DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0670/P1dn
RLR&MGD:cjs:pg

December 8, 2000

Representative Walker:

Below are explanations of several changes I made to the 1999 Senate Substitute Amendment 1 to Assembly Bill 497 (1999 senate substitute) as well as discussions of other possible changes that I chose not to make without further instruction from you:

1. I am unclear as to how much you intend that I modify the 1999 senate substitute in accordance with the Uniform Statute for Obtaining Postconviction DNA Testing (uniform statute) that was produced by the National Commission on the Future of DNA Evidence (Commission). The uniform statute and this draft achieve the same goal with respect to providing a postconviction process for DNA testing. The greatest difference is in the standards they impose for courts to use in determining whether to order postconviction DNA testing. I retained the standard from the 1999 senate substitute, which is based on language in the federal Innocence Protection Act of 2000 (S. 2073, 106th Congress).

The uniform statute creates two separate standards, one governing when testing is mandatory, and the other governing when testing is at the discretion of the court. Both standards share the following three elements:

a. That the evidence is still in existence and in a condition such that it can be tested.

b. That the evidence was not previously tested, or was tested using a less advanced method of testing.

c. That the application for testing is made for the purpose of demonstrating innocence and not for the purpose of delay.

In addition to the above three criteria, the person making the motion for postconviction DNA testing must show that a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing at the trial stage in order for testing to be mandatory. As is stated in the Commission comments accompanying the uniform statute, this is a stringent standard. A person who pled guilty or no contest is not eligible for testing under this standard.

The uniform statute makes testing discretionary if the person making the motion for postconviction DNA testing shows that the three criteria listed above are met and if the person shows that a reasonable probability exists that testing would have resulted in a more favorable verdict or sentence.

The 1999 senate substitute, and this draft, adopt a single standard for mandatory testing that requires a court to order testing if testing is relevant to the investigation or prosecution that resulted in custody, if the evidence is in the possession of a government agency, and if the evidence was not previously tested, or was tested using a less advanced method of testing. I retained this standard because it is simpler, perhaps easier to apply, and because it allows courts more discretion to handle the variety of scenarios they will encounter.

2. The uniform statute has a provision regarding discovery that is not in the 1999 senate substitute. The Wisconsin Supreme Court found in *State v. O'Brien*, 223 Wis. 2d 303 (1999), that there is a generalized right to postconviction discovery, but the Court did not adopt guidelines for postconviction discovery, so I added a discovery provision for postconviction DNA testing to this draft.

3. Current law provides separate discovery provisions for use of DNA evidence in criminal proceedings under s. 972.11 (5), stats. The discovery provisions consist of a definition of "DNA profile," a list of test results that a party introducing DNA evidence at trial must provide to the opposing party, and time frames for producing the results. "DNA profile" is defined as analysis using the restriction fragment length polymorphism (RFLP) technique and does not include other analysis techniques adopted after RFLP that scientists are currently using.

At our meeting on this draft we discussed amending the definition of "DNA profile" to include all types of testing techniques that are used to derive a person's genetic makeup. If I amend the definition of "DNA profile," I also have to change the list of test result items that a party must produce because the current list is applicable only to RFLP testing. If I amend the list of items that must be produced, the new language will be similar to language used in the generic criminal discovery section of the statute, s. 971.23, stats. This means that the only difference between ss. 972.11 (5) and 971.23, stats., is that s. 972.11 (5), stats., requires notification of the intent to use DNA evidence and production of test results within a specific number of days prior to trial, whereas s. 971.23, stats., requires notice and production within a "reasonable time" before trial.

Norm Gahn suggested that I eliminate the separate discovery rules for DNA evidence and simply apply the general criminal discovery rules for scientific evidence to DNA evidence. Norm reasoned that the separate rules are no longer necessary now that judges and attorneys are familiar with DNA evidence. On the other hand, perhaps the statutory time frames for notice and production in s. 972.11 (5), stats., are justified by the complexity of DNA evidence.

In the draft I chose to eliminate s. 972.11 (5), including the definition of "DNA profile," which is not referenced outside 972.11 (5). Instead, the draft applies the general criminal discovery provisions for scientific evidence to DNA evidence.

4. Under the 1999 senate substitute, if a person committed to the department of health and family services as a sexually violent person is subsequently exonerated from the crime that led to his or her commitment by DNA testing, and the person is released from commitment, he or she must register as a sexual offender within ten days of

release. I deleted the amendment to s. 301.45 (3) (a) 3r., stats., in the 1999 senate substitute that requires the person to register within ten days of release. Under current law, if the finding that a person is a sexually violent person is reversed the person is exempted from the registration requirement. I therefore added reversal of a finding that a person is sexually violent to the list of potential orders that a court may make if a person is exonerated by DNA testing under s. 980.101, stats., as created by the 1999 senate substitute and this draft.

5. Sections 950.04 (1v) (xm) and 980.11 (2) (am), stats., require that DHFS make a reasonable attempt to notify the victim when a sexually violent offender is discharged from commitment based on a determination by DHFS or the court that the offender is no longer sexually violent. The 1999 senate substitute extends the notification requirement to cases in which a person is discharged from DHFS commitment as a result of exoneration from the underlying crime based on DNA evidence. Under current law, there is no similar requirement that DHFS notify the victim when a person is discharged from commitment as a sexually violent persons upon a successful appeal of his or her criminal conviction or a successful motion under s. 974.06, stats. I did not change the notification requirement in the 1999 senate substitute. Please let me know either if you would like to delete the requirement for DHFS to notify victims when a person is discharged based on exoneration as a result of DNA testing, or if you would like to extend the notification requirement to all instances of discharge from commitment.

6. I modified the sections in the 1999 senate substitute that authorize a court presiding over a motion for DNA testing to order disposition of DNA evidence after proceedings on the motion are completed (ss. 974.07 (6m) and (8)). In order to assure that evidence is preserved for any other person involved in the same crime but not party to the motion, I applied the same evidence preservation standards to courts presiding over DNA testing motions as are provided in the bill for trial courts, crime laboratories, district attorneys, and law enforcement.

7. I have made several changes in the bill to change provisions that were in passive voice to active voice.

8. The newly created appropriation to fund DNA testing for indigent people at s. 20.410 (1) (be), stats., is currently funded at zero dollars. On the assumption that you will insert a specific dollar amount in the appropriation, I included a delayed effective date for the creation for the appropriation. Section 16.47 (2), stats., does not permit either house of the legislature to pass a bill that contains an appropriation of, or an increase in the cost of state government of, more than $10,000, except for emergency appropriation bills, until the budget bill has passed both houses. If this bill is introduced and enacted as an emergency measure prior to passage of the budget, any appropriation in the bill with an effective date prior to passage of the budget would be repealed by action of the budget bill (which repeals and recreates the appropriations schedule) unless you have also amended the budget bill to include the correct appropriation line amount. Instead of using a delayed effective date for the appropriation you may wish to consider having this bill redrafted as an amendment to the budget bill. Alternatively, you may wish to introduce this bill after passage of

the budget bill; if that is done, please check with me after the budget bill passage to ensure that the numbers for created statutes in this bill have not been supplanted by the budget bill.

Please let me know if you would like to discuss the bill.

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

Michael Dsida
Legislative Attorney
Phone: (608) 266–9867