



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

☞ Appendix A ... Part 01 of 03

Date Transfer Requested: 08/16/2005 (Per: RLR)



The 2005 drafting file for  
☞ LRB-1609/4 (transferred)  
LRB-3242/2 (transferred)  
where used to create ...  
**LRB 05-3492**

☞ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were added, as an appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

2005 DRAFTING REQUEST

Bill

Received: 01/11/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - law enforcement  
Criminal Law - procedure

Extra Copies: Don Dyke

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
michael.dsida@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Retention and testing of DNA evidence; time limits for prosecution of a crime that is related to a sexual assault; law enforcement procedures for using an eyewitness to identify a suspect

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							S&L
/1	rryan 02/07/2005	lkunkel 02/08/2005	pgreensl 02/14/2005		lemery 02/21/2005		S&L
	rryan 03/15/2005	wjackson 02/20/2005	jfrantze 02/21/2005				

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/2		wjackson 03/15/2005	rschluet 03/16/2005	_____	lnorthro 03/16/2005		S&L
/3	rryan 07/12/2005	wjackson 07/13/2005	chaugen 07/13/2005	_____	lemery 07/13/2005		S&L
/4	rryan 08/16/2005	wjackson 08/16/2005	chaugen 08/16/2005	_____	lemery 08/16/2005		S&L

FE Sent For:

<END>

**2005 DRAFTING REQUEST**

**Bill**

Received: 01/11/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - law enforcement  
Criminal Law - procedure

Extra Copies: Don Dyke

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
michael.dsida@legis.state.wi.us

---

**Pre Topic:**

No specific pre topic given

---

**Topic:**

Retention and testing of DNA evidence; time limits for prosecution of a crime that is related to a sexual assault; law enforcement procedures for using an eyewitness to identify a suspect

---

**Instructions:**

See Attached

---

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							S&L
/1	rryan 02/07/2005	lkunkel 02/08/2005	pgreensl 02/14/2005		lemery 02/21/2005		S&L
	rryan 03/15/2005	wjackson 02/20/2005	jfrantze 02/21/2005				

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/2		wjackson 03/15/2005	rschluet 03/16/2005	_____	lnorthro 03/16/2005		S&L
/3	rryan 07/12/2005	wjackson 07/13/2005	chaugen 07/13/2005	_____	lemery 07/13/2005		S&L

FE Sent For:

*1/4 wlj 8/16*

*ch 8/16*

*ch 8/16  
Dob*

<END>

**2005 DRAFTING REQUEST**

**Bill**

Received: 01/11/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - law enforcement  
Criminal Law - procedure

Extra Copies: Don Dyke

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
michael.dsida@legis.state.wi.us

---

**Pre Topic:**

No specific pre topic given

---

**Topic:**

Retention and testing of DNA evidence; time limits for prosecution of a crime that is related to a sexual assault; law enforcement procedures for using an eyewitness to identify a suspect

---

**Instructions:**

See Attached

---

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?				_____			S&L
/1	rryan 02/07/2005	lkunkel 02/08/2005	pgreensl 02/14/2005	_____	lemery 02/21/2005		S&L
	rryan 03/15/2005	wjackson 02/20/2005	jfrantze 02/21/2005	_____			

↓ ↓

Vers.      Drafted      Reviewed      Typed      Proofed      Submitted      Jacketed      Required

/2

wjackson  
03/15/2005  
/3 WJ 7/13

rschluet  
03/16/2005

CH  
7-13  
CH  
7-13  
RS  
<END>

lnorthro  
03/16/2005

S&L

FE Sent For:

2005 DRAFTING REQUEST

Bill

Received: 01/11/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - law enforcement  
Criminal Law - procedure

Extra Copies: Don Dyke

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
michael.dsida@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Retention and testing of DNA evidence; time limits for prosecution of a crime that is related to a sexual assault; law enforcement procedures for using an eyewitness to identify a suspect

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							S&L
/1	rryan 02/07/2005	lkunkel 02/08/2005 wjackson 02/20/2005	pgreensl 02/14/2005 jfrantze 02/21/2005		lemery 02/21/2005		S&L

12 Wlj 3/15

Handwritten initials and numbers: 2, 16, 3, pb

**LRB-1609**

02/21/2005 12:15:52 PM

Page 2

FE Sent For:

<END>

2005 DRAFTING REQUEST

Bill

Received: 01/11/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - law enforcement  
Criminal Law - procedure

Extra Copies: Don Dyke

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
michael.dsida@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Retention and testing of DNA evidence; time limits for prosecution of a crime that is related to a sexual assault; law enforcement procedures for using an eyewitness to identify a suspect

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rryan	1 wj 2/20	<i>[Signature]</i>	<i>[Signature]</i>			S&L

FE Sent For:

<END>

1       **AN ACT** to create 66.0512 of the statutes; relating to: requiring law enforcement  
2           agencies to adopt policies on eyewitness identification procedures.

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

**COMMENT:** This draft makes one change to the previous version of the draft that was reviewed at the September 28, 2004 meeting of the Avery Task Force. The change, suggested by the Wisconsin Chiefs of Police Association, Inc., legislative committee, removes reference in the definition of "eyewitness identification procedure" to procedures that use a witness to identify an individual who may have violated "local law". With this change, the definition and, consequently, the written policy requirement apply only to eyewitness identification procedures involving identification of an individual who may have violated "state" law.

3       **SECTION 1.** 66.0512 of the statutes is created to read:

4       **66.0512 Law enforcement policies on eyewitness identification procedures. (1)**

5       **DEFINITIONS.** In this section:

6           (a) "Eyewitness identification procedure" means any law enforcement agency  
7           procedure that uses a witness to identify an individual who may have violated state law by  
8           giving the witness an opportunity to identify the individual through the use of live individuals  
9           or representations of individuals.

10          (b) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

11          **(2) FINDINGS.** (a) Research and studies have shown that:

12           1. When erroneous convictions in criminal cases occur, mistaken eyewitness  
13           identification is a leading contributor.

1           2. Eyewitness identification procedures can affect human memory and those effects,  
2 including memory contamination and relative judgment, can contribute to erroneous  
3 eyewitness identifications.

4           3. Eyewitness identification methods and procedures are available that can reduce or  
5 minimize erroneous identifications.

6           (b) The individual and social costs of erroneous criminal convictions include:

7           1. Loss of liberty by the wrongfully convicted individual.

8           2. Failure to prosecute and convict the actual perpetrator.

9           3. Costs to taxpayers of investigating, prosecuting, incarcerating, and exonerating  
10 wrongfully convicted individuals.

11           4. Diminished public perception regarding the criminal justice system.

12           (c) Even when a potential erroneous conviction is not at issue, a known mistaken  
13 eyewitness identification can negatively affect an investigation by tainting that witness for  
14 any future identifications in the case.

15           (d) Current minimum legal standards for eyewitness identification procedures do not  
16 sufficiently reflect current knowledge regarding erroneous eyewitness identification.

17           (e) To reduce the potential for erroneous eyewitness identification in criminal cases, it  
18 is essential that law enforcement agencies adopt procedures to enhance the reliability of  
19 eyewitness identification. Experience in other jurisdictions has shown that such procedures  
20 are consistent with good law enforcement investigation practices.

21           (f) Many of the recommended procedures for eyewitness identification can be  
22 implemented even when lack of personnel and other resources precludes wholesale adoption  
23 of the recommendations.

1           (3) REQUIREMENT. Each law enforcement agency shall adopt written policies on  
2 eyewitness identification procedures used by that agency. Biennially, each law enforcement  
3 agency shall review its written policies.

4           (4) CONSIDERATIONS. In adopting or revising policies under sub. (3), a law enforcement  
5 agency:

6           (a) Shall consider model policies and policies adopted by other jurisdictions.

7           (b) Shall consider including in the policies procedural components that enhance the  
8 objectivity and reliability of the identification procedures and minimize the possibility of  
9 mistaken identifications, including procedures that:

10           1. Use persons who have no knowledge of the identity of the suspect to administer the  
11 eyewitness identification procedures, to the extent feasible given available resources.

12           2. Present individuals, or representations of individuals, to witnesses sequentially  
13 rather than simultaneously, to the extent feasible.

14           3. Minimize influences on the witness during the procedure, such as verbal and  
15 nonverbal reactions by the lineup administrator to a witness' responses and actions that  
16 contribute to an overstated confidence level by a witness in a positive identification.

17           4. Document the identification procedure and procedure results.

18           **SECTION 2. Effective date.** This act takes effect on the first day of the 12th month  
19 beginning after publication.

20

(END)

1        **AN ACT to amend** 939.74 (2d) (a) and 939.74 (2d) (b) and (c); and **to create** 939.74  
2        (2d) (a) 2. of the statutes; **relating to:** ...

**COMMENT:** Current law permits prosecution of specified sexual assault crimes after the statute of limitations has run if:

1. The state develops a DNA profile of the perpetrator before the statute of limitations runs and the state does not have a match for the DNA profile; and
2. When the state does have a match that results in a probable identification of the perpetrator, the state commences prosecution within 12 months.

This draft allows in addition to prosecution of the sexual assault crime, prosecution of crimes “related” to the sexual assault crime after the statute of limitations has run. The draft defines “related crime” as a crime that is linked to the sexual assault crime by involving the same victim, by time, and by intent, purpose, or opportunity so that it is part of the same course of conduct that included the sexual assault. (The previous draft reviewed by the Avery Task Force defined “related crime” as one that may be charged under s. 971.12 (1) in the same complaint, information, or indictment charging the sexual assault offense. The revised definition of “related crime” in this draft is intended to narrow the range of conduct to which the concept of “related crime” applies.)

3        **SECTION 1.** 939.74 (2d) (a) of the statutes is amended to read:

4        939.74 (2d) (a) In this subsection, ~~“deoxyribonucleic~~

5        1. “Deoxyribonucleic acid profile” means an individual’s patterned chemical structure  
6 of genetic information identified by analyzing biological material that contains the  
7 individual’s deoxyribonucleic acid.

8        **SECTION 2.** 939.74 (2d) (a) 2. of the statutes is created to read:

9        939.74 (2d) (a) 2. “Related crime” means another crime that is linked to the crime under  
10 s. 940.225 (1) or (2), 948.02 (1) or (2), or 948.025 by involving the same victim, by time, and

1 by intent, purpose, or opportunity so that it is part of the same course of conduct that included  
2 the violation of s. 940.225 (1) or (2), 948.02 (1) or (2), or 948.025.

3 **SECTION 3.** 939.74 (2d) (b) and (c) of the statutes are amended to read:

4 939.74 (2d) (b) If before the time limitation under sub. (1) expired, the state collected  
5 biological material that is evidence of the identity of the person who committed a violation  
6 of s. 940.225 (1) or (2), the state identified a deoxyribonucleic acid profile from the biological  
7 material, and comparisons of that deoxyribonucleic acid profile to deoxyribonucleic acid  
8 profiles of known persons did not result in a probable identification of the person who is the  
9 source of the biological material, the state may commence prosecution of the person who is  
10 the source of the biological material for violation of s. 940.225 (1) or (2) and for a related crime  
11 within 12 months after comparison of the deoxyribonucleic acid profile relating to the  
12 violation results in a probable identification of the person.

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

22 **SECTION 4. Initial applicability.**



- 1     **AN ACT** *to renumber* 968.205 (1) (a); *to amend* 968.205 (2); and *to create* 968.205  
2           (1) (af) of the statutes; **relating to:** retention of biological evidence.

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

**COMMENT:** Current law generally requires the state crime laboratories, circuit courts, law enforcement agencies, and district attorneys' offices to preserve physical evidence containing biological material collected in connection with the investigation of a crime until every person in custody from a resulting criminal conviction, juvenile adjudication or insanity commitment has reached his or her discharge date. The law includes a procedure that allows destruction of biological material otherwise required to be retained. That procedure includes notice to all persons who remain in custody and their attorneys. The custodial agency may then destroy the evidence unless a recipient of the notice files, within 90 days, either a motion for DNA testing or a written request to preserve the evidence.

This draft provides a definition of "biological material" intended to narrow the scope of the biological material retention requirement. Biological material that does not fall within the definition need not be retained. Under the draft, biological material is defined as biological material that was collected in connection with a criminal investigation resulting in a criminal conviction, delinquency adjudication, or commitment and that is:

1. Biological material that, based on the criminal investigation, has been or may be relevant in inculcating or exculpating any person with criminal responsibility for the offense that resulted in the conviction, adjudication, or commitment; or
2. Biological material of the victim of the offense that resulted in the conviction, adjudication, or commitment.

In addition, the draft, in SEC. 3, provides that physical evidence that includes biological material must be retained only "in an amount and manner sufficient to develop a [DNA] profile from the biological material".

- 3           **SECTION 1.** 968.205 (1) (a) of the statutes is renumbered 968.205 (1) (am).

1           **SECTION 2.** 968.205 (1) (af) of the statutes is created to read:

2           968.205 (1) (af) "Biological material" means biological material that was collected in  
3 connection with a criminal investigation resulting in a criminal conviction, delinquency  
4 adjudication, or commitment under s. 971.17 or 980.06 and that is any of the following:

5           1. Biological material that, based on the criminal investigation, has been or may be  
6 relevant in inculcating or exculpating any person with criminal responsibility for the offense  
7 that resulted in the criminal conviction, delinquency adjudication, or commitment under s.  
8 971.17 or 980.06.

9           2. Biological material of the victim of the offense that resulted in the criminal  
10 conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06.

11           **SECTION 3.** 968.205 (2) of the statutes is amended to read:

12           968.205 (2) Except as provided in sub. (3), if physical evidence that is in the possession  
13 of a law enforcement agency includes any biological material ~~that was collected in connection~~  
14 ~~with a criminal investigation that resulted in a criminal conviction, delinquency adjudication,~~  
15 ~~or commitment under s. 971.17 or 980.06,~~ the law enforcement agency shall ~~preserve~~ retain  
16 the physical evidence in an amount and manner sufficient to develop a deoxyribonucleic acid  
17 profile, as defined in s. 939.74 (2d) (a), from the biological material until every person in  
18 custody as a result of the conviction, adjudication, or commitment has reached his or her  
19 discharge date.

**COMMENT:** It is assumed that ss. 165.81 (3), 757.54 (2), and 978.08  
          should receive corresponding treatment.

20

(END)

1     **AN ACT** to amend 974.07 (8) and 974.07 (12) (a) of the statutes; **relating to:** the  
2           responsibility of the state crime laboratories for postconviction DNA testing.

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

**COMMENT:** In connection with postconviction DNA testing under s. 974.07, Stats., this draft:

(1) Authorizes the court to order the state crime laboratories to perform the testing, without the stipulation of the movant and the district attorney.

(2) Authorizes the state crime laboratories, if the laboratories determine that another facility should perform the testing, to arrange for another facility to perform the testing, subject to approval of the movant and the district attorney.

(3) Expressly authorizes the court, when appropriate, to order that the material be sent to a facility other than the state crime laboratories for testing, after the court consults with the movant and the district attorney.

(4) Requires the state crime laboratories to give priority to tests ordered to be performed by or arranged by the laboratories.

(5) Provides that the cost of any testing ordered or arranged under 974.07 is the responsibility of the state crime laboratories, to the extent the movant is not ordered to pay the costs.

In addition, the draft contemplates, in SEC. 2, increased appropriations to the department of justice in the next biennium to enable the department to give priority to and pay for DNA testing under s. 974.07 (8), as affected by the draft.

3           **SECTION 1.** 974.07 (8) of the statutes is amended to read:

4           974.07 (8) The court may impose reasonable conditions on any testing ordered or  
5           arranged under this section in order to protect the integrity of the evidence and the testing  
6           process. If appropriate ~~and if stipulated to by the movant and the district attorney~~, the court  
7           may order the state crime laboratories to perform the testing as provided under s. 165.77 (2m).  
8           If the state crime laboratories determine that another facility should perform the testing, the

1 state crime laboratories shall arrange for another facility to perform the testing, subject to the  
2 approval of the movant and the district attorney. If appropriate, and after consultation with  
3 the movant and the district attorney, the court may order that the material be sent to a facility  
4 other than the state crime laboratories for the testing. The state crime laboratories shall give  
5 priority to any tests the laboratories are ordered to perform under this subsection or that the  
6 laboratories arrange under this subsection. The costs of any testing ordered or arranged under  
7 this subsection that are not ordered to be paid by the movant under sub. (12) are the  
8 responsibility of the state crime laboratories.

9 **SECTION 2.** 974.07 (12) (a) of the statutes is amended to read:

10 974.07 (12) (a) The court may order a movant to pay the costs of any testing ordered  
11 ~~by the court~~ or arranged under this section if the court determines that the movant is not  
12 indigent.

13 **SECTION 3. Appropriation changes; justice.**

14 (1) In the schedule under section 20.455 (2) (a) of the statutes for the appropriation to  
15 the department of justice under section 20.455 (2) (a) of the statutes, as affected by the acts  
16 of 2005, the dollar amount is increased by \$[ ] for fiscal year 2005–06 and the dollar amount  
17 is increased by \$[ ] for fiscal year 2006–07 to enable the state crime laboratories to give priority  
18 to and pay for postconviction deoxyribonucleic acid testing as required under s. 974.07 (8) of  
19 the statutes.

20 (END)

## Ryan, Robin

---

**From:** Ryan, Robin  
**Sent:** Tuesday, January 11, 2005 1:17 PM  
**To:** Dyke, Don  
**Subject:** Avery bill

*Answers from  
Don 1/11 by  
phone*

Don, here are a couple of questions on the Avery bill.

Thanks, Robin

Draft # 0014:

1. Can the crime labs arrange to have another lab test evidence even if the court has specifically ordered the crime lab to do the testing? *yes*
2. Are the crime labs to give priority to DNA testing over all other work they do or just over other DNA testing (such as testing the DNA profiles of all prisoners who have to give a sample)? *yes*
3. Do you want the appropriation increase? (I think Mike Dsida told me this wasn't settled yet) *leave out*
4. There will always be a court order for DNA testing under 974.07, right? I am assuming that the reference to "arranged" on page 1, line 5, refers to arrangements by the crime labs to have someone else do the testing once the court has ordered testing, not to testing without a court order. *yes*

Draft # 0252:

1. In your bill, the requirement to adopt procedures applies to any law enforcement agency that has power to arrest, so this includes state agencies such as DOJ and the DNR? Since chapter 66 just covers local government, I think it would be more appropriate to place the requirement to adopt procedures in chapter 968. What do you think?  
*excessive force is in 66 - use same def. of Law enf agency*
2. In the definition of "eyewitness identification procedure," how about referring to an individual who may have committed a crime rather than one who may have violated state law? *fine*
3. The findings section isn't appropriate for the statutes (I am sure you are expecting me to say this). May I drop that section or incorporate it into a resolution instead?  
*legislators want it in for educational purpose  
- can put in a non-stat.*

Draft # 0012:

On page 2, line 5, what does "based on the criminal investigation" mean?

Phone call to Don Dyke  
based on the com. mves

0012

has been or based on investy may be  
relevant

play w/ "in context" lang.

Don agrees w/ concern about draft lang.  
narrowing more than intended.



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-16092

RLR:.....  
WJ

Wanted Soon  
In 2/7/05

Today  
please

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMR

X-note

1 **AN ACT** <sup>Gen</sup> relating to: retention and testing of evidence that includes biological  
2 material, time limits for prosecuting a crime that is related to a sexual assault,  
3 and law enforcement procedures for using an eyewitness to identify a person  
4 suspected of committing a crime.

*Analysis by the Legislative Reference Bureau*

**Retention of evidence containing DNA**

Under current law, law enforcement agencies, district attorneys (DAs), courts, and the state crime laboratories are required to preserve evidence that includes biological material and was collected in connection with a criminal investigation, which resulted in a conviction, delinquency adjudication, or commitment order, for as long as any person remains in custody under the conviction, delinquency adjudication, or commitment order. However, if a law enforcement agency, DA, court, or crime laboratory informs every person in custody in connection with a piece of evidence of its intent to destroy the evidence and none of the people either requests preservation of the evidence or files a motion for deoxyribonucleic acid (DNA) testing of the biological material contained in or included on the evidence, the law enforcement agency, DA, court, or crime laboratory may destroy the evidence.

This bill provides that a law enforcement agency, DA, court, or crime laboratory must retain evidence that includes biological material and was collected in connection with a criminal investigation that resulted in a conviction, delinquency adjudication, or commitment order only if the biological material is either from the

victim of the offense for which the conviction, adjudication, or commitment order was imposed or the biological material may be used to incriminate or exculpate any person for the offense. Also, a law enforcement agency, DA, court, or crime laboratory need retain the evidence only in an amount and manner sufficient to develop a DNA profile from the evidence.

#### **Testing of DNA evidence**

Under current law, a person who has been convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for committing a crime may petition a court to order DNA testing of evidence that was relevant to the investigation or prosecution of the crime (postconviction DNA testing). If a court grants the person's petition, the court may order the state crime laboratories to perform the DNA testing as long as the petitioner and the ~~district attorney~~ agree that the laboratories should conduct the testing. The court may order the petitioner to pay for testing if the petitioner is not indigent. DA

This bill provides that if a court grants a petition for postconviction DNA testing, the court may, after consulting with the petitioner and the ~~district attorney~~, order the state crime laboratories to conduct the testing, regardless of whether the ~~petitioner or district attorney~~ consents to selection of the laboratories. Even if DA ordered to conduct postconviction DNA testing, the state crime laboratories may arrange for another facility to conduct the testing. If the laboratories arrange for another facility to conduct the testing and the court has not ordered the petitioner to pay for testing, the laboratories must pay for it. The bill further requires that the state crime laboratories prioritize postconviction DNA testing ordered by a court over other work of the laboratories.

#### **Time limits for prosecuting a crime related to a felony sexual assault**

Current law imposes time limits for commencing prosecution of most crimes. Prosecution of a felony sexual assault must be commenced within six years after the assault, except that prosecution of sexual assault of a child may be commenced at any time before the victim reaches the age of 45. However, if the state collects DNA evidence in connection with a first or second degree sexual assault or a sexual assault of a child before the time for prosecution expires and does not match the DNA evidence with an identified person until after that time expires, the state may initiate prosecution for the assault within one year after making the match. \*

This bill applies the time limits for prosecuting felony sexual assaults as well as the DNA exception from those time limits to crimes that are related to a felony sexual assault. Under the bill, crimes are related if they are committed against the same victim and with the same intent, purpose, or opportunity so as to be part of the same course of conduct.

#### **Eyewitness identification of a suspect**

This bill requires law enforcement agencies to adopt policies governing the use of an eyewitness to identify a person suspected of committing a crime. The policies must apply to practices under which a witness identifies a suspect upon viewing him or her in person, such as in a lineup, and to practices under which a witness identifies a suspect upon viewing a representation of the suspect, as by viewing a photograph array.

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:*

1           **SECTION 1.** 165.75 (3) (g) of the statutes is created to read:

2           165.75 (3) (g) Deoxyribonucleic acid testing ordered under s. 974.07 shall have  
3 priority over other work of the laboratories.

4           **SECTION 2.** 165.77 (2m) (a) of the statutes is repealed.

5           **SECTION 3.** 165.77 (2m) (b) of the statutes is amended to read:

6           165.77 (2m) (b) ~~The~~ If the laboratories analyze biological material pursuant to  
7 an order issued under s. 974.07 (8), the laboratories may compare the data obtained  
8 from the material received under par. (a) with data obtained from other specimens.  
9 The laboratories may make data obtained from any analysis and comparison  
10 available to law enforcement agencies in connection with criminal or delinquency  
11 investigations and, upon request, to any prosecutor, defense attorney, or subject of  
12 the data. The data may be used in criminal and delinquency actions and proceedings.  
13 The laboratories shall not include data obtained from deoxyribonucleic acid analysis  
14 of material ~~received under par. (a)~~ that is tested pursuant to an order under s. 974.07  
15 (8) in the data bank under sub. (3).

16 History: 1993 a. 16, 98; 1995 a. 77, 440; 2001 a. 16.

16           **SECTION 4.** 165.81 (3) (b) of the statutes is repealed and recreated to read:

17           165.81 (3) (b) Except as provided under par. (c), the laboratories shall retain  
18 physical evidence that includes biological material and to which all of the following  
19 apply:

20           1. The evidence is in the possession of the laboratories.

1           2. The evidence was collected in connection with a criminal investigation that  
2           resulted in a criminal conviction, delinquency adjudication, or commitment under s.  
3           971.17 or 980.06 and a person remains in custody as a result of the conviction,  
4           adjudication, or commitment.

5           3. The evidence includes biological material that is from a victim of the offense  
6           that was the subject of the criminal investigation or biological material that may be  
7           used to incriminate or exculpate any person for the offense.

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

9           165.81 (3) (bm) The laboratories shall retain evidence to which par. (b) applies  
10          in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as  
11          defined in s. 939.74 (2d) (a), from the biological material contained in or included on  
12          the evidence.

13          **SECTION 6.** 165.81 (3) (c) (intro.) of the statutes is amended to read:

14          165.81 (3) (c) (intro.) Subject to par. (e), the department may destroy biological  
15          material before the expiration of the time period specified in par. (b) if all of the  
16          following apply evidence to which par. (b) 1. to 3. applies if all of the following  
17          conditions are satisfied:

18          History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16.

18          **SECTION 7.** 165.81 (3) (c) 1. of the statutes is amended to read:

19          165.81 (3) (c) 1. The department sends a notice of its intent to destroy the  
20          biological material evidence to all persons who remain in custody as a result of the  
21          criminal conviction, delinquency adjudication, or commitment, and to either the  
22          attorney of record for each person in custody or the state public defender.

23          History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16.

23          **SECTION 8.** 165.81 (3) (c) 2. a. and b. of the statutes are amended to read:

1           165.81 (3) (c) 2. a. Files a motion for testing of the ~~biological material~~ evidence ✓  
2           under s. 974.07 (2).

3           b. Submits a written request to ~~preserve the biological material~~ for retention  
4           of the evidence to the department.

5           History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16. ✓

5           **SECTION 9.** 165.81 (3) (c) 3. of the statutes is amended to read:

6           165.81 (3) (c) 3. No other provision of federal or state law requires the  
7           department to ~~preserve~~ retain the ~~biological material~~ evidence. ✓

8           History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16. ✓

8           **SECTION 10.** 165.81 (3) (d) of the statutes is amended to read:

9           165.81 (3) (d) A notice provided under par. (c) 1. shall clearly inform the  
10          recipient that the ~~biological material~~ evidence ✓ will be destroyed unless, within 90  
11          days after the date on which the person receives the notice, either a motion for testing  
12          of the ~~material~~ evidence ✓ is filed under s. 974.07 (2) or a written request to ~~preserve~~  
13          for retention of the material evidence is submitted to the department.

14          History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16. ✓

14          **SECTION 11.** 165.81 (3) (e) of the statutes is amended to read:

15          165.81 (3) (e) If, after providing notice under par. (c) 1. of its intent to destroy  
16          ~~biological material~~ evidence, the department receives a written request to ~~preserve~~  
17          for retention of the material evidence, the department shall ~~preserve~~ retain the  
18          ~~material~~ evidence until the discharge date of the person who made the request or on  
19          whose behalf the request was made, subject to a court order issued under s. 974.07  
20          (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the  
21          ~~biological material~~ evidence ✓ under s. 974.07 (9) (b) or (10) (a) 5.

22          History: 1981 c. 348; 1985 a. 29 ss. 2012, 3200 (35); 2001 a. 16.

22          **SECTION 12.** 175.50 of the statutes is created to read:

23          **175.50 Eyewitness identification procedures.** (1) In this section:

## SECTION 12

1 (a) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b). ✓

2 (b) "Suspect" means a person suspected of committing a crime.

3 (2) Each law enforcement agency shall adopt written policies for using an  
4 eyewitness to identify a suspect upon viewing the suspect in person or upon viewing  
5 a representation of the suspect.

6 (3) A law enforcement agency shall biennially review policies adopted under  
7 this section. ✓

8 (4) In developing and revising policies under this section, ✓ a law enforcement  
9 agency shall consider model policies and policies adopted by other jurisdictions.

10 (5) A law enforcement agency shall consider including in policies adopted  
11 under this section ✓ the following practices to enhance the objectivity and reliability  
12 of <sup>eyewitness</sup> identifications by ~~eyewitnesses~~ ✓ and to minimize the possibility of mistaken  
13 identifications:

14 (a) Having a person who does not know the identity of the suspect administer  
15 the eyewitness' viewing of individuals or representations.

16 (b) Showing an eyewitness individuals or representations sequentially rather  
17 rather than simultaneously <sup>to</sup> ✓

18 (c) Minimizing factors that influence an eyewitness to identify a suspect or  
19 overstate his or her confidence level in identifying a suspect, including verbal or  
20 nonverbal reactions <sup>of</sup> by the person administering the eyewitness' viewing of  
21 individuals or representations.

22 (d) Documenting the procedure by which the eyewitness views the suspect or  
23 a representation of the suspect and documenting the results or outcome of the  
24 procedure.

25 SECTION 13. 757.54 (2) (b) ✓ of the statutes is amended to read:

1           757.54 (2) (b) Except as provided in par. (c), if an exhibit in a criminal action  
2           or a delinquency proceeding under ch. 938 includes any biological material that was  
3           collected in connection with the action or proceeding and that is either from a victim  
4           of the offense that was the subject of the action or proceeding or may be used to  
5           incriminate or exculpate any person for the offense, the court presiding over the  
6           action or proceeding shall ensure that the exhibit is ~~preserved~~ retained until every  
7           person in custody as a result of the action or proceeding, or as a result of commitment  
8           under s. 980.06 that is based on a judgment of guilty or not guilty by reason of mental  
9           disease or defect in the action or proceeding, has reached his or her discharge date.

10       History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.  
11       SECTION 14. 757.54 (2) (bm) of the statutes is created to read:

12           757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies  
13           is retained in an amount and manner sufficient to develop a deoxyribonucleic acid  
14           profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or  
15           included on the exhibit.

16       SECTION 15. 757.54 (2) (c) (intro.) of the statutes is amended to read:

17           757.54 (2) (c) (intro.) Subject to par. (e), the court may destroy biological  
18           material an exhibit before the expiration of the time period specified in par. (b) if all  
19           of the following apply:

20       History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.  
21       SECTION 16. 757.54 (2) (c) 1. of the statutes is amended to read:

22           757.54 (2) (c) 1. The court sends a notice of its intent to destroy the biological  
23           material exhibit to all persons who remain in custody as a result of the criminal  
24           action, delinquency proceeding, or commitment under s. 980.06 and to either the  
25           attorney of record for each person in custody or the state public defender.

26       History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.  
27       SECTION 17. 757.54 (2) (c) 2. a. and b. of the statutes are amended to read:

1           757.54 (2) (c) 2. a. Files a motion for testing of the ~~biological material~~ exhibit ✓  
2           under s. 974.07 (2).

3           b. Submits a written request to ~~preserve the biological material~~ for retention  
4           of the exhibit to the court. ✓

5           History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.

5           **SECTION 18.** 757.54 (2) (c) 3. ✓ of the statutes is amended to read:

6           757.54 (2) (c) 3. No other provision of federal or state law requires ~~the court to~~  
7           ~~preserve retention of the biological material~~ exhibit. ✓

8           History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.

8           **SECTION 19.** 757.54 (2) (d) ✓ of the statutes is amended to read:

9           757.54 (2) (d) A notice provided under par. (c) 1. shall clearly inform the  
10          recipient that the ~~biological material~~ exhibit will be destroyed unless, within 90 days  
11          after the date on which the person receives the notice, either a motion for testing of  
12          the ~~material~~ exhibit is filed under s. 974.07 (2) or a written request to ~~preserve for~~  
13          retention of the ~~material~~ exhibit is submitted to the court. ✓

14          History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.

14          **SECTION 20.** 757.54 (2) (e) ✓ of the statutes is amended to read:

15          757.54 (2) (e) If, after providing notice under par. (c) 1. of its intent to destroy  
16          ~~biological material~~ exhibit, a court receives a written request to ~~preserve for~~  
17          retention of the material exhibit, the court shall ~~preserve the material~~ ensure that  
18          the exhibit is retained until the discharge date of the person who made the request  
19          or on whose behalf the request was made, subject to a court order issued under s.  
20          974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the  
21          ~~biological material~~ exhibit under s. 974.07 (9) (b) or (10) (a) 5. ✓

22          History: Sup. Ct. Order, 136 Wis. 2d xi (1987); 2001 a. 16.

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

1           939.74 (2d) (am) For purposes of this subsection, crimes are related if they are  
2 committed against the same victim and with the same intent, purpose, or  
3 opportunity so as to be part of the same course of conduct.

4           **SECTION 22.** 939.74 (2d) (b) and (c) of the statutes are amended to read:

5           939.74 (2d) (b) If before the time limitation under sub. (1) expired, the state  
6 collected biological material that is evidence of the identity of the person who  
7 committed a violation of s. 940.225 (1) or (2), the state identified a deoxyribonucleic  
8 acid profile from the biological material, and comparisons of that deoxyribonucleic  
9 acid profile to deoxyribonucleic acid profiles of known persons did not result in a  
10 probable identification of the person who is the source of the biological material, the  
11 state may commence prosecution of the person who is the source of the biological  
12 material for the violation of s. 940.225 (1) or (2) or a crime that is related to the  
13 violation within 12 months after comparison of the deoxyribonucleic acid profile  
14 relating to the violation results in a probable identification of the person.

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269; 1993 a. 219, 227, 486; 1995 a. 456; 1997 a. 237; 2001 a. 16, 109; 2003 a. 196, 279, 326.

15           (c) If before the time limitation under sub. (2) (c) expired, the state collected  
16 biological material that is evidence of the identity of the person who committed a  
17 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid  
18 profile from the biological material, and comparisons of that deoxyribonucleic acid  
19 profile to deoxyribonucleic acid profiles of known persons did not result in a probable  
20 identification of the person who is the source of the biological material, the state may  
21 commence prosecution of the person who is the source of the biological material for  
22 the violation of s. 948.02 (1) or (2) or 948.025 or a crime that is related to the violation

1 within 12 months after comparison of the deoxyribonucleic acid profile relating to the  
2 violation results in a probable identification of the person.

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269; 1993 a. 219, 227, 486; 1995 a. 456; 1997 a. 237; 2001 a. 16, 109; 2003 a. 196, 279, 326.

3 **SECTION 23.** 968.205 (2) of the statutes is repealed and recreated to read:

4 968.205 (2) Except as provided under sub. (3) a law enforcement agency shall  
5 retain physical evidence that includes biological material and to which all of the  
6 following apply:

7 (a) The evidence is in the possession of the law enforcement agency.

8 (b) The evidence was collected in connection with a criminal investigation that  
9 resulted in a criminal conviction, delinquency adjudication, or commitment under s.  
10 971.17 or 980.06 and a person remains in custody as a result of the conviction,  
11 adjudication, or commitment.

12 (c) The evidence includes biological material that is from a victim of the offense  
13 that was the subject of the criminal investigation or biological material that may be  
14 used to incriminate or exculpate any person for the offense.

15 **SECTION 24.** 968.205 (2m) of the statutes is created to read:

16 968.205 (2m) A law enforcement agency shall retain evidence to which sub. (2)  
17 applies in an amount and manner sufficient to develop a deoxyribonucleic acid  
18 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or  
19 included on the evidence.

20 **SECTION 25.** 968.205 (3) (intro.) of the statutes is amended to read:

21 968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy  
22 biological material before the expiration of the time period specified in sub. (2) if all

1 of the following apply evidence to which sub. (2) (a) to (c) applies if all of the following  
2 conditions are satisfied:

3 History: 2001 a. 16.

3 SECTION 26. 968.205 (3) (a) of the statutes is amended to read:

4 968.205 (3) (a) The law enforcement agency sends a notice of its intent to  
5 destroy the ~~biological material~~ evidence to all persons who remain in custody as a  
6 result of the criminal conviction, delinquency adjudication, or commitment, and to  
7 either the attorney of record for each person in custody or the state public defender.

8 History: 2001 a. 16.

8 SECTION 27. 968.205 (3) (b) 1. and 2. of the statutes are amended to read:

9 968.205 (3) (b) 1. Files a motion for testing of the ~~biological material~~ evidence  
10 under s. 974.07 (2).

11 2. Submits a written request to ~~preserve the biological material~~ for retention  
12 of the evidence to the law enforcement agency or district attorney.

13 History: 2001 a. 16.

13 SECTION 28. 968.205 (3) (c) of the statutes is amended to read:

14 968.205 (3) (c) No other provision of federal or state law requires the law  
15 enforcement agency to ~~preserve~~ retain the ~~biological material~~ evidence.

16 History: 2001 a. 16.

16 SECTION 29. 968.205 (4) of the statutes is amended to read:

17 968.205 (4) A notice provided under sub. (3) (a) shall clearly inform the  
18 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90  
19 days after the date on which the person receives the notice, either a motion for testing  
20 of the ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~  
21 for retention of the material evidence is submitted to the law enforcement agency.

22 History: 2001 a. 16.

22 SECTION 30. 968.205 (5) of the statutes is amended to read:

1           968.205 (5) If, after providing notice under sub. (3) (a) of its intent to destroy  
2 biological material, <sup>evidence</sup> a law enforcement agency receives a written request to preserve  
3 for retention of the material evidence, the law enforcement agency shall preserve  
4 retain the material evidence until the discharge date of the person who made the  
5 request or on whose behalf the request was made, subject to a court order issued  
6 under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or  
7 transfer of the biological material evidence under s. 974.07 (9) (b) or (10) (a) 5.

8 History: 2001 a. 16.

8           **SECTION 31.** 974.07 (8) of the statutes is amended to read:

9           974.07 (8) The court may impose reasonable conditions on any testing ordered  
10 under this section in order to protect the integrity of the evidence and the testing  
11 process. ~~If appropriate and if stipulated to by the movant and the district attorney,~~  
12 ~~the court may order the state crime laboratories to perform the testing as provided~~  
13 ~~under s. 165.77 (2m) or, after consulting with the movant and the district attorney,~~  
14 ~~may order that the material be sent to a facility other than the state crime~~  
15 ~~laboratories for testing. If ordered to perform testing under this section, the crime~~  
16 ~~laboratories may, subject to the approval of the movant and the district attorney,~~  
17 arrange for another facility to perform the testing. <sup>plain</sup>

18 History: 2001 a. 16.

18           **SECTION 32.** 974.07 (12) (c) of the statutes is created to read:

19           974.07 (12) (c) The state crime laboratories shall pay for testing ordered under  
20 this section and performed by a facility other than the state crime laboratories if the  
21 court does not order the movant to pay for the testing.

22           **SECTION 33.** 978.08 (2) of the statutes is repealed and recreated to read:

1 978.08 (2) Except as provided under sub. (3) a district attorney shall retain  
2 physical evidence that includes biological material and to which all of the following  
3 apply:

4 (a) The evidence is in the possession of the district attorney.

5 (b) The evidence was collected in connection with a criminal investigation that  
6 resulted in a criminal conviction, delinquency adjudication, or commitment under s.  
7 971.17 or 980.06 and a person remains in custody as a result of the conviction,  
8 adjudication, or commitment.

9 (c) The evidence includes biological material that is from a victim of the offense  
10 that was the subject of the criminal investigation or biological material that may be  
11 used to incriminate or exculpate any person for the offense.

12 SECTION 34. 978.08 (2m) of the statutes is created to read:

13 978.08 (2m) A district attorney shall retain evidence to which sub. (2) applies  
14 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as  
15 defined in s. 939.74 (2d) (a), from the biological material contained in or included on  
16 the evidence.

17 SECTION 35. 978.08 (3) (intro.) of the statutes is amended to read:

18 978.08 (3) Subject to sub. (5), a district attorney may destroy biological  
19 ~~material before the expiration of the time period specified in sub. (2) if all of the~~  
20 ~~following apply~~ evidence to which sub. (2) (a) to (c) applies if all of the following  
21 conditions are satisfied:

22 History: 2001 a. 16.

23 SECTION 36. 978.08 (3) (a) of the statutes is amended to read:

24 978.08 (3) (a) The district attorney sends a notice of its intent to destroy the  
~~biological material~~ evidence to all persons who remain in custody as a result of the

1 criminal conviction, delinquency adjudication, or commitment and to either the  
2 attorney of record for each person in custody or the state public defender.

3 History: 2001 a. 16.

SECTION 37. 978.08 (3) (b) 1. and 2. of the statutes are amended to read:

4 978.08 (3) (b) 1. Files a motion for testing of the ~~biological-material~~ evidence  
5 under s. 974.07 (2).

6 2. Submits a written request to ~~preserve the biological-material~~ for retention  
7 of the evidence to the district attorney.

8 History: 2001 a. 16.

SECTION 38. 978.08 (3) (c) of the statutes is amended to read:

9 978.08 (3) (c) No other provision of federal or state law requires the district  
10 attorney to ~~preserve~~ retain the ~~biological-material~~ evidence.

11 History: 2001 a. 16.

SECTION 39. 978.08 (4) of the statutes is amended to read:

12 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient  
13 that the ~~biological-material~~ evidence will be destroyed unless, within 90 days after  
14 the date on which the person receives the notice, either a motion for testing of the  
15 ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~ for  
16 retention of the material evidence is submitted to the district attorney.

17 History: 2001 a. 16.

SECTION 40. 978.08 (5) of the statutes is amended to read:

18 978.08 (5) If, after providing notice under sub. (3) (a) of its intent to destroy  
19 ~~biological-material~~ evidence, a district attorney receives a written request to  
20 ~~preserve~~ for retention of the material evidence, the district attorney shall ~~preserve~~  
21 retain the ~~material~~ evidence until the discharge date of the person who made the  
22 request or on whose behalf the request was made, subject to a court order issued

**BILL**

1 under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or  
2 transfer of the ~~biological material~~ evidence under s. 974.07 (9) (b) or (10) (a) 5.

3 History: 2001 a. 16.

**SECTION 41. Initial applicability.**

4 (1) TIME LIMITS FOR PROSECUTING CRIMES RELATED TO SEXUAL ASSAULTS. The  
5 treatment of section 939.74 (2d) (am), (b), and (c) of the statutes first applies to  
6 offenses that are not barred from prosecution on the effective date of this subsection.

7 **SECTION 42. Effective date.**

8 (1) EYEWITNESS IDENTIFICATION PROCEDURES. The treatment of section 175.50 of  
9 the statutes takes effect on the first day of the 12th month beginning after  
10 publication.

11

(END)

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-1609/1dn

RLR:.....

WJ

Representative Gundrum and Don Dyke

DNA evidence retention

The suggested language in WLC: 0012 for the evidence retention provision requires retention of, "biological material that, based on the criminal investigation, has been or may be relevant to inculpating or exculpating any person with criminal responsibility for the offense." I removed the clause, "based on the criminal investigation." If relevance is determined on the basis of the original criminal investigation, a court may find that evidence related to a lead that was discounted by the original investigators is irrelevant even though such evidence is precisely the type of evidence that subsequent investigators may wish to pursue. I think the bill achieves your goal of narrowing the scope of evidence that must be retained by limiting the retention requirement to evidence that may be used to inculpate or exculpate a person.

I standardized the language in the evidence retention provisions to refer uniformly to "evidence" rather than "biological material" and to "retaining" rather than "preserving" evidence.

Technical correction: Section 968.205 (3) (b) 2., stats., refers to submitting a request for preservation of evidence to the law enforcement agency or district attorney. I think that the request should only go to the law enforcement agency so that the provision is consistent with s. 968.205 (4) and (5) as well as the evidence retention provision for the crime laboratories, courts, and DAs. Do you want me to make this correction in the bill?

\* Related Crimes

As Don and I discussed, I removed the requirement that related crimes ~~must~~ be "linked by time," because events that take place years apart are still linked by time (just a long period of time). If you want to include a time element, perhaps you could require that the crimes be proximate in time:

Crimes are related if they are committed against the same victim, are proximate in time, and are committed with the same intent, purpose, or opportunity so as to be part of the same course of conduct.

Please fix  
indent

Alternatively, use of the term "series of acts or transactions" might suggest a proximity of time requirement.

Please fix  
indent

Crimes are related if they are committed against the same victim and with the same intent, purpose, or opportunity and are part of the same act or transaction or series of acts or transactions.

Please let me know if you prefer either of the alternatives.

Eyewitness identification of suspect

I did not include the findings section from WLC: 0252<sup>g</sup> because legislative findings are inappropriate for a bill. The findings are, however, appropriate for a resolution. The findings are inappropriate for a bill because they promote and explain. One of the dangers of including promotional language in a bill is that the language will be construed by courts to create greater rights and privileges than you intend. See *In the Matter of the Protective Placement of D.E.R. v. La Crosse Co.*, 155 Wis. 2d 240 (1990), in which the court interpreted a phrase within a legislative intent statement that included sweeping language about protecting individuals to mean that a developmentally disabled individual is entitled to be protectively placed in an environment that requires funding by the county in amounts greater than federal and state funds and the funds that the county was explicitly required to provide as matching funds. Please let me know if you would like the findings drafted as a resolution or if you would like to discuss the reasons for eliminating the findings section.

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

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-1609/1dn  
RLR:wljjf

February 21, 2005

Representative Gundrum and Don Dyke:

DNA evidence retention

The suggested language in WLC: 0012 for the evidence retention provision requires retention of, "biological material that, based on the criminal investigation, has been or may be relevant to inculpatory or exculpatory any person with criminal responsibility for the offense." I removed the clause, "based on the criminal investigation." If relevance is determined on the basis of the original criminal investigation, a court may find that evidence related to a lead that was discounted by the original investigators is irrelevant even though such evidence is precisely the type of evidence that subsequent investigators may wish to pursue. I think the bill achieves your goal of narrowing the scope of evidence that must be retained by limiting the retention requirement to evidence that may be used to incriminate or exculpate a person.

I standardized the language in the evidence retention provisions to refer uniformly to "evidence" rather than "biological material" and to "retaining" rather than "preserving" evidence.

Technical correction: Section 968.205 (3) (b) 2., stats., refers to submitting a request for preservation of evidence to the law enforcement agency or district attorney. I think that the request should go only to the law enforcement agency so that the provision is consistent with s. 968.205 (4) and (5) as well as the evidence retention provision for the crime laboratories, courts, and DAs. Do you want me to make this correction in the bill?

Related crimes

As Don and I discussed, I removed the requirement that related crimes be "linked by time," because events that take place years apart are still linked by time (just a long period of time). If you want to include a time element, perhaps you could require that the crimes be proximate in time:

Crimes are related if they are committed against the same victim, are proximate in time, and are committed with the same intent, purpose, or opportunity so as to be part of the same course of conduct.

Alternatively, use of the term "series of acts or transactions" might suggest a proximity of time requirement:

Crimes are related if they are committed against the same victim and with the same intent, purpose, or opportunity and are part of the same act or transaction or series of acts or transactions.

Please let me know if you prefer either of the alternatives.

Eyewitness identification of suspect

I did not include the findings section from WLC: 0252 because legislative findings are inappropriate for a bill. The findings are, however, appropriate for a resolution. The findings are inappropriate for a bill because they promote and explain. One of the dangers of including promotional language in a bill is that the language will be construed by courts to create greater rights and privileges than you intend. See *In the Matter of the Protective Placement of D.E.R. v. La Crosse Co.*, 155 Wis. 2d 240 (1990), in which the court interpreted a phrase within a legislative intent statement that included sweeping language about protecting individuals to mean that a developmentally disabled individual is entitled to be protectively placed in an environment that requires funding by the county in amounts greater than federal and state funds and the funds that the county was explicitly required to provide as matching funds. Please let me know if you would like the findings drafted as a resolution or if you would like to discuss the reasons for eliminating the findings section.

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

3/10/05

Don Dyke - Redraft instructions for 1609

### D-Note

DRAFT evidence retention

- ✓ 1st ¶ - add reasonableness standard
- ✓ 2nd ¶ - ok
- ✓ 3rd ¶ - yes, make connection

### Related Issues

✓ want time proximity language

✓ Witness ident' of suspect

Add purpose statement from Keith Findley's  
2/28/05 e-mail

### Bill

✓ p. 6, lines 19-22 - make sure pars. under  
sub 5 are just examples, not comprehensive  
list

✓ p. 6, line 24 & p. 7, line 2 - add "to the  
extent feasible"

## Dyke, Don

**From:** Gahn, Norm  
**Sent:** Friday, March 04, 2005 1:45 PM  
**To:** Gundrum, Mark; Bertelle, Sandra; Bies, Garey; jfbbrook@aol.com; louis.butler@wicourts.gov; Colon, Pedro; dallosto@grgblaw.com; Donohoo, Bob - DDA; Dyke, Don; kafindle@wisc.edu; Sen.Fitzgerald; fleishf@co.portage.wi.us; Gahn, Norm; Horne, Scott; Randy.Koschnick@wicourts.gov; ReedT@mail.opd.state.wi.us; Schwaemle, Judy; terry.schwefel@wicourts.gov; Staskunas, Tony; e.stenz@sbcglobal.net; ns1997@ci.merrill.wi.us; Waukesha Co. Sheriff; Dyke, Don  
**Subject:** RE: Assembly Judiciary Committee - Avery Task Force recommendations Draft Legislation

Mark, Just one comment on the evidence retention statute. I like the way the statute is written. I think that it achieves what we want to accomplish. However, I feel that it is a little too broad for the police. I would like to see a State v. Denny third party defense type analysis. In other words, I would like to see a "reasonableness" standard applied in determining what evidence can be destroyed. How about subsection (c) reading "...or biological material that may be reasonably used to incriminate or exculpate any person for the offense." As written, I do not think that the statute gets rid of needless cigarette butts, coke cans, beer bottles, and all the other stuff law enforcement collects from crime scenes that turn out to be meaningless as far as evidence goes, but still may contain DNA to "exculpate any person." Maybe I am making too much of this. What does the rest of the group think? The reasonable standard is the best I can come up with. Norm

*Evidence Retention*

> -----Original Message-----

> From: Gundrum, Mark [mailto:Mark.Gundrum@legis.state.wi.us]  
> Sent: Wednesday, February 23, 2005 1:48 PM  
> To: Bertelle, Sandra; Bies, Garey; jfbbrook@aol.com;  
> louis.butler@wicourts.gov; Colon, Pedro; dallosto@grgblaw.com; Donohoo,  
> Bob - DDA; Dyke, Don; kafindle@wisc.edu; Sen.Fitzgerald;  
> fleishf@co.portage.wi.us; Gahn, Norm; Horne, Scott;  
> Randy.Koschnick@wicourts.gov; ReedT@mail.opd.state.wi.us; Schwaemle, Judy;  
> terry.schwefel@wicourts.gov; Staskunas, Tony; e.stenz@sbcglobal.net;  
> ns1997@ci.merrill.wi.us; dtrawicki@waukeshacounty.gov; Dyke, Don  
> Subject: Assembly Judiciary Committee - Avery Task Force  
> recommendations Draft Legislation

> Dear Avery Task Force members,

> I apologize for how long it has taken to get this draft back from the  
> Legislative Reference Bureau, but here it is. Please review this and get  
> back to me within the next 5 days if you see any problems with this LRB  
> draft. If I do not hear of any problems with the way it is drafted within  
> the next 5 days or so, I will assume LRB did everything correctly and will  
> introduce it shortly thereafter.

> Within the next few days, we will contact all of you to set a date for our  
> next meeting to discuss the issue of electronic recording. I will have a  
> ROUGH draft suggesting how we might increase use of electronic recording  
> without creating an unfunded state mandate. Obviously it will be totally  
> and completely just a starting point for discussion. We will also be  
> adding a few additional members to the Task Force to give us some added  
> input from the law enforcement perspective on the electronic recording  
> issue. To help us properly address law enforcement concerns that might  
> arise.

> Thanks so much again for all your time and service on the Task Force. I  
> look forward to hearing from you if you see any issues related to this LRB  
> draft.

> Mark  
> 1-888-534-0084-Capitol  
>  
>  
> << File: 05-16091dn.pdf >> (Drafter's Notes)  
>  
> << File: 05-16091.pdf >> (LRB Draft 1609/1)

**Dyke, Don**

---

**From:** Gahn, Norm  
**Sent:** Tuesday, March 01, 2005 10:06 AM  
**To:** 'Keith Findley'; Gundrum, Mark  
**Cc:** Dyke, Don; Gahn, Norm  
**Subject:** RE: Assembly Judiciary Committee - Avery Task Force recommendations Draft  
The "proximate in time" language is fine with me. Norm

-----Original Message-----

**From:** Keith Findley [mailto:kafindle@wisc.edu]  
**Sent:** Monday, February 28, 2005 9:56 AM  
**To:** Gundrum, Mark  
**Cc:** don.dyke@legis.state.wi.us; gahn.norm@mail.da.state.wi.us  
**Subject:** Re: Assembly Judiciary Committee - Avery Task Force recommendations Draft Legislation

*Related Crimes*

On the statute of limitations provision for related crimes, I think it is important that we include language expressly requiring that the crimes be linked by the same time period. Whether that means saying crimes that are "proximate in time," or saying crimes that occurred in the "same period of time," doesn't matter to me. But I think it is important to make it clear that we're not talking about one crime committed against a victim one day, and another against the same victim the next day, with "the same intent, purpose, or opportunity." The time element is really quite important.

Keith Findley

At 01:48 PM 2/23/2005 -0600, you wrote:

- > Dear Avery Task Force members,
- >
- > I apologize for how long it has taken to get this draft back from the Legislative Reference Bureau, but here it is. Please review this and get back to me within the next 5 days if you see any problems with this LRB draft. If I do not hear of any problems with the way it is drafted within the next 5 days or so, I will assume LRB did everything correctly and will introduce it shortly thereafter.
- >
- > Within the next few days, we will contact all of you to set a date for our next meeting to discuss the issue of electronic recording. I will have a ROUGH draft suggesting how we might increase use of electronic recording without creating an unfunded state mandate. Obviously it will be totally and completely just a starting point for discussion. We will also be adding a few additional members to the Task Force to give us some added input from the law enforcement perspective on the electronic recording issue. To help us properly address law enforcement concerns that might arise.
- >
- > Thanks so much again for all your time and service on the Task Force. I look forward to hearing from you if you see any issues related to this LRB draft.
- >
- > Mark
- 1-888-534-0084-Capitol

<<05-16091.dn.pdf>> (Drafter's Notes)

<<05-16091.pdf>> (LRB Draft 1609/1)

**Dyke, Don**

**From:** Keith Findley [kafindle@wisc.edu]  
**Sent:** Monday, February 28, 2005 9:50 AM  
**To:** Dyke, Don  
**Subject:** Fwd: Re: Assembly Judiciary Committee - Avery Task Force recommendations Draft

*Eyewitness  
Identification*

On the eyewitness ID statute, my preference remains to be to include language, such as our findings, to help law enforcement understand what these guidelines are meant to achieve. If that isn't feasible, then I think 175.50 should be drafted to make clear what the purpose of these policies is. I therefore suggest that 175.50(2) be rewritten as follows:

"(2) Each law enforcement agency shall adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The written policies shall be designed to reduce the potential for erroneous eyewitness identification in criminal cases."

That language is lifted from our previous version's findings section, but obviously does not include the "findings" that the drafter says we can't have.

Keith Findley

At 01:48 PM 2/23/2005 -0600, you wrote:

- > Dear Avery Task Force members,
- >
- > I apologize for how long it has taken to get this draft back from the Legislative Reference Bureau, but here it is. Please review this and get back to me within the next 5 days if you see any problems with this LRB draft. If I do not hear of any problems with the way it is drafted within the next 5 days or so, I will assume LRB did everything correctly and will introduce it shortly thereafter.
- >
- > Within the next few days, we will contact all of you to set a date for our next meeting to discuss the issue of electronic recording. I will have a ROUGH draft suggesting how we might increase use of electronic recording without creating an unfunded state mandate. Obviously it will be totally and completely just a starting point for discussion. We will also be adding a few additional members to the Task Force to give us some added input from the law enforcement perspective on the electronic recording issue. To help us properly address law enforcement concerns that might arise.
- >
- > Thanks so much again for all your time and service on the Task Force. I look forward to hearing from you if you see any issues related to this LRB draft.
- >
- > Mark
- 1-888-534-0084-Capitol

<<05-16091dn.pdf>> (Drafter's Notes)

<<05-16091.pdf>> (LRB Draft 1609/1)

03/14/2005