section, "government agency" means any department or agency of the federal government, of this state or of a city, village, town or county in this state.

(2) At any time after conviction, a person who is in custody under sentence of a court may make a motion in the court that imposed the sentence for an order requiring fingerprint testing or forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is related to the investigation or prosecution that resulted in the sentence imposed on the person.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to fingerprint testing or forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A person who makes a motion under this section or, if applicable, his or her attorney shall serve a copy of the motion on the district attorney's office that prosecuted the case that resulted in the sentence imposed on the person. The court in which the motion is made shall also notify the appropriate district attorney's office that a motion has been made under this section and shall give the district attorney an opportunity to respond to the motion.

(4) Upon receiving under sub. (3) a copy of a motion made under this section or notice from a court that a motion has been made, whichever occurs first, the district attorney shall take all actions necessary to ensure that all fingerprint evidence and biological material that was collected in connection with the investigation or prosecution of the case and that remains in the actual or constructive

custody of a government agency is preserved pending completion of the proceedings under this section.

(5) A court in which a motion under this section is filed shall order fingerprint testing or forensic deoxyribonucleic acid testing if it determines that all of the following apply:

(a) The person making the motion establishes a prima facie case that all of the following apply:

1. The identity of the person who committed the offense for which the person was sentenced was an issue in the investigation, trial or disposition of the case.

2. The chain of custody of the evidence to be tested is reasonably sufficient to establish that it has not been tampered with, replaced or altered in any material respect.

(b) The testing may produce new, noncumulative evidence that is materially relevant to the person's assertion of actual innocence or wrongful conviction.

(c) The testing requested employs a scientific method generally accepted within the relevant scientific community.

(6) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate and if stipulated to by the person who made the motion under this section and the district attorney, the court may order the state crime laboratories to perform forensic deoxyribonucleic acid testing as provided under ss. 165.77 (2m).

(7) A court considering a motion under this section made by a person who is not represented by counsel may, if the person claims or appears to be indigent, refer the person to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(8) The court may order a person who makes a motion under this section to pay the costs of any testing ordered by the court under this section if the court determines that the person is not indigent and that the person possesses the financial resources to pay the costs. If the court determines that the person is indigent, the court shall order the costs of the testing to be paid for from the appropriation account under s. 20.410 (1) (be).

SECTION 16. Initial applicability.

(1) The treatment of sections 939.74 (1), (2) (c) and (2d) of the statutes first applies to offenses not barred from prosecution on the effective date of this subsection.

(END)

D-note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0375/1dn
JEO:...

Dan Rossmiller:

I have had to do this amendment and drafter's note quickly, so I have not had time to think all of these issues through as completely as I would have liked. There may also be other issues raised by the language of the draft that will bear further thought. However, please note the following when reviewing this draft:

1. The suggested language that you sent to me for proposed s. 974.07 seemed to be an amalgamation of the Illinois statute (725 Ill. Comp. Stat. 5/116–3) and the pending U.S. Senate proposal (S. 2073). I made a number of language changes for purposes of conforming to current drafting style. Also, note the following when reviewing proposed s. 974.07:

a) The draft does not explicitly address the relationship between motions under proposed s. 974.07 and other postconviction proceedings. Nor does it explicitly address the issues of successive motions under s. 974.07, though presumably they are allowed as long as the motion otherwise meets the criteria specified in proposed s. 974.07 (2). Lastly, the draft does not address what happens after evidence is tested and appears to exonerate the person or at least make it reasonably probable that the outcome of the original case would have been different. Does the person have to make a separate motion for a new trial or other postconviction relief and, if so, what procedure should be used? (Note that the U.S. Senate proposal goes into more detail on the issue of post–testing procedures.) Also, note that if the person's motion is denied, he or she will presumably be able to appeal and it appears that the appellate rules under s. 809.30, stats., would apply. Is that your intent, or should s. 809.30 (1) (a), stats., be amended to exclude motions under proposed s. 974.07?

b) Proposed s. 974.07 (3) does not cover persons who are not incarcerated but who want to get testing done to challenge a conviction because, for instance, the conviction constitutes a "strike" under the "three strikes, you're out" law or keeps the person from owning a gun or getting a job or an occupational license of some sort. It also doesn't cover juveniles subject to ch. 938 or persons found not guilty by reason of mental disease or defect and committed under s. 971.17, stats.

c) The draft defines "government agency" to include federal agencies. Even though the district attorney would be acting under proposed s. 974.07 (4), I am not certain that we can force a federal agency to follow an order from a district attorney to preserve evidence in its possession.

d) Proposed s. 974.07 (3) requires that the DA get notice of the motion from both the person filing the motion and the court. Is that your intent? Also, should proposed s. 974.07 provide for notice to victims that a motion has been made?

e) Like the Illinois statute, under proposed s. 974.07 (5) (a) the person filing the motion has to make a prima facie showing that identity was an issue in the case and that there is a chain of custody that establishes the evidence hasn't been tainted. Unlike the suggested language, this draft does not require a prima facie showing that the testing may produce noncumulative, exculpatory evidence because that requirement was virtually identical to proposed s. 974.07 (5) (b). Also, what is the significance of the person's prima facie showing? Is the DA allowed to rebut that showing? If so, must the motion be denied if the DA rebuts the prima facie case or could the person then put on additional evidence? Should the draft just say that the court must determine whether identity was an issue, whether the chain of custody was good and whether the testing will produce noncumulative, relevant evidence, and leave it at that? Also, should the draft specify a burden of proof for the court's determination, or is that unnecessary?

f) With respect to identity being an issue in the case, what if the person needs other material that is not otherwise readily available in order to make that showing (e.g., trial transcripts)? Should the draft address the need for and discovery of such material?

g) Proposed s. 974.07 (5) (b) refers to the person's assertion of actual innocence or wrongful conviction, but nowhere does the draft require the person to make such an assertion in his or her motion. Should the person be required to make that assertion in his or her motion? I suppose that as a practical matter he or she would do so anyway, but it is odd to have the statute refer to an assertion that, strictly speaking, the person is not required to make. Also, proposed s. 974.07 (5) (b) refers to "new" evidence; does that open up the argument that retesting of previously tested material is not really "new" evidence? Should the draft amplify what is meant by "new" evidence, or, alternatively, would it work just to refer to relevant, noncumulative evidence? Lastly, the language refers to evidence that is "materially relevant". Isn't it sufficient to say "relevant"? In Wisconsin relevancy already incorporates the notion of "consequential facts" (i.e., materiality), and in any event the use of the term "material" seems to be disfavored. See s. 904.01, stats.; *State v. Sullivan*, 216 Wis. 2d 768, 786 n.15 (1998).

h) Like the Illinois statute, proposed s. 974.07 (5) (c) requires that the testing employ a generally accepted scientific method. This language essentially restates the test for admissibility of scientific evidence in federal courts that was set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* is no longer the rule in federal courts and has never been the rule in Wisconsin courts. See, most recently, *State v. Donner*, 192 Wis. 2d 305, 315–16 (Ct. App. 1995), citing *State v. Walstad*, 119 Wis. 2d 483, 518–19 (1984). Is it your intent to use the *Frye* standard to evaluate tests done under proposed s. 974.07 even though that standard is not used to determine admissibility of the evidence in court?

i) Unlike the suggested language that you sent to me, proposed s. 974.07 (6) does not provide that the court's may impose conditions on testing to protect "the state's

interest" in the integrity of the evidence and the testing process; instead, this draft leaves out the reference to the state's interest because it seems that the defendant also has an interest in the integrity of the evidence and the testing process. Okay? Also, please carefully review the language of proposed s. 165.77 (2m) relating to testing by the state crime labs. It is based on s. 165.77 (2), stats. Does that language do what you want it to do?

j) Proposed s. 974.07 (7) says that a court "may" refer a person who claims or appears to be indigent to the public defender for an indigency determination. Should it say "shall" instead of "may", given the potential constitutional dimension of the issues involved in the proceeding? Compare s. 974.06 (3) (b), stats.

2. Should the provisions relating to the preservation of biological material also cover fingerprint evidence? Should they also require preservation of reports of earlier test results that are conducted on the material or evidence (so that, for instance, people can compare the earlier and later test results)? Also, if someone does file a motion under proposed s. 974.07, what happens when that motion has been disposed of? Can the custodian then destroy any remaining evidence or does he or she have to go through the notice procedure again?

3. Please review the language of proposed s. 939.74 (2d) (b) carefully to make sure that it does what you want it to do. Also, note that the definition of "deoxyribonucleic acid profile" refers to the definition in s. 972.11 (5) (a), stats., which refers to a DNA analysis that uses "the restriction fragment length polymorphism analysis of deoxyribonucleic acid". Thus, the definition will apparently not cover polymerase chain reaction testing results. Should the definition in both proposed s. 939.74 (2d) (a) and s. 972.11 (5) (a), stats., be changed to cover methods of analysis other than restriction fragment length polymorphism?

Please let me know if you have any questions or changes.

Jefren E. Olsen
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0375/1dn
JEO:jlg:jf

March 7, 2000

Dan Rossmiller:

I have had to do this amendment and drafter's note quickly, so I have not had time to think all of these issues through as completely as I would have liked. There may also be other issues raised by the language of the draft that will bear further thought. However, please note the following when reviewing this draft:

1. The suggested language that you sent to me for proposed s. 974.07 seemed to be an amalgamation of the Illinois statute (725 Ill. Comp. Stat. 5/116–3) and the pending U.S. Senate proposal (S. 2073). I made a number of language changes for purposes of conforming to current drafting style. Also, note the following when reviewing proposed s. 974.07:

a) The draft does not explicitly address the relationship between motions under proposed s. 974.07 and other postconviction proceedings. Nor does it explicitly address the issues of successive motions under s. 974.07, though presumably they are allowed as long as the motion otherwise meets the criteria specified in proposed s. 974.07 (2). Lastly, the draft does not address what happens after evidence is tested and appears to exonerate the person or at least make it reasonably probable that the outcome of the original case would have been different. Does the person have to make a separate motion for a new trial or other postconviction relief and, if so, what procedure should be used? (Note that the U.S. Senate proposal goes into more detail on the issue of post–testing procedures.) Also, note that, if the person's motion is denied, he or she will presumably be able to appeal and it appears that the appellate rules under s. 809.30, stats., would apply. Is that your intent, or should s. 809.30 (1) (a), stats., be amended to exclude motions under proposed s. 974.07?

b) Proposed s. 974.07 (3) does not cover persons who are not incarcerated but who want to get testing done to challenge a conviction because, for instance, the conviction constitutes a "strike" under the "three strikes, you're out" law or keeps the person from owning a gun or getting a job or an occupational license of some sort. It also doesn't cover juveniles subject to ch. 938 or persons found not guilty by reason of mental disease or defect and committed under s. 971.17, stats.

c) The draft defines "government agency" to include federal agencies. Even though the district attorney would be acting under proposed s. 974.07 (4), I am not certain that we can force a federal agency to follow an order from a district attorney to preserve evidence in its possession.

d) Proposed s. 974.07 (3) requires that the DA get notice of the motion from both the person filing the motion and the court. Is that your intent? Also, should proposed s. 974.07 provide for notice to victims that a motion has been made?

e) Like the Illinois statute, under proposed s. 974.07 (5) (a) the person filing the motion has to make a prima facie showing that identity was an issue in the case and that there is a chain of custody that establishes the evidence hasn't been tainted. Unlike the suggested language, this draft does not require a prima facie showing that the testing may produce noncumulative, exculpatory evidence because that requirement was virtually identical to proposed s. 974.07 (5) (b). Also, what is the significance of the person's prima facie showing? Is the DA allowed to rebut that showing? If so, must the motion be denied if the DA rebuts the prima facie case or could the person then put on additional evidence? Should the draft just say that the court must determine whether identity was an issue, whether the chain of custody was good and whether the testing will produce noncumulative, relevant evidence, and leave it at that? Also, should the draft specify a burden of proof for the court's determination, or is that unnecessary?

f) With respect to identity being an issue in the case, what if the person needs other material that is not otherwise readily available in order to make that showing (e.g., trial transcripts)? Should the draft address the need for and discovery of such material?

g) Proposed s. 974.07 (5) (b) refers to the person's assertion of actual innocence or wrongful conviction, but nowhere does the draft require the person to make such an assertion in his or her motion. Should the person be required to make that assertion in his or her motion? I suppose that as a practical matter he or she would do so anyway, but it is odd to have the statute refer to an assertion that, strictly speaking, the person is not required to make. Also, proposed s. 974.07 (5) (b) refers to "new" evidence; does that open up the argument that retesting of previously tested material is not really "new" evidence? Should the draft amplify what is meant by "new" evidence, or, alternatively, would it work just to refer to relevant, noncumulative evidence? Lastly, the language refers to evidence that is "materially relevant". Isn't it sufficient to say "relevant"? In Wisconsin relevancy already incorporates the notion of "consequential facts" (i.e., materiality), and in any event the use of the term "material" seems to be disfavored. See s. 904.01, stats.; *State v. Sullivan*, 216 Wis. 2d 768, 786 n.15 (1998).

h) Like the Illinois statute, proposed s. 974.07 (5) (c) requires that the testing employ a generally accepted scientific method. This language essentially restates the test for admissibility of scientific evidence in federal courts that was set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* is no longer the rule in federal courts and has never been the rule in Wisconsin courts. See, most recently, *State v. Donner*, 192 Wis. 2d 305, 315–16 (Ct. App. 1995), citing *State v. Walstad*, 119 Wis. 2d 483, 518–19 (1984). Is it your intent to use the *Frye* standard to evaluate tests done under proposed s. 974.07 even though that standard is not used to determine admissibility of the evidence in court?

i) Unlike the suggested language that you sent to me, proposed s. 974.07 (6) does not provide that the court's may impose conditions on testing to protect "the state's

interest" in the integrity of the evidence and the testing process; instead, this draft leaves out the reference to the state's interest because it seems that the defendant also has an interest in the integrity of the evidence and the testing process. Okay? Also, please carefully review the language of proposed s. 165.77 (2m) relating to testing by the state crime labs. It is based on s. 165.77 (2), stats. Does that language do what you want it to do?

j) 1. Proposed s. 974.07 (7) says that a court "may" refer a person who claims or appears to be indigent to the public defender for an indigency determination. Should it say "shall" instead of "may", given the potential constitutional dimension of the issues involved in the proceeding? Compare s. 974.06 (3) (b), stats.

2. Should the provisions relating to the preservation of biological material also cover fingerprint evidence? Should they also require preservation of reports of earlier test results that are conducted on the material or evidence (so that, for instance, people can compare the earlier and later test results)? Also, if someone does file a motion under proposed s. 974.07, what happens when that motion has been disposed of? Can the custodian then destroy any remaining evidence or does he or she have to go through the notice procedure again?

3. Please review the language of proposed s. 939.74 (2d) (b) carefully to make sure that it does what you want it to do. Also, note that the definition of "deoxyribonucleic acid profile" refers to the definition in s. 972.11 (5) (a), stats., which refers to a DNA analysis that uses "the restriction fragment length polymorphism analysis of deoxyribonucleic acid". Thus, the definition will apparently not cover polymerase chain reaction testing results. Should the definition in both proposed s. 939.74 (2d) (a) and s. 972.11 (5) (a), stats., be changed to cover methods of analysis other than restriction fragment length polymorphism?

Please let me know if you have any questions or changes.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

March 7, 2000

LRBsO375/1dn
JEO:jlg:jf

I have had to do this amendment and drafter's note quickly, so I have not had time to think all of these issues through as completely as I would have liked. There may also be other issues raised by the language of the draft that will bear further thought. However, please note the following when reviewing this draft:

1. The suggested language that you sent to me for proposed §974.07 seemed to be an amalgamation of the Illinois statute (725 Ill. Comp. Stat. 5/1163) and the pending U.S. Senate proposal (S. 2073). I made a number of language changes for purposes of conforming to current drafting style. Also, note the following when reviewing proposed §974.07:

a) The draft does not explicitly address the relationship between motions under proposed §974.07 and other postconviction proceedings. Nor does it explicitly address the issues of successive motions under §974.07, though presumably they are allowed as long as the motion otherwise meets the criteria specified in proposed §974.07 (2). Lastly, the draft does not address what happens after evidence is tested and appears to exonerate the person or at least make it reasonably probable that the outcome of the original case would have been different. Does the person have to make a separate motion for a new trial or other postconviction relief and, if so, what procedure should be used? (Note that the U.S. Senate proposal goes into more detail on the issue of post-testing procedures.) Also, note that, if the person's motion is denied, he or she will presumably be able to appeal and it appears that the appellate rules under §809.30, stats., would apply. Is that your intent, or should §809.30 (1) (a), stats., be amended to exclude motions under proposed §974.07?

809.30 should be amended to exclude 974.07. (We think) Check with the PD's appellate division.

Joe Ehmann 266-8388

b) Proposed §974.07 (3) does not cover persons who are not incarcerated but who want to get testing done to challenge a conviction because, for instance, the conviction constitutes a "strike" under the "three strikes, you're out" law or keeps the person from owning a gun or getting a job or an occupational license of some

sort. It also doesn't cover juveniles subject to ch. 938 or persons found not guilty by reason of mental disease or defect and committed under §971.17, stats.

It would make sense to cover someone who's facing a third strike to challenge the conviction of any of the three strikes. More importantly, amend the statutes to make it clear that it applies to juveniles under 938. NGI commitments under 971.17 and 980.

c) The draft defines "government agency" to include federal agencies. Even though the district attorney would be acting under proposed §974.07(4), I am not certain that we can force a federal agency to follow an order from a district attorney to preserve evidence in its possession.

We should at least try to get the feds to do it.

d) Proposed §974.07 (3) requires that the DA get notice of the motion from both the person filing the motion and the court. Is that your intent? Also, should proposed §974.07 provide for notice to victims that a motion has been made?

Yes bot are necessary because it may be in many of these cases the defendant may be proceeding pro se and may not understand all of the procedures for proceeding pro se. In other words a defendant may not serve the DA on his or her own. Even when the defendant or counsel serves the DA it serves a useful mechanism to preserve the notice because if the court provides notice there is less chance of conflict on whether or not to preserve the evidence.

e) Like the Illinois statute, under proposed §974.07 (5) (a) the person filing the motion has to make a prima facie showing that identity was an issue in the case and that there is a chain of custody that establishes the evidence hasn't been tainted. Unlike the suggested language, this draft does not require a prima facie showing that the testing may produce noncumulative, exculpatory evidence because that requirement was virtually identical to proposed §974.07 (5) (b). Also, what is the significance of the person's prima facie showing? Is the DA allowed to rebut that showing? If so, must the motion be denied if the DA rebuts the prima facie case or could the person then put on additional evidence? Should the draft just say that the court must determine whether identity was an issue, whether the chain of custody was good and whether the testing will produce noncumulative, relevant evidence, and leave it at that? Also, should the draft specify a burden of proof for the court's determination, or is that unnecessary?

A court will order testing if
(a) the defendant claims or alleges he or she was not the perpetrator of the crime and if
(b) the court determines a reasonable basis for concluding
1) chain of custody (there may be scientific testing to over come the failures in the chain of custody, e.g. discarded evidence may include victims DNA may be included, even if the sample was lost. Could there be language on chain of custody, OR, 2) integrity of sample
2) DNA testing can overcome the chain of command
3) the testing may include new non-cumulative evidence relevant to actual innocence or wrongful conviction.
4) Employs a testing method that is accepted by science.

Delete prima facie

f) With respect to identity being an issue in the case, what if the person needs other material that is not otherwise readily available in order to make that showing (e.g.,

trial transcripts)? Should the draft address the need for and discovery of such material?

Add language saying if transcripts not previously prepared and are necessary to make the determination set forth in sub (5) that the court shall order the preparation of the transcripts at the state's expense iof the defendant is indigent.

g) Proposed §974.07 (5) (b) refers to the person's assertion of actual innocence or wrongful conviction, but nowhere does the draft require the person to make such an assertion in his or her motion. Should the person be required to make that assertion in his or her motion? I suppose that as a practical matter he or she would do so anyway, but it is odd to have the statute refer to an assertion that, strictly speaking, the person is not required to make. Also, proposed §974.07 (5) (b) refers to "new" evidence; does that open up the argument that retesting of previously tested material is not really "new" evidence? Should the draft amplify what is meant by "new" evidence, or, alternatively, would it work just to refer to relevant, noncumulative evidence? Lastly, the language refers to evidence that is "materially relevant". Isn't it sufficient to say "relevant"? In Wisconsin relevancy already incorporates the notion of "consequential facts" (i.e., materiality), and in any event the use of the term "material" seems to be disfavored. See §904.01, stats.; *State v. Sullivan,* 216 Wis. 2d 768, 786 n.15 (1998).

"Relevant" language is sufficient

h) Like the Illinois statute, proposed §974.07 (5) (c) requires that the testing employ a generally accepted scientific method. This language essentially restates the test for admissibility of scientific evidence in federal courts that was set out in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). *Frye* is no longer the rule in federal courts and has never been the rule in Wisconsin courts. See, most recently, *State V. Donner,* 192 Wis. 2d 305, 315-16 (Ct. App. 1995), citing State V. *Waistad,* 119 Wis. 2d 483, 518-19 (1984). Is it your intent to use the *Frye* standard to evaluate tests done under proposed §974.07 even though that standard is not used to determine admissibility of the evidence in court?

? Frye unless the state comes up with certification for DNA labs.

i) Unlike the suggested language that you sent to me, proposed §974.07 (6) does not provide that the court's may impose conditions on testing to protect "the state's

Fine

interest" in the integrity of the evidence and the testing process; instead, this draft leaves out the reference to the state's interest because it seems that the defendant also has an interest in the integrity of the evidence and the testing process. Okay? Also, please carefully review the language of proposed §165.77 (2m) relating to testing by the state crime labs. It is based on §165.77(2), stats. Does that language do what you want it to do?

j) 1. Proposed §974.07 (7) says that a court "may" refer a person who claims or appears to be indigent to the public defender for an indigency determination. Should it say "shall" instead of "may", given the potential constitutional dimension of the issues involved in the proceeding? Compare §974.06 (3) (b), stats.

Fine, make it "shall."

2. Should the provisions relating to the preservation of biological material also cover fingerprint evidence? Should they also require preservation of reports of earlier test results that are conducted on the material or evidence (so that, for instance, people can compare the earlier and later test results)? Also, if someone does file a motion under proposed §974.07, what happens when that motion has been disposed of? Can the custodian then destroy any remaining evidence or does he or she have to go through the notice procedure again?

Yes on fingerprints and test results and also the bench notes from the lab. In fraud cases of DNA testing it was not discovered until they looked at the analyst's notes. Leave the language on notice as is. If the court finds identity, chain of custody cannot be established or the integrity of the sample cannot be established through any scientific testing, or if the sample proves guilt, then it can be destroyed. Otherwise hold on to it.

3. Please review the language of proposed §939.74 (2d) (b) carefully to make sure that it does what you want it to do. Also, note that the definition of "deoxyribonucleic acid profile" refers to the definition in §972.11 (5) (a), stats., which refers to a DNA analysis that uses "the restriction fragment length polymorphism analysis of deoxyribonucleic acid". Thus, the definition will apparently not cover polymerase chain reaction testing results. Should the definition in both proposed §939.74 (2d) (a) and §972.11 (5) (a), stats., be changed to cover methods of analysis other than restriction fragment length polymorphism?

Here's the intent: The language should limited to DNA evidence of the person who perpetrated the crime. Profile of that of the person who committed the violation. We want to make sure there are no loopholes here.

We do want to include the Restriction Fragment Length Polymorphism test. But not explicitly. We should use the *Frye* standard that says you can use any standards that is accepted in the field. Who knows what the next wave of tests will be called.

The Legislation does nothing to remove the statute of limitation 805.16 (4). We should delete the first sentence of 805.16 (4). Also be explicit that if DNA evidence 805.15 (3) (a) and (b) does not apply in cases in which DNA provides evidence of innocence.

165.77(b) Delete this language unless the testing is conclusive one way or another, in the event that something more conclusive comes along later.

165.81(3) Expand to include juveniles 971, 980 that was collected in the criminal action or juvenile delinquency, NGI commitment or 980.

Language repeatedly (Section 7 and 12) 974.07 under the new provision we are creating not .06.

Same with sub. (b)

Section12 page 7, add or juvenile delinquency, or 980 or NGI commitment.

Page 9
974.07(2)
Sentence of a court add or juvenile delinquency, or 980 or NGI commitment, may make a motion in a court, which court? Make sure it is the proper court (which may not be the committing court in 980 cases).

974.07 (2)(a)
What does "related" mean? It should say relevant instead.

Please let me know if you have any questions or changes.

Jefren E. Olsen
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3/17

Stripes from Dan
Monday/Tues

1) Amend 809.30 to exclude (new) §974.07?
{Follow 974.06}
Allow counsel?..

2) Post-motion procedure
Follow fed. language
New "step" in process
NB – 805.16; other stats?

3) Take out fingerprint evidence

4) Expand to all persons convicted of crime, adj'udicated del., §§ 971.17

5) P. 9, L. 5: relevant not related

6) Ct. does all notice to victims

7) Failure to serve motion on DA not juris. flaw (motion to dismiss

8) Ct does victim notice

9) See p. 10 & 11 for penciled in changes

(RM) (MB) (10) Change 972.11(5)(a) def.

(11) Ev. preservation – ~~[illegible]~~
forever

→ to destroy, give notice
→ either file motion
or request preservation; in which
case preserved → till off paper/discharged

(12) Cover possession by l.e. (Ch. 968.205)
& by DA – [ch. 978]

follow 165.81...

LRBs0375/1
JEO:jlg:jf

Weds 3/22 afternoon

2

r.m.r.

SENATE SUBSTITUTE AMENDMENT,

TO 1999 ASSEMBLY BILL 497

regenerate

AN ACT *to renumber and amend* 757.54; *to amend* 165.81 (1), 939.74 (1), 939.74 (2) (c), 968.20 (1) (intro.), 968.20 (2) and 968.20 (4); and *to create* 20.410 (1) (be), 165.77 (2m), 165.81 (3), 757.54 (2), 939.74 (2d), 968.20 (1g) and 974.07 of the statutes; **relating to:** preservation and maintenance of certain evidence, time limits for prosecution of certain crimes of sexual assault and postconviction motions for testing of certain evidence.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

		1999–00	2000–01
20.410 Corrections, department of			
(1) ADULT CORRECTIONAL SERVICES			
(be) Postconviction evidence testing costs	GPR A	–0–	–0–

SECTION 2. 20.410 (1) (be) of the statutes is created to read:

20.410 **(1)** (be) *Postconviction evidence testing costs.* The amounts in the schedule for the costs of performing fingerprint testing or forensic deoxyribonucleic acid testing for indigent persons under s. 974.07, pursuant to a court order issued under s. 974.07 (~~8~~ 10).

SECTION 3. 165.77 (2m) of the statutes is created to read:

165.77 **(2m)** (a) If the laboratories receive biological material pursuant to the order of a court issued under s. 974.07 (~~6~~ 7), the laboratories shall analyze the deoxyribonucleic acid in the material and submit the results of the analysis to the court that ordered the analysis.

(b) The laboratories may compare the data obtained from material received under par. (a) with data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings. In this state, the use is subject to s. 972.11 (5). The laboratories shall not include data obtained from deoxyribonucleic acid analysis of material received under this paragraph in the data bank under sub. (3). The laboratories shall destroy material obtained under this

paragraph after analysis has been completed and the applicable court proceedings have concluded, unless the court that issued the order under s. 974.07 (6) provides otherwise.

(c) Paragraph (b) does not apply to specimens received under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063.

SECTION 4. 165.81 (1) of the statutes is amended to read:

165.81 **(1)** Whenever the department is informed by the submitting officer or agency that physical evidence in the possession of the laboratories is no longer needed the department may, except as provided in sub. (3) or unless otherwise provided by law, either destroy the same, retain it in the laboratories or turn it over to the University of Wisconsin upon the request of the head of any department. ~~Whenever~~ Except as provided in sub. (3), whenever the department receives information from which it appears probable that the evidence is no longer needed, the department may give written notice to the submitting agency and the appropriate district attorney, by registered mail, of the intention to dispose of the evidence. If no objection is received within 20 days after the notice was mailed, it may dispose of the evidence.

INS 3-19

SECTION 5. 165.81 (3) of the statutes is created to read:

165.81 **(3)** If physical evidence in the possession of the laboratories includes any biological material that was collected in connection with a criminal action or proceeding, the evidence shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The department notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person

or the state public defender that the department intends to destroy the biological material unless a motion for testing of the material is filed under s. ~~974.06~~ 974.07 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. ~~974.06~~ 974.07 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the department to preserve the biological material.

SECTION 6. 757.54 of the statutes is renumbered 757.54 (1) and amended to read:

757.54 **(1)** ~~The~~ Except as provided in sub. (2), the retention and disposal of all court records and exhibits in any civil or criminal action or proceeding or probate proceeding of any nature in a court of record shall be determined by the supreme court by rule.

SECTION 7. 757.54 (2) of the statutes is created to read:

757.54 **(2)** If an exhibit in a criminal action or proceeding includes any biological material that was collected in connection with the action or proceeding, the exhibit shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The court notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person or the state public defender that the court intends to destroy the biological material unless a motion for testing of the material is filed under s. ~~974.06~~ 974.07 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. ~~974.06~~ 974.07 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the court to preserve the biological material.

SECTION 8. 939.74 (1) of the statutes is amended to read:

939.74 **(1)** Except as provided in ~~sub.~~ subs. (2)~~,~~ and (2d) and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

SECTION 9. 939.74 (2) (c) of the statutes is amended to read:

939.74 **(2)** (c) A prosecution for violation of s. 948.02, 948.025, 948.03 (2) (a), 948.05, 948.06, 948.07 (1), (2), (3) or (4), 948.08 or 948.095 shall be commenced before the victim reaches the age of 31 years or be barred, except as provided in sub. (2d) (d).

SECTION 10. 939.74 (2d) of the statutes is created to read:

939.74 **(2d)** (a) In this subsection, "deoxyribonucleic acid profile" ~~has the~~ meaning given in s. 972.11 (5m).

(b) In a case in which the state has evidence of a deoxyribonucleic acid profile of a person and the state believes the evidence may identify a person who committed a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025 but comparisons of the evidence to deoxyribonucleic acid profiles of known persons have not resulted in a probable identification of the person, the state may, before the expiration of the time limit under sub. (1) or (2) (c), whichever is applicable, request the circuit court in the

county in which the violation is believed to have been committed to determine whether there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed the violation. A request under this paragraph shall be made and heard ex parte. The court shall make a written record of the proceeding that shall remain secret unless a prosecution for the violation is commenced, in which case the record shall be made available to both the state and any defendant in that prosecution.

(c) Notwithstanding that the time limitation under sub. (1) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 940.225 (1) or (2), a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

(d) Notwithstanding that the time limitation under sub. (2) (c) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 948.02 (1) or (2) or 948.025, a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

INS 6-22

SECTION 11. 968.20 (1) (intro.) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(1)** (intro.) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. ~~(1)~~ (1m) or (1r) or s. 173.12 ~~or~~ 173.21 (4) ~~(b)~~, returned if:

SECTION 12. ~~968.20~~ (1g) of the statutes is created to read:

968.20 **(1g)** If property seized by and in the possession of a law enforcement agency or a district attorney includes any biological material that was collected in connection with a criminal action or proceeding, the biological material shall be maintained and preserved as long as any person remains under custody of a sentence imposed in the action or proceeding, unless all of the following apply:

(a) The law enforcement agency or district attorney notifies all persons who remain under custody of a sentence imposed in the action or proceeding and either the attorney of record for each person or the state public defender that the law enforcement agency or district attorney intends to destroy the biological material unless a motion for testing of the material is filed under s. 974.06 within 90 days after the date on which the person receives the notice.

(b) No person notified under par. (a) files a motion for testing of the biological material under s. 974.06 within 90 days after the date on which the person received the notice.

(c) No other provision of federal or state law requires the law enforcement agency or district attorney to preserve the biological material.

SECTION 13. 968.20 (2) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(2)** Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1g), (1m) or (1r) or s. 173.12 or 968.205, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

SECTION 14. 968.20 (4) of the statutes is amended to read:

968.20 **(4)** Any property seized, other than property covered under s. 968.205, which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

SECTION 15. 974.07 of the statutes is created to read:

974.07 Motion for ~~fingerprint or~~ deoxyribonucleic acid testing of certain evidence. (1) In this section, "government agency" means any department or agency of the federal government, of this state or of a city, village, town or county in this state.

being convicted of a crime, adjudicated delinquent or found not guilty ~~or not responsible~~ by reason of mental disease or defect

(2) At any time after ~~conviction~~, a person ~~who is in custody under sentence of a court~~ may make a motion in the court ~~that imposed the sentence~~ for an order requiring ~~fingerprint testing or~~ forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

relevant

(a) The evidence is ~~related~~ to the investigation or prosecution that resulted in the ~~sentence imposed on the person~~ conviction, adjudication or finding of not guilty ~~or not responsible~~ by reason of mental disease or defect

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to ~~fingerprint testing or~~ forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A person who makes a motion under this section or, if applicable, his or her attorney shall serve a copy of the motion on the district attorney's office that prosecuted the case that resulted in the ~~sentence imposed on the person~~. The court in which the motion is made shall also notify the appropriate district attorney's office that a motion has been made under this section and shall give the district attorney an opportunity to respond to the motion.

INS 9-19

INS 9-20

(4) Upon receiving under sub. (3) a copy of a motion made under this section or notice from a court that a motion has been made, whichever occurs first, the district attorney shall take all actions necessary to ensure that all ~~fingerprint~~ evidence and biological material that was collected in connection with the investigation or prosecution of the case and that remains in the actual or constructive

in which he or she was convicted, adjudicated delinquent or found not guilty ~~or not responsible~~ by reason of mental disease or defect

custody of a government agency is preserved pending completion of the proceedings under this section.

(5) A court in which a motion under this section is filed shall order ~~DNA~~ testing ~~or~~ forensic deoxyribonucleic acid testing if ~~it determines that~~ all of the following apply:

~~(a) The person making the motion establishes a prima facie case that all of the following apply:~~

~~1. The identity of the person who committed the offense for which the person was sentenced was an issue in the investigation, trial or disposition of the case.~~

~~2. The chain of custody of the evidence to be tested is reasonably sufficient to establish that it has not been tampered with, replaced or altered in any material respect.~~

(b) The court determines that the testing may produce ~~new,~~ noncumulative evidence that is ~~materially~~ relevant to the person's assertion of actual innocence ~~an wrongful conviction.~~

~~(c) The testing requested employs a scientific method generally accepted within the relevant scientific community.~~

(6) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate and if stipulated to by the person who made the motion under this section and the district attorney, the court may order the state crime laboratories to perform ~~forensic deoxyribonucleic acid~~ the testing as provided under s. 165.77 (2m).

(7) A court considering a motion under this section made by a person who is not represented by counsel ~~may~~ shall, if the person claims or appears to be indigent, refer the person to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(8) The court may order a person who makes a motion under this section to pay the costs of any testing ordered by the court under this section if the court determines that the person is not indigent ~~and that the person possesses the financial resources to pay the costs~~. If the court determines that the person is indigent, the court shall order the costs of the testing to be paid for from the appropriation account under s. 20.410 (1) (be).

SECTION 16. Initial applicability.

(1) The treatment of section 939.74 (1), (2) (c) and (2d) of the statutes first applies to offenses not barred from prosecution on the effective date of this subsection.

(END)

INSERT 3–19:

165.81 **(3)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if physical evidence that is in the possession of the laboratories includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the department may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The department sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the department.

3. No other provision of federal or state law requires the department to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which

the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the department.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, the department receives a written request to preserve the evidence, the department shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made.

INSERT 4–16:

757.54 **(2)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if an exhibit in a criminal action or a delinquency proceeding under ch. 938 includes any biological material that was collected in connection with the action or proceeding , the exhibit shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the court may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The court sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the court.

3. No other provision of federal or state law requires the court to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the court.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, a court receives a written request to preserve the evidence, the court shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made.

SECTION 1. 801.02 (7) (a) 2. c. of the statutes is amended to read:

801.02 **(7)** (a) 2. c. A person bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an extraordinary writ or a supervisory writ seeking relief from a judgment of conviction or a sentence of a court or an action under s. 809.30, 809.40, 973.19 ~~or~~, 974.06 or 974.07.

History: Sup. Ct. Order, 67 Wis. 2d 585, 589 (1975); 1975 c. 218; 1981 c. 317; 1995 a. 27; 1997 a. 133, 187.

SECTION 2. 805.15 (3) (intro.) of the statutes is amended to read:

805.15 **(3)** (intro.) ~~A~~ Except as provided in s. 974.07 (8) (c), a new trial shall be ordered on the grounds of newly–discovered evidence if the court finds that:

History: Sup. Ct. Order, 67 Wis. 2d 585, 708 (1975); 1975 c. 218; 1979 c. 110; 1983 a. 219; Sup. Ct. Order, 141 Wis. 2d xiii (1987).

SECTION 3. 805.16 (4) of the statutes is amended to read:

805.16 **(4)** Notwithstanding sub. (1), a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Unless an order granting or denying the motion is entered within 90 days after the motion

is made, it shall be deemed denied. This subsection does not apply to motions made under s. 974.07.

History: Sup. Ct. Order, 67 Wis. 2d 585, 711 (1975); Sup. Ct. Order, 118 Wis. 2d xiii (1984); Sup. Ct. Order, 136 Wis. 2d xxv (1987); Sup. Ct. Order 160 Wis. 2d xiii (1991).

SECTION 4. 809.30 (1) (a) of the statutes is amended to read:

809.30 **(1)** (a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 ~~or,~~ 974.06 or 974.07. In a ch. 48, 51, 55 or 938 case, other than a termination of parental rights case under s. 48.43, it means an appeal or a motion for reconsideration by the trial court of its final judgment or order; in such cases a notice of intent to pursue such relief or a motion for such relief need not be styled as seeking "postconviction" relief.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 112 Wis. 2d xvii (1985); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 332; Sup Ct. Order, 136 Wis. 2d xxv (1987); Sup. Ct. Order, 161 Wis. 2d xiii (1991); Sup. Ct. Order No. 93–19, 179 Wis. 2d xxiii (1994); 1993 a. 16, 395, 451; 1995 a. 77.

SECTION 5. 809.30 (2) (L) of the statutes is amended to read:

809.30 **(2)** (L) An appeal under s. 974.06 or 974.07 is governed by the procedures for civil appeals.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 112 Wis. 2d xvii (1985); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 332; Sup Ct. Order, 136 Wis. 2d xxv (1987); Sup. Ct. Order, 161 Wis. 2d xiii (1991); Sup. Ct. Order No. 93–19, 179 Wis. 2d xxiii (1994); 1993 a. 16, 395, 451; 1995 a. 77.

SECTION 6. 938.46 of the statutes is amended to read:

938.46 New evidence. A juvenile whose status is adjudicated by the court under this chapter, or the juvenile's parent, guardian or legal custodian, may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication. Upon a showing that such evidence does exist, the court shall order a new hearing. This section does not apply to motions made under s. 974.07.

History: 1995 a. 77.

INSERT 5–19:

means any analysis of deoxyribonucleic acid that results in the identification of an individual's patterned chemical structure of genetic information.

INSERT 6–22:

SECTION 7. 950.04 (1v) (s) of the statutes is amended to read:

950.04 **(1v)** (s) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence, subject to s. 968.205. If feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, property subject to preservation under s. 968.205 and property the ownership of which is disputed, shall be returned to the person within 10 days of being taken.

History: 1979 c. 219; 1983 a. 102, 364; 1985 a. 311; 1987 a. 332 s. 64; 1989 a. 31; 1997 a. 181, 237, 283; 1999 a. 9.

SECTION 8. 950.04 (1v) (yd) of the statutes is created to read:

950.04 **(1v)** (yd) To have the appropriate clerk of court make a reasonable attempt to send the victim a copy of a motion for postconviction deoxyribonucleic acid testing of certain evidence made under s. 974.07 and notification of any hearing on that motion, as provided under s. 974.07 (4).

INSERT 8–19:

SECTION 9. 968.205 of the statutes is created to read:

968.205 Preservation of certain evidence. (1) In this section:

(a) "Custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order under ch. 938 and supervision of a person, whether in

institutional care or on conditional release, pursuant to a commitment order under s. 971.17.

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action or delinquency proceeding or, if the person is serving consecutive sentences of imprisonment, the date on which the person is released or discharged from custody under all of the sentences.

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a law enforcement agency may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The law enforcement agency sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the law enforcement agency or district attorney.

(c) No other provision of federal or state law requires the law enforcement agency to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the law enforcement agency.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a law enforcement agency receives a written request to preserve the evidence, the law enforcement agency shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made.

SECTION 10. 971.04 (3) of the statutes is amended to read:

971.04 **(3)** If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times. A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02 ~~or,~~ 974.06 or 974.07. If the defendant is not present, the time for appeal from any order under ss. 974.02 ~~and,~~ 974.06 and 974.07 shall commence after a copy has been served upon the attorney representing the defendant, or upon the defendant if he or she appeared without counsel. Service of such an order shall be complete upon mailing. A defendant appearing without counsel shall supply the court with his or her current mailing address. If the defendant fails to supply the court with a current and accurate mailing address, failure to receive a copy of the

order granting or denying relief shall not be a ground for tolling the time in which an appeal must be taken.

History: 1971 c. 298; Sup. Ct. Order, 130 Wis. 2d xix (1986); 1993 a. 486; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997).

SECTION 11. 974.02 (1) of the statutes is amended to read:

974.02 **(1)** A motion for postconviction relief other than under s. 974.06 or 974.07 by the defendant in a criminal case shall be made in the time and manner provided in ss. 809.30 and 809.40. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3), 809.30 and 809.40. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

History: 1971 c. 298; 1977 c. 187; 1977 c. 418 s. 929 (8m); 1979 c. 89; 1983 a. 27, 219.

SECTION 12. 974.05 (1) (b) of the statutes is amended to read:

974.05 **(1)** (b) Order granting postconviction relief under s. 974.02 ~~or~~, 974.06 or 974.07.

History: 1971 c. 298; Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 1977 c. 187; 1983 a. 219; 1991 a. 39; 1993 a. 486.

INSERT 9–19:

Failure by a person making a motion under this section to serve a copy of the motion on the appropriate district attorney's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

INSERT 9–20:

(4) (a) The clerk of the circuit court in which a motion made under this section shall send a copy of the motion and, if a hearing is scheduled, a notice of the hearing on the motion to the victim of the crime or delinquent act committed by the person who made the motion, if the clerk is able to determine an address for the victim. The

clerk of the circuit court shall make a reasonable attempt to send the copy of the motion to the address of the victim within 7 days of the date on which the motion is filed and shall make a reasonable attempt to send a notice of hearing, if a hearing is scheduled, to the address of the victim, postmarked at least 10 days before the date of the hearing.

(b) Notwithstanding the limitation on the disclosure of mailing addresses from completed information cards submitted by victims under ss. 51.37 (10) (dx), 301.046 (4) (d), 301.048 (4m) (d), 301.38 (4), 302.115 (4), 304.06 (1) (f), 304.063 (4), 938.51 (2), 971.17 (6m) (d) and 980.11 (4), the department of corrections, the parole commission and the department of health and family services shall, upon request, assist clerks of court in obtaining information regarding the mailing address of victims for the purpose of sending copies of motions and notices of hearings under par. (a).

INSERT 10–6:

(a) The person making the motion claims that he or she is actually innocent of the offense for which he or she was convicted, found not guilty by reason of mental disease or defect or adjudicated delinquent.

(b) The court determines either that the chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody cannot establish the integrity of the evidence, that the testing itself can establish the integrity of the evidence.

INSERT 10–21:

(8) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section are unfavorable to the person who made the motion for testing, the court shall dismiss the proceedings under this section.

(b) If the results of forensic deoxyribonucleic acid testing ordered under this section are favorable to the person who made the motion for testing, the court shall schedule a hearing to determine the appropriate relief to be granted to the person. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the person's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency.

2. An order granting the person a new trial or fact–finding hearing.

3. An order granting the person a new sentencing hearing, commitment hearing or dispositional hearing.

4. An order discharging the person from custody, as defined in s. 968.205 (1) (a), if the person is in custody.

(c) A court may order a new trial under par. (b) without making the findings specified in s. 805.15 (3) (a) and (b).

INSERT 11–7:

(b) A person is indigent for purposes of par. (a) if any of the following apply:

1. The person was referred to the state public defender under sub. (9) for a determination of indigency and was found to be indigent.

2. The person was referred to the state public defender under sub. (9) for a determination of indigency but was found not to be indigent, and the court determines that the person does not possess the financial resources to pay the costs of testing.

3. The person was not referred to the state public defender under sub. (9) for a determination of indigency and the court determines that the person does not possess the financial resources to pay the costs of testing.

(11) An appeal may be taken from an order entered under this section as from a final judgment.

SECTION 13. 977.07 (1) (b) of the statutes is amended to read:

977.07 **(1)** (b) For referrals not made under ss. 809.30 ~~and~~, 974.06 and 974.07, a representative of the state public defender is responsible for making indigency determinations unless the county became responsible under s. 977.07 (1) (b) 2. or 3., 1983 stats., for these determinations. Subject to the provisions of par. (bn), those counties may continue to be responsible for making indigency determinations. Any such county may change the agencies or persons who are designated to make indigency determinations only upon the approval of the state public defender.

History: 1977 c. 29; 1979 c. 175 s. 53; 1979 c. 356; 1981 c. 20 s. 1833, 2202 (41) (a); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 29; 1987 a. 27, 61, 399; 1991 a. 39; 1993 a. 16, 451, 491; 1995 a. 27, 77.

SECTION 14. 977.07 (1) (c) of the statutes is amended to read:

977.07 **(1)** (c) For all referrals made under ss. 809.30 ~~and~~, 974.06 (3) (b) and 974.07 (9), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, a representative of the state public defender shall determine indigency~~, and~~. For referrals made under ss. 809.30 and 974.06 (3) (b), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, the representative of the state public defender may, unless a request for redetermination has been filed under s. 809.30 (2) (d) or the defendant's request for representation states that his or her financial circumstances have materially

improved, rely upon a determination of indigency made for purposes of trial representation under this section.

History: 1977 c. 29; 1979 c. 175 s. 53; 1979 c. 356; 1981 c. 20 s. 1833, 2202 (41) (a); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 29; 1987 a. 27, 61, 399; 1991 a. 39; 1993 a. 16, 451, 491; 1995 a. 27, 77.

SECTION 15. 978.08 of the statutes is created to read:

978.08 Preservation of certain evidence. (1) In this section:

(a) "Custody" has the meaning given in s. 968.205 (1) (a).

(b) "Discharge date" has the meaning given in s. 968.205 (1) (b).

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a district attorney includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a district attorney may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The district attorney sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the district attorney.

(c) No other provision of federal or state law requires the district attorney to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the district attorney.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a district attorney receives a written request to preserve the evidence, the district attorney shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made.

State of Wisconsin
1999 – 2000 LEGISLATURE

LRBs0375/2
JEO:jlg:jf

Today

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T.M.N.

SENATE SUBSTITUTE AMENDMENT,

TO 1999 ASSEMBLY BILL 497

Regen

AN ACT *to renumber and amend* 757.54; *to amend* 165.81 (1), 801.02 (7) (a) 2. c., 805.15 (3) (intro.), 805.16 (4), 809.30 (1) (a), 809.30 (2) (L), 938.46, 939.74 (1), 939.74 (2) (c), 950.04 (1v) (s), 968.20 (1) (intro.), 968.20 (2), 968.20 (4), 971.04 (3), 974.02 (1), 974.05 (1) (b), 977.07 (1) (b) and 977.07 (1) (c); and *to create* 20.410 (1) (be), 165.77 (2m), 165.81 (3), 757.54 (2), 939.74 (2d), 950.04 (1v) (yd), 968.205, 974.07 and 978.08 of the statutes; **relating to:** preservation and maintenance of certain evidence, time limits for prosecution of certain crimes of sexual assault and postconviction motions for testing of certain evidence.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

		1999–00	2000–01
20.410 Corrections, department of			
(1) ADULT CORRECTIONAL SERVICES			
(be) Postconviction evidence testing costs	GPR A	–0–	–0–

SECTION 2. 20.410 (1) (be) of the statutes is created to read:

20.410 **(1)** (be) *Postconviction evidence testing costs.* The amounts in the schedule for the costs of performing ~~fingerprint testing or~~ forensic deoxyribonucleic acid testing for indigent persons under s. 974.07, pursuant to a court order issued under s. 974.07 (10).

SECTION 3. 165.77 (2m) of the statutes is created to read:

165.77 **(2m)** (a) If the laboratories receive biological material pursuant to the order of a court issued under s. 974.07 (7), the laboratories shall analyze the deoxyribonucleic acid in the material and submit the results of the analysis to the court that ordered the analysis.

(b) The laboratories may compare the data obtained from material received under par. (a) with data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings. In this state, the use is subject to s. 972.11 (5). The laboratories shall not include data obtained from deoxyribonucleic acid analysis of material received under this paragraph in the data bank under sub. (3).

(c) Paragraph (b) does not apply to specimens received under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063.

SECTION 4. 165.81 (1) of the statutes is amended to read:

165.81 **(1)** Whenever the department is informed by the submitting officer or agency that physical evidence in the possession of the laboratories is no longer needed the department may, except as provided in sub. (3) or unless otherwise provided by law, either destroy the same, retain it in the laboratories or turn it over to the University of Wisconsin upon the request of the head of any department. ~~Whenever~~ Except as provided in sub. (3), whenever the department receives information from which it appears probable that the evidence is no longer needed, the department may give written notice to the submitting agency and the appropriate district attorney, by registered mail, of the intention to dispose of the evidence. If no objection is received within 20 days after the notice was mailed, it may dispose of the evidence.

SECTION 5. 165.81 (3) of the statutes is created to read:

165.81 **(3)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if physical evidence that is in the possession of the laboratories includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the department may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The department sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the department.

3. No other provision of federal or state law requires the department to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the department.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, the department receives a written request to preserve the evidence, the department shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, ~~or~~ a subject to a court order issued under s. 974.07 (6m), (7) or (8)

SECTION 6. 757.54 of the statutes is renumbered 757.54 (1) and amended to read:

757.54 **(1)** ~~The~~ Except as provided in sub. (2), the retention and disposal of all court records and exhibits in any civil or criminal action or proceeding or probate proceeding of any nature in a court of record shall be determined by the supreme court by rule.

SECTION 7. 757.54 (2) of the statutes is created to read:

757.54 **(2)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if an exhibit in a criminal action or a delinquency proceeding under ch. 938 includes any biological material that was collected in connection with the action or proceeding , the exhibit shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the court may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The court sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the court.

3. No other provision of federal or state law requires the court to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed

under s. 974.07 or a written request to preserve the evidence is submitted to the court.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, a court receives a written request to preserve the evidence, the court shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8)

SECTION 8. 801.02 (7) (a) 2. c. of the statutes is amended to read:

801.02 **(7)** (a) 2. c. A person bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an extraordinary writ or a supervisory writ seeking relief from a judgment of conviction or a sentence of a court or an action under s. 809.30, 809.40, 973.19 ~~or~~, 974.06 or 974.07.

SECTION 9. 805.15 (3) (intro.) of the statutes is amended to read:

805.15 **(3)** (intro.) ~~A~~ Except as provided in s. 974.07 (8) (c), a new trial shall be ordered on the grounds of newly–discovered evidence if the court finds that:

SECTION 10. 805.16 (4) of the statutes is amended to read:

805.16 **(4)** Notwithstanding sub. (1), a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Unless an order granting or denying the motion is entered within 90 days after the motion is made, it shall be deemed denied. This subsection does not apply to motions made under s. 974.07.

SECTION 11. 809.30 (1) (a) of the statutes is amended to read:

809.30 **(1)** (a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 ~~or~~, 974.06 or 974.07. In a ch. 48, 51, 55 or 938 case, other than a termination of parental rights case under s. 48.43, it means an appeal or a motion for

reconsideration by the trial court of its final judgment or order; in such cases a notice of intent to pursue such relief or a motion for such relief need not be styled as seeking "postconviction" relief.

SECTION 12. 809.30 (2) (L) of the statutes is amended to read:

809.30 **(2)** (L) An appeal under s. 974.06 or 974.07 is governed by the procedures for civil appeals.

SECTION 13. 938.46 of the statutes is amended to read:

938.46 New evidence. A juvenile whose status is adjudicated by the court under this chapter, or the juvenile's parent, guardian or legal custodian, may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication. Upon a showing that such evidence does exist, the court shall order a new hearing. This section does not apply to motions made under s. 974.07.

SECTION 14. 939.74 (1) of the statutes is amended to read:

939.74 **(1)** Except as provided in ~~sub.~~ subs. (2)~~,~~ and (2d) and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

SECTION 15. 939.74 (2) (c) of the statutes is amended to read:

939.74 **(2)** (c) A prosecution for violation of s. 948.02, 948.025, 948.03 (2) (a), 948.05, 948.06, 948.07 (1), (2), (3) or (4), 948.08 or 948.095 shall be commenced before the victim reaches the age of 31 years or be barred, except as provided in sub. (2d) (d).

SECTION 16. 939.74 (2d) of the statutes is created to read:

939.74 **(2d)** (a) In this subsection, "deoxyribonucleic acid profile" means any analysis of deoxyribonucleic acid that results in the identification of an individual's patterned chemical structure of genetic information.

(b) In a case in which the state has evidence of a deoxyribonucleic acid profile of a person and the state believes the evidence may identify a person who committed a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025 but comparisons of the evidence to deoxyribonucleic acid profiles of known persons have not resulted in a probable identification of the person, the state may, before the expiration of the time limit under sub. (1) or (2) (c), whichever is applicable, request the circuit court in the county in which the violation is believed to have been committed to determine whether there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed the violation. A request under this paragraph shall be made and heard ex parte. The court shall make a written record of the proceeding that shall remain secret unless a prosecution for the violation is commenced, in which case the record shall be made available to both the state and any defendant in that prosecution.

(c) Notwithstanding that the time limitation under sub. (1) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 940.225 (1) or (2), a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

(d) Notwithstanding that the time limitation under sub. (2) (c) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 948.02 (1) or (2) or 948.025, a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

SECTION 17. 950.04 (1v) (s) of the statutes is amended to read:

950.04 **(1v)** (s) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence, subject to s. 968.205. If feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, property subject to preservation under s. 968.205 and property the ownership of which is disputed, shall be returned to the person within 10 days of being taken.

SECTION 18. 950.04 (1v) (yd) of the statutes is created to read:

950.04 **(1v)** (yd) To have the appropriate clerk of court make a reasonable attempt to send the victim a copy of a motion for postconviction deoxyribonucleic acid testing of certain evidence made under s. 974.07 and notification of any hearing on that motion, as provided under s. 974.07 (4).

SECTION 19. 968.20 (1) (intro.) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(1)** (intro.) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or

where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.12 ~~or~~, 173.21 (4) ~~(b)~~ or 968.205, returned if:

SECTION 20. 968.20 (2) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(2)** Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1m) or (1r) or s. 173.12 or 968.205, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

SECTION 21. 968.20 (4) of the statutes is amended to read:

968.20 **(4)** Any property seized, other than property covered under s. 968.205, which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

SECTION 22. 968.205 of the statutes is created to read:

968.205 Preservation of certain evidence. (1) In this section:

(a) "Custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order under ch. 938 and supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order under s. 971.17.

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action or delinquency proceeding or, if the person is serving consecutive sentences of imprisonment, the date on which the person is released or discharged from custody under all of the sentences.

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a law enforcement agency may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The law enforcement agency sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the law enforcement agency or district attorney.

(c) No other provision of federal or state law requires the law enforcement agency to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the law enforcement agency.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a law enforcement agency receives a written request to preserve the evidence, the law enforcement agency shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8).

SECTION 23. 971.04 (3) of the statutes is amended to read:

971.04 **(3)** If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times. A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02 ~~or,~~ 974.06 or 974.07. If the defendant is not present, the time for appeal from any order under ss. 974.02 ~~and,~~ 974.06 and 974.07 shall commence after a copy has been served upon the attorney representing the defendant, or upon

the defendant if he or she appeared without counsel. Service of such an order shall be complete upon mailing. A defendant appearing without counsel shall supply the court with his or her current mailing address. If the defendant fails to supply the court with a current and accurate mailing address, failure to receive a copy of the order granting or denying relief shall not be a ground for tolling the time in which an appeal must be taken.

SECTION 24. 974.02 (1) of the statutes is amended to read:

974.02 **(1)** A motion for postconviction relief other than under s. 974.06 or 974.07 by the defendant in a criminal case shall be made in the time and manner provided in ss. 809.30 and 809.40. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3), 809.30 and 809.40. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

SECTION 25. 974.05 (1) (b) of the statutes is amended to read:

974.05 **(1)** (b) Order granting postconviction relief under s. 974.02 ~~or~~, 974.06 or 974.07.

SECTION 26. 974.07 of the statutes is created to read:

974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence. (1) In this section, "government agency" means any department or agency of the federal government, of this state or of a city, village, town or county in this state.

(2) At any time after being convicted of a crime, adjudicated delinquent or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication or finding of not guilty by reason of mental disease or defect.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A person who makes a motion under this section or, if applicable, his or her attorney shall serve a copy of the motion on the district attorney's office that prosecuted the case that resulted in the conviction, adjudication or finding of not guilty by reason of mental disease or defect. The court in which the motion is made shall also notify the appropriate district attorney's office that a motion has been made under this section and shall give the district attorney an opportunity to respond to the motion. Failure by a person making a motion under this section to serve a copy of the motion on the appropriate district attorney's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

(4) (a) The clerk of the circuit court in which a motion made under this section shall send a copy of the motion and, if a hearing is scheduled, a notice of the hearing on the motion to the victim of the crime or delinquent act committed by the person who made the motion, if the clerk is able to determine an address for the victim. The clerk of the circuit court shall make a reasonable attempt to send the copy of the motion to the address of the victim within 7 days of the date on which the motion is filed and shall make a reasonable attempt to send a notice of hearing, if a hearing is scheduled, to the address of the victim, postmarked at least 10 days before the date of the hearing.

(b) Notwithstanding the limitation on the disclosure of mailing addresses from completed information cards submitted by victims under ss. 51.37 (10) (dx), 301.046 (4) (d), 301.048 (4m) (d), 301.38 (4), 302.115 (4), 304.06 (1) (f), 304.063 (4), 938.51 (2), 971.17 (6m) (d) and 980.11 (4), the department of corrections, the parole commission and the department of health and family services shall, upon request, assist clerks of court in obtaining information regarding the mailing address of victims for the purpose of sending copies of motions and notices of hearings under par. (a).

(5) Upon receiving under sub. (3) a copy of a motion made under this section or notice from a court that a motion has been made, whichever occurs first, the district attorney shall take all actions necessary to ensure that all biological material that was collected in connection with the investigation or prosecution of the case and that remains in the actual or constructive custody of a government agency is preserved pending completion of the proceedings under this section.

(6) A court in which a motion under this section is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

(a) The person making the motion claims that he or she is actually innocent of the offense for which he or she was convicted, found not guilty by reason of mental disease or defect or adjudicated delinquent.

(b) The court determines either that the chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody cannot establish the integrity of the evidence, that the testing itself can establish the integrity of the evidence.

(c) The court determines that the testing may produce noncumulative evidence that is relevant to the person's assertion of actual innocence.

(7) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate and if stipulated to by the person who made the motion under this section and the district attorney, the court may order the state crime laboratories to perform the testing as provided under s. 165.77 (2m).

(8) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section are unfavorable to the person who made the motion for testing, the court shall ~~dismiss the proceedings under this section.~~

(b) If the results of forensic deoxyribonucleic acid testing ordered under this section are favorable to the person who made the motion for testing, the court shall schedule a hearing to determine the appropriate relief to be granted to the person. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the person's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency.

2. An order granting the person a new trial or fact–finding hearing.

3. An order granting the person a new sentencing hearing, commitment hearing or dispositional hearing.

4. An order discharging the person from custody, as defined in s. 968.205 (1) (a), if the person is in custody.

(c) A court may order a new trial under par. (b) without making the findings specified in s. 805.15 (3) (a) and (b).

(9) A court considering a motion under this section made by a person who is not represented by counsel shall, if the person claims or appears to be indigent, refer the person to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(10) (a) The court may order a person who makes a motion under this section to pay the costs of any testing ordered by the court under this section if the court determines that the person is not indigent. If the court determines that the person is indigent, the court shall order the costs of the testing to be paid for from the appropriation account under s. 20.410 (1) (be).

(b) A person is indigent for purposes of par. (a) if any of the following apply:

1. The person was referred to the state public defender under sub. (9) for a determination of indigency and was found to be indigent.

2. The person was referred to the state public defender under sub. (9) for a determination of indigency but was found not to be indigent, and the court

determines that the person does not possess the financial resources to pay the costs of testing.

3. The person was not referred to the state public defender under sub. (9) for a determination of indigency and the court determines that the person does not possess the financial resources to pay the costs of testing.

(11) An appeal may be taken from an order entered under this section as from a final judgment.

SECTION 27. 977.07 (1) (b) of the statutes is amended to read:

977.07 **(1)** (b) For referrals not made under ss. 809.30 ~~and~~, 974.06 and 974.07, a representative of the state public defender is responsible for making indigency determinations unless the county became responsible under s. 977.07 (1) (b) 2. or 3., 1983 stats., for these determinations. Subject to the provisions of par. (bn), those counties may continue to be responsible for making indigency determinations. Any such county may change the agencies or persons who are designated to make indigency determinations only upon the approval of the state public defender.

SECTION 28. 977.07 (1) (c) of the statutes is amended to read:

977.07 **(1)** (c) For all referrals made under ss. 809.30 ~~and~~, 974.06 (3) (b) and 974.07 (9), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, a representative of the state public defender shall determine indigency~~, and~~. For referrals made under ss. 809.30 and 974.06 (3) (b), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, the representative of the state public defender may, unless a request for redetermination has been filed under s. 809.30 (2) (d) or the defendant's request for representation states that his or her financial circumstances have materially

improved, rely upon a determination of indigency made for purposes of trial representation under this section.

SECTION 29. 978.08 of the statutes is created to read:

978.08 Preservation of certain evidence. (1) In this section:

(a) "Custody" has the meaning given in s. 968.205 (1) (a).

(b) "Discharge date" has the meaning given in s. 968.205 (1) (b).

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a district attorney includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a district attorney may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The district attorney sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the district attorney.

(c) No other provision of federal or state law requires the district attorney to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on

which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the district attorney.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a district attorney receives a written request to preserve the evidence, the district attorney shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made.

SECTION 30. Initial applicability.

(1) The treatment of section 939.74 (1), (2) (c) and (2d) of the statutes first applies to offenses not barred from prosecution on the effective date of this subsection.

(END)

, subject to a court order issued under s. 974.07 (6m), (7) or (8)

INSERT 16–9:

(6m) If a court in which a motion under this section is filed does not order forensic deoxyribonucleic acid testing, the court shall determine the disposition of the evidence that the motion seeks to have tested and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

INSERT 16–17:

determine the disposition of any evidence that remains after the completion of the testing and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

INSERT 17–8:

5. An order specifying the disposition of any evidence that remains after the completion of the testing and, if the evidence is to be preserved, by whom and for how long.

s0875

T.c. w/ K. Finley / Corey Mason State Bar

Per Day – ok

P. 11/5-10: Add ch. 980 commitment

ch. 980 set aside or vacated

– 1 conviction: Vacate commit

– 2 or more –

hrg.

LRBs0375/3 r.m.r.
JEC:jlg:km

Fri 3/24 by 8:30 a.m.

& MGD

SENATE SUBSTITUTE AMENDMENT,

TO 1999 ASSEMBLY BILL 497

and certain postcommitment motions in sexually violent person commitment proceedings

regenerate

AN ACT *to renumber and amend* 757.54; *to amend* 165.81 (1), 801.02 (7) (a) 2. c., 805.15 (3) (intro.), 805.16 (4), 809.30 (1) (a), 809.30 (2) (L), 938.46, 939.74 (1), 939.74 (2) (c), 950.04 (1v) (s), 968.20 (1) (intro.), 968.20 (2), 968.20 (4), 971.04 (3), 974.02 (1), 974.05 (1) (b), 977.07 (1) (b) and 977.07 (1) (c); and *to create* 20.410 (1) (be), 165.77 (2m), 165.81 (3), 757.54 (2), 939.74 (2d), 950.04 (1v) (yd), 968.205, 974.07 and 978.08 of the statutes; **relating to:** preservation and maintenance of certain evidence, time limits for prosecution of certain crimes of sexual assault and postconviction motions for testing of certain evidence.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:

				1999–00	2000–01
20.410 Corrections, department of					
(1) ADULT CORRECTIONAL SERVICES					
(be) Postconviction evidence testing costs	GPR	A		–0–	–0–

SECTION 2. 20.410 (1) (be) of the statutes is created to read:

20.410 **(1)** (be) *Postconviction evidence testing costs.* The amounts in the schedule for the costs of performing forensic deoxyribonucleic acid testing for indigent persons under s. 974.07, pursuant to a court order issued under s. 974.07 (10).

SECTION 3. 165.77 (2m) of the statutes is created to read:

165.77 **(2m)** (a) If the laboratories receive biological material pursuant to the order of a court issued under s. 974.07 (7), the laboratories shall analyze the deoxyribonucleic acid in the material and submit the results of the analysis to the court that ordered the analysis.

(b) The laboratories may compare the data obtained from material received under par. (a) with data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings. In this state, the use is subject to s. 972.11 (5). The laboratories shall not include data obtained from deoxyribonucleic acid analysis of material received under this paragraph in the data bank under sub. (3).

(c) Paragraph (b) does not apply to specimens received under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063.

SECTION 4. 165.81 (1) of the statutes is amended to read:

165.81 **(1)** Whenever the department is informed by the submitting officer or agency that physical evidence in the possession of the laboratories is no longer needed the department may, except as provided in sub. (3) or unless otherwise provided by law, either destroy the same, retain it in the laboratories or turn it over to the University of Wisconsin upon the request of the head of any department. ~~Whenever~~ Except as provided in sub. (3), whenever the department receives information from which it appears probable that the evidence is no longer needed, the department may give written notice to the submitting agency and the appropriate district attorney, by registered mail, of the intention to dispose of the evidence. If no objection is received within 20 days after the notice was mailed, it may dispose of the evidence.

SECTION 5. 165.81 (3) of the statutes is created to read:

165.81 **(3)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if physical evidence that is in the possession of the laboratories includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the department may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The department sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the department.

3. No other provision of federal or state law requires the department to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the department.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, the department receives a written request to preserve the evidence, the department shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8).

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SECTION 6. 757.54 of the statutes is renumbered 757.54 (1) and amended to read:

757.54 **(1)** ~~The~~ Except as provided in sub. (2), the retention and disposal of all court records and exhibits in any civil or criminal action or proceeding or probate

proceeding of any nature in a court of record shall be determined by the supreme court by rule.

SECTION 7. 757.54 (2) of the statutes is created to read:

757.54 **(2)** (a) In this subsection:

1. "Custody" has the meaning given in s. 968.205 (1) (a).

2. "Discharge date" has the meaning given in s. 968.205 (1) (b).

(b) Except as provided in par. (c), if an exhibit in a criminal action or a delinquency proceeding under ch. 938 includes any biological material that was collected in connection with the action or proceeding , the exhibit shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(c) Subject to par. (e), the court may destroy biological material before the expiration of the time period specified in par. (b) if all of the following apply:

1. The court sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

2. No person who is notified under subd. 1. does either of the following within 90 days after the date on which the person received the notice:

a. Files a motion for testing of the biological material under s. 974.07.

b. Submits a written request to preserve the evidence to the court.

3. No other provision of federal or state law requires the court to preserve the biological material.

(d) A notice provided under par. (c) 1. shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which

the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the court.

(e) If, after providing notice under par. (c) 1. of its intent to destroy biological material, a court receives a written request to preserve the evidence, the court shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8).

SECTION 8. 801.02 (7) (a) 2. c. of the statutes is amended to read:

801.02 **(7)** (a) 2. c. A person bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an extraordinary writ or a supervisory writ seeking relief from a judgment of conviction or a sentence of a court or an action under s. 809.30, 809.40, 973.19 ~~or~~, 974.06 or 974.07.

SECTION 9. 805.15 (3) (intro.) of the statutes is amended to read:

805.15 **(3)** (intro.) ~~A~~ Except as provided in s. 974.07 (8) (c), a new trial shall be ordered on the grounds of newly–discovered evidence if the court finds that:

SECTION 10. 805.16 (4) of the statutes is amended to read:

805.16 **(4)** Notwithstanding sub. (1), a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Unless an order granting or denying the motion is entered within 90 days after the motion is made, it shall be deemed denied. This subsection does not apply to motions made under s. 974.07.

SECTION 11. 809.30 (1) (a) of the statutes is amended to read:

809.30 **(1)** (a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19

~~or,~~ 974.06 or 974.07. In a ch. 48, 51, 55 or 938 case, other than a termination of parental rights case under s. 48.43, it means an appeal or a motion for reconsideration by the trial court of its final judgment or order; in such cases a notice of intent to pursue such relief or a motion for such relief need not be styled as seeking "postconviction" relief.

SECTION 12. 809.30 (2) (L) of the statutes is amended to read:

809.30 **(2)** (L) An appeal under s. 974.06 or 974.07 is governed by the procedures for civil appeals.

SECTION 13. 938.46 of the statutes is amended to read:

938.46 New evidence. A juvenile whose status is adjudicated by the court under this chapter, or the juvenile's parent, guardian or legal custodian, may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication. Upon a showing that such evidence does exist, the court shall order a new hearing. This section does not apply to motions made under s. 974.07.

SECTION 14. 939.74 (1) of the statutes is amended to read:

939.74 **(1)** Except as provided in ~~sub.~~ subs. (2), and (2d) and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

SECTION 15. 939.74 (2) (c) of the statutes is amended to read:

939.74 **(2)** (c) A prosecution for violation of s. 948.02, 948.025, 948.03 (2) (a), 948.05, 948.06, 948.07 (1), (2), (3) or (4), 948.08 or 948.095 shall be commenced before

the victim reaches the age of 31 years or be barred, except as provided in sub. (2d) (d).

SECTION 16. 939.74 (2d) of the statutes is created to read:

939.74 **(2d)** (a) In this subsection, "deoxyribonucleic acid profile" means any analysis of deoxyribonucleic acid that results in the identification of an individual's patterned chemical structure of genetic information.

(b) In a case in which the state has evidence of a deoxyribonucleic acid profile of a person and the state believes the evidence may identify a person who committed a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025 but comparisons of the evidence to deoxyribonucleic acid profiles of known persons have not resulted in a probable identification of the person, the state may, before the expiration of the time limit under sub. (1) or (2) (c), whichever is applicable, request the circuit court in the county in which the violation is believed to have been committed to determine whether there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed the violation. A request under this paragraph shall be made and heard ex parte. The court shall make a written record of the proceeding that shall remain secret unless a prosecution for the violation is commenced, in which case the record shall be made available to both the state and any defendant in that prosecution.

(c) Notwithstanding that the time limitation under sub. (1) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 940.225 (1) or (2), a prosecution for the violation may be

commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

(d) Notwithstanding that the time limitation under sub. (2) (c) has expired, if the state has evidence of a deoxyribonucleic acid profile of a person and a court found under par. (b) that there is probable cause to believe that the evidence of the deoxyribonucleic acid profile is evidence of the identification of a person who committed a violation of s. 948.02 (1) or (2) or 948.025, a prosecution for the violation may be commenced within one year after a comparison of the deoxyribonucleic acid profile evidence relating to the violation results in a probable identification of the person.

SECTION 17. 950.04 (1v) (s) of the statutes is amended to read:

950.04 **(1v)** (s) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence, subject to s. 968.205. If feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, property subject to preservation under s. 968.205 and property the ownership of which is disputed, shall be returned to the person within 10 days of being taken.

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SECTION 18. 950.04 (1v) (yd) of the statutes is created to read:

950.04 **(1v)** (yd) To have the appropriate clerk of court make a reasonable attempt to send the victim a copy of a motion made under s. 974.07 for postconviction deoxyribonucleic acid testing of certain evidence and notification of any hearing on that motion, as provided under s. 974.07 (4).

SECTION 19. 968.20 (1) (intro.) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(1)** (intro.) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.12 ~~or~~, 173.21 (4) ~~(b)~~ or 968.205, returned if:

SECTION 20. 968.20 (2) of the statutes, as affected by 1997 Wisconsin Act 192, is amended to read:

968.20 **(2)** Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1m) or (1r) or s. 173.12 or 968.205, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

SECTION 21. 968.20 (4) of the statutes is amended to read:

968.20 **(4)** Any property seized, other than property covered under s. 968.205, which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such

provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

SECTION 22. 968.205 of the statutes is created to read:

968.205 Preservation of certain evidence. (1) In this section:

(a) "Custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order under ch. 938, and supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order under s. 971.17.

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action or delinquency proceeding or, if the person is serving consecutive sentences of imprisonment, the date on which the person is released or discharged from custody under all of the sentences.

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a law enforcement agency may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The law enforcement agency sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal

action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the law enforcement agency or district attorney.

(c) No other provision of federal or state law requires the law enforcement agency to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the law enforcement agency.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a law enforcement agency receives a written request to preserve the evidence, the law enforcement agency shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8).

SECTION 23. 971.04 (3) of the statutes is amended to read:

971.04 **(3)** If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to

the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times. A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02 ~~or,~~ 974.06 or 974.07. If the defendant is not present, the time for appeal from any order under ss. 974.02 ~~and,~~ 974.06 and 974.07 shall commence after a copy has been served upon the attorney representing the defendant, or upon the defendant if he or she appeared without counsel. Service of such an order shall be complete upon mailing. A defendant appearing without counsel shall supply the court with his or her current mailing address. If the defendant fails to supply the court with a current and accurate mailing address, failure to receive a copy of the order granting or denying relief shall not be a ground for tolling the time in which an appeal must be taken.

SECTION 24. 974.02 (1) of the statutes is amended to read:

974.02 **(1)** A motion for postconviction relief other than under s. 974.06 or 974.07 by the defendant in a criminal case shall be made in the time and manner provided in ss. 809.30 and 809.40. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3), 809.30 and 809.40. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

SECTION 25. 974.05 (1) (b) of the statutes is amended to read:

974.05 **(1)** (b) Order granting postconviction relief under s. 974.02 ~~or,~~ 974.06 or 974.07.

SECTION 26. 974.07 of the statutes is created to read:

974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence. (1) In this section, "government agency" means any department or agency of the federal government, of this state or of a city, village, town or county in this state.

(2) At any time after being convicted of a crime, adjudicated delinquent or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication or finding of not guilty by reason of mental disease or defect.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A person who makes a motion under this section or, if applicable, his or her attorney shall serve a copy of the motion on the district attorney's office that prosecuted the case that resulted in the conviction, adjudication or finding of not guilty by reason of mental disease or defect. The court in which the motion is made shall also notify the appropriate district attorney's office that a motion has been

made under this section and shall give the district attorney an opportunity to respond to the motion. Failure by a person making a motion under this section to serve a copy of the motion on the appropriate district attorney's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

(4) (a) The clerk of the circuit court in which a motion made under this section shall send a copy of the motion and, if a hearing is scheduled, a notice of the hearing on the motion to the victim of the crime or delinquent act committed by the person who made the motion, if the clerk is able to determine an address for the victim. The clerk of the circuit court shall make a reasonable attempt to send the copy of the motion to the address of the victim within 7 days of the date on which the motion is filed and shall make a reasonable attempt to send a notice of hearing, if a hearing is scheduled, to the address of the victim, postmarked at least 10 days before the date of the hearing.

(b) Notwithstanding the limitation on the disclosure of mailing addresses from completed information cards submitted by victims under ss. 51.37 (10) (dx), 301.046 (4) (d), 301.048 (4m) (d), 301.38 (4), 302.115 (4), 304.06 (1) (f), 304.063 (4), 938.51 (2), 971.17 (6m) (d) and 980.11 (4), the department of corrections, the parole commission and the department of health and family services shall, upon request, assist clerks of court in obtaining information regarding the mailing address of victims for the purpose of sending copies of motions and notices of hearings under par. (a).

(5) Upon receiving under sub. (3) a copy of a motion made under this section or notice from a court that a motion has been made, whichever occurs first, the district attorney shall take all actions necessary to ensure that all biological material that was collected in connection with the investigation or prosecution of the case and

that remains in the actual or constructive custody of a government agency is preserved pending completion of the proceedings under this section.

(6) A court in which a motion under this section is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

(a) The person making the motion claims that he or she is actually innocent of the offense for which he or she was convicted, found not guilty by reason of mental disease or defect or adjudicated delinquent.

(b) The court determines either that the chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody cannot establish the integrity of the evidence, that the testing itself can establish the integrity of the evidence.

(c) The court determines that the testing may produce noncumulative evidence that is relevant to the person's assertion of actual innocence.

(6m) If a court in which a motion under this section is filed does not order forensic deoxyribonucleic acid testing, the court shall determine the disposition of the evidence that the motion seeks to have tested and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

(7) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate and if stipulated to by the person who made the motion under this section and the district attorney, the court may order the state crime laboratories to perform the testing as provided under s. 165.77 (2m).

(8) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section are unfavorable to the person who made the motion for testing, the court shall

determine the disposition of any evidence that remains after the completion of the testing and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

(b) If the results of forensic deoxyribonucleic acid testing ordered under this section are favorable to the person who made the motion for testing, the court shall schedule a hearing to determine the appropriate relief to be granted to the person. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the person's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency.

2. An order granting the person a new trial or fact–finding hearing.

3. An order granting the person a new sentencing hearing, commitment hearing or dispositional hearing.

4. An order discharging the person from custody, as defined in s. 968.205 (1) (a), if the person is in custody.

5. An order specifying the disposition of any evidence that remains after the completion of the testing and, if the evidence is to be preserved, by whom and for how long.

(c) A court may order a new trial under par. (b) without making the findings specified in s. 805.15 (3) (a) and (b).

(9) A court considering a motion made under this section by a person who is not represented by counsel shall, if the person claims or appears to be indigent, refer

the person to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(10) (a) The court may order a person who makes a motion under this section to pay the costs of any testing ordered by the court under this section if the court determines that the person is not indigent. If the court determines that the person is indigent, the court shall order the costs of the testing to be paid for from the appropriation account under s. 20.410 (1) (be).

(b) A person is indigent for purposes of par. (a) if any of the following apply:

1. The person was referred to the state public defender under sub. (9) for a determination of indigency and was found to be indigent.

2. The person was referred to the state public defender under sub. (9) for a determination of indigency but was found not to be indigent, and the court determines that the person does not possess the financial resources to pay the costs of testing.

3. The person was not referred to the state public defender under sub. (9) for a determination of indigency and the court determines that the person does not possess the financial resources to pay the costs of testing.

(11) An appeal may be taken from an order entered under this section as from a final judgment.

SECTION 27. 977.07 (1) (b) of the statutes is amended to read:

977.07 **(1)** (b) For referrals not made under ss. 809.30 ~~and~~, 974.06 and 974.07, a representative of the state public defender is responsible for making indigency determinations unless the county became responsible under s. 977.07 (1) (b) 2. or 3., 1983 stats., for these determinations. Subject to the provisions of par. (bn), those counties may continue to be responsible for making indigency determinations. Any

such county may change the agencies or persons who are designated to make indigency determinations only upon the approval of the state public defender.

SECTION 28. 977.07 (1) (c) of the statutes is amended to read:

977.07 **(1)** (c) For all referrals made under ss. 809.30 ~~and~~, 974.06 (3) (b) and 974.07 (9), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, a representative of the state public defender shall determine indigency~~, and~~. For referrals made under ss. 809.30 and 974.06 (3) (b), except a referral of a child who is entitled to be represented by counsel under s. 48.23 or 938.23, the representative of the state public defender may, unless a request for redetermination has been filed under s. 809.30 (2) (d) or the defendant's request for representation states that his or her financial circumstances have materially improved, rely upon a determination of indigency made for purposes of trial representation under this section.

SECTION 29. 978.08 of the statutes is created to read:

978.08 Preservation of certain evidence. (1) In this section:

(a) "Custody" has the meaning given in s. 968.205 (1) (a).

(b) "Discharge date" has the meaning given in s. 968.205 (1) (b).

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a district attorney includes any biological material that was collected in connection with a criminal action or with a delinquency proceeding under ch. 938, the physical evidence shall be preserved until every person in custody as a result of the criminal action or delinquency proceeding has reached his or her discharge date.

(3) Subject to sub. (5), a district attorney may destroy biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The district attorney sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the criminal action or delinquency proceeding and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the biological material under s. 974.07.

2. Submits a written request to preserve the evidence to the district attorney.

(c) No other provision of federal or state law requires the district attorney to preserve the biological material.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the biological material will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the material is filed under s. 974.07 or a written request to preserve the evidence is submitted to the district attorney.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy biological material, a district attorney receives a written request to preserve the evidence, the district attorney shall preserve the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (6m), (7) or (8).

INS 20-20

SECTION 30. Initial applicability.

(1) The treatment of section 939.74 (1), (2) (c) and (2d) of the statutes first applies to offenses not barred from prosecution on the effective date of this subsection.

(END)

INSERT 4–20:

SECTION 1. 301.45 (3) (a) 3r. of the statutes, as affected by 1999 Wisconsin Act 9, is amended to read:

301.45 **(3)** (a) 3r. If the person has been committed under ch. 980, he or she is subject to this subsection upon being placed on supervised release under s. 980.06 (2), 1997 stats., or s. 980.08 or, if he or she was not placed on supervised release, before being discharged under s. 980.09 ~~or~~, 980.10 or 980.101 (2) (a).

History: 1995 a. 440 ss. 26 to 49, 53 to 74; Stats. 1995 s. 301.45; 1997 a. 3, 35, 130, 191, 237, 283; 1999 a. 9.

INSERT 6–17:

SECTION 2. 805.16 (5) of the statutes is created to read:

805.16 **(5)** The time limits in this section for filing motions do not apply to motions made under s. 974.07 or 980.101.

SECTION 3. 808.075 (4) (h) of the statutes is amended to read:

808.075 **(4)** (h) Commitment, supervised release, recommitment and discharge and postcommitment relief under ss. 980.06, 980.08, 980.09 ~~and~~, 980.10 and 980.101 of a person found to be a sexually violent person under ch. 980.

History: Sup. Ct. Order, 146 Wis. 2d xiii (1988); 1989 a. 86; 1993 a. 16, 446, 479, 481; 1995 a. 38, 73, 77, 275; 1997 a. 35, 191, 292, 296, 334; 1999 a. 9.

INSERT 9–17:

SECTION 4. 950.04 (1v) (xm) of the statutes, as affected by 1999 Wisconsin Act 9, is amended to read:

950.04 **(1v)** (xm) To have the department of health and family services make a reasonable attempt to notify the victim under s. 980.11 regarding supervised release under s. 980.08 and discharge under s. 980.09 ~~or~~, 980.10 or 980.101 (2) (a).

History: 1979 c. 219; 1983 a. 102, 364; 1985 a. 311; 1987 a. 332 s. 64; 1989 a. 31; 1997 a. 181, 237, 283; 1999 a. 9.

INSERT 11–10:

and supervision of a person under ch. 980, whether in detention before trial or while in institutional care or on supervised release pursuant to a commitment order

INSERT 20–20:

SECTION 5. 980.101 of the statutes is created to read:

980.101 Reversal, vacation or setting aside of judgment relating to a sexually violent offense; effect. **(1)** In this section, "judgment relating to a sexually violent offense" means a judgment of conviction for a sexually violent offense, an adjudication of delinquency on the basis of a sexually violent offense or a judgment of not guilty of a sexually violent offense by reason of mental disease or defect.

(2) If, at any time after a person is committed under s. 980.06, a judgment relating to a sexually violent offense committed by the person is reversed, set aside or vacated and that sexually violent offense was a basis for the allegation made in the petition under s. 980.02 (2) (a), the person may bring a motion for postcommitment relief in the court the committed the person. The court shall proceed as follows on the motion for postcommitment relief:

(a) If the sexually violent offense was the sole basis for the allegation under s. 980.02 (2) (a) and there are no other judgments relating to a sexually violent offense committed by the person, the court shall vacate the commitment order and discharge the person from the custody or supervision of the department.

(b) If the sexually violent offense was the sole basis for the allegation under s. 980.02 (2) (a) but there are other judgments relating to a sexually violent offense committed by the person that have not been reversed, set aside or vacated, or if the sexually violent offense was not the sole basis for the allegation under s. 980.02 (2)

(a), the court shall determine whether to grant the person a new trial under s. 980.05 because the reversal, setting aside or vacating of the judgement for the sexually violent offense would probably change the result of the trial.

(3) An appeal may be taken from an an order entered under sub. (2) as from a final judgment.

SECTION 6. 980.11 (2) (intro.) of the statutes, as affected by 1999 Wisconsin Act 9, is amended to read:

980.11 **(2)** (intro.) If the court places a person on supervised release under s. 980.08 or discharges a person under s. 980.09 ~~or~~, 980.10 or 980.101 (2) (a), the department shall do all of the following:

History: 1993 a. 479; 1995 a. 27 s. 9126 (19); 1995 a. 440; 1997 a. 181; 1999 a. 9.