Scott Walker
Wauwatosa's Representative in the Wisconsin State Assembly

3/7/01

Dear Robin,

Thanks again for e-mailing over the preliminary draft and drafter's note. We have received the enclosed comments in response to the initial draft. Please incorporate these changes into the bill, with Norm Gahn's comments overriding those of the State Bar. Specifically, please revert to the National Commission's standards for determining whether to order post-conviction testing.

Thanks,
Missy

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STATE BAR of WISCONSIN®
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January 24, 2001

Representative Scott Walker
State Capitol Building
Room 308
PO Box 8953
Madison, WI 53708-8953

Dear Representative Walker:

On behalf of the State Bar of Wisconsin Criminal Law Section, I want to thank you for soliciting our input on the DNA Evidence Bill (LRB 0670/P1dn). Your interest in the administration of justice is much appreciated. The Section looks forward to working with you on this and other bills throughout the Legislative Session.

As you know, the complicated issues raised in the bill merit considerable study and discussion. As such, I apologize for the time it took to respond to your request. Hopefully you'll agree that the time taken was well spent. The entire Section Board reviewed the bill draft, and then formed a special ad-hoc DNA sub-committee to review the bill in-depth. Following is the result of our work.

We reviewed the comments made by the drafters, compared the current bill draft (LRB 0670/P1dn) to last session's proposal, and have the following suggestions that we believe will augment the merit of the bill. I hope that you will find our comments to be worthy of consideration.

1. In response to the drafters' first comment:

We believe that the drafters were correct in retaining the language of 1999 Assembly Bill 497. The language seems simpler and allows for more flexibility in addressing different types of situations as they arise.

2. In response to the drafters' second comment:

We commend the drafters for incorporating case law into the statute to allow for consistency and clarity.

3. In response to the drafters' third comment:

The drafters seem to be raising this question: For purposes of discovery, is it necessary to enumerate different kinds of DNA tests, or is it satisfactory to apply the general criminal discovery rules for scientific evidence to DNA evidence?

In considering this issue, there seems to be this concern: If different kinds of DNA tests are enumerated in the legislation, does the bill draft unintentionally exclude new types of DNA testing that may be developed? At first glance, the suggestion to apply the general criminal rules for discovery rules for scientific evidence seems reasonable.

However, there is a legitimate reason to continue the separate discovery provision of 972.11. It allows the prosecution and the defense adequate notice (the already drafted 45 days) to respond to the evidence. Although in populated counties such as Milwaukee and Dane this would rarely if ever be an issue, some of the smaller counties which rarely deal with DNA evidence may warrant an appropriate time limit for discovery.

So in response to the drafters' reference, we would like to offer the following suggestion:

On page 18, line 14, §33, amend 972.11(5)(a) to read as DNA tests are later defined in the bill draft under page 12, lines 12-14, §21, 939.74(2d)(a). Or alternatively, it could be amended to read:

> *For the purposes of discovery, DNA tests shall be defined as any analysis that results in the identification of an individual's patterned chemical structure of genetic information.*

This language ensures proper time for discovery for both parties and creates a broader definition of DNA testing that is flexible enough to encompass future kinds of tests.

4. In response to the drafters' fourth comment:

Again, we commend the drafters for their judgment and suggest that their recommendation be adopted.

5. In response to the drafters' fifth comment:

We concur with the drafters' suggestion that the victim should not be notified if a person's conviction is overturned with DNA evidence. As the drafters point out, a person whose conviction is overturned on appeal on a constitutional procedural question is not reported to the victim. It would seem only logical to extend apply this approach to DNA evidence. This is especially so since DNA evidence is likely to exonerate someone of a crime, whereas an appeal or a constitutional procedural question may raise issues such as police conduct or procedural questions, versus the actual innocence of a person.

6. In response to the drafters' sixth comment:

The drafters here are addressing authorization of a court presiding over a motion for DNA testing to order disposition of DNA evidence after proceedings on the motion are completed. This is addressed in two parts of the bill draft: On pages 22-23, §36, 974.07(9)(a) and 974.07(9)(b). We appreciate the drafters' work on 974.07(9)(a).

However, we have concerns about the ambiguity of 947.07(9)(b). It says simply that if the conditions of (a) are not met, then the evidence is destroyed. While this seems to address the problem we would like to suggest that the language from 1999 Assembly Bill 497 is more precise and gives the court more flexibility. Senate Substitute Amendment 1 to 1999 AB497 Page 17, lines 15-20, §29, 947.07(8)(a) reads:

> *If the results of forensic [DNA] 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 determination.*

It is our belief that this language is more precise and gives the court flexibility to determine if the evidence may still be useful in:

a) determining who the real perpetrator of a crime may be, and
b) protecting the rights of other co-defendants or other persons later charged who may be able to use the evidence to exonerate themselves.

7. In response to the drafters' seventh comment:

We had no opinion on the voice employed in the bill draft.

8. In response to the drafters' eighth comment:

The concern about the fiscal estimate for this bill is legitimate. We were hoping that the State Bar staff might be able to share this draft with the Department of Justice (based on the presumption that they would do the fiscal estimate) to determine:

a) what kind of estimate they would return, and
b) if there would be any money available to do such tests based on the Attorney General's recent announcement that he intends to assist the counties in their efforts to collect DNA samples from all convicted felons. Perhaps there are (or could be) similar funds available for funding post conviction DNA testing. We obviously would like to keep this devoid of a trip to the Joint Committee on Finance.

We will wait to hear from you as to how to proceed on this last matter.

We also had three other suggestions for the bill draft that we think would augment its merits.

9. Postconviction Relief

The drafters have included a good starting point as to where to allow for postconviction relief.

We suggest amending page 10, line 7, §12, 805.16(5) to read:

Time limits in this section do not apply to motions made under 974.06, 974.07, 980.101, or to other motions seeking new trials based on newly discovered evidence in criminal or juvenile delinquency cases.

This would allow for new evidence to be used in all criminal and juvenile delinquency cases, which conforms to current case law. It also provides for greater clarity and consistency in the statutes and delineates between criminal and civil new trial motions. See *State v. Bembenek* 140 Wis. 2d 248, 409 N.W. 2d 432 (Ct. App. 1987).

In fact, in the last week there was an example of the need for such a provision of postconviction relief in the *Chicago Tribune* (article attached). It seems a man was convicted of a murder that he could not have committed because he was in prison at the time of the victim's death. New scientific testing on the time of death was used to determine the actual time of the victim's death, and the man was released based on the introduction of this new evidence. The new evidence had nothing to do with DNA evidence. Without distinguishing criminal from civil new trial motions, this man could still be in jail if his case took place in Wisconsin because the motion was brought over a year after the conviction.

10. Commencement of Prosecution and the Establishment of Probable Cause

This was an area of great concern and dispute amongst the Criminal Law Section Board members, and the distinction was clearly defense attorneys versus prosecutors. Defense attorneys in the Section seemed concerned that probable cause be determined before the statute of limitation exception applies.

However, prosecutors in the Section (responding mostly to a memo written by Norm Gahn) seemed to feel that such a provision almost defeated the purpose of extending the statute of limitation. They argued that in big counties a person would have to be devoted to do little else but file for extensions on the statute of limitations by requiring prosecutors in every case to first go before a judge.

Trying to balance the interests of both defense attorneys and prosecutors in our membership, the DNA sub-committee believes it has a solution.

It is not the intention of the Section to second-guess the nationally recognized work of people like Norm Gahn. However, great effort should be taken to ensure that there be evidence actually left by the perpetrator of a sex crime so that a DNA profile can be done.

Investigators are most likely to get this information from a rape kit or a sex assault treatment center, with DA's subsequently putting out a warrant for someone's DNA profile. That's great and we want to congratulate Atty. Gahn and help him and other prosecutors across the state in those efforts.

However, last year Representative Gundrum and you testified before the Senate Judiciary Committee on AB497 and urged the Senate Judiciary Committee to remove the Assembly floor amendment that allowed the statute of limitations to be extended for fingerprint evidence. Representative Gundrum's eloquent testimony argued that such evidence would be largely circumstantial in sex assault cases and may have nothing to do with the perpetrator of the crime.

The same standard should be applied using DNA evidence when extending the statute of limitations. What if a hair is found on the floor at the crime scene rather than on the victim? There is no indication or even probable cause that that hair was left by the perpetrator of the crime at the time of the crime.

Therefore, we suggest that as a solution, a prosecutor need not go before a judge to extend the statute of limitation on each case. In return, the extension of the statute of limitations must be based on DNA evidence left by the perpetrator of the crime. In addition, if a prosecution has commenced a prosecution outside the ordinary statute of limitation and there is not at least probable cause to believe that the DNA profile is that of the perpetrator of the crime, then that is grounds for dismissing the prosecution. But it must be something the defense raises with the court once the prosecution is operating outside the ordinary time frame.

11. Not Utilized Provisions

The sub-committee found an oversight in the draft from last session. We would like to suggest the addition of four words on page 19, lines 19-23, §36, so that 974.07(1)(c) be amended to read:

> *The evidence has not previously been subjected to forensic [DNA] testing or, if evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available* ***or was not utilized*** *at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.*

We would like to add "or was not utilized" to this section of the bill draft to ensure that even if the test was available and not utilized by counsel (either due to ignorance, ineffective counsel, cost, or novelty), the incarcerated defendants will not be penalized.

OFFICE OF DISTRICT ATTORNEY

Milwaukee County

E. MICHAEL McCANN • District Attorney

March 6, 2001

Representative Scott Walker
State Capitol Building
Room 308
P.O. Box 8953
Madison, WI 53708-8953

Dear Representative Walker:

The following is my response to a letter, dated January 24, 2001, from the State Bar of Wisconsin Criminal Law Section.

As to item #1:

I disagree with the position taken by the drafters of this particular portion of the legislation. As you know, I am very much in favor of the more stringent standard advocated for by the National Commission on the Future of DNA Evidence. I believe that the intention was to provide DNA testing for those cases in which actual innocence is at issue. The drafter elected to go with a less stringent standard because it was simpler to apply and also allows courts more discretion. I do not agree with this analysis. I believe that it is possible that the legislation, as drafted, is somewhat flawed. I say this because the drafter has actually written two standards into the legislation that are inconsistent. Referring to page 19, lines 9 thru 16, the person making the motion merely has to allege that the evidence is relevant to the investigation or prosecution. I find this to be a very broad standard, as well as a very low standard. However, on page 21, line 22 continuing on to page 22 at (a), the court shall order forensic DNA testing if the movant claims that he or she is actually innocent of the offense for which he or she was convicted. It seems very inconsistent to me that the person bringing the motion has such a very low threshold, yet the judge must rule on a very high threshold. It seems to me that the person bringing the motion is alleging a low standard that the court cannot rule on. The court cannot deliver that low standard. Therefore, I believe that the language proposed by the National Commission on the Future of DNA that the person making the motion for 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. This, in effect, puts these cases back into an actual innocence posture and is consistent with the standard that the judge must rule on.

As to item #2, I have no response.

As to items #3, 4, 5, 6, 7, and 8, I have either no response or have no problem with what is proposed.

As to item #9, my only comment is that I don't believe that it is necessary.

As to paragraph 10:

I believe that the Wisconsin Criminal Law Section basically agrees with the statutory language as drafted. I also agree with that language. The criminal law section suggested that the extension of the statute of limitations must be based on DNA evidence left by the perpetrator of the crime. I fully agree. I do not believe, though, that any changes should be made to the statutory language. I believe that this is common sense. The criminal complaint will provide sufficient probable cause to believe that the perpetrator of the crime left the evidence at the scene. As in any case, the defense is free to attack the criminal complaint as lacking in probable cause.

As to item #11, I agree.

I hope that this clarifies some of the matters that we discussed over the phone a few weeks ago. If you have any questions or comments, please call me at 414-278-5314.

Sincerely,

Norman A. Gahn
Assistant District Attorney

NAG:map

Norm Gahns
Dep. DA Md.

UNIFORM STATUTE FOR OBTAINING POSTCONVICTION DNA TESTING

Request for testing. Notwithstanding any other provision of law governing postconviction relief, a person who was convicted of and sentenced for a crime may, at any time, institute a proceeding under this Act requesting the forensic DNA testing of any evidence that is in the possession or control of the prosecution, and that is related to the investigation or prosecution that resulted in the judgment of conviction.

A. **Mandatory testing.** After notice to the prosecution and an opportunity to respond, the court shall order testing if it finds that:

1. A reasonable probability exists that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

2. The evidence is still in existence and in such a condition that DNA testing may be conducted; and

3. The evidence was never previously subjected to DNA testing, or was not subjected to the testing that is now requested.

B. **Testing in the Court's Discretion.** After notice to the prosecution and an opportunity to respond, the court may order testing if it finds that:

1. A reasonable probability exists that the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction;

2. The evidence is still in existence, and in such a condition that DNA testing may be conducted; and

3. The evidence was never previously subjected to DNA testing, or was not subject to the testing that is now requested.

C. **Procedures.**

1. *Payment.* In the case of an order under subdivision A, the court shall order the test, and payment, if necessary. In the case of an order under subdivision B, the court may require the petitioner to pay for the testing.

2. *Counsel.* The court may, at any time, during proceedings instituted under this Act, appoint counsel for an indigent petitioner.

3. *Discovery.* If evidence had previously been subjected to DNA testing, the court may order the prosecution or defense to provide all parties and the court with access to the laboratory reports prepared in connection with the DNA testing, as well as the underlying data, and laboratory notes. If the court orders DNA testing in connection with a proceeding brought under this Act, the court shall order the production of any laboratory reports prepared in connection with the DNA testing, and may in its discretion order production of the underlying data, and laboratory notes.

4. *Additional orders.* The court, may in its discretion make such other orders as may be appropriate.

Procedure after testing results are obtained. If the results of the postconviction DNA testing are unfavorable to the petitioner, the court shall dismiss the petition, and make such further orders as may be appropriate. If the results of the postconviction DNA testing are favorable, the court shall order a hearing, notwithstanding any provisions of law that would bar such a hearing as untimely, and thereafter make such orders as are required by the jurisdiction's rules or statutes regarding postconviction proceedings.

June 25, 1999

Commission's Notes to Uniform Statute

Background. This statute follows the lead of Illinois and New York in recognizing that requests for postconviction DNA testing raise novel legal issues that require specialized treatment. The usual statutory vehicle for postconviction relief – a motion on the ground of newly discovered evidence – is often ill-suited to address such requests. First, the language of many postconviction statutes does not fit. Petitioner's claim is not that new evidence has been found, but that preexisting evidence -- in the prosecution's control since the time of the original trial -- needs to be tested. Second, many statutes contain extremely short time limits after judgment in which to move for a new trial on the basis of newly discovered evidence. In many instances, the period is considerably shorter than the time served in prison by the more than sixty inmates whose convictions have been vacated to date on the basis of postconviction DNA testing. Furthermore, one of the principal reasons for a restrictive approach to postconviction relief does not apply in the DNA context – the fear that over time the likelihood of more accurate determinations lessens as memories fade and witnesses disappear, thus increasing the opportunity for perjury. Unlike testimonial proof, DNA evidence becomes more probative with the passage of time as technological advances and growing databases enhance the possibility of identifying perpetrators and eliminating suspects.

On the other hand, finality is an important value in our legal system, and efficiency and economy dictate that meritless and costly claims must not be allowed to waste scarce judicial resources. Consequently, any statute that provides for postconviction DNA testing must limit relief to the exceptional case in which justice so requires, and must protect courts from being swamped by floods of unfounded applications. It should be noted that Illinois and New York have not been inundated with postconviction DNA proceedings despite passing specialized statutes.

Structure of the statute. The proposed statute recognizes that there are two distinct phases with regard to DNA testing in postconviction proceedings. In the first phase, the petitioner seeks discovery of evidence in the prosecution's control so that it can be tested. The statute sets forth certain conditions that must be satisfied in all cases before a request for testing shall be entertained, and then distinguishes between those cases in which the court shall order testing and payment by the state, if necessary, and cases in which the court may in its discretion order testing, but may require payment by the petitioner. The second phase takes place only if the testing results are favorable. If they are, petitioner will seek to introduce the results in a proceeding aimed at securing his release, or the grant of a new trial. The statute eliminates any time bars to seeking such relief, and contemplates that a jurisdiction will follow its usual procedures for handling timely motions for postconviction relief.

Conditions for granting requests for testing. Subdivisions (A)(2) and (B)(2) provide that testing is not an option if relevant evidence subject to DNA testing does not exist because it was never collected, or was destroyed, or cannot now be found despite best efforts, or if the evidence exists but its condition precludes DNA testing. Furthermore, subdivisions (A)(3) and

(B)(3) state that petitioner's request will not be granted unless the "evidence was never previously subjected to DNA testing, or was not subjected to the testing that is now requested."

Mandatory testing. Provided these conditions are satisfied, a court must order testing only if it finds after notice to the prosecution and an opportunity for the petitioner to respond that "[a] reasonable probability exists that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." This is a stringent standard, requiring the court to find it likely that had the exculpatory results been available before trial the prosecution would not have prosecuted petitioner, or if the results had been introduced at trial, they either would have exonerated petitioner or raised sufficient doubt to avert a conviction. The term "reasonable probability" is taken from the New York statute.

In order to determine the probable impact of exculpatory DNA test results, the court may have to examine the transcript of the proceedings below in order to consider relevant factors such as: whether the conviction rested on a guilty plea, a no contest plea, or a trial verdict? the nature of the evidence introduced against petitioner at trial? the defenses petitioner raised at trial? whether petitioner took the stand? For instance, in a prosecution for rape, if petitioner had testified in support of a consent defense, a petition seeking testing is frivolous unless petitioner is able to provide a reasonable explanation for his testimony, such as lack of mental capacity, or coercion. For further discussion of factors that may affect a court's decision, and examples of the kinds of cases in which the standard for mandatory testing would be satisfied, see Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests*, pp. __-___ (National Institute of Justice, 1999) (hereafter *Postconviction DNA Testing)*.

If the standard for mandatory relief is met, an indigent petitioner will not be required to pay for testing. The court may either order payment, or make arrangements for testing at a state laboratory.

Discretionary testing. The court has discretion to order testing in other cases in which a reasonable probability exists that petitioner's verdict or sentence would have been more favorable if the results of the DNA testing had been available at the trial leading to the judgment of conviction. For instance, in a homicide case, the prosecution may have argued at trial that a shirt found at petitioner's home was smeared with blood. A test that shows that the blood stains were unrelated to the victim does not exonerate the petitioner or raise a reasonable doubt about his guilt. Depending, however, on the use the prosecutor made of the bloody shirt at trial, and on the other evidence in the case, the petitioner's trial might have had a more favorable outcome if DNA test results had been available. The court has the option of conditioning testing on payment by the petitioner.

Procedures at the pretesting phase.. The court needs flexibility in handling requests for testing. It may, for instance, wish to refer the request to a resource center that specializes in postconviction DNA testing requests, or the local public defender's office, or choose to appoint

counsel. If the parties are willing to cooperate, many issues can be resolved through stipulations. Orders may have to be issued requesting the prosecution to locate evidence that could be subjected to DNA testing, and to preserve any evidence that is found. Once it is determined that relevant evidence exists that could be tested and the court decides to order testing, further stipulations or orders may be needed, such as, for instance, designating the type of DNA analysis to be utilized, the laboratory to do the testing, procedures to be followed during testing (including the preservation of some of the sample for replicate testing), and the method of payment. In addition, the court may need to issue orders with regard to elimination samples from third parties. For a detailed discussion see *Postconviction DNA Testing*, *supra*.

Procedures after testing results are obtained. If the testing results are unfavorable, the court shall dismiss the petition. It may, when appropriate, make other orders such as notifying the parole board or probation department, requesting that the petitioner's profile be added to CODIS offender databases, and notifying the victim or survivors through the local victim's services agency. If the testing results are favorable, the statute operates to negate any time bars that would halt a proceeding to vacate the conviction. The petitioner's request to introduce the testing results will be deemed timely, and the proceeding will thereafter continue in accordance with the particular jurisdiction's procedures for postconviction relief.

By Monday AM

RMR

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

D-Note

cjs

Regen.

AN ACT *to repeal* 972.11 (5); *to renumber and amend* 757.54; *to amend* 165.77 (2) (a) 2., 165.77 (3), 165.81 (1), 801.02 (7) (a) 2. c., 805.15 (3) (intro.), 808.075 (4) (h), 809.30 (1) (a), 809.30 (2) (L), 938.293 (2), 938.299 (4) (a), 938.46, 939.74 (1), 939.74 (2) (c), 950.04 (1v) (s), 950.04 (1v) (xm), 968.20 (1) (intro.), 968.20 (2), 968.20 (4), 971.04 (3), 971.23 (1) (e), 971.23 (2m) (am), 972.11 (1), 974.02 (1), 974.05 (1) (b), 977.07 (1) (b), 977.07 (1) (c) and 980.11 (2) (intro.); and *to create* 20.410 (1) (be), 165.77 (2m), 165.81 (3), 757.54 (2), 805.16 (5), 939.74 (2d), 950.04 (1v) (yd), 968.205, 974.07, 978.08 and 980.101 of the statutes; **relating to:** time limits for prosecution of certain sexual assault crimes, preservation of certain evidence, and postconviction and post commitment deoxyribonucleic acid testing of evidence.

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~~ matching the DNA evidence to a known person.

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 file a motion 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 file a motion 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 motion for postconviction relief the person must have raised the issues contained in the motion for postconviction relief at trial or on appeal. A person may not make successive motions 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. An indigent person making a motion for postconviction DNA testing 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 reveal whether tampering has occurred, and 3.) testing may produce evidence relevant to the person's assertion of innocence. If the person is indigent or if the court determines that the person 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 person's claim of innocence, the court is required to vacate the conviction, judgment of not guilty by reason of mental disease or defect, or delinquency adjudication, 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 requirements 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:

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

				2001–02	2002–03
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 (12).

SECTION 3. 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.

SECTION 4. 165.77 (2m) of the statutes is created to read:

165.77 **(2m)** (a) If the laboratories receive biological material under a court order issued under s. 974.07 (8), 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. The laboratories shall not include data obtained from deoxyribonucleic acid analysis of material received under par. (a) 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 5. 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 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 destroy specimens obtained under this subsection after analysis has been completed and the applicable court proceedings have concluded.

SECTION 6. 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 7. 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 investigation that resulted in a criminal conviction, a delinquency adjudication, or commitment under s. 971.17 or s. 980.06, the laboratories shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment 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 conviction, delinquency adjudication, 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 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 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 material, the department shall preserve the material 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 (7), (9) (a), or (10) (a) 5., unless the court authorizes destruction of the biological material under s. 974.07 (9) (b) or (10) (a) 5.

SECTION 8. 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 9. 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 court presiding over the action or proceeding shall ensure that the exhibit is preserved until every person in custody as a result of the action or proceeding, or as a result of commitment under s. 980.06 that is based on a judgment of guilty or not guilty by reason of mental disease or defect in the action or 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, delinquency proceeding, or commitment under s. 980.06 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 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 (2) or a written request to preserve the material 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 material, the court shall preserve the material 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 (7), (9) (a), or (10) (a) 5., unless the court authorizes destruction of the biological material under s. 974.07 (9) (b) or (10) (a) 5.

SECTION 10. 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 11. 805.15 (3) (intro.) of the statutes is amended to read:

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

SECTION 12. 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 (2) or 980.101.

SECTION 13. 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.

SECTION 14. 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 (2). 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 15. 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 16. 938.293 (2) of the statutes is amended to read:

938.293 **(2)** All records relating to a juvenile which are relevant to the subject matter of a proceeding under this chapter shall be open to inspection by a guardian ad litem or counsel for any party, upon demand and upon presentation of releases where necessary, at least 48 hours before the proceeding. Persons entitled to inspect the records may obtain copies of the records with the permission of the custodian of the records or with the permission of the court. The court may instruct counsel not to disclose specified items in the materials to the juvenile or the parent if the court reasonably believes that the disclosure would be harmful to the interests of the juvenile. ~~Sections~~ Section 971.23 ~~and 972.11 (5)~~ shall be applicable in all delinquency proceedings under this chapter, except that the court shall establish the timetable for the disclosures required under ~~ss.~~ s. 971.23 (1), (2m), ~~and~~ (8) ~~and 972.11 (5)~~.

SECTION 17. 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.~~

SECTION 18. 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 (2).

SECTION 19. 939.74 (1) of the statutes is amended to read:

identified by analyzing biological material that contains the individual's deoxyribonucleic acid

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 20. 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) (c).

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SECTION 21. 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.

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(b) If the state has ~~evidence of a~~ deoxyribonucleic acid profile evidence 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 acid profile evidence relating to the violation results in a probable identification of the person.

(c) If the state has ~~evidence of a~~ deoxyribonucleic acid profile evidence of a person who committed a violation of s. 948.02 (1) or (2) or 948.025, the evidence was collected before the time limitation under sub. (2) (c) expired, and comparisons of the evidence

to deoxyribonucleic acid profiles of known persons made before the time limits 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 acid profile evidence relating to the violation results in a probable identification of the person.

SECTION 22. 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 23. 950.04 (1v) (xm) of the statutes 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).

SECTION 24. 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 (2) for postconviction deoxyribonucleic acid testing of certain evidence and notification of any hearing on that motion, as provided under s. 974.07 (4).

SECTION 25. 968.20 (1) (intro.) of the statutes 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), or 968.205, returned if:

SECTION 26. 968.20 (2) of the statutes 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 27. 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~~ that poses a danger to life or other property in storage, transportation or use and ~~which~~ that 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 28. 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, supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order under s. 971.17 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.

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action, a delinquency proceeding under ch. 938, or a commitment proceeding under s. 971.17 or ch. 980 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 investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment 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

conviction, delinquency adjudication, or commitment, 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).

2. Submits a written request to preserve the biological material 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 (2) or a written request to preserve the material 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 material, the law enforcement agency shall preserve the material 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 (7), (9) (a), or (10) (a) 5., unless the court authorizes destruction of the biological material under s. 974.07 (9) (b) or (10) (a) 5.

SECTION 29. 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 30. 971.23 (1) (e) of the statutes is amended to read:

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

SECTION 31. 971.23 (2m) (am) of the statutes is amended to read:

971.23 **(2m)** (am) Any relevant written or recorded statements of a witness named on a list under par. (a), including any reports or statements of experts made

in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial. ~~This paragraph does not apply to reports subject to disclosure under s. 972.11 (5).~~

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SECTION 32. 972.11 (1) of the statutes is amended to read:

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

SECTION 33. 972.11 (5) of the statutes is repealed.

SECTION 34. 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 (2) 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 35. 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 36. 974.07 of the statutes is created to read:

974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence. (1) In this section:

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

(b) "Government agency" means any department, agency, or court 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 or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A movant or, if applicable, his or her attorney shall serve a copy of the motion made under sub. (2) 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 sub. (2) and shall give the district attorney an opportunity to respond to the motion. Failure by a movant 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 under sub. (2) is made shall send a copy of the motion and, if a hearing on the motion is scheduled, a notice of the hearing to the victim of the crime or delinquent act committed by the movant, 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 sub. (2) 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) 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).

(7) (a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

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(a) The movant 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.

2. (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 movant's assertion of actual innocence.

(8) 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 movant and the district attorney, the court may order the state crime laboratories to perform the testing as provided under s. 165.77 (2m).

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

(a) If a person other than the movant is in custody, as defined in s. 968.205 (1) (a), the evidence is relevant to the criminal, delinquency, or commitment proceeding that resulted in the person being in custody, the person has not been denied deoxyribonucleic acid testing or postconviction relief under this section, and the person has not waived his or her right to preserve the evidence under s. 165.81 (3), 757.54 (2), 968.205, or 978.08, the court shall order the evidence preserved until all

persons entitled to have the evidence preserved are released from custody, and the court shall designate who shall preserve the evidence.

Insert 23-3

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

(10) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section support the movant's claim of innocence, the court shall schedule a hearing to determine the appropriate relief to be granted to the movant. 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 movant's judgment of conviction, judgment of not guilty by reason of mental disease or defect, or adjudication of delinquency.

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

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

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

5. An order specifying the disposition of any evidence that remains after the completion of the testing, subject to sub. (9) (a) and (b).

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

(11) A court considering a motion made under sub. (2) by a movant who is not represented by counsel shall, if the movant claims or appears to be indigent, refer the

movant to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(12) (a) The court may order a movant to pay the costs of any testing ordered by the court under this section if the court determines that the movant is not indigent. If the court determines that the movant 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 movant is indigent for purposes of par. (a) if any of the following apply:

1. The movant was referred to the state public defender under sub. (11) for a determination of indigency and was found to be indigent.

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

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

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

SECTION 37. 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 38. 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), 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 39. 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 investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06, the district attorney shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment 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 conviction, delinquency adjudication, or commitment 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).

2. Submits a written request to preserve the biological material 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 (2) or a written request to preserve the material 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 material, the district attorney shall preserve the material 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 (7), (9) (a), or (10) (a) 5., unless the court authorizes destruction of the biological material under s. 974.07 (9) (b) or (10) (a) 5.

SECTION 40. 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 that 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 reverse, set aside, or vacate the judgment under s. 980.05 (5) that the person is a sexually violent person, 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 41. 980.11 (2) (intro.) of the statutes 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:

SECTION 42. 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.

SECTION 43. Effective dates. This act takes effect on the day after publication, except as follows:

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

(END)

Analysis Insert 1:

The bill also establishes standards for courts to apply in determining whether to order testing of DNA evidence. A court must order testing if all of the following conditions exist: 1) it is reasonably probable that the person seeking testing would not have been convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent, if exculpatory DNA testing results had been available; 2) the evidence is in the actual or constructive possession of a government agency; 3) the chain of custody of the evidence establishes that it has not been tampered with, or testing can establish the integrity of the evidence; and 4) the evidence has not previously been tested, or was tested with a less advanced method of analysis. Whether to order testing is left to the discretion of the court if conditions two, three, and four are met, and if the court finds that the outcome of a criminal or delinquency proceeding, including the sentence or other disposition, would have been more favorable to the person seeking testing of evidence, if DNA analysis had been available in the criminal or deliquency proceeding.

2), 3), and 4)

Analysis Insert 2:

The bill modifies the definition for DNA evidence so that it covers all methods of analysis that result in identification of an individual's patterned chemical structure of genetic information. The bill eliminates the list of specific forms of test results that a party who intends to introduce DNA evidence must provide to the opposing party, and instead relies on general discovery rules for production of scientific test results. The bill does, however, retain the time frames for providing notice of intent to use DNA evidence at trial and for providing test results to the opposing party.

deoxyribonucleic acid

Insert at 12 after 14:

(b) If before the time limitation under sub. (1) expired, the state collected biological material that is evidence of the identity of the person who committed a violation of s. 940.225 (1) or (2), the state identified a DNA profile from the biological material, and comparisons of that DNA profile to DNA profiles of known persons did not result in a probable identification of the person who is the source of the biological material, the state may commence prosecution of the person who is the source of the

deoxyribonucleic acid

biological material for violation of s. 940.225 (1) or (2) within 12 months after comparison of the DNA profile relating to the violation results in a probable identification of the person.

(c) If before the time limitation under sub. (2) (c) expired, the state collected biological material that is evidence of the identity of the person who committed a violation of s. 948.02 (1) or (2) or 948.025, the state identified a DNA profile from the biological material, and comparisons of that DNA profile to DNA profiles of known persons did not result in a probable identification of the person who is the source of the biological material, the state may commence prosecution of the person who is the source of the biological material for violation of s. 948.02 (1) or (2) or 948.025 within 12 months after comparison of the DNA profile relating to the violation results in a probable identification of the person.

Insert at 18 after 6:

SECTION 1. 971.23 (9) of the statutes is created to read:

971.23 **(9)** DEOXYRIBONUCLEIC ACID EVIDENCE. (a) In this subsection "deoxyribonucleic acid profile" has the meaning given in s. 939.74 (2d) (a).

(b) Notwithstanding sub. (1) (e) or (2m) (am), if either party intends to submit deoxyribonucleic acid profile evidence at a trial to prove or disprove the identity of a person, the party seeking to introduce the evidence shall notify the other party of the intent to introduce the evidence in writing by mail at least 45 days before the date set for trial; and shall provide the other party, within 15 days of request, the material identified under par. (1) (e), or par. (2m) (am), whichever is appropriate, that relates to the evidence.

Sub.

(c) The court shall exclude deoxyribonucleic acid profile evidence at trial, if the notice and production deadlines under par. (b) are not met, except the court may waive the 45 day notice requirement or may extend the 15 day production requirement upon stipulation of the parties, or for good cause, if the court finds that no party will be prejudiced by the waiver or extension. The court may in appropriate cases grant the opposing party a recess or continuance.

Insert at 21 after 23:

1. It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.

2. The evidence is in the actual or constructive possession of a government agency.

3. 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 does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

4. 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 or was not utilized

at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(b) A court in which a motion under sub. (2) is filed may order forensic deoxyribonucleic acid testing if all of the following apply:

1. The conviction or sentence in a criminal proceeding, the finding of not guilty by reason of mental disease or defect, the commitment under s. 971.17, or the adjudication or disposition in a proceeding under ch. 938, would have been more favorable to the movant if the results of deoxyribonucleic acid testing had been available before he or she was prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense.

2. The evidence is in the actual or constructive possession of a government agency.

3. 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 does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

4. 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 or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Insert 23–3:

shall determine the disposition of the evidence, 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.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0670/1dn
RLR:.....
cjs

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. (the remainder of 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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0670/1dn
RLR:cjs:jf

March 26, 2001

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Robin Ryan
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State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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CHIEF

LEGAL SECTION: (608) 266-3561
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March 26, 2001

MEMORANDUM

To: Representative Walker

From: Robin L. Ryan, Legislative Attorney

Re: LRB-0670 statute of limitations for sexual assault and postconviction relief based on DNA testing

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

X JACKET FOR ASSEMBLY ____ JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 261-6927 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.