

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0670/1dn
RLR:cjs:jf

March 26, 2001

Representative Walker:

This bill incorporates the changes suggested by the State Bar Criminal Law Section and by Norm Gahn, and gives preference to Norm Gahn's suggestions. Please look in particular at changes to s. 974.07 (7), stats., that incorporate the uniform statute standards for whether a judge must or may order testing of DNA evidence; and the addition of s. 971.23 (9), stats., that incorporates the time frames for notifying a party of intent to use DNA evidence at trial and for production of test results from DNA testing, that are currently in s. 972.11 (5), stats. (s. 972.11 (5), stats., is repealed by this bill).

Please also review changes to s. 939.74 (2d), stats. We changed the definition of "deoxyribonucleic acid profile" so that it refers to the actual result of testing, "the individual's patterned chemical structure of genetic information," rather than describing a profile as "an analysis" as it is defined under current law. This clarification in the definition required changes in 939.74 (2d) (b) and (c), as created by the bill, though the effect of those paragraphs remains the same as in the prior draft.

We did not make the change to s. 805.16 (5), stats., that was suggested in item number 9. of the letter from the State Bar. In his letter, Norm Gahn stated he did not believe the change was necessary, but did not request that it not be made. The change suggested by the State Bar is significant so we did not want to make it without specific direction from your office:

Under current law, a person seeking a new trial on the basis of newly discovered evidence must file a motion for a new trial within one year after the verdict in his or trial is entered. To succeed in obtaining a new trial the person must show that the new evidence came to the person's attention after the trial, the failure to discover the new evidence was not due to lack of diligence, the evidence is material and not cumulative, and the new evidence would probably change the outcome. A court will not entertain a motion for a new trial based on newly discovered evidence that is filed more than one year after the verdict is entered. Instead, a person seeking to present new evidence after the one-year mark may obtain court review of the evidence only by succeeding in a s. 974.06, stats., or a habeas corpus proceeding, in which the person must show that the proceedings leading to his or imprisonment violated the U.S. or Wisconsin constitution or other state law. Hence, under current law, it is much more difficult to

obtain review of new evidence after the one-year time limit has expired. The change suggested by the State Bar would eliminate the one-year time limit for bringing a motion for a new trial based on newly discovered evidence.

Please also note that the bill does not assign the burden of proof in postconviction DNA proceedings to either party, nor does it establish a standard of proof, or clarify whether a postconviction DNA proceeding under s. 974.07, stats., as established by the bill, is civil or criminal. Current law governing postconviction procedures under s. 974.06, stats., assigns the burden of proof to the petitioner, and establishes that procedures under s. 974.06, stats., are civil in nature, though there is no specification as to the standard of proof. There is no need for you to specify these elements because the courts will determine these factors in the absence of statutory language. Please let us know if you prefer to designate the burden of proof, standard of proof, and the civil versus criminal nature of the proceeding in the bill.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us