State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-0670/1
RLR&MGD:cjs:jf

2001 ASSEMBLY BILL 291

April 3, 2001 – Introduced by Representatives WALKER, WASSERMAN, BIES, BERCEAU, FREESE, GUNDERSON, GUNDRUM, HAHN, HUNDERTMARK, KESTELL, LADWIG, LA FAVE, F. LASEE, KREUSER, MCCORMICK, MUSSER, NASS, OWENS, PLOUFF, REYNOLDS, STARZYK, TURNER, WADE, STONE, MILLER, KEDZIE, SYKORA, OLSEN, VRAKAS and BALOW, cosponsored by Senators BURKE, ERPENBACH, HUELSMAN, ROSENZWEIG and DARLING. Referred to Committee on Corrections and the Courts.

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), 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) and 977.07 (1) (c); 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, 971.23 (9), 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 deoxyribonucleic acid (DNA) evidence related to the crime. If the state collects and analyzes 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 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 testing of DNA 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 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 2), 3), and 4) 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 delinquency proceeding. If the person seeking testing 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.

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.

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)~~ (9).

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:

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).

SECTION 21. 939.74 (2d) of the statutes is created to read:

939.74 **(2d)** (a) In this subsection, "deoxyribonucleic acid profile" means an individual's patterned chemical structure of genetic information identified by analyzing biological material that contains the individual's deoxyribonucleic acid.

(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 deoxyribonucleic acid profile from the biological material, and comparisons of that deoxyribonucleic acid profile to deoxyribonucleic acid 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. 940.225 (1) or (2) within 12 months after comparison of the deoxyribonucleic acid 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 deoxyribonucleic acid profile from the biological material, and comparisons of that deoxyribonucleic acid profile to deoxyribonucleic acid 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 deoxyribonucleic acid profile 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) (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 24. 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 25. 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 26. 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 27. 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 28. 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 29. 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 30. 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).~~

SECTION 31. 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 sub. (1) (e), or par. (2m) (am), whichever is appropriate, that relates to the evidence.

(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.

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:

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.

(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.

(b) If the conditions in par. (a) are not present, the court 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.

(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. 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 42. 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 day after publication, or on the 2nd day after the publication of the 2001–2003 biennial budget act, whichever is later.

(END)