

2001 DRAFTING REQUEST

Bill

Received: **10/04/2000**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Walker (608) 266-9180**

By/Representing: **himself**

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

Drafter: **rryan**

May Contact: **Norm Gahn, Milwaukee County ADA**

Addl. Drafters: **mdsida**

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

Extra Copies: **MGD**

Submit via email: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

statute of limitations for sexual assault and postconviction relief based on DNA testing

Instructions:

Redraft 1999 Senate Substitute regarding DNA evidence, with changes as specified on attachment

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	rryan 11/20/2000 rryan 12/06/2000	csicilia 12/05/2000	pgreensl 12/08/2000	_____	lrb_docadmin 12/08/2000		S&L
/1	rryan	csicilia	jfrantze	_____	lrb_docadmin	lrb_docadminS&L	

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	03/23/2001	03/26/2001	03/26/2001 _____		03/26/2001		03/30/2001

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Handwritten signatures and dates: 03/26, Jch, 3/26, <END>

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	rryan 12/06/2000						

FE Sent For:

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

In 11/20/00

WFO:
proof all
amended
sections w/12
folio

D-Note

gen cat.

1 AN ACT ...; relating to: time limits for prosecution of certain sexual assault
2 crimes, preservation of certain evidence, ^{and} postconviction and post commitment
3 deoxyribonucleic acid testing of evidence ~~and~~ ~~creating~~ an appropriation.

[Handwritten scribbles and signatures]

Analysis by the Legislative Reference Bureau

Time limits for prosecuting sexual assault

Current law provides time limits for commencing the prosecution of most crimes, including sexual assault. The state must initiate prosecution within the time limit or is barred from prosecuting the offense. A prosecution is commenced when a court issues a summons or a warrant for arrest, when a grand jury issues an indictment, or when a district attorney files an information alleging that a person committed a specific crime. Time during which a defendant is either a nonresident of the state or is secretly a resident in concealment is not calculated as part of the time limit.

Under current law, the state must prosecute first and second degree sexual assault within six years of the date of the crime. The state must prosecute first and second degree sexual assault of a child, as well as repeated sexual assault of the same child, before the victim reaches the age of 31.

This bill creates an exception to the time limits for prosecuting the crimes of sexual assault, sexual assault of a child, and repeated sexual assault of the same child in certain circumstances if the state has DNA evidence related to the crime. If the state collects DNA evidence related to the crime before the time limit for prosecution expires and does not link the DNA evidence to an identified person until

after the time limit expires, the state may initiate prosecution for the crime within one year of making the match.

Postconviction deoxyribonucleic acid testing

Current law provides several options for a person who is convicted of a crime, found not guilty by reason of mental disease or defect, or adjudicated delinquent to challenge his or her conviction, finding of not guilty by reason of mental disease or defect, or delinquency adjudication:

1. The person may file a motion for relief with the trial court, and upon losing the postconviction motion in the trial court may appeal to the appellate court. In some cases the person may bypass the trial court and proceed directly to the appellate court. To initiate either a request for relief from the trial court or to initiate an appeal the person must serve notice of intent to pursue postconviction relief within 20 days of sentencing.

2. The person may petition for a new trial on the basis of newly discovered evidence up to one year after a verdict is entered. In order to obtain 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 evidence was not due to lack of diligence, the evidence is material and not cumulative, and the new evidence would probably change the outcome.

3. At any time, a person serving time in prison under a sentence imposed by a state circuit court, or a person serving time under the volunteer probation program for a misdemeanor, who has exhausted direct appeal rights, may petition for release from custody under the state postconviction relief law if the person alleges that the sentence was imposed in violation of the U.S. or Wisconsin constitution, or in violation of other state law. In order to prevail on a petition for postconviction relief the person must have raised the issues contained in the petition for postconviction relief at trial or on appeal. A person may not bring successive petitions for postconviction relief.

4. At any time, a person whose liberty is restrained may seek state habeas corpus relief if the restraint of liberty is imposed in violation of the U.S. or Wisconsin constitution or in violation of the sentencing court's jurisdiction, and if no other adequate legal remedy is available to the person.

This bill provides an additional avenue to challenge a conviction, finding of not guilty by reason of mental disease or defect, or delinquency adjudication. The bill authorizes a person who was convicted of a crime, found not guilty by reason of mental disease or defect, or adjudicated delinquent to file a motion for DNA testing of evidence if 1.) the evidence is relevant to the conviction, finding of not guilty by reason of mental disease or defect, or delinquency adjudication, 2.) the evidence is in the possession of a government agency or court, and 3.) the evidence was not previously subjected to DNA testing or was tested with a less advanced method than is currently available. Indigent petitioners may be represented by a public defender.

The bill requires courts to order DNA testing of evidence if 1.) the person making the motion for DNA testing claims innocence of the crime for which he or she was convicted, found not guilty of by reason of mental disease or defect, or adjudicated delinquent, 2.) the evidence has not been tampered with or testing will

File a motion

File a motion for

motion

STET

bring successive petitions for postconviction relief

make

motions

Am

person making a motion for postconviction DNA testing

or delinquency adjudications

reveal whether tampering has occurred, and 3.) testing may produce evidence relevant to the person's assertion of innocence. If the petitioner is indigent or if the court determines that the petitioner does not have the financial resources to pay for testing, the state is required to pay for testing.

Upon receiving test results that support the petitioner's claim of innocence, the court is required to vacate the conviction or judgment of not guilty by reason of mental disease or defect, release the person from custody, grant a new trial, or grant a new sentencing hearing. If the person is committed to an institution as a sexually violent person, the court may vacate the commitment order, reverse the finding that the person is sexually violent, or grant the person a new trial to determine whether the person is a sexually violent person.

The bill directs courts, law enforcement agencies, district attorneys, and the state crime laboratories to preserve biological specimen evidence if a person in custody could potentially be exonerated as a result of DNA testing of the evidence and if the person in custody has not waived his or her right to preserve the evidence.

Use of deoxyribonucleic acid testing evidence at trial

Current law provides separate discovery rules for use of DNA evidence in a criminal or delinquency proceeding. The rules include a definition for DNA evidence that applies only to evidence obtained by using the restriction fragment length polymorphism (RFLP) technique of DNA analysis. More recently adopted DNA testing techniques such as polymerase chain reaction and mitochondrial DNA testing are not covered by the current rules.

The discovery rules for DNA evidence specify what test results a party that intends to use DNA evidence must provide to the opposing party. The specified results are only created when the RFLP testing technique is used. The DNA evidence discovery rules also set specific time frames for providing notice of intent to use DNA evidence at trial and for producing test results.

This bill eliminates the separate discovery rules for use of DNA evidence in criminal proceedings. Instead the bill applies general criminal discovery rules, which are applicable to other scientific evidence, to the use of DNA evidence in criminal and delinquency proceedings. The general rules include a description of the types of information and materials that a party must produce as well as guidelines for the timing of production.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

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

INSERT LRB 99 S 0375/4

- 1 SECTION 1. Effective date. This act takes effect on the day after publication,
- 2 except as follows:

✓
✓
*

requirements

sections

1 (1) The treatment of ss. 20.005 (3) (schedule), 20.410 (1) (be), and 974.07 (12) ✓
2 of the statutes takes effect on the second day after the publication of the 2001-2003 ✓
3 biennial budget act.

2nd

(END)



State of Wisconsin
1999 - 2000 LEGISLATURE

LRBs0375/4
JEO&MGD;jlg:hnh

SENATE SUBSTITUTE AMENDMENT 1,
TO 1999 ASSEMBLY BILL 497

March 28, 2000 - Offered by COMMITTEE ON JUDICIARY AND CONSUMER AFFAIRS.

1 AN ACT *to renumber and amend* 757.54; *to amend* 165.81 (1), 301.45 (3)(a) 3r.,
2 801.02 (7) (a) 2. c., 805.15 (3) (intro.), 808.075 (4) (h), 809.30 (1) (a), 809.30 (2)
3 (L), 938.46, 939.74 (1), 939.74 (2) (c), 950.04 (1v) (s), 950.04 (1v) (xm), 968.20 (1)
4 (intro.), 968.20 (2), 968.20 (4), 971.04 (3), 974.02 (1), 974.05 (1) (b), 977.07 (1)
5 (b), 977.07 (1) (c) and 980.11 (2) (intro.); and *to create* 20.410 (1) (be), 165.77
6 (2m), 165.81 (3), 757.54 (2), 805.16 (5), 939.74 (2d), 950.04 (1v) (yd), 968.205,
7 974.07, 978.08 and 980.101 of the statutes; **relating to:** preservation and
8 maintenance of certain evidence, time limits for prosecution of certain crimes
9 of sexual assault, postconviction motions for testing of certain evidence and
10 certain postcommitment motions in sexually violent person commitment
11 proceedings.

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

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

3 2001-02 1999-00 2000-01 2002-03

4 **20.410 Corrections, department of**

5 (1) ADULT CORRECTIONAL SERVICES

6 (be) Postconviction evidence testing

7 costs GPR A -0- -0-

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

9 20.410 (1) (be) *Postconviction evidence testing costs.* The amounts in the
10 schedule for the costs of performing forensic deoxyribonucleic acid testing for
11 indigent persons under s. 974.07, pursuant to a court order issued under s. 974.07

12 ~~12~~ (12) ✓
INSERT 2-12 ✓

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

14 165.77 (2m) (a) If the laboratories receive biological material ^{under} ~~pursuant to the~~
15 ~~order~~ a court ^{order} issued under s. 974.07 ~~(8)~~ the laboratories shall analyze the
16 deoxyribonucleic acid in the material and submit the results of the analysis to the
17 court that ordered the analysis.

18 (b) The laboratories may compare the data obtained from material received
19 under par. (a) with data obtained from other specimens. The laboratories may make
20 data obtained from any analysis and comparison available to law enforcement
21 agencies in connection with criminal or delinquency investigations and, upon
22 request, to any prosecutor, defense attorney, or subject of the data. The data may be
23 used in criminal and delinquency actions and proceedings. (In this state, the use is

24 subject to s. 972.11 (5)) The laboratories shall not include data obtained from

par. (a)
Plain text

1

deoxyribonucleic acid analysis of material received under ~~this paragraph~~ in the data bank under sub. (3).

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.

4

5

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

6

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.

10

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.

17

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

18

165.81 (3) (a) In this subsection:

19

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

20

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

21

(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

23

with a criminal action or with a delinquency proceeding under ch. 938, the physical

24

evidence shall be preserved until every person in custody as a result of the criminal

25

action or delinquency proceeding has reached his or her discharge date.

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Insert 3-25

(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 ^{conviction,} ~~action or delinquency~~ ^{adjudication,} ~~proceeding~~ ^{or commitment,} 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⁽²⁾.

b. Submits a written request to preserve the ^{biological material} ~~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⁽²⁾ or a written request to preserve the ~~evidence~~ ^{biological material} 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~~ ^{biological material}, 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)} ~~(6m), (7), or (8)~~ ^{(9)(a) or (10)(a)5,} unless the court

SECTION 6. 301.45 (3) (a) 3r. of the statutes, as affected by 1999 Wisconsin Act 9, is amended to read:

authorizes destruction of the ~~evidence~~ ^{biological material} under s. 974.07(9)(b) or (10)(a)5.

1 301.45 (3) (a) 3r. If the person has been committed under ch. 980, he or she is
 2 subject to this subsection upon being placed on supervised release under s. 980.06
 3 (2), 1997 stats., or s. 980.08 or, if he or she was not placed on supervised release,
 4 before being discharged under s. 980.09 or, 980.10 or 980.101 (2) (a).

5 SECTION 7. 757.54 of the statutes is renumbered 757.54 (1) and amended to
 6 read:

7 757.54 (1) The Except as provided in sub. (2), the retention and disposal of all
 8 court records and exhibits in any civil or criminal action or proceeding or probate
 9 proceeding of any nature in a court of record shall be determined by the supreme
 10 court by rule.

11 SECTION 8. 757.54 (2) of the statutes is created to read:

12 757.54 (2) (a) In this subsection:

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

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

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

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

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

or commitment under s. 980.06

Insert 5-17

p.w.f.

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

3 a. Files a motion for testing of the biological material under s. 974.07. ✓ (2)

4 b. Submits a written request to preserve the ~~evidence~~ to the court. biological material

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

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

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

16 974.07 (6)(a), (7), or (8) ~~(9)(a) or (10)(a)~~ unless the court authorizes destruction
17 SECTION 9. 801.02 (7) (a) 2. c. of the statutes is amended to read: biological material
of the ~~evidence~~ under s. 974.07 (9)(b) or
(10)(a) 5

18 801.02 (7) (a) 2. c. A person bringing an action seeking relief from a judgment
19 of conviction or a sentence of a court, including an action for an extraordinary writ
20 or a supervisory writ seeking relief from a judgment of conviction or a sentence of a
21 court or an action under s. 809.30, 809.40, 973.19 or, 974.06 or 974.07.

22 SECTION 10. 805.15 (3) (intro.) of the statutes is amended to read:

23 805.15 (3) (intro.) -A- Except as provided in ss. 974.07 (8)(c) and 980.101 (2)
24 (b), a new trial shall be ordered on the grounds of newly-discovered evidence if the
25 court finds that: (10)(b)

P.w.f.

P.w.f.

1 SECTION 11. 805.16 (5) of the statutes is created to read:

2 805.16 (5) The time limits in this section for filing motions do not apply to
3 motions made under s. 974.07⁽²⁾ or 980.101.

4 SECTION 12. 808.075 (4) (h) of the statutes is amended to read:

5 808.075 (4) (h) Commitment, supervised release, recommitment and discharge,
6 and postcommitment relief under ss. 980.06, 980.08, 980.09 and 980.10³ and 980.101³
7 of a person found to be a sexually violent person under ch. 980.

8 SECTION 13. 809.30 (1) (a) of the statutes is amended to read:

9 809.30 (1) (a) "Postconviction relief" means, in a felony or misdemeanor case,
10 an appeal or a motion for postconviction relief other than a motion under s. 973.19
11 or 974.06 or 974.07⁽²⁾. In a ch. 48, 51, 55 or 938 case, other than a termination of
12 parental rights case under s. 48.43, it means an appeal or a motion for
13 reconsideration by the trial court of its final judgment or order; in such cases a notice
14 of intent to pursue such relief or a motion for such relief need not be styled as seeking
15 "postconviction" relief.

16 SECTION 14. 809.30 (2) (L) of the statutes is amended to read:

17 809.30 (2) (L) An appeal under s. 974.06 or 974.07¹ is governed by the
18 procedures for civil appeals.

19 SECTION 15. 938.46 of the statutes is amended to read:

20 **938.46 New evidence.** A juvenile whose status is adjudicated by the court
21 under this chapter, or the juvenile's parent, guardian or legal custodian, may at any
22 time within one year after the entering of the court's order petition the court for a
23 rehearing on the ground that new evidence has been discovered affecting the
24 advisability of the court's original adjudication. Upon a showing that such evidence

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→ INSERT 7-18

1 does exist, the court shall order a new hearing. This section does not apply to motions
2 made under s. 974.07 (2)

3 SECTION 16. 939.74 (1) of the statutes is amended to read:

4 939.74 (1) Except as provided in sub. ~~subs.~~ (2), and (2d) and s. 946.88 (1),
5 prosecution for a felony must be commenced within 6 years and prosecution for a
6 misdemeanor or for adultery within 3 years after the commission thereof. Within the
7 meaning of this section, a prosecution has commenced when a warrant or summons
8 is issued, an indictment is found, or an information is filed.

9 SECTION 17. 939.74 (2) (c) of the statutes is amended to read:

10 939.74 (2) (c) A prosecution for violation of s. 948.02, 948.025, 948.03 (2) (a),
11 948.05, 948.06, 948.07 (1), (2), (3) or (4), 948.08 or 948.095 shall be commenced before
12 the victim reaches the age of 31 years or be barred, except as provided in sub. (2d)

13 (1).

14 SECTION 18. 939.74 (2d) of the statutes is created to read:

15 939.74 (2d) (a) In this subsection, "deoxyribonucleic acid profile" means any
16 analysis of deoxyribonucleic acid that results in the identification of an individual's
17 patterned chemical structure of genetic information.

18 (b) In a case in which the state has evidence of a deoxyribonucleic acid profile
19 of a person and the state believes the evidence may identify a person who committed
20 a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025 but comparisons of the
21 evidence to deoxyribonucleic acid profiles of known persons have not resulted in a
22 probable identification of the person, the state may, before the expiration of the time
23 limit under sub. (1) or (2) (c), whichever is applicable, request the circuit court in the
24 county in which the violation is believed to have been committed to determine
25 whether there is probable cause to believe that the evidence of the deoxyribonucleic

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13

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1 acid profile is evidence of the identification of a person who committed the violation.

2 A request under this paragraph shall be made and heard ex parte. The court shall
3 make a written record of the proceeding that shall remain secret unless a prosecution
4 for the violation is commenced, in which case the record shall be made available to
5 both the state and any defendant in that prosecution.

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

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

21 **SECTION 19.** 950.04 (1v) (s) of the statutes is amended to read:

22 950.04 (1v) (s) To have any stolen or other personal property expeditiously
23 returned by law enforcement agencies when no longer needed as evidence, subject
24 to s. 968.205. If feasible, all such property, except weapons, currency, contraband,
25 property subject to evidentiary analysis, property subject to preservation under s.

P.W.F.
Insert 9-21

P.w.f.

1 968.205 and property the ownership of which is disputed, shall be returned to the
2 person within 10 days of being taken.

3 SECTION 20. 950.04 (1v) (xm) of the statutes, as affected by 1999 Wisconsin Act
4 192, is amended to read:

P.w.f.

5 950.04 (1v) (xm) To have the department of health and family services make
6 a reasonable attempt to notify the victim under s. 980.11 regarding supervised
7 release under s. 980.08 and discharge under s. 980.09 or, 980.10, or 980.101 (2) (a).

8 SECTION 21. 950.04 (1v) (yd) of the statutes is created to read:

9 950.04 (1v) (yd) To have the appropriate clerk of court make a reasonable
10 attempt to send the victim a copy of a motion made under s. 974.07 for postconviction
11 deoxyribonucleic acid testing of certain evidence and notification of any hearing on
12 that motion, as provided under s. 974.07 (4).

13 SECTION 22. 968.20 (1) (intro.) of the statutes, as affected by 1997 Wisconsin
14 Act 192, is amended to read:

15 968.20 (1) (intro.) Any person claiming the right to possession of property
16 seized pursuant to a search warrant or seized without a search warrant may apply
17 for its return to the circuit court for the county in which the property was seized or
18 where the search warrant was returned. The court shall order such notice as it
19 deems adequate to be given the district attorney and all persons who have or may
20 have an interest in the property and shall hold a hearing to hear all claims to its true
21 ownership. If the right to possession is proved to the court's satisfaction, it shall
22 order the property, other than contraband or property covered under sub. (1m) or (1r)
23 or s. 173.12 or, 173.21 (4) (b) or 968.205, returned if:

P.w.f.

24 SECTION 23. 968.20 (2) of the statutes, as affected by 1997 Wisconsin Act 192,
25 is amended to read:

P.w.f.

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

5 SECTION 24. 968.20 (4) of the statutes is amended to read:

6 968.20 (4) Any property seized, other than property covered under s. 968.205,
7 ~~which~~ ^{that} poses a danger to life or other property in storage, transportation or use and
8 ~~which~~ ^{that} is not required for evidence or further investigation shall be safely disposed
9 of upon command of the person in whose custody they are committed. The city,
10 village, town or county shall by ordinance or resolution establish disposal
11 procedures. Procedures may include provisions authorizing an attempt to return to
12 the rightful owner substances which have a commercial value in normal business
13 usage and do not pose an immediate threat to life or property. If enacted, any such
14 provision shall include a presumption that if the substance appears to be or is
15 reported stolen an attempt will be made to return the substance to the rightful owner.

16 SECTION 25. 968.205 of the statutes is created to read:

17 **968.205 Preservation of certain evidence.** (1) In this section:

18 (a) "Custody" means actual custody of a person under a sentence of
19 imprisonment, custody of a probationer, parolee or person on extended supervision
20 by the department of corrections, actual or constructive custody of a person pursuant
21 to a dispositional order under ch. 938, supervision of a person, whether in
22 institutional care or on conditional release, pursuant to a commitment order under
23 s. 971.17 and supervision of a person under ch. 980, whether in detention before trial
24 or while in institutional care or on supervised release pursuant to a commitment
25 order.

P.w.f.

1 (b) "Discharge date" means the date on which a person is released or discharged
2 from custody that resulted from a criminal action, a delinquency proceeding under
3 ch. 938 or a commitment proceeding under s. 971.17 or ch. 980 or, if the person is
4 serving consecutive sentences of imprisonment, the date on which the person is
5 released or discharged from custody under all of the sentences.

6 (2) Except as provided in sub. (3), if physical evidence that is in the possession
7 of a law enforcement agency includes any biological material that was collected in
8 connection with a criminal ^{INSERT 12-8} action or with a delinquency proceeding under ch. 938,
9 the physical evidence shall be preserved until every person in custody as a result of
10 the criminal action or delinquency proceeding has reached his or her discharge date.

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

14 (a) The law enforcement agency sends a notice of its intent to destroy the
15 biological material to all persons who remain in custody as a result of the criminal ^{conviction,}
16 ^{adjudication, or commitment,} action or delinquency proceeding and to either the attorney of record for each person
17 in custody or the state public defender.

18 (b) No person who is notified under par. (a) does either of the following within
19 90 days after the date on which the person received the notice:

- 20 1. Files a motion for testing of the biological material under s. 974.07. ⁽²⁾
21 2. Submits a written request to preserve the ~~evidence~~ ^{biological material} to the law enforcement
22 agency or district attorney.

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

1 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient that
 2 the biological material will be destroyed unless, within 90 days after the date on
 3 which the person receives the notice, either a motion for testing of the material is
 4 filed under s. 974.07⁽⁶⁾ or a written request to preserve the ~~evidence~~ is submitted to the
 5 law enforcement agency.

biological material

6 (5) If, after providing notice under sub. (3) (a) of its intent to destroy biological
 7 material, a law enforcement agency receives a written request to preserve the
 8 ~~evidence~~, the law enforcement agency shall preserve the ~~evidence~~ until the discharge
 9 date of the person who made the request or on whose behalf the request was made,
 10 subject to a court order issued under s. 974.07 (6m) (7), or (8) ^{(9)(a) or (10)(a) 5, n}

11 SECTION 26. 971.04 (3) of the statutes is amended to read:

12 971.04 (3) If the defendant is present at the beginning of the trial and
 13 thereafter, during the progress of the trial or before the verdict of the jury has been
 14 returned into court, voluntarily absents himself or herself from the presence of the
 15 court without leave of the court, the trial or return of verdict of the jury in the case
 16 shall not thereby be postponed or delayed, but the trial or submission of said case to
 17 the jury for verdict and the return of verdict thereon, if required, shall proceed in all
 18 respects as though the defendant were present in court at all times. A defendant
 19 need not be present at the pronouncement or entry of an order granting or denying
 20 relief under s. 974.02 ~~or~~, 974.06 ^{or} 974.07. If the defendant is not present, the time
 21 for appeal from any order under ss. 974.02 ~~and~~, 974.06 ^{and} and 974.07 shall commence
 22 after a copy has been served upon the attorney representing the defendant, or upon
 23 the defendant if he or she appeared without counsel. Service of such an order shall
 24 be complete upon mailing. A defendant appearing without counsel shall supply the
 25 court with his or her current mailing address. If the defendant fails to supply the

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unless the court authorizes destruction of the ^{biological material} ~~evidence~~ under s. 974.07 (9)(b) or (10)(a) 5

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1 court with a current and accurate mailing address, failure to receive a copy of the
2 order granting or denying relief shall not be a ground for tolling the time in which
3 an appeal must be taken.

Insert 14-4

4 SECTION 27. 974.02 (1) of the statutes is amended to read:

5 974.02 (1) A motion for postconviction relief other than under s. 974.06 or
6 974.07⁽²⁾ by the defendant in a criminal case shall be made in the time and manner
7 provided in ss. 809.30 and 809.40. An appeal by the defendant in a criminal case from
8 a judgment of conviction or from an order denying a postconviction motion or from
9 both shall be taken in the time and manner provided in ss. 808.04 (3), 809.30 and
10 809.40. An appeal of an order or judgment on habeas corpus remanding to custody
11 a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and
12 809.50, with notice to the attorney general and the district attorney and opportunity
13 for them to be heard.

14 SECTION 28. 974.05 (1) (b) of the statutes is amended to read:

15 974.05 (1) (b) Order granting postconviction relief under s. 974.02 or, 974.06
16 or 974.07.

17 SECTION 29. 974.07 of the statutes is created to read:

18 974.07 Motion for postconviction deoxyribonucleic acid testing of
19 certain evidence. (1) In this section, "government agency" means any department,
20 or court agency of the federal government, of this state, or of a city, village, town, or county
21 in this state.

22 (2) At any time after being convicted of a crime, adjudicated delinquent, or
23 found not guilty by reason of mental disease or defect, a person may make a motion
24 in the court in which he or she was convicted, adjudicated delinquent or found not

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¶(a) "Movant" means a person who makes a motion under sub. (2). ¶ (b)

1 guilty by reason of mental disease or defect for an order requiring forensic
2 deoxyribonucleic acid testing of evidence to which all of the following apply:

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

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

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

13 (3) A person who makes a motion under this section or, if applicable, his or her
14 attorney shall serve a copy of the motion, made under sub (2) on the district attorney's office that
15 prosecuted the case that resulted in the conviction, adjudication or finding of not
16 guilty by reason of mental disease or defect. The court in which the motion is made
17 shall also notify the appropriate district attorney's office that a motion has been
18 made under this section and shall give the district attorney an opportunity to
19 respond to the motion. Failure by a person making a motion under this section to
20 serve a copy of the motion on the appropriate district attorney's office does not
21 deprive the court of jurisdiction and is not grounds for dismissal of the motion.

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

movant

made under sub (2)

sub. (2)

movant

Sub. (2)

on the motion

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unintentional

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

6 (b) Notwithstanding the limitation on the disclosure of mailing addresses from
7 completed information cards submitted by victims under ss. 51.37 (10) (dx), 301.046
8 (4) (d), 301.048 (4m) (d), 301.38 (4), 302.115 (4), 304.06 (1) (f), 304.063 (4), 938.51 (2),
9 971.17 (6m) (d) and 980.11 (4), the department of corrections, the parole commission,
10 and the department of health and family services shall, upon request, assist clerks
11 of court in obtaining information regarding the mailing address of victims for the
12 purpose of sending copies of motions and notices of hearings under par. (a).

13 (5) Upon receiving under sub. (3) a copy of a motion made under ~~this section~~ ^{sub. (2)}
14 or notice from a court that a motion has been made, whichever occurs first, the
15 district attorney shall take all actions necessary to ensure that all biological material
16 that was collected in connection with the investigation or prosecution of the case and
17 that remains in the actual or constructive custody of a government agency is
18 preserved pending completion of the proceedings under this section.

19 ^{INSERT 16-19} (7) A court in which a motion under ~~this section~~ ^{sub. (2)} is filed shall order forensic
20 deoxyribonucleic acid testing if all of the following apply:

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

24 (b) The court determines either that the chain of custody of the evidence to be
25 tested establishes that the evidence has not been tampered with, replaced or altered

1 in any material respect or, if the chain of custody cannot establish the integrity of the
2 evidence, that the testing itself can establish the integrity of the evidence.

3 (c) The court determines that the testing may produce noncumulative evidence
4 that is relevant to the ~~person's~~ ^{movant's} assertion of actual innocence.

5 (6m) If a court in which a motion under this section is filed does not order
6 forensic deoxyribonucleic acid testing, the court shall determine the disposition of
7 the evidence that the motion seeks to have tested and, if the evidence is to be
8 preserved, by whom and for how long. The court shall issue appropriate orders
9 concerning the disposition of the evidence based on its determinations.

10 ⁹ ⁸ (8) ~~the~~ The court may impose reasonable conditions on any testing ordered under
11 this section in order to protect the integrity of the evidence and the testing process.

12 If appropriate and if stipulated to by the ~~person who made the motion under this~~
13 ~~section~~ ^{movant} and the district attorney, the court may order the state crime laboratories to
14 perform the testing as provided under s. 165.77 (2m).

15 (8) (a) If the results of forensic deoxyribonucleic acid testing ordered under this
16 section are unfavorable to the person who made the motion for testing, the court shall
17 determine the disposition of any evidence that remains after the completion of the
18 testing and, if the evidence is to be preserved, by whom and for how long. The court
19 shall issue appropriate orders concerning the disposition of the evidence based on its
20 determinations

21 ¹⁷⁻²¹ ¹⁰ (10) (a) ~~the~~ If the results of forensic deoxyribonucleic acid testing ordered under this
22 ⁹ ⁸ section are favorable to the person who made the motion for testing, the court shall

23 schedule a hearing to determine the appropriate relief to be granted to the ~~person~~ ^{movant}.

24 After the hearing, and based on the results of the testing and any evidence or other

support the movant's claim of innocence

1 matter presented at the hearing, the court shall enter any order that serves the
2 interests of justice, including any of the following:

3 1. An order setting aside or vacating the ~~person's~~ ^{movant's} judgment of conviction,
4 judgment of not guilty by reason of mental disease or defect, or adjudication of
5 delinquency.

6 2. An order granting the ~~person~~ ^{movant} a new trial or fact-finding hearing.

7 3. An order granting the ~~person~~ ^{movant} a new sentencing hearing, commitment
8 hearing, or dispositional hearing.

9 4. An order discharging the ~~person~~ ^{movant} from custody, as defined in s. 968.205 (1) (a),
10 if the ~~person~~ ^{movant} is in custody.

11 5. An order specifying the disposition of any evidence that remains after the
12 completion of the testing ^{subject to ~~par. (9) (a) and (b)~~} and, if the evidence is to be preserved, by whom and for how
13 long ^{keep period}.

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

16 (b) A court considering a motion made under ^{sub. (2)} this section by a ~~person~~ ^{movant} who is
17 not represented by counsel shall, if the ~~person~~ ^{movant} claims or appears to be indigent, refer
18 the ~~person~~ ^{movant} to the state public defender for determination of indigency and
19 appointment of counsel under s. 977.05 (4) (j).

20 (a) The court may order a ~~person who makes a motion under this section~~ ^{movant}
21 to pay the costs of any testing ordered by the court under this section if the court
22 determines that the ~~person~~ ^{movant} is not indigent. If the court determines that the ~~person~~ ^{movant}
23 is indigent, the court shall order the costs of the testing to be paid for from the
24 appropriation account under s. 20.410 (1) (be).

25 (b) A ~~person~~ ^{movant} is indigent for purposes of par. (a) if any of the following apply:

1

1. The ~~person~~ ^{morant} was referred to the state public defender under sub. ~~(8)~~ ⁽¹¹⁾ for a determination of indigency and was found to be indigent.

3

2. The ~~person~~ ^{morant} was referred to the state public defender under sub. ~~(8)~~ ⁽¹¹⁾ for a determination of indigency but was found not to be indigent, and the court determines that the ~~person~~ ^{morant} does not possess the financial resources to pay the costs of testing.

7

3. The ~~person~~ ^{morant} was not referred to the state public defender under sub. ~~(8)~~ ⁽¹¹⁾ for a determination of indigency and the court determines that the ~~person~~ ^{morant} does not possess the financial resources to pay the costs of testing.

10

¶ ~~(10)~~ ^{(13) B} An appeal may be taken from an order entered under this section as from a final judgment.

SECTION 30. 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 31. 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 ^{(11) ← underscore}, 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

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1 or 938.23, the representative of the state public defender may, unless a request for
2 redetermination has been filed under s. 809.30 (2) (d) or the defendant's request for
3 representation states that his or her financial circumstances have materially
4 improved, rely upon a determination of indigency made for purposes of trial
5 representation under this section.

6 ~~*~~ SECTION 32. 978.08 of the statutes is created to read:

7 **978.08 Preservation of certain evidence.** (1) In this section:

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

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

10 (2) Except as provided in sub. (3), if physical evidence that is in the possession
11 of a district attorney includes any biological material that was collected in connection
12 with a criminal ~~action~~ INSERT 20-12 or with a delinquency proceeding under ch. 938, the physical
13 evidence shall be preserved until every person in custody as a result of the criminal
14 action or delinquency proceeding has reached his or her discharge date.

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

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

21 (b) No person who is notified under par. (a) does either of the following within
22 90 days after the date on which the person received the notice:

23 1. Files a motion for testing of the biological material under s. 974.07. (2)

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

biological material

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

3 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient that
4 the biological material will be destroyed unless, within 90 days after the date on
5 which the person receives the notice, either a motion for testing of the material is
6 filed under s. 974.07⁽²⁾ or a written request to preserve the ~~evidence~~ is submitted to the
7 district attorney.

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

12 order issued under s. 974.07 (6m), (7), (8), (9)(a) or (10)(a) ⁵, unless the court
13 ^{authorizes destruction of} SECTION 33. 980.101 of the statutes is created to read: ^{the evidence under}
14 ^{biological material} 980.101 Reversal, vacation or setting aside of judgment relating to a
15 ^{s. 974.07(9)(b) or (10)(a) 50}

16 **sexually violent offense; effect.** (1) In this section, "judgment relating to a
17 sexually violent offense" means a judgment of conviction for a sexually violent
18 offense, an adjudication of delinquency on the basis of a sexually violent offense or
19 a judgment of not guilty of a sexually violent offense by reason of mental disease or
20 defect.

21 (2) If, at any time after a person is committed under s. 980.06, a judgment
22 relating to a sexually violent offense committed by the person is reversed, set aside
23 or vacated and that sexually violent offense was a basis for the allegation made in
24 the petition under s. 980.02⁽²⁾ (a), the person may bring a motion for
25 postcommitment relief in the court ^{that} the committed the person. The court shall
proceed as follows on the motion for postcommitment relief:

INSERT 22-3

1 (a) If the sexually violent offense was the sole basis for the allegation under s.
2 980.02 (2) (a) and there are no other judgments relating to a sexually violent offense
3 committed by the person, the court shall vacate the commitment order and discharge
4 the person from the custody or supervision of the department.

5 (b) If the sexually violent offense was the sole basis for the allegation under s.
6 980.02 (2) (a) but there are other judgments relating to a sexually violent offense
7 committed by the person that have not been reversed, set aside or vacated, or if the
8 sexually violent offense was not the sole basis for the allegation under s. 980.02 (2)
9 (a), the court shall determine whether to grant the person a new trial under s. 980.05
10 because the reversal, setting aside or vacating of the judgement for the sexually
11 violent offense would probably change the result of the trial.

12 (3) An appeal may be taken from an an order entered under sub. (2) as from
13 a final judgment.

14 SECTION 34. 980.11 (2) (intro.) of the statutes, as affected by 1999 Wisconsin

15 Act 9, is amended to read:

16 980.11 (2) (intro.) If the court places a person on supervised release under s.
17 980.08 or discharges a person under s. 980.09 or 980.10 or 980.101 (2) (a), the
18 department shall do all of the following:

19 SECTION 35. Initial applicability.

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

23 (END)

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Insert 2-12:

SECTION 1. 165.77 (2) (a) 2. of the statutes is amended to read:

165.77 (2) (a) 2. The laboratories may compare the data obtained from the specimen 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 those specimens received under this paragraph in the data bank under sub. (3). The laboratories shall destroy specimens obtained under this paragraph after analysis has been completed and the applicable court proceedings have concluded.

History: 1993 a. 16, 98; 1995 a. 77, 440.

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

165.77 (3) If the laboratories receive a human biological specimen under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063, the laboratories shall analyze the deoxyribonucleic acid in the specimen. The laboratories shall maintain a data bank based on data obtained from deoxyribonucleic acid analysis of those specimens. The laboratories may compare the data obtained from one specimen with the 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

1 investigations and, upon request, to any prosecutor, defense attorney or subject of
 2 the data. The data may be used in criminal and delinquency actions and proceedings.
 3 ~~In this state, the use is subject to s. 972.11 (5).~~ The laboratories shall destroy
 4 specimens obtained under this subsection after analysis has been completed and the
 5 applicable court proceedings have concluded.

6
 7 **Insert 3-25:**

8 History: 1993 a. 16, 98; 1995 a. 77, 440.

8 investigation that resulted in a criminal conviction, a delinquency
 9 adjudication, or commitment under s. 971.17 or 980.06, the laboratories shall
 10 preserve the physical evidence until every person in custody as a result of the
 11 conviction, adjudication, or commitment

12
 13 **Insert 5-17:**

14 the court presiding over the action or proceeding shall ensure that the exhibit
 15 is preserved until every person in custody as a result of the action or proceeding, or
 16 as a result of commitment under s. 980.06 that is based on a judgment of guilty or
 17 not guilty by reason of mental disease or defect in the action or proceeding

18
 19 **Insert 7-18:**

20 **SECTION 3.** 938.293 (2) of the statutes is amended to read:

21 938.293 (2) All records relating to a juvenile which are relevant to the subject
 22 matter of a proceeding under this chapter shall be open to inspection by a guardian
 23 ad litem or counsel for any party, upon demand and upon presentation of releases
 24 where necessary, at least 48 hours before the proceeding. Persons entitled to inspect

1 the records may obtain copies of the records with the permission of the custodian of
 2 the records or with the permission of the court. The court may instruct counsel not
 3 to disclose specified items in the materials to the juvenile or the parent if the court
 4 reasonably believes that the disclosure would be harmful to the interests of the
 5 juvenile. ~~Sections~~ Section 971.23 and 972.11 (5) shall be applicable in all delinquency
 6 proceedings under this chapter, except that the court shall establish the timetable
 7 for the disclosures required under ss. 971.23 (1), (2m) and (8) and 972.11 (5).

History: 1995 a. 77, 387; 1997 a. 35.

S.

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SECTION 4. 938.299 (4) (a) of the statutes is amended to read:

938.299 (4) (a) Chapters 901 to 911 govern the presentation of evidence at the
 fact-finding hearing under s. 938.31. ~~Section 972.11 (5) applies at fact-finding
 proceedings in all delinquency proceedings under this chapter.~~

History: 1995 a. 77, 275, 352; 1997 a. 35, 205, 252, 296; 1999 a. 32, 188.

Insert 9-21:

(b) If the state has evidence of a deoxyribonucleic acid profile of a person who
 committed a violation of s. 940.225 (1) or (2), the evidence was collected before the
 time limitation under sub. (1) expired, and comparisons of the evidence to
 deoxyribonucleic acid profiles of known persons made before the time limitation
 expired did not result in a probable identification of the person, the state may
 commence prosecution of the person within 12 months after comparison of the
 deoxyribonucleic evidence relating to the violation results in a probable
 identification of the person.

(c) If the state has evidence of a deoxyribonucleic acid profile of a person who
 committed a violation of s. 948.02 (1) or (2) or 948.025, the evidence was collected

1 before the time limitation under sub. (2) (c) expired, and comparisons of the evidence
2 to deoxyribonucleic acid profiles of known persons made before the time limits
3 expired did not result in a probable identification of the person, the state may
4 commence prosecution of the person within 12 months after comparison of the
5 deoxyribonucleic evidence relating to the violation results in a probable
6 identification of the person.

7
8 **Insert 12-8:**

9 investigation that resulted in a criminal conviction, delinquency adjudication,
10 or commitment under s. 971.17 or 980.06, the law enforcement agency shall preserve
11 the physical evidence until every person in custody as a result of the conviction,
12 adjudication, or commitment

13
14 **Insert 14-4:**

15 **SECTION 5.** 971.23 (1) (e) of the statutes is amended to read:

16 971.23 (1) (e) Any relevant written or recorded statements of a witness named
17 on a list under par. (d), including any videotaped oral statement of a child under s.
18 908.08, any reports or statements of experts made in connection with the case or, if
19 an expert does not prepare a report or statement, a written summary of the expert's
20 findings or the subject matter of his or her testimony, and the results of any physical
21 or mental examination, scientific test, experiment or comparison that the district
22 attorney intends to offer in evidence at trial. ~~This paragraph does not apply to~~
23 ~~reports subject to disclosure under s. 972.11 (5).~~

1 **SECTION 6.** 971.23 (2m) (am) of the statutes is amended to read:

2 971.23 (2m) (am) Any relevant written or recorded statements of a witness
3 named on a list under par. (a), including any reports or statements of experts made
4 in connection with the case or, if an expert does not prepare a report or statement,
5 a written summary of the expert's findings or the subject matter of his or her
6 testimony, and including the results of any physical or mental examination, scientific
7 test, experiment or comparison that the defendant intends to offer in evidence at
8 trial. ~~This paragraph does not apply to reports subject to disclosure under s. 972.11~~
9 (5).

History: 1973 c. 196; 1975 c. 378, 421; 1989 a. 121; 1991 a. 223; 1993 a. 16, 486; 1995 a. 27, 387.

10

11 **SECTION 7.** 972.11 (1) of the statutes is amended to read:

12 972.11 (1) Except as provided in subs. (2) to ~~(5)~~ (4), the rules of evidence and
13 practice in civil actions shall be applicable in all criminal proceedings unless the
14 context of a section or rule manifestly requires a different construction. No guardian
15 ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895,
16 except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal
17 proceedings.

History: Sup. Ct. Order, 59 Wis. 2d R1, R7 (1973); Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 1975 c. 184, 422; 1979 c. 89; 1981 c. 147 ss. 1, 2; 1983 a. 165, 449; 1985 a. 275; 1987 a. 332 s. 64; 1993 a. 16, 97, 227, 359; 1995 a. 456; 1997 a. 319; 1999 a. 185.

18

19 **SECTION 8.** 972.11 (5) of the statutes is repealed.

20

21 **Insert 16-19:**

22 (6) Upon demand the petitioner ~~and~~ the district attorney shall produce or
23 disclose the following items if they are relevant to the investigation or prosecution

or?
petitioner's claim of innocence

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0670/plins2
RLR:.....

"Bill insert"

LPS:
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Insert 16-19:

(6) (a) Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:

1. Findings based on testing of biological materials.
2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

(b) Upon demand the movant or his or her attorney shall disclose to the district attorney whether biological material has been tested and shall make available to the district attorney the following material:

1. Findings based on testing of biological materials.
2. The movant's biological specimen.

(c) Upon motion of the district attorney or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a) 2. and (b) 2. in order to protect the integrity of the evidence.

(d) This subsection does not apply unless the information being disclosed or the material ^{being} made available is relevant to the movant's claim of innocence at issue in the motion made under sub. (2).

1 that resulted in the conviction, adjudication, or finding of not guilty by reason of
2 mental disease or defect.

3 (a) Physical evidence that is in the actual or constructive possession of a
4 government agency ^{and} that contains biological material or on which there is biological
5 material.

6 (b) Previous deoxyribonucleic acid testing conducted by either party. ^{not an item}

7 (c) Laboratory reports prepared in connection with previous deoxyribonucleic
8 acid testing conducted by either party.

9
10 **Insert 17-21:**

11 (9) If a court in which a motion under ^{sub. (2)} ~~this section~~ is filed does not order forensic
12 deoxyribonucleic acid testing, or if the results of forensic deoxyribonucleic acid
13 testing ordered under this section are not supportive of the ~~petitioner's~~ ^{movant's} innocence
14 claim, the court shall determine the disposition of the evidence specified in the
15 motion subject to the following:

16 (a) If ~~an individual~~ ^{a person} other than the ~~person who filed the motion under this~~
17 ~~section~~ ^{movant} is in custody, as defined in s. 968.205 (1) (a), the evidence is relevant to the
18 criminal, delinquency, or commitment proceeding that resulted in the ~~individual~~ ^{person}
19 being in custody, the ~~individual~~ ^{person} has not been denied deoxyribonucleic acid testing
20 or postconviction relief under this section, and the ~~individual~~ ^{person} has not waived his or
21 her right to preserve the evidence under s. 165.81 (3) ¹, 757.54 (2) ¹, 968.205 ¹,
22 or 978.08 ^{3(b)}, the court shall order the evidence preserved until all ~~individuals~~ ^{persons}
23 entitled to have the evidence preserved are released from custody, and the court shall
24 designate who shall preserve the evidence.

1 (b) If the conditions in par. (a) are not present, the court may authorize
2 destruction of the evidence.

3
4 **Insert 20-12:**

5 investigation that resulted in a criminal conviction, delinquency adjudication,
6 or commitment under s. 971.17 or 980.06, the district attorney shall preserve the
7 physical evidence until every person in custody as a result of the conviction,
8 adjudication, or commitment

9
10 **Insert 22-3:**

11 reverse, set aside, or vacate the judgment under s. 980.05 (5) that the person
12 is a sexually violent person,

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0670/P1dn

RLB:.....

JMGD
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uniform statute
and this draft

*
(uniform statute)

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 that was produced by the National Commission on the Future of DNA Evidence. The ~~two drafts~~ 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).

*
(Commission)

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:

such*

- a. That the evidence is still in existence and in a condition 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 ~~petitioner~~ must show that a reasonable probability exists that the ~~petitioner~~ 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.

person making the motion for postconviction DNA testing

The uniform statute makes testing discretionary if the ~~petitioner~~ shows that the three criteria listed above are met and if the ~~petitioner~~ 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

LPS: make sure there is an extra return here - the spaces look too small, but maybe that is an illusion due to justification?

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.

put comma inside quotation mark

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 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

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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 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 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 senate substitute. Please let me know if you would either 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 senate substitute that authorize a court presiding over a petition for DNA testing to order disposition of DNA evidence after proceedings on the petition 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 petition, 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. I included a delayed effective date for the creation of an appropriation of ~~200,000~~ (1) (b), stats., to fund post-conviction DNA testing for indigent people. Section 16.47 (2), stats., does not permit either house of the legislature to pass a bill that contains an appropriation of or increase of the cost of state government by 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 instead 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.

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The newly created appropriation to fund DNA testing for indigent people at s. 20.410 (1) (b), 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 of the appropriation.

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

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0670/P1dn
RLR&MGD:cjs:pg

December 8, 2000

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- b. That the evidence was not previously tested, or was tested using a less advanced method of testing.
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Please let me know if you would like to discuss the bill.

Robin Ryan
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