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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2001-02
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on ... Corrections and Courts (AC-CC)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (May/2012)

STATEMENT OF KEITH A. FINDLEY
Clinical Associate Professor of Law
Co-Director, Wisconsin Innocence Project
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53705
(608) 262-4763

AB 291
Date ?

I am a clinical associate professor of law and co-director of the Wisconsin Innocence Project at the University of Wisconsin Law School. The Wisconsin Innocence Project works to free individuals who have provable claims that they are actually innocent of the crimes for which they have been convicted.

In at least 85 cases now across this country, DNA has been used in postconviction proceedings to prove that an innocent person was wrongly convicted of a serious crime. Preservation of biological evidence, and ensuring a right of access to that evidence after conviction in appropriate cases, are important steps toward minimizing the risk of continuing the wrongful imprisonment of innocent people. I therefore strongly support Assembly Bill 291. With passage of this bill, Wisconsin will join the growing ranks of states that have similar legislation.

This bill accomplishes three important functions in the effort to ensure that only the guilty are convicted and imprisoned. First, it requires preservation of biological evidence after conviction. Presently, there are no rules that govern preservation of biological evidence in this state, and such evidence is often destroyed shortly after conviction. Innocence Projects across this country report that, in approximately 75% of their cases, they learn that the biological evidence has been destroyed before it can be tested. Even where some testing has been done already, preservation is necessary because the technology of forensic DNA testing is constantly improving, making it possible to get conclusive results where previously the testing was inconclusive or imprecise.

Second, this bill provides a right of access to DNA testing, where the testing might prove innocence. Where DNA evidence might prove guilt or innocence, no one should have an interest in blocking the testing that can establish the truth. This bill makes that clear.

And third, the bill makes the right to DNA testing meaningful for the indigent, as well as the wealthy. The bill makes clear that the state will pay for the testing, if a prisoner lacks the wealth to pay for it himself. And the bill makes clear that appointment of counsel through the public defender's office may be available in appropriate cases.

Despite these strengths, I do have some concerns about the bill as currently drafted.

First, section 36 of the bill, which creates a new postconviction procedure under §974.07(7) of the statutes, establishes standards for DNA testing that are inconsistent and illogical. The new §974.07(7) provides two scenarios in which DNA testing might be ordered postconviction. Subsection (7)(a) provides for *mandatory* testing; it provides that a court *must* order DNA testing whenever, among other things, "it is reasonably probable" that the defendant would not have been prosecuted or convicted if exculpatory DNA testing results had been available previously. Subsection (7)(b) provides separately for *discretionary* DNA testing; it provides that a court *may*, but is not required to, order DNA testing whenever the conviction or sentence or other adjudication "would have been more favorable" to the defendant had there been DNA testing prior to conviction or sentencing. This language is problematic, because discretionary DNA testing logically ought to be available under a less demanding standard than mandatory DNA testing, yet for discretionary testing the statute requires not just a showing of a "reasonable probability" of a more favorable outcome, as is required for mandatory testing, but what appears to be a higher standard, a showing that the conviction or sentence or other adjudication "*would have been* more favorable." I note also that the statutory language structurally does not make sense, for it is meaningless to speak, as does subsection (7)(b), of a "conviction" being "more favorable" to a defendant.

In any event, it is reasonable to require a defendant to show a reasonable probability that exculpatory DNA results would exonerate him or her before mandating DNA testing. But it also would then make sense, in the provision empowering courts to exercise discretion in deciding whether to order DNA testing in other cases, to allow the courts to act on a lesser showing. The discretionary provision of the statute most reasonably should read that courts have the power—although not the obligation—to order DNA testing whenever they conclude that testing would be relevant to an issue in the case before them. We cannot anticipate at this time all of the circumstances when a court might find it useful to order postconviction DNA testing, so a broad grant of discretion makes most sense. There is no reason to tie the courts' hands and bar them from ordering DNA testing under any circumstances where they might deem it helpful in their mission to ascertain the truth and do justice. Thus, subsection (7)(b), which grants trial courts discretion to order DNA testing in circumstances when the testing is not mandated by subsection (7)(a), ought to be redrafted to authorize, but not require, courts to order the testing whenever the testing would produce evidence relevant to the case.

My second concern has to do with the time limits for seeking a new trial based upon newly discovered evidence. Under current law, §805.16(4) of the statutes provides that motions for a new trial based on newly discovered evidence must be brought within one year of verdict. Section 12 of this bill, which creates a new §805.16(5) of the statutes, wisely and necessarily provides that those time limits do not apply to motions for a new trial based upon new DNA testing, under the provisions created elsewhere in this bill.

The bill, however, should go further, and abolish the statute of limitations for all motions for a new trial based upon newly discovered evidence in criminal cases, regardless of the nature of that evidence. As powerful as DNA evidence is, it is not a

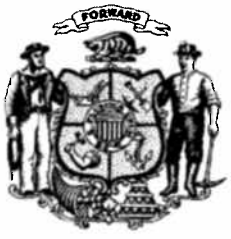
panacea. We should not fool ourselves into believing that if we make DNA testing available, we will eliminate the problem of wrongful convictions. Biological evidence exists in only a small fraction of all criminal cases. New evidence proving innocence can take many forms; it is not always DNA. If new evidence proving innocence comes to light years after conviction, we should have no more interest in barring the courts from considering that new evidence than we have in barring the courts from considering new DNA evidence. The standards for granting a new trial based upon newly discovered evidence are onerous. A statute of limitations is not necessary to bar frivolous claims; those claims will be promptly dismissed on their merits. Indeed, the current one-year statute of limitations conflicts with Wisconsin case law that currently provides that, in some cases, due process compels courts to consider new evidence beyond the one-year time period. *See State v. Bemebenek*, 140 Wis. 2d 248, 409 N.W. 2d 432 (Ct. App. 1987). Deleting the one-year statute of limitations in criminal cases therefore also conforms the statutes to the constitutional mandates set forth in case law and eliminates a confusing conflict between the statutes and the case law.

The one-year statute of limitations makes sense in civil cases, when finality interests argue for preserving a judgment after some period of time, even if it is wrong. But when human beings are locked up for crimes they did not commit, there is no reason to bar them from proving their innocence just because it might take them more than a year to find the evidence to prove their innocence. It is for this reason that the Wisconsin State Bar Criminal Law Section has urged that §805.16 be redrafted to provide that the one-year statute of limitations is applicable only in civil cases, and is not applicable in any criminal case or sexually violent offender commitment case, whether the newly discovered evidence is DNA or some other type of convincing evidence of innocence.

My final concern with this bill has to do with the provisions extending the statute of limitations for sexual assault prosecutions where the state obtains a DNA profile of the perpetrator. My concern is that the bill as drafted may not sufficiently ensure that the statute of limitations will be exceeded only in those cases where a DNA profile clearly points to the actual perpetrator of the sexual assault. Police and prosecutors conceivably might obtain a DNA profile from any number of sources at a sexual assault crime scene. Some sources, like semen taken from the victim's body or clothing, might clearly point to the perpetrator of the crime. Others, like saliva on a bottle found at the scene, or a hair on the floor of the victim's apartment, might have an innocent explanation, and might not point with any certainty to the perpetrator. If we are going to extend the statute of limitations in sexual assault cases when the state is able to develop a DNA profile, we ought to make clear that that applies only when there is at least probable cause to believe that the DNA sample was left by the perpetrator of the crime. I therefore would encourage an amendment to this bill that would make it clear that, absent a sufficient showing of a nexus between the DNA profile and the perpetrator, a sexual assault prosecution initiated after the expiration of the traditional statute of limitations would be subject to a motion to dismiss.

With these caveats and suggestions for improving what is an important piece of legislation, I support Assembly Bill 291.


WISCONSIN STATE LEGISLATURE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April 12, 2001
Thursday

AB 291 folder

April 2001

S	M	T	W	T	F	S
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8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

May 2001

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27	28	29	30	31		

No school

- 7 am — Scott call into Sly radio show (call from home)
- 11 00 — mtg w/Peggy R (Peggy's office)
- 12 pm — Meet w/ Mike Rigowski (Lunch ???)
- 1 00 — Financial Institutions Committee - hearing & possible exec session (415 NW)
- 3 00 — Meet w/ Anne Sappenfield (SKW office)
- 6 00 — 6:00pm-7:30pm Maundy Thursday (Underwood Church)
- 6:30pm-7:15pm Matt to Rainbow Choir (Underwood Church)

TaskPad

☑	☐	TaskPad
☑	☐	LIRC release
☑	☐	DHFS Sex offender group home
☑	☐	Door to door flyer
☑	☐	Ck on bridge audit
☑	☐	Release on sex offender web site
☑	☐	Web site
☑	☐	Scott Thurner
☑	☐	Get the most out of Outlook 98
☑	☐	John Lott (Yale) More Guns, less crime
☑	☐	90 day special elections
☑	☐	Pedestrian laws/fines

Notes


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CALUMET COUNTY CLERK

Courthouse, 206 Court Street
Chilton WI 53014-1198

BETH A. HAUSER

Chilton (920) 849-1458
From Appleton (920) 989-2700
Fax (920) 849-1469
E-mail: beth@co.calumet.wi.us

April 17, 2001

AB 291 folder

State of Wisconsin)
) ss
County of Calumet)

This is to certify that the attached document is a true and correct copy of Resolution 2001-4, a Resolution in support of Complete Funding of Probation and Parole Violation Inmates and Assembly Bill AB197.

Very truly yours,

Beth A. Hauser

Beth A. Hauser
Calumet County Clerk

CALUMET COUNTY BOARD ROLL CALL

	AYES	NAYS	ABSENT	ABSTAIN
BALLERING	—			
BARRIBEAU	—			
BROCK		—		
CONNORS	—			
DORN	—			
DRAHEIM		—		
GENTZ	—			
STANKE	—			
HOFMEISTER	—			
LAUGHRIN		—		
LEHRER	—			
LEONHARDT		—		
MUELLER	—			
SALM	—			
SCHOLZ	—			
SCHWOBE	—			
SOMMERS	—			
SPRINGER		—		
STECKER	—			
THIEL	—			
WOLF		—		

RESOLUTION/~~ORDIANCE~~ NO. 2001-4

SESSION _____

DATE TABLED _____

DATE ADOPTED 4-17-01

AYES 15

NAYS 6

ABSENT _____

ABSTAIN _____

10CB20 4/00

RESOLUTION 2001-4

RESOLUTION IN SUPPORT OF COMPLETE FUNDING OF PROBATION AND PAROLE VIOLATION INMATES AND ASSEMBLY BILL AB197

To the Honorable Chairperson and Board of Supervisors of Calumet County, Wisconsin:

WHEREAS, Regulations adopted by the State Legislature require the County to incarcerate inmates for a longer period of time, and

WHEREAS, Inmates released on probation, parole, or extended supervision, are being monitored for a longer time, causing their return to jail for violations of said probation or parole, and

WHEREAS, Said inmates aggravate overcrowding of county jails and the daily cost of housing these inmates is not covered in total by the State, causing additional fundamental burden on the County jail budget, and

WHEREAS, Reimbursement for housing these probation and parole inmates should be at the full cost and not be an unfunded mandate required to be paid by county taxpayers, and

WHEREAS, Assembly Bill AB197 proposes reimbursement of $60 per day to the counties to cover the costs of housing these inmates and that the Department of Corrections adjust this rate annually to reflect changes in the consumer price index, and

WHEREAS, Assembly Bill AB197 further proposes that the Department of Corrections pay for any necessary medical costs incurred by these inmates, which currently is the responsibility of the County and its taxpayers.

NOW, THEREFORE, BE IT RESOLVED By the Calumet County Board of Supervisors herein assembled, request the Governor and the Wisconsin Legislature to provide sufficient funding to support the implementation of state policies when they result in additional cost to county taxpayers for housing probation and parole violation inmates in county jails.

BE IT FURTHER RESOLVED That the state funding shall cover both the medical expenses and increased staffing costs incurred by a jail facility in order to safely support increased jail population.

BE IT FURTHER RESOLVED That the County Clerk be directed to send a copy of this resolution to all Wisconsin Counties, Governor Scott McCallum, the Secretary of the Department of Administration, the Secretary of the Department of Corrections and Legislators representing constituents of Calumet County.

Dated this 17th Day of April, 2001.

INTRODUCED BY THE PROTECTION OF PERSONS AND PROPERTY COMMITTEE

Countersigned by:

Merlin Gentz, County Board Chair

Alice Connors, Chair

James Lehrer

Raymond Mueller

Kurt Hofmeister

James Stecker


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AB291 folder

date ?

WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

The Use of DNA Evidence in Criminal Proceedings

INTRODUCTION

DNA is shorthand for deoxyribonucleic acid. DNA is the biological material which contains all the genetic information within living organisms, including human beings. The ability of a cell of a human body to replicate itself is due to the presence of the DNA "blueprint" in the chromosomes within the nucleus of each cell.

Each human cell contains 23 pairs of chromosomes within its nucleus. One-half of each pair of chromosomes is provided by each parent at the time of conception. Although most of the information stored in human DNA includes general information common to all humans, some of the information is unique to a particular individual. Only identical twins have identical DNA.

The DNA information unique to a particular individual is stored in genes known as polymorphic genes and their location on a DNA molecule is called a polymorphic site or locus. By isolating and identifying certain segments of the DNA molecule contained in human tissue samples (e.g., blood, skin, hair follicles or semen stains) it is possible to identify the individual who is the source of the DNA. Like fingerprints, DNA evidence can be useful in criminal investigations and prosecutions.

DNA evidence was first admitted in a criminal trial in the United States in a 1988 Florida case. [*Andrews v. State*, 533 So. 2d 841, 850 (Fla. Dist. Ct. App. 1988); rev. denied, 542 So. 2d 1332 (Fla. 1989).] Since that time, DNA evidence has engendered controversy, both in the scientific and legal communities.

The purpose of this memorandum is to explain briefly the science of DNA identification analysis, rules governing the admission of DNA analysis as evidence in criminal proceedings, collection of DNA evidence in Wisconsin and issues relating to the use of DNA evidence in Wisconsin.

DNA IDENTIFICATION ANALYSIS

Background

DNA identification analysis is the process of isolating and identifying segments of the DNA molecule. The scientific community developed the technique in order to study human genetics. This research lead to the discovery in the early 1980's that the same DNA segment has different lengths in different individuals and that various analysis techniques could be used to match samples of human DNA.

Analysis Techniques

Two analysis techniques are most often used in forensic DNA analysis. These are known as Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR). The most commonly used technique is RFLP.

The first step in the RFLP analysis is to extract DNA from the evidentiary tissue sample by the use of solvents. Next, the extracted DNA is cut into smaller segments by the use of a restriction enzyme. The location of these restriction sites and the resulting DNA fragment lengths differ among individuals.

The next step is to sort the DNA fragments by the procedure "gel electrophoresis." Because DNA fragments have a negative electrical charge, the application of an electrical current causes the DNA fragments to move through agarose gel, with shorter fragments grouped toward the positive pole and the longer fragments toward the negative pole. [See Figure 1.]

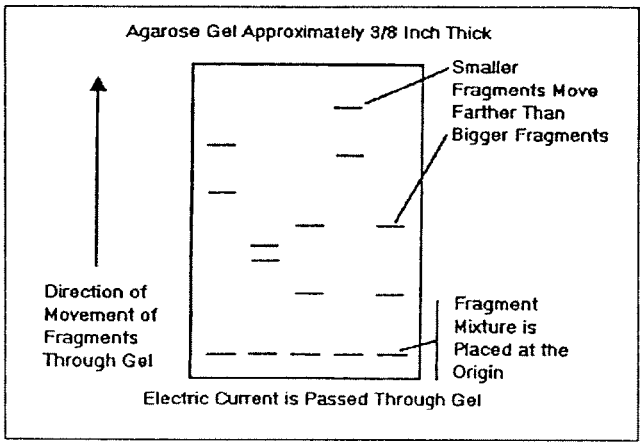

Figure 1. DNA Fragment Separation by Electrophoresis.[1]

The DNA fragments are then transferred to a nylon membrane by a procedure called "Southern Blotting." [See Figure 2.]

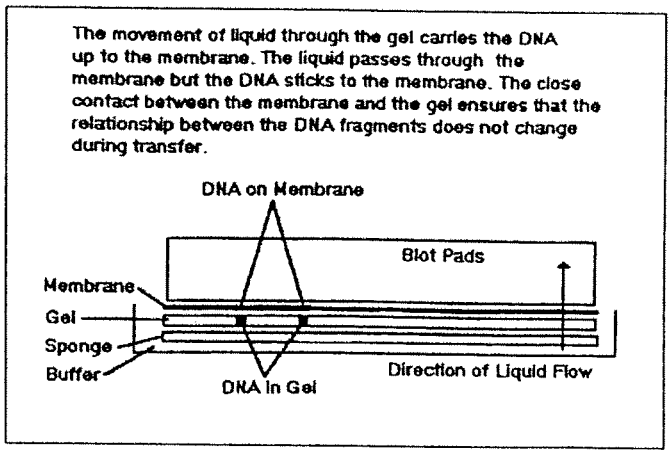

Figure 2. Southern Blotting Transfers the DNA to a Nylon Membrane[1]

In order to visualize the DNA that has been fixed to the membrane, a radioactive DNA probe is applied. When placed on the membrane, the probe seeks out and attaches (i.e., "hybridizes") itself to any complementary sequence on the target DNA. After the probe hybridizes to the target DNA fragment on the membrane, the location of the radioactive fragment can be determined by placing an x-ray film in contact with the membrane. The resulting autoradiograph shows a DNA pattern, similar to the bar code used in merchandising, that can be used like fingerprints to compare the suspect's DNA with DNA found on samples at the crime scene. [See Figures 3 and 4.]

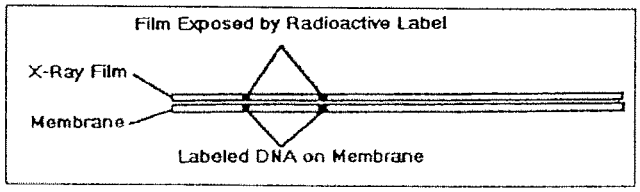

Figure 3. Autoradiography[1]

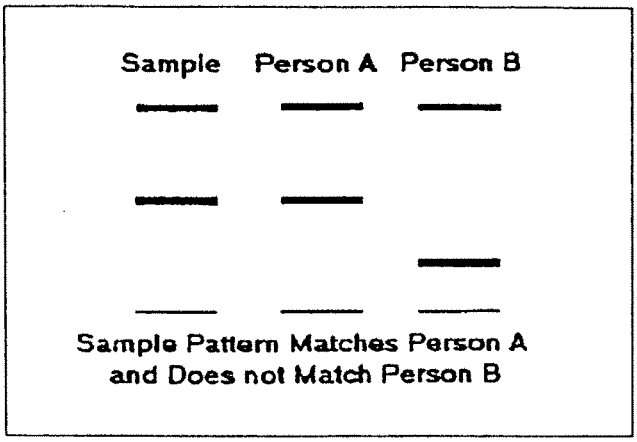

Figure 4. Pattern Comparisons[1]

A statistical probability calculation determines the uniqueness of the matched DNA patterns. This statistical calculation is expressed in terms of the probability that the match would occur by chance in this population group.

The major disadvantage to using RFLP analysis is that DNA samples which have been degraded by exposure to prolonged sunlight or extensive soiling cannot be used.

The second most commonly used method of DNA identification analysis is PCR. The first step in PCR is extraction of the DNA from the evidence sample. After that the PCR technology differs greatly from the RFLP technology. In the PCR technology, a small amount of DNA is amplified until it is sufficient for analysis. Amplication refers to the process by which copies of DNA are made using a polymerase (enzyme) chain reaction.

The major drawback to using PCR amplication analysis is that it is particularly susceptible to contamination.

DNA Evidence Use in Criminal Proceedings

Rules of Evidence Applicable to DNA Evidence in Federal Courts and Most State Courts

All scientific evidence in criminal trials, including evidence derived from DNA identification analysis, must satisfy the test of admissibility in effect in a particular jurisdiction. In general, courts use one of two tests. The so-called "Frye" test, which was pronounced by the U.S. Circuit Court for the District of Columbia in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), or one of its variations, is used in a majority of state jurisdictions. Under the *Frye* test, a novel scientific technique must have gained general acceptance in the relevant scientific community before it will be admitted by the court.

The second test follows the basic relevancy standard of the Federal Rules of Evidence (Rules 401, 402, 403 and 702) and is used in a minority of state jurisdictions. For admissibility under the Federal Rules, scientific evidence must have some relevance to the issues in the case, and its probative value must outweigh the potential for prejudice. In *Daubert v. Merrill Dom Pharmaceuticals, Inc.*, 509 U.S. 579, 1135 S. Ct. 2786 (1993), the U.S. Supreme Court ruled that the Federal Rules of Evidence have replaced the *Frye* test in federal court trials. Additionally, the Court defined a new federal standard:

> [U]nder the rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. [1135 S. Ct. at 2795.] Determining reliability entails a preliminary assessment of "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and . . . whether [the] reasoning or methodology properly can be applied to the facts in issue. [*Id.* at 2796.]

The court provided a nonexclusive list of factors that may be used to determine scientific validity: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific

field. [*Id.* at 2796-97.] While the *Daubert* test applies to federal courts, most state courts continue to follow the *Frye* test.[2]

Rules of Evidence Applicable to DNA Evidence in Wisconsin Courts

Wisconsin courts have rejected the *Frye* requirement of general acceptance within the scientific community as a prerequisite to admissibility. In *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), the Wisconsin Supreme Court confirmed that Wisconsin's expert witness relevancy standard, as promulgated by the Supreme Court and codified in s. 907.02, Stats., determines the admissibility of expert testimony:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although many states are still wrestling with the issue of admissibility of DNA evidence, the relevancy test adopted by the Wisconsin Supreme Court in *Walstad* permits the admission of scientific evidence, including DNA evidence, regardless of whether the evidence meets the reliability requirements set forth in *Frye* and *Daubert*. As noted by the Wisconsin Supreme Court in *Walstad*:

> The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible. [351 N.W.2d at 487.]

Consistent with *Walstad*, the Wisconsin Court of Appeals in *State v. Peters*, 192 Wis. 674, 534 N.W.2d 867 (1995), a case specifically dealing with the question of the admissibility of DNA evidence, rejected the argument made by the defendant on appeal that DNA evidence should not have been admitted because the trial court had failed to make a determination as to the reliability of the evidence. In making this ruling, the Court of Appeals held:

> Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment. *Walstad*, 119 Wis. 2d at 518-19, 351 N.W.2d at 487. Thus, the trial court was not required to determine that the DNA evidence and the statistics derived therefrom were reliable. Rather, the trial court's obligation was to determine whether the testifying witness was qualified as an expert, whether the evidence was relevant and whether it would assist the trier of fact. [534 N.W.2d at 873.]

WISCONSIN DNA DATABANK

Legislation creating the current Wisconsin DNA Databank was enacted in the 1993 Legislative Session (1993 Wisconsin Act 16) and revised by legislation enacted in the 1995, 1997, and 1999 Legislative Sessions. [See ss. 165.76, 165.765 and 165.77, Stats., in particular.]

The law originally required the submission of a biological specimen to the DNA Databank for analysis of any person who, on or after August 12, 1993, is: (1) imprisoned or placed on

probation, parole or aftercare supervision for first- or second-degree sexual assault [s. 940.225 (1) and (2), Stats.] or sexual assault of a child [ss. 948.02 (1) or (2) or 948.025, Stats.]; or (2) found not guilty or not responsible by mental disease or defect and is under state institutional care for first- or second-degree sexual assault or sexual assault of a child. Subsequently, persons found to be "sexually violent" under ch. 980, Stats., on or after June 2, 1994, were also required to provide a biological specimen to the Databank.

Most recently (1999 Wisconsin Act 9), the law was revised to require the submission of biological specimens for inclusion in the DNA Databank from persons: (1) in prison on or after January 1, 2000 for ***any felony*** committed in Wisconsin; (2) released on parole, extended supervision or placed on probation in another state on or after January 1, 2000 and are on parole, extended supervision or probation in Wisconsin for a violation of a law in the other state that DOC determines would constitute a ***felony*** if committed by an adult in Wisconsin; and (3) sentenced or placed on probation for ***any felony*** conviction on or after January 1, 2000. [ss. 165.76 (1) (ar), 165.76 (1) (f) and 973.047 (1f), Stats.]

A law enforcement agency investigating a crime and a defense attorney representing a client are also authorized under the law to submit a biological specimen and request a DNA analysis of the specimen. [s. 165.77 (2) (a), Stats.]

The Department of Justice (DOJ) is responsible for administration of the DNA Databank. The DNA Databank is located in the State Crime Lab in Milwaukee, one of three crime labs administered by the DOJ.

ISSUES RELATING TO THE USE OF DNA EVIDENCE IN WISCONSIN

At a hearing before the Assembly Committees on Criminal Justice and Corrections and the Courts on March 1, 2000, spokespersons for the Wisconsin Innocence Project (hereinafter, "the Innocence Project"), Frank J. Remington Center, University of Wisconsin Law School, presented recommendations for changes in state law to improve the "truth-finding" function of the criminal justice system through the use of DNA evidence. Innocence Project recommendations include:

- Mandate preservation of biological evidence in criminal cases.

The Innocence Project notes:

> No statute or other uniform rule governs the preservation of biological evidence. The experience varies widely from jurisdiction to jurisdiction; some Wisconsin police agencies preserve biological evidence indefinitely, while in other cases the evidence is destroyed before the direct appeal process is concluded. Once such evidence is destroyed a prisoner's ability to provide his or her innocence may be lost. Concomitantly, once the evidence is destroyed the state loses the ability to use this powerful DNA evidence to find and convict the true perpetrator.

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

The Innocence Project has learned: "In the last ten years, the United States and Canada have exonerated more than 65 individuals with the use of DNA testing," citing findings set forth in the Innocence Protection Act of 2000 for this conclusion. [Proposed U.S. Senate Bill 2073, 106th Cong. S. 101 (a) (5) (2000).]

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

The Innocence Project observes that current law ". . . requires that motions for new trials based

on newly discovered evidence be made within one year of conviction." While the Innocence Project authors recognize that "due process" may require courts to consider newly discovered evidence outside the one-year window [citing *State v. Bembenek*, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1997)], they suggest that elimination of the one-year limitation is particularly warranted in the case of DNA evidence.

In addition, the Legislature recently considered legislation (1999 Assembly Bill 497) to eliminate the time limitations on prosecution for first- and second-degree sexual assault of a child and repeated acts of sexual assault of a child (ss. 940.225 (1) or (2), 948.02 (1) or (2) and 948.025, Stats.). Proponents of the legislation argued that the current statutory time limits for the commencement of prosecution of crimes (generally, three years for misdemeanors and six years for felonies; see s. 939.74 (1), Stats.), fail to recognize the advent of DNA analysis to prove the guilt or innocence of alleged sex offenders. The bill, as amended by both the Assembly and Senate, received strong bipartisan support in the Legislature but the Legislature adjourned before final action could be taken on the measure.

This memorandum was prepared on October 11, 2000, by Shaun Haas, Senior Staff Attorney, Legislative Council Staff.

This Information Memorandum is not a policy statement of the Joint Legislative Council or its staff.

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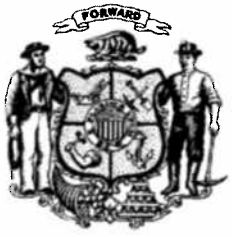
[1] Figures 1, 2, 3 and 4 are from: Dirk W. Janssen, Serology Section Head, Wisconsin State Crime laboratory, Milwaukee, *Forensic DNA Analysis An Introduction to Science and Technology* (February 27, 1992).

[2] The Uniform Rules of Evidence, as promulgated by the National Conference of Commissioners on Uniform State Laws and recommended for enactment by the states, deals with expert testimony in Rule 702. Rule 702 combines a modified historic *Frye* standard governing the admissibility of expert testimony as a procedural rule with the reliability standards established in *Daubert*. Under this formulation, a principle or method is either presumed to be reliable or unreliable depending upon whether it has substantial acceptance within the relevant scientific, technical or specialized community. The presumption of reliability or unreliability can then be rebutted by resort to, among others, the reliability factors or absence thereof established in *Daubert* for determining the admissibility of expert testimony. Establishing a modified *Frye* standard as a procedural rule is an accommodation of the conflict in the decisional law among the several states between applying the historic *Frye* standard of reliability, the *Daubert* standard of reliability and varying other approaches to the admissibility of expert testimony.

WISCONSIN STATE LEGISLATURE



1. Enhancing the Use of DNA Evidence

Source of Funds	Agency Request FY02 Dollars	Agency Request FY02 Positions	Agency Request FY03 Dollars	Agency Request FY03 Positions	Governor's Recommendation FY02 Dollars	Governor's Recommendation FY02 Positions	Governor's Recommendation FY03 Dollars	Governor's Recommendation FY03 Positions
PR-S	0	0.00	0	0.00	116,400	1.00	122,100	1.00
TOTAL	0	0.00	0	0.00	116,400	1.00	122,100	1.00

The Governor recommends the authorization of 1.0 FTE assistant district attorney position in Milwaukee County to serve as a statewide authority and resource on the use of DNA evidence in the court room. Salary and benefits costs of the position will be covered by a portion of the $5 crime lab and drug enforcement surcharge and the $250 DNA surcharge. The Governor's recommendation includes eliminating the statute of limitations for serious sexual assaults, including first and second degree sexual assault, first and second degree sexual assault of a child and repeated acts of sexual assault of a child. With the availability of DNA profiles, prosecution for these crimes could be commenced within 12 months of a probable match. See Department of Justice, Item #3.

2. Refinements and Clarifications to Truth in Sentencing

The Governor recommends refining certain applications under the original truth in sentencing bill (1997 Wisconsin Act 283) relating to the revocation of extended supervision, penalties for criminal attempts, bifurcated sentences for certain enhanced misdemeanors, commitment of persons found not guilty by reason of mental disease or mental defect, and handling of consecutive and concurrent sentences under certain circumstances.

3. Internet and Technology Assisted Crimes

The Governor recommends creating and amending statutory provisions to address Internet and technology assisted crimes. Updates define modern terms, prescribe penalties and add references to computer and digital technology to state statute. These changes address computer viruses, exposing children to harmful materials, video peeping and require the labeling of unsolicited E-mail advertisements with adult content. Amendments address loopholes in current law that have been identified by recent Supreme Court decisions and enhance state and local law enforcement's efforts in combating crimes that are aided by modern technology.

4. Telemarketing Practices

The Governor recommends creating three specific requirements regarding telephone solicitations. First, require telephone solicitors to disclose the caller's name, whether the caller is employed by or under contract with a professional telemarketing firm, the name of the business on whose behalf the call is made and the purpose of the call. Second, prohibit a person from making a telephone solicitation to a person who has provided notice to that person that the person does not want to receive telephone solicitations. Lastly, prohibit telephone solicitors from blocking a person's caller ID. These requirements will be enforced by the Department of Agriculture, Trade and Consumer Protection (DATCP) and may be enforced by district attorneys after consulting with DATCP. Violators will be subject to a civil forfeiture. See Department of Agriculture, Trade and Consumer Protection, Item #11.

3. Enhancing the Use of DNA Evidence

Source of Funds	Agency Request FY02 Dollars	Agency Request FY02 Positions	Agency Request FY03 Dollars	Agency Request FY03 Positions	Governor's Recommendation FY02 Dollars	Governor's Recommendation FY02 Positions	Governor's Recommendation FY03 Dollars	Governor's Recommendation FY03 Positions
PR-S	0	0.00	0	0.00	93,300	2.00	108,500	2.00
TOTAL	0	0.00	0	0.00	93,300	2.00	108,500	2.00

The Governor recommends the authorization of 2.0 FTE forensic scientist positions dedicated to enhancing the use of DNA evidence by expediting new DNA profile searches and analyzing cold cases. Funding for the positions will come from a portion of the $5 crime lab and drug enforcement surcharge and the $250 DNA surcharge. One position will be located at the State Crime Lab in Milwaukee and one in Madison. These positions will work in conjunction with the newly designated DNA prosecutor in Milwaukee County. This item is part of the Governor's initiative to enhance the use of DNA evidence. This initiative is described under District Attorneys, Item #1.

4. Crime Laboratory Equipment

Source of Funds	Agency Request FY02 Dollars	Agency Request FY02 Positions	Agency Request FY03 Dollars	Agency Request FY03 Positions	Governor's Recommendation FY02 Dollars	Governor's Recommendation FY02 Positions	Governor's Recommendation FY03 Dollars	Governor's Recommendation FY03 Positions
PR-S	505,000	0.00	505,000	0.00	200,000	0.00	90,000	0.00
TOTAL	505,000	0.00	505,000	0.00	200,000	0.00	90,000	0.00

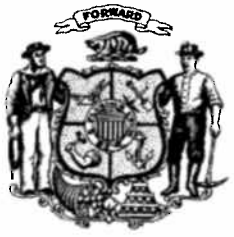
The Governor recommends providing $200,000 in FY02 and $90,000 in FY03 from the $5 crime lab and drug enforcement fee to enable the State Crime Labs to replace obsolete equipment, resolve outstanding Year 2000 issues and to capitalize on new technology.

5. Victim-Witness Grants to Counties

Source of Funds	Agency Request FY02 Dollars	Agency Request FY02 Positions	Agency Request FY03 Dollars	Agency Request FY03 Positions	Governor's Recommendation FY02 Dollars	Governor's Recommendation FY02 Positions	Governor's Recommendation FY03 Dollars	Governor's Recommendation FY03 Positions
PR-O	215,000	0.00	435,000	0.00	215,000	0.00	435,000	0.00
PR-S	448,700	0.00	670,900	0.00	0	0.00	0	0.00
TOTAL	663,700	0.00	1,105,900	0.00	215,000	0.00	435,000	0.00

The Governor recommends providing additional funding from the victim-witness surcharge to increase reimbursements to counties for costs of their victim-witness assistance programs. Funding sources for victim-witness grants to counties includes GPR, revenue from the penalty assessment surcharge, federal Byrne and matching monies administered by the Office of Justice Assistance, and the victim-witness surcharge. This recommendation will bring total state funding for reimbursements to counties to $5.5 million in FY02 and $5.7 million in FY03.

WISCONSIN STATE LEGISLATURE



Rape case hinging on DNA flawed, lawyer says

Legal motions begin after inmate accused in 1994 sexual assault

MJS 7/9/01

By DAVID DOEGE
of the Journal Sentinel staff

A groundbreaking rape case filed in Circuit Court when the suspect was identified only by a genetic code should be dismissed instead of advancing to trial, according to the suspect's lawyer.

The case wrongly circumvented the six-year statute of limitations, didn't properly identify the alleged attacker when it was issued, and is "unfair" to the man eventually identified as the supposed rapist, according to a motion asking that the case be dismissed.

When the sexual assault case against John Doe 12 was filed in Milwaukee County Circuit Court in December, Bobby Richard Dabney Jr., a twice-convicted rapist, was serving a prison term for armed robbery, and authorities weren't listing him as a suspect in the unsolved December 1994 rape that was the basis for the case.

At the time, Milwaukee County Assistant District Attorney Norman Gahn and Milwaukee Police sensitive crimes Detective Lori Gaglione had been filing complaints and arrest warrants against John Does in unsolved rape cases for more than a year in hopes of mooting impending statute of limitations issues. They were well aware that if any of the John Does, who were identified in the complaints only by genetic codes, were ever identified by name through DNA databanking technology, a legal battle would ensue over whether the case was legitimately filed and the John Doe charging maneuver was sound.

Dabney

By the time DNA technology at the State Crime Laboratory identified Dabney as John Doe 12 and he was officially charged with the 1994 rape in March, police and prosecutors in other states were following the John Doe, genetic charging strategy first employed by Gahn and Gaglione.

Please see **DNA CASE, 5A**

AB 291 folder

Rape case that hinges on DNA flawed, lawyer argues in motion

DNA CASE, From **1A**

Recently, Dabney's lawyer, Lynn Ellen Hackbarth, filed a long-expected dismissal motion in the novel case against her client, citing three reasons she believes the maneuver is improper.

The legal battle many expected has begun, and it is being watched nationwide.

"Mr. Dabney's case will resolve not only the legal issues pertaining to him, but will have a profound influence on similar cases that followed," said Marquette University Law School professor Daniel D. Blinka. "Eventually, though, we will have to have the definitive word on these issues, either in Mr. Dabney's case or some other case, from the Court of Appeals or the Supreme Court."

Dabney, 38, was charged with one count of kidnapping and four counts of first-degree sexual assault in the attack on a then-15-year-old girl who was waiting to catch a bus at N. 60th and W. Congress streets in the early morning hours of Dec. 7, 1994.

The assailant pulled out a handgun and forced the girl to accompany him to a car, bound the teen's hands, then sexually assaulted her, according to the complaint. He drove the teen around before stopping the car and forcing her to perform a sex act, the complaint says.

After he released her, the complaint says, the girl went to a store and summoned police.

As a convicted sex offender from the 1980s, Dabney was required to provide a DNA sample under a 1993 law, and he did so in February 1996 while incarcerated at the Waupun Correctional Institution for his armed robbery conviction that year.

The evidentiary samples used as a basis for the new case against him were taken to the crime laboratory in December. Dabney was linked to the attack at the crime laboratory in February during a comparison of DNA databank offender samples to the evidence from the 1994 case, the complaint says.

Dabney, who has been imprisoned for six years, has made three uneventful court appearances since he was charged with the rape. But because the primary battles in his watershed case will be about first-of-a-kind legal issues, the important rulings will concern the positions of Gahn and Hackbarth in written and oral arguments.

In her brief, Hackbarth cites the following three reasons that the case should be dismissed:

■ The warrant first filed was deficient.

"If the state's logic was applied consistently, warrants could be issued regularly using evidence with no identity and no statutes of limitation would run for any crime in which scientific evidence, such as fingerprints, is left behind," Hackbarth writes. "Warrants would be issued based on evidence alone.

"Second, a warrant based on a DNA description alone with no other external, easily ascertainable description does not notify a defendant that a prosecution against him is pending."

Blinka said that while the deficiency argument was a natural one ("new technology breeds new issues"), a DNA-based warrant is as specific as science gets today.

"Actually, these warrants are much more precise than conventional warrants involving things like height, weight and race," he said. "The genetic code that is specified is very precise."

Blinka added that Dabney was not linked to the genetic warrant until it was determined that his DNA matched the DNA on the crime scene evidence.

"While they are novel, they also foreclose any possibility of mistaken arrest because of the testing," he said.

■ A DNA warrant cannot expand the statute of limitations.

Hackbarth complains that a warrant could sit for months or even years before a profile could be matched and an arrest made. But the case could still proceed because the warrant would have made the statute of limitations moot, she says.

"Mr. Dabney contends that the Legislature did not intend prosecutors to expand the statute of limitations in this fashion," she argues.

Blinka conceded that the statute of limitations issue "is potentially troubling."

"DNA cannot tell you anything about the circumstances under which an assault may have occurred," he said. "In many sexual assault cases, consent or degree of force is an issue, and DNA cannot tell you anything about those factors.

"If somebody is arrested 15 or 20 years down the road, witnesses might no longer be available to testify about issues like consent."

■ The warrant unfairly violated Dabney's due process rights.

While the state has "strong" DNA evidence, Dabney's potential alibi witnesses may have "faded" and other evidence "could be destroyed or otherwise gone forever," Hackbarth says.

"If this prosecution is allowed to stand, there is virtually nothing to stop prosecutors from waiting as long as possible to issue a warrant instead of actively running DNA samples through the DNA databank," she argues.

Gahn has previously expressed confidence that the genetic charging methodology was legally sound. His response to Hackbarth's brief is due July 16.