



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

☞ Appendix B ... Part 02 of 02

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.



State of Wisconsin
2005 - 2006 LEGISLATURE

Wanted Monday 8/1

LRB-3242
RLR&GMM:.....
IMK

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMR

LFS: PLS
RESORT

D-note

GenCat

1 AN ACT ...; relating to: making audio or audio and visual recordings of custodial
2 interrogations, limitations on admitting unrecorded statements into evidence
3 in juvenile delinquency and criminal proceedings, and creating a grant
4 program for digital recording equipment and training for digital recording of
5 custodial interrogations.

Analysis by the Legislative Reference Bureau

The Wisconsin Supreme Court, on July 7, 2005, exercised its supervisory authority over the court system to require that law enforcement agencies electronically record custodial interrogations of juveniles if they are conducted at a place of detention and to require that, if feasible, law enforcement agencies also electronically record custodial interrogations of juveniles that are conducted at a place other than a place of detention. (See *State v. Jerrell*, 2005 WI 105.)

This bill codifies the *Jerrell* recording requirement. The bill requires that law enforcement agencies make an audio or audio and visual recording (recording) of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. The bill also requires law enforcement agencies to make a recording, if feasible, of a custodial interrogation of a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention. The bill allows several exceptions (listed below) to the recording requirements.

The bill defines "custodial interrogation" as "an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected

of committing a crime from the time the suspect is informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way." ✓

The bill defines "place of detention" as "a secure detention facility, jail, municipal lockup facility, or secured correctional facility, or a police or sheriff's office or other building under the control of a law enforcement agency, at which juveniles are held in custody in connection with an investigation of a delinquent act." ✓

The bill provides that a statement made by a juvenile during a custodial interrogation that was not recorded is not admissible in evidence in a delinquency proceeding unless one of several exceptions apply. ✓ The exceptions to inadmissibility of unrecorded statements and to the requirement that custodial interrogations of juveniles be recorded are: that the juvenile refused to cooperate if the interrogation was recorded; the statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody; the interrogator in good faith failed to make a recording due to equipment malfunction or improper operation of the recording equipment; the statement was made spontaneously and not in response to a question by the interrogator; or exigent public safety circumstances prevented recording. ✓

The bill further provides that it is the policy of the state to make a recording of a custodial interrogation of an adult suspected of committing a felony (a crime punishable by confinement for one year or more in a state prison), unless good cause is shown for not making a recording, or unless certain exceptions apply. The exceptions are those applicable to a juvenile delinquency case plus that the interrogator was not aware at the time of the interrogation that his or her investigation concerned a felony offense. ✓

The bill provides that if a statement made by an adult during a custodial interrogation that was not recorded is admitted into evidence at a felony trial before a jury, the judge shall instruct the jury that it is the policy of the state to record custodial interrogations related to felonies and that the jury may consider the absence of a recording in weighing the evidence unless the judge finds that one of the above listed exception applies or there is other good cause for not giving such an instruction. ✓ In a felony trial before a judge without a jury, the judge may consider the absence of a recording of a custodial interrogation in weighing the evidence unless one of the exceptions apply. ✓

The provisions relating to recording custodial interrogations of juveniles and admissibility in evidence of statements made by juveniles during custodial interrogations first apply to custodial interrogations conducted on the day after this bill is enacted as an act. The provisions relating to recording custodial interrogations of adults and admissibility in evidence of statements made by an adult during a custodial interrogation first apply to custodial interrogations conducted on January 1, 2007. ✓

Finally, the bill creates a grant program administered by the Office of Justice Assistance to provide law enforcement agencies funding for the purchase, installation, or maintenance of equipment for making digital recordings of custodial interrogations and for training personnel to use such equipment. The grant program is funded by increasing the penalty surcharge amount from 25 percent to 26 percent of the amount of fines or forfeitures assessed by a court.

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. 16.964 (10) of the statutes is created to read:

16.964 (10) (a) In this subsection:

1. "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).

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

(b) The office shall provide grants from the appropriation under s. 20.505 (6) (kc) to law enforcement agencies to fund or reimburse expenses incurred on or after July 7, 2005, for the purchase, installation, or maintenance of digital recording equipment for making audio or audio and visual recordings of custodial interrogations or for training personnel to use such equipment. Grants awarded under this subsection may be used to support recording of custodial interrogations of either juveniles or adults and of interrogations related to either misdemeanor or felony offenses. The office may award more than one grant under this subsection to a law enforcement agency. The office shall develop criteria and procedures to administer this subsection. Notwithstanding s. 227.10 (1), the criteria and procedures need not be promulgated as rules under ch. 227.

(c) A law enforcement agency shall include the following information in an application for a grant under this subsection:

1. How the agency proposes to use the grant funds.

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20.455 (2) (i) 16. The amount transferred to s. 20.505 (6) (kc) shall be the amount in the schedule under s. 20.505 (6) (kc).

SECTION 5. 165.85 (3) (d) of the statutes is amended to read:

165.85 (3) (d) Establish minimum curriculum requirements for preparatory courses and programs, and recommend minimum curriculum requirements for recertification and advanced courses and programs, in schools operated by or for this state or any political subdivision of the state for the specific purpose of training law enforcement recruits, law enforcement officers, tribal law enforcement recruits, tribal law enforcement officers, jail officer recruits, jail officers, secure detention officer recruits, or secure detention officers in areas of knowledge and ability necessary to the attainment of effective performance as an officer, and ranging from traditional subjects such as first aid, patrolling, statutory authority, techniques of arrest and, firearms, and recording custodial interrogations to subjects designed to provide a better understanding of ever-increasing complex problems in law enforcement such as human relations, civil rights, constitutional law, and supervision, control, and maintenance of a jail or secure detention facility. The board shall appoint a 13-member advisory curriculum committee consisting of 6 chiefs of police and 6 sheriffs to be appointed on a geographic basis of not more than one chief of police and one sheriff from any one of the 8 state administrative districts together with the director of training of the Wisconsin state patrol. This committee shall advise the board in the establishment of the curriculum requirements.

History: 1973 c. 90, 333; 1975 c. 94 s. 91 (11); 1977 c. 29, 418; 1979 c. 111; 1981 c. 20; 1983 a. 27; 1985 a. 29, 260; 1987 a. 237, 366, 394; 1989 a. 31, 291; 1991 a. 39; 1993 a. 16, 167, 213, 399, 407, 460, 482, 491; 1995 a. 201, 225, 349; 1997 a. 27, 88, 191; 1999 a. 9; 2001 a. 16, 109.

SECTION 6. 757.05 (1) (a) of the statutes, as affected by 2005 Wisconsin Act 25,

is amended to read:

SECTION 6

1 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of
 2 state law or for a violation of a municipal or county ordinance except for a violation
 3 of s. 101.123 (2) (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s.
 4 23.33 (4c) (a) 2., 30.681 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who
 5 committed the violation had a blood alcohol concentration of 0.08 or more but less
 6 than 0.1 at the time of the violation, or for a violation of state laws or municipal or
 7 county ordinances involving nonmoving traffic violations or safety belt use violations
 8 under s. 347.48 (2m), there shall be imposed in addition a penalty surcharge under
 9 ch. 814 in an amount of ~~25%~~ ^{percent} ~~20%~~ of the fine or forfeiture imposed. If multiple offenses
 10 are involved, the penalty surcharge shall be based upon the total fine or forfeiture
 11 for all offenses. When a fine or forfeiture is suspended in whole or in part, the penalty
 12 surcharge shall be reduced in proportion to the suspension.

History: 1999 a. 9 ss. 2292m, 2298, 3050m to 3050o; 1999 a. 72 s. 6; 1999 a. 150 s. 672; 2001 a. 16; 2003 a. 30, 33, 139, 268, 326, 327.

13 **SECTION 7. 938.195 of the statutes is created to read:**

14 **938.195 Recording custodial interrogations. (1) In this section:**

15 (a) "Custodial interrogation" has the meaning give in s. 968.073 (1) (a).

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

17 (c) "Place of detention" means a secure detention facility, jail, municipal lockup
 18 facility, or secured correctional facility, or a police or sheriff's office or other building
 19 under the control of a law enforcement agency, at which juveniles are held in custody
 20 in connection with an investigation of a delinquent act.

21 (2) (a) A law enforcement agency shall make an audio or audio and visual
 22 recording of any custodial interrogation of a juvenile that is conducted at a place of
 23 detention unless a condition under s. 938.31 (3) (c) 1. to 5. applies.

1 (b) If feasible, a law enforcement agency shall make an audio or audio and
2 visual recording of any custodial interrogation of a juvenile that is conducted at a
3 place other than a place of detention unless a condition under s. 938.31 (3) (c) 1. to
4 5. applies. ✓

5 (3) A law enforcement officer or agent of a law enforcement agency conducting
6 a custodial interrogation is not required to inform the subject of the interrogation
7 that the officer or agent is making an audio or audio and visual recording of the
8 interrogation. ✓

9 ~~SECTION 8.~~ 938.31 (3) of the statutes is created to read:

10 938.31 (3)(a) In this subsection:

- 11 1. "Custodial interrogation" has the meaning given in 968.073 (1) (a). ✓
12 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b). ✓
13 3. "Law enforcement officer" has the meaning given in s. 165.85 (2) (c). ✓
14 4. "Statement" has the meaning given in s. 972.115 (1) (d). ✓

15 (b) Except as provided under par. (c), a statement made by the juvenile during
16 a custodial interrogation is not admissible in evidence against the juvenile in a case
17 alleging the juvenile to be delinquent unless an audio or audio and visual recording
18 of the interrogation was made as required under s. 938.195 (2) and is available. ✓

19 (c) A juvenile's statement is not inadmissible in evidence under par. (b) if any
20 of the following applies: ✓

21 1. The juvenile refused to respond or cooperate in the custodial interrogation
22 if an audio or audio and visual recording was made of the interrogation so long as a
23 contemporaneous audio or audio and visual recording or written record was made of
24 the juvenile's refusal. ✓

1 2. The statement was made in response to a question asked as part of the
2 routine processing after the juvenile was taken into custody. ✓

3 3. The law enforcement officer or agent of a law enforcement agency conducting
4 the interrogation in good faith failed to make an audio or audio and visual recording
5 of the interrogation because the recording equipment did not function, the officer or
6 agent inadvertently failed to operate the equipment properly, or, without the officer's
7 or agent's knowledge, the equipment malfunctioned or stopped operating. ✓

8 4. The statement was made spontaneously and not in response to a question
9 by a law enforcement officer or agent of a law enforcement agency. ✓

10 5. Exigent public safety circumstances existed that prevented the making of
11 an audio or audio and visual recording or rendered the making of such a recording
12 infeasible. ✓

13 (d) Notwithstanding ss. 968.28 to 968.37, a juvenile's lack of consent to having
14 an audio or audio and visual recording made of a custodial interrogation does not
15 affect the admissibility in evidence of an audio or audio and visual recording of a
16 statement made by the juvenile during the interrogation. ✓

17 SECTION 9. 968.073 of the statutes is created to read:

18 **968.073 Recording custodial interrogations.** (1) In this section:

19 (a) "Custodial interrogation" means an interrogation by a law enforcement
20 officer or an agent of a law enforcement agency of a person suspected of committing
21 a crime from the time the suspect is informed of his or her rights to counsel and to
22 remain silent until the questioning ends, during which the officer or agent asks a
23 question that is reasonably likely to elicit an incriminating response and during
24 which a reasonable person in the suspect's position would believe that he or she is
25 in custody or otherwise deprived of his or her freedom of action in any significant way. ✓

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

2 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c). ✓

3 (2) It is the policy of this state to make an audio or audio and visual recording
4 of a custodial interrogation of a person suspected of committing a felony unless a
5 condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making
6 an audio or audio and visual recording of the interrogation. ✓

7 (3) A law enforcement officer or agent of a law enforcement agency conducting
8 a custodial interrogation is not required to inform the subject of the interrogation
9 that the officer or agent is making an audio or audio and visual recording of the
10 interrogation. ✓

11 ~~972.115~~ SECTION 10. 972.115 of the statutes is created to read:

12 **972.115 Admissibility of defendant's statement** (1) In this section:

13 (a) "Custodial interrogation" has the meaning given in s. 968.073 (1) (a). ✓

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

15 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c). ✓

16 (d) "Statement" means an¹ oral, written, sign language, or nonverbal
17 communication. ✓

18 (2) (a) If a statement made by a defendant during a custodial interrogation is
19 admitted into evidence in a trial for a felony before a jury and if an audio or audio
20 and visual recording of the interrogation is not available, upon a request made by the
21 defendant as provided in s. 972.10¹ (5) and unless the state asserts and the court finds
22 that one of the following conditions applies or that good cause exists for not providing
23 an instruction, the court shall instruct the jury that it is the policy of this state to
24 make an audio or audio and visual recording of a custodial interrogation of a person
25 suspected of committing a felony and that the jury may consider the absence of an

SECTION 10

1 audio or audio and visual recording of the interrogation in evaluating the evidence
2 in the case: ✓

3 1. The person refused to respond or cooperate in the interrogation if an audio
4 or audio and visual recording was made of the interrogation so long as a
5 contemporaneous audio or audio and visual recording or written record was made of
6 the subject's refusal. ✓

7 2. The statement was made in response to a question asked as part of the
8 routine processing of the person. ✓

9 3. The law enforcement officer or agent of a law enforcement agency conducting
10 the interrogation in good faith failed to make an audio or audio and visual recording
11 of the interrogation because the recording equipment did not function, the officer or
12 agent inadvertently failed to operate the equipment properly, or, without the officer's
13 or agent's knowledge, the equipment malfunctioned or stopped operating. ✓

14 4. The statement was made spontaneously and not in response to a question
15 by a law enforcement officer or agent of a law enforcement agency. ✓

16 5. Exigent public safety circumstances existed that prevented the making of
17 an audio or audio and visual recording or rendered the making of such a recording
18 infeasible. ✓

19 6. The law enforcement officer conducting the interrogation or the law
20 enforcement officer responsible for observing an interrogation conducted by an agent
21 of a law enforcement agency reasonably believed at the time of the interrogation that
22 the offense for which the person was taken into custody or for which the person was
23 being investigated, was not a felony. ✓

24 (b) If a statement made by a defendant during a custodial interrogation is
25 admitted into evidence in a trial for a felony before the court without a jury and if an

1 audio or audio and visual recording of the interrogation is not available, the court
2 may consider the absence of an audio or audio and visual recording of the
3 interrogation in evaluating the evidence in the case unless the court determines that
4 one of the conditions under par. (a) 1. to 6 applies. ✓

5 (4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to
6 having an audio or audio and visual recording made of a custodial interrogation does
7 not affect the admissibility in evidence of an audio or audio and visual recording of
8 a statement made by the defendant during the interrogation. ✓

9 (5) An audio or audio and visual recording of a custodial interrogation shall not
10 be open to public inspection under ss. 19.31 to 19.39 before one of the following
11 occurs:

12 (a) The person interrogated is convicted or acquitted of an offense that is a
13 subject of the interrogation. ✓

14 (b) All criminal investigations and prosecutions to which the interrogation
15 relates are concluded. ✓

16 **SECTION 11. Initial applicability.**

17 (1) RECORDING INTERROGATIONS OF JUVENILES. The treatment of sections 938.195 ✓ ✓
18 and 938.31 (3) of the statutes first applies to custodial interrogations, as defined in
19 section 968.073 (1) (a) of the statutes, as created by this act, conducted on the
20 effective date of this subsection. ✓

21 (2) RECORDING INTERROGATIONS OF ADULTS. The treatment of sections 968.073 ✓
22 and 972.115 of the statutes first applies to ^{custodial}interrogations, as defined in section
23 968.073 (1) (a) of the statutes, as created by this act, conducted on January 1, 2007. ✓

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3242/?dn

RLR:.....

lmk

(date)

Representative Gundrum and Don Dyke:

1. The latest WLC draft included an exception to recording custodial interrogations that take place in another jurisdiction and are conducted by officials of that jurisdiction. ✓ This bill does not include the exception, because it is inapplicable. ✓ "Custodial interrogation" is defined as an interrogation by a state or local law enforcement agency. ✓ Hence an interrogation conducted by officers of another jurisdiction is not a "custodial interrogation" that must be recorded. ✓ Since the bill does not contain any other exceptions for interrogations conducted out of jurisdiction, interrogations of juveniles conducted by state or local law enforcement agencies must be recorded (and interrogations of adults should be recorded) regardless of whether they are conducted in another state, another country, or a federal law enforcement or correctional facility within Wisconsin (unless recording is found infeasible). Does this satisfy the Committee's intent? ✓
2. The exceptions under proposed s. 938.31 (3) (c) 2. and 4. refer to a statement rather than an interrogation, so should proposed s. 938.195 (2) (a) and (b) refer only to the exceptions under s. 938.31 (c) 1., 3., and 5., rather than 1. to 5.? This question is also relevant to s. 968.073 (2). ✓
3. Rather than requiring that interrogations be "electronically recorded" and defining "electronically recorded" to mean memorialized audibly or audibly and visually, this bill just requires that audio or audio and visual recordings be made of interrogations. ✓ I believe this simplifies the bill and accomplishes the intent, because audio or audio and visual recordings are necessarily electronic. ✓
4. Do you have appropriation amounts for the grant program? ✓
5. The provision creating the grant program is effective the day after publication of the bill as an act. Please let me know if you want to delay the effective date for the grant program. ✓

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-3242/1dn

RLR:lmk:jf

August 1, 2005

Representative Gundrum and Don Dyke:

1. The latest WLC draft included an exception to recording custodial interrogations that take place in another jurisdiction and are conducted by officials of that jurisdiction. This bill does not include the exception, because it is inapplicable. "Custodial interrogation" is defined as an interrogation by a state or local law enforcement agency. Hence an interrogation conducted by officers of another jurisdiction is not a "custodial interrogation" that must be recorded. Since the bill does not contain any other exceptions for interrogations conducted out of jurisdiction, interrogations of juveniles conducted by state or local law enforcement agencies must be recorded (and interrogations of adults should be recorded) regardless of whether they are conducted in another state, another country, or a federal law enforcement or correctional facility within Wisconsin (unless recording is found infeasible). Does this satisfy the Committee's intent?
2. The exceptions under proposed s. 938.31 (3) (c) 2. and 4. refer to a statement rather than an interrogation, so should proposed s. 938.195 (2) (a) and (b) refer only to the exceptions under s. 938.31 (c) 1., 3., and 5., rather than 1. to 5.? This question is also relevant to s. 968.073 (2).
3. Rather than requiring that interrogations be "electronically recorded" and defining "electronically recorded" to mean memorialized audibly or audibly and visually, this bill just requires that audio or audio and visual recordings be made of interrogations. I believe this simplifies the bill and accomplishes the intent, because audio or audio and visual recordings are necessarily electronic.
4. Do you have appropriation amounts for the grant program?
5. The provision creating the grant program is effective the day after publication of the bill as an act. Please let me know if you want to delay the effective date for the grant program.

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

Dyke, Don

From: Keith Findley [kafindle@wisc.edu]
Sent: Tuesday, August 09, 2005 3:42 PM
To: Gahn, Norm; Gundrum, Mark; Staskunas, Tony; Colon, Pedro; Dyke, Don; Bertelle, Sandra; Bies, Garey; jfbbrook@aol.com; dallosto@grgblaw.com; Donohoo, Bob - DDA; 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; e.stenz@sbcglobal.net; ns1997@ci.merrill.wi.us; Waukesha Co. Sheriff; Walworth Co. Sheriff; kondrackie@cityoflacrosse.org; de Felice, David Patrick; Plotkin, Adam; Zien, Dave
Subject: RE: Avery Task Force - Please Review 2 Avery Drafts (LRB 3242/1 and LRB 1609/3)

A few thoughts on the bill drafts:

First, on the electronic recording bill, sec. 972.115(2)(b) provides that "If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before the court without a jury and if an audio or audio and visual recording of the interrogation is not available, the court may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence in the case unless..." The underscored language should be changed to read something like, "in any proceeding heard by the court without a jury in a felony case." My recollection from the last Task Force hearing was that we wanted this section to make clear that the statute would not be read to limit by omission the purposes for which a court could consider the lack of a recording. Thus, it is not just trials, but any proceeding decided by a judge, at which the judge can consider the lack of a recording (as we agreed at the Task Force hearing, this just preserves existing law).

Second, responding to Robin Ryan's note dated August 1, 2005, I think it makes perfect sense to omit the exception for interrogations that take place in another jurisdiction by officials of that jurisdiction, because the definition of "custodial interrogation" already limits the reach of the bill to interrogations conducted by a state or local law enforcement agency. So I concur with Ryan's drafting judgment on that.

Third, I am comfortable with Norm's suggestion about 939.74(2d)(b) and (c) (see Norm's comment below).

Otherwise, the bills look good to me.

Keith

At 10:32 AM 8/9/2005 -0500, Gahn, Norm wrote:

Mark,
Sorry that I missed the last meeting. I have looked over the drafts pertaining to electronic recordings and really have nothing to offer. Not having the benefit of hearing the discussions from the last meeting, I think that the draft looks good. I do have a question on the language in 939.74 (2d)(b) and (c): The language reads "or a crime that is related to the violation..." Would it be better to read "and any crime or crimes that are related to the violation..." Under the current language, can the argument be made that it is an either/or proposition - charge either the sexual assault or a related crime? Our goal is to be able to charge the sexual

08/09/2005

assault and any related crimes. As such, isn't and preferable to or to accomplish that. Norm

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

> From: Gundrum, Mark [<mailto:Mark.Gundrum@legis.state.wi.us>]

> Sent: Friday, August 05, 2005 9:04 AM

> To: Staskunas, Tony; Colon, Pedro; Gundrum, Mark; Dyke, Don; Bertelle,
> Sandra; Bies, Garey; jfbbrook@aol.com; dallosto@grgblaw.com; Donohoo, Bob

> - DDA; 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](mailto:Schwaemle,Judy); terry.schwefel@wicourts.gov;

> e.stenz@sbcglobal.net; ns1997@ci.merrill.wi.us;

> dtrawicki@waukeshacounty.gov; dgraves@co.walworth.wi.us;

> kondrackie@cityoflacrosse.org; de Felice, David Patrick; Plotkin, Adam;

> Zien, Dave

> Subject: Avery Task Force - Please Review 2 Avery Drafts (LRB 3242/1

> and LRB 1609/3)

> Importance: High

>

> Dear Task Force Members,

>

> Attached are the most recent drafts of our Task Force legislation. If you
> could, please review these and respond to me if anything has been missed
> by Wednesday, August 10th. We will be introducing this very soon and I
> would like things to be as perfected as possible before introduction.

>

> Thanks!

>

> Mark

> 414-313-3962-Cell

>

>

>

>

> << File: 05-32421.pdf >> (Draft 3242/1 - Electronic recording,

> limitations on admission into evidence, and grant funding program)

> << File: 05-32421dn.pdf >> (Coinciding Drafter's Notes for LRB 3242/1)

>

>

>

> << File: 05-1609/3 >> (Draft 1609/3 - Retention/Testing and Eyewitness

> Procedures)



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3242/1
RLR&GMM:lmk:jf

↑
keep

Now

2005 BILL

RMR

D-Note

ReGen

✓

1 AN ACT to amend 165.85 (3) (d) and 757.05 (1) (a); and to create 16.964 (10),
2 20.455 (2) (i) 16., 20.505 (6) (kc), 938.195, 938.31 (3), 968.073 and 972.115 of the
3 statutes; relating to: making audio or audio and visual recordings of custodial
4 interrogations, limitations on admitting unrecorded statements into evidence
5 in juvenile delinquency and criminal proceedings, and creating a grant
6 program for digital recording equipment and training for digital recording of
7 custodial interrogations. ✓

Analysis by the Legislative Reference Bureau

The Wisconsin Supreme Court, on July 7, 2005, exercised its supervisory authority over the court system to require that law enforcement agencies electronically record custodial interrogations of juveniles if they are conducted at a place of detention and to require that, if feasible, law enforcement agencies also electronically record custodial interrogations of juveniles that are conducted at a place other than a place of detention. (See *State v. Jerrell*, 2005 WI 105.)

This bill codifies the *Jerrell* recording requirement. The bill requires that law enforcement agencies make an audio or audio and visual recording (recording) of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. The bill also requires law enforcement agencies to make a recording, if feasible, of a custodial interrogation of

BILL

a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention. The bill allows several exceptions (listed below) to the recording requirements.

The bill defines "custodial interrogation" as "an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way."

The bill defines "place of detention" as "a secure detention facility, jail, municipal lockup facility, or secured correctional facility, or a police or sheriff's office or other building under the control of a law enforcement agency, at which juveniles are held in custody in connection with an investigation of a delinquent act."

The bill provides that a statement made by a juvenile during a custodial interrogation that was not recorded is not admissible in evidence in a delinquency proceeding unless one of several exceptions apply. The exceptions to inadmissibility of unrecorded statements and to the requirement that custodial interrogations of juveniles be recorded are: that the juvenile refused to cooperate if the interrogation was recorded; the statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody; the interrogator in good faith failed to make a recording due to equipment malfunction or improper operation of the recording equipment; the statement was made spontaneously and not in response to a question by the interrogator; or exigent public safety circumstances prevented recording.

The bill further provides that it is the policy of the state to make a recording of a custodial interrogation of an adult suspected of committing a felony (a crime punishable by confinement for one year or more in a state prison), unless good cause is shown for not making a recording, or unless certain exceptions apply. The exceptions are those applicable to a juvenile delinquency case plus that the interrogator was not aware at the time of the interrogation that his or her investigation concerned a felony offense.

The bill provides that if a statement made by an adult during a custodial interrogation that was not recorded is admitted into evidence at a felony trial before a jury, the judge shall instruct the jury that it is the policy of the state to record custodial interrogations related to felonies and that the jury may consider the absence of a recording in weighing the evidence unless the judge finds that one of the above listed exception applies or there is other good cause for not giving such an instruction. In a felony trial before a judge without a jury, the judge may consider the absence of a recording of a custodial interrogation in weighing the evidence unless one of the exceptions apply.

The provisions relating to recording custodial interrogations of juveniles and admissibility in evidence of statements made by juveniles during custodial interrogations first apply to custodial interrogations conducted on the day after this

proceeding heard by

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bill is enacted as an act. The provisions relating to recording custodial interrogations of adults and admissibility in evidence of statements made by an adult during a custodial interrogation first apply to custodial interrogations conducted on January 1, 2007.

Finally, the bill creates a grant program administered by the Office of Justice Assistance to provide law enforcement agencies funding for the purchase, installation, or maintenance of equipment for making digital recordings of custodial interrogations and for training personnel to use such equipment. The grant program is funded by increasing the penalty surcharge amount from 25 percent to 26 percent of the amount of fines or forfeitures assessed by a court.

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.** 16.964 (10) of the statutes is created to read:

2 16.964 (10) (a) In this subsection:

3 1. “Custodial interrogation” has the meaning given in s. 968.073 (1) (a).

4 2. “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

5 (b) The office shall provide grants from the appropriation under s. 20.505 (6)
6 (kc) to law enforcement agencies to fund or reimburse expenses incurred on or after
7 July 7, 2005, for the purchase, installation, or maintenance of digital recording
8 equipment for making audio or audio and visual recordings of custodial
9 interrogations or for training personnel to use such equipment. Grants awarded
10 under this subsection may be used to support recording of custodial interrogations
11 of either juveniles or adults and of interrogations related to either misdemeanor or
12 felony offenses. The office may award more than one grant under this subsection to
13 a law enforcement agency. The office shall develop criteria and procedures to
14 administer this subsection. Notwithstanding s. 227.10 (1), the criteria and
15 procedures need not be promulgated as rules under ch. 227.

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1 (c) A law enforcement agency shall include the following information in an
2 application for a grant under this subsection:

- 3 1. How the agency proposes to use the grant funds.
- 4 2. Procedures to be followed when recording equipment fails to operate
5 correctly, including procedures for reporting failures, using alternative recording
6 equipment, and repairing or replacing the equipment.
- 7 3. Procedures for storing recordings of custodial interrogations, including
8 storage format, storage location, and indexing of recordings for retrieval.
- 9 4. Measures to prevent or detect tampering with recordings of custodial
10 interrogations.
- 11 5. Any other information required by the office.

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

	2005-06	2006-07
14		
15 20.505 Administration, department of		
16 (6) OFFICE OF JUSTICE ASSISTANCE		
17 (kc) Grants for digital recording of		
18 custodial interrogations	- 0-	- 0-

19 **SECTION 3.** 20.455 (2) (i) 16. of the statutes is created to read:
20 20.455 (2) (i) 16. The amount transferred to s. 20.505 (6) (kc) shall be the
21 amount in the schedule under s. 20.505 (6) (kc).

22 **SECTION 4.** 20.505 (6) (kc) of the statutes is created to read:
23 20.505 (6) (kc) *Grants for digital recording of custodial interrogations.* The
24 amounts in the schedule for grants to law enforcement agencies under s. 16.964 (10)

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1 for equipment or training used to digitally record custodial interrogations. All
2 moneys transferred from the appropriation account under s. 20.455 (2) (i) 16. shall
3 be credited to this appropriation account.

4 **SECTION 5.** 165.85 (3) (d) of the statutes is amended to read:

5 165.85 (3) (d) Establish minimum curriculum requirements for preparatory
6 courses and programs, and recommend minimum curriculum requirements for
7 recertification and advanced courses and programs, in schools operated by or for this
8 state or any political subdivision of the state for the specific purpose of training law
9 enforcement recruits, law enforcement officers, tribal law enforcement recruits,
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11 officer recruits, or secure detention officers in areas of knowledge and ability
12 necessary to the attainment of effective performance as an officer, and ranging from
13 traditional subjects such as first aid, patrolling, statutory authority, techniques of
14 arrest and, firearms, and recording custodial interrogations to subjects designed to
15 provide a better understanding of ever-increasing complex problems in law
16 enforcement such as human relations, civil rights, constitutional law, and
17 supervision, control, and maintenance of a jail or secure detention facility. The board
18 shall appoint a 13-member advisory curriculum committee consisting of 6 chiefs of
19 police and 6 sheriffs to be appointed on a geographic basis of not more than one chief
20 of police and one sheriff from any one of the 8 state administrative districts together
21 with the director of training of the Wisconsin state patrol. This committee shall
22 advise the board in the establishment of the curriculum requirements.

23 **SECTION 6.** 757.05 (1) (a) of the statutes, as affected by 2005 Wisconsin Act 25,
24 is amended to read:

BILL

1 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of
2 state law or for a violation of a municipal or county ordinance except for a violation
3 of s. 101.123 (2) (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s.
4 23.33 (4c) (a) 2., 30.681 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who
5 committed the violation had a blood alcohol concentration of 0.08 or more but less
6 than 0.1 at the time of the violation, or for a violation of state laws or municipal or
7 county ordinances involving nonmoving traffic violations or safety belt use violations
8 under s. 347.48 (2m), there shall be imposed in addition a penalty surcharge under
9 ch. 814 in an amount of ~~25%~~ 26 percent of the fine or forfeiture imposed. If multiple
10 offenses are involved, the penalty surcharge shall be based upon the total fine or
11 forfeiture for all offenses. When a fine or forfeiture is suspended in whole or in part,
12 the penalty surcharge shall be reduced in proportion to the suspension.

13 **SECTION 7.** 938.195 of the statutes is created to read:

14 **938.195 Recording custodial interrogations.** (1) In this section:

15 (a) “Custodial interrogation” has the meaning give in s. 968.073 (1) (a).

16 (b) “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

17 (c) “Place of detention” means a secure detention facility, jail, municipal lockup
18 facility, or secured correctional facility, or a police or sheriff’s office or other building
19 under the control of a law enforcement agency, at which juveniles are held in custody
20 in connection with an investigation of a delinquent act.

21 (2) (a) A law enforcement agency shall make an audio or audio and visual
22 recording of any custodial interrogation of a juvenile that is conducted at a place of
23 detention unless a condition under s. 938.31 (3) (c) 1. to 5. applies.

24 (b) If feasible, a law enforcement agency shall make an audio or audio and
25 visual recording of any custodial interrogation of a juvenile that is conducted at a

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1 place other than a place of detention unless a condition under s. 938.31 (3) (c) 1. to
2 5. applies.

3 (3) A law enforcement officer or agent of a law enforcement agency conducting
4 a custodial interrogation is not required to inform the subject of the interrogation
5 that the officer or agent is making an audio or audio and visual recording of the
6 interrogation.

7 **SECTION 8.** 938.31 (3) of the statutes is created to read:

8 938.31 (3) (a) In this subsection:

- 9 1. "Custodial interrogation" has the meaning given in 968.073 (1) (a).
- 10 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).
- 11 3. "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).
- 12 4. "Statement" has the meaning given in s. 972.115 (1) (d).

13 (b) Except as provided under par. (c), a statement made by the juvenile during
14 a custodial interrogation is not admissible in evidence against the juvenile in a case
15 alleging the juvenile to be delinquent unless an audio or audio and visual recording
16 of the interrogation was made as required under s. 938.195 (2) and is available.

17 (c) A juvenile's statement is not inadmissible in evidence under par. (b) if any
18 of the following applies:

19 1. The juvenile refused to respond or cooperate in the custodial interrogation
20 if an audio or audio and visual recording was made of the interrogation so long as a
21 contemporaneous audio or audio and visual recording or written record was made of
22 the juvenile's refusal.

23 2. The statement was made in response to a question asked as part of the
24 routine processing after the juvenile was taken into custody.

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1 3. The law enforcement officer or agent of a law enforcement agency conducting
2 the interrogation in good faith failed to make an audio or audio and visual recording
3 of the interrogation because the recording equipment did not function, the officer or
4 agent inadvertently failed to operate the equipment properly, or, without the officer's
5 or agent's knowledge, the equipment malfunctioned or stopped operating.

6 4. The statement was made spontaneously and not in response to a question
7 by a law enforcement officer or agent of a law enforcement agency.

8 5. Exigent public safety circumstances existed that prevented the making of
9 an audio or audio and visual recording or rendered the making of such a recording
10 infeasible.

11 (d) Notwithstanding ss. 968.28 to 968.37, a juvenile's lack of consent to having
12 an audio or audio and visual recording made of a custodial interrogation does not
13 affect the admissibility in evidence of an audio or audio and visual recording of a
14 statement made by the juvenile during the interrogation.

15 **SECTION 9.** 968.073 of the statutes is created to read:

16 **968.073 Recording custodial interrogations.** (1) In this section:

17 (a) "Custodial interrogation" means an interrogation by a law enforcement
18 officer or an agent of a law enforcement agency of a person suspected of committing
19 a crime from the time the suspect is informed of his or her rights to counsel and to
20 remain silent until the questioning ends, during which the officer or agent asks a
21 question that is reasonably likely to elicit an incriminating response and during
22 which a reasonable person in the suspect's position would believe that he or she is
23 in custody or otherwise deprived of his or her freedom of action in any significant way.

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

25 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

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1 (2) It is the policy of this state to make an audio or audio and visual recording
2 of a custodial interrogation of a person suspected of committing a felony unless a
3 condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making
4 an audio or audio and visual recording of the interrogation.

5 (3) A law enforcement officer or agent of a law enforcement agency conducting
6 a custodial interrogation is not required to inform the subject of the interrogation
7 that the officer or agent is making an audio or audio and visual recording of the
8 interrogation.

9 **SECTION 10.** 972.115 of the statutes is created to read:

10 **972.115 Admissibility of defendant's statement.** (1) In this section:

11 (a) "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).

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

13 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

14 (d) "Statement" means an oral, written, sign language, or nonverbal
15 communication.

16 (2) (a) If a statement made by a defendant during a custodial interrogation is
17 admitted into evidence in a trial for a felony before a jury and if an audio or audio
18 and visual recording of the interrogation is not available, upon a request made by the
19 defendant as provided in s. 972.10 (5) and unless the state asserts and the court finds
20 that one of the following conditions applies or that good cause exists for not providing
21 an instruction, the court shall instruct the jury that it is the policy of this state to
22 make an audio or audio and visual recording of a custodial interrogation of a person
23 suspected of committing a felony and that the jury may consider the absence of an
24 audio or audio and visual recording of the interrogation in evaluating the evidence
25 in the case:

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1 1. The person refused to respond or cooperate in the interrogation if an audio
2 or audio and visual recording was made of the interrogation so long as a
3 contemporaneous audio or audio and visual recording or written record was made of
4 the subject's refusal.

5 2. The statement was made in response to a question asked as part of the
6 routine processing of the person.

7 3. The law enforcement officer or agent of a law enforcement agency conducting
8 the interrogation in good faith failed to make an audio or audio and visual recording
9 of the interrogation because the recording equipment did not function, the officer or
10 agent inadvertently failed to operate the equipment properly, or, without the officer's
11 or agent's knowledge, the equipment malfunctioned or stopped operating.

12 4. The statement was made spontaneously and not in response to a question
13 by a law enforcement officer or agent of a law enforcement agency.

14 5. Exigent public safety circumstances existed that prevented the making of
15 an audio or audio and visual recording or rendered the making of such a recording
16 infeasible.

17 6. The law enforcement officer conducting the interrogation or the law
18 enforcement officer responsible for observing an interrogation conducted by an agent
19 of a law enforcement agency reasonably believed at the time of the interrogation that
20 the offense for which the person was taken into custody or for which the person was
21 being investigated, was not a felony.

22 (b) If a statement made by a defendant during a custodial interrogation is
23 admitted into evidence in a trial for a felony before the court without a jury and if an
24 audio or audio and visual recording of the interrogation is not available, the court
25 may consider the absence of an audio or audio and visual recording of the

proceeding heard by ✓

in a felony case ✓

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1 interrogation in evaluating the evidence in the case unless the court determines that
2 one of the conditions under par. (a) 1. to 6 applies.

3 (4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to
4 having an audio or audio and visual recording made of a custodial interrogation does
5 not affect the admissibility in evidence of an audio or audio and visual recording of
6 a statement made by the defendant during the interrogation.

7 (5) An audio or audio and visual recording of a custodial interrogation shall not
8 be open to public inspection under ss. 19.31 to 19.39 before one of the following
9 occurs:

10 (a) The person interrogated is convicted or acquitted of an offense that is a
11 subject of the interrogation.

12 (b) All criminal investigations and prosecutions to which the interrogation
13 relates are concluded.

14 **SECTION 11. Initial applicability.**

15 (1) RECORDING INTERROGATIONS OF JUVENILES. The treatment of sections 938.195
16 and 938.31 (3) of the statutes first applies to custodial interrogations, as defined in
17 section 968.073 (1) (a) of the statutes, as created by this act, conducted on the
18 effective date of this subsection.

19 (2) RECORDING INTERROGATIONS OF ADULTS. The treatment of sections 968.073
20 and 972.115 of the statutes first applies to custodial interrogations, as defined in
21 section 968.073 (1) (a) of the statutes, as created by this act, conducted on January
22 1, 2007.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3242/2dn

RLR:.....

Imk

(date)

Representative G[✓]undrum and Don D[✓]dyke:

★ This redraft provides that a judge's[✓] discretion to consider the lack of a recording of a custodial interrogation in weighing^Δ evidence applies to all proceedings in a felony case, not just a trial.

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-3242/2dn
RLR:lmk:rs

August 16, 2005

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State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3242/2
RLR&GMM:lmk:rs

2005 BILL

1 AN ACT to amend 165.85 (3) (d) and 757.05 (1) (a); and to create 16.964 (10),
2 20.455 (2) (i) 16., 20.505 (6) (kc), 938.195, 938.31 (3), 968.073 and 972.115 of the
3 statutes; relating to: making audio or audio and visual recordings of custodial
4 interrogations, limitations on admitting unrecorded statements into evidence
5 in juvenile delinquency and criminal proceedings, and creating a grant
6 program for digital recording equipment and training for digital recording of
7 custodial interrogations.

Analysis by the Legislative Reference Bureau

The Wisconsin Supreme Court, on July 7, 2005, exercised its supervisory authority over the court system to require that law enforcement agencies electronically record custodial interrogations of juveniles if they are conducted at a place of detention and to require that, if feasible, law enforcement agencies also electronically record custodial interrogations of juveniles that are conducted at a place other than a place of detention. (See *State v. Jerrell*, 2005 WI 105.)

This bill codifies the *Jerrell* recording requirement. The bill requires that law enforcement agencies make an audio or audio and visual recording (recording) of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. The bill also requires law enforcement agencies to make a recording, if feasible, of a custodial interrogation of

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a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention. The bill allows several exceptions (listed below) to the recording requirements.

The bill defines “custodial interrogation” as “an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect’s position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.”

The bill defines “place of detention” as “a secure detention facility, jail, municipal lockup facility, or secured correctional facility, or a police or sheriff’s office or other building under the control of a law enforcement agency, at which juveniles are held in custody in connection with an investigation of a delinquent act.”

The bill provides that a statement made by a juvenile during a custodial interrogation that was not recorded is not admissible in evidence in a delinquency proceeding unless one of several exceptions apply. The exceptions to inadmissibility of unrecorded statements and to the requirement that custodial interrogations of juveniles be recorded are: that the juvenile refused to cooperate if the interrogation was recorded; the statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody; the interrogator in good faith failed to make a recording due to equipment malfunction or improper operation of the recording equipment; the statement was made spontaneously and not in response to a question by the interrogator; or exigent public safety circumstances prevented recording.

The bill further provides that it is the policy of the state to make a recording of a custodial interrogation of an adult suspected of committing a felony (a crime punishable by confinement for one year or more in a state prison), unless good cause is shown for not making a recording, or unless certain exceptions apply. The exceptions are those applicable to a juvenile delinquency case plus that the interrogator was not aware at the time of the interrogation that his or her investigation concerned a felony offense.

The bill provides that if a statement made by an adult during a custodial interrogation that was not recorded is admitted into evidence at a felony trial before a jury, the judge shall instruct the jury that it is the policy of the state to record custodial interrogations related to felonies and that the jury may consider the absence of a recording in weighing the evidence unless the judge finds that one of the above listed exception applies or there is other good cause for not giving such an instruction. In a felony proceeding heard by a judge without a jury, the judge may consider the absence of a recording of a custodial interrogation in weighing the evidence unless one of the exceptions apply.

The provisions relating to recording custodial interrogations of juveniles and admissibility in evidence of statements made by juveniles during custodial interrogations first apply to custodial interrogations conducted on the day after this

BILL

bill is enacted as an act. The provisions relating to recording custodial interrogations of adults and admissibility in evidence of statements made by an adult during a custodial interrogation first apply to custodial interrogations conducted on January 1, 2007.

Finally, the bill creates a grant program administered by the Office of Justice Assistance to provide law enforcement agencies funding for the purchase, installation, or maintenance of equipment for making digital recordings of custodial interrogations and for training personnel to use such equipment. The grant program is funded by increasing the penalty surcharge amount from 25 percent to 26 percent of the amount of fines or forfeitures assessed by a court.

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.** 16.964 (10) of the statutes is created to read:
2 16.964 (10) (a) In this subsection:
3 1. "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).
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5 (b) The office shall provide grants from the appropriation under s. 20.505 (6)
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11 of either juveniles or adults and of interrogations related to either misdemeanor or
12 felony offenses. The office may award more than one grant under this subsection to
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14 administer this subsection. Notwithstanding s. 227.10 (1), the criteria and
15 procedures need not be promulgated as rules under ch. 227.

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1 (c) A law enforcement agency shall include the following information in an
2 application for a grant under this subsection:

- 3 1. How the agency proposes to use the grant funds.
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5 correctly, including procedures for reporting failures, using alternative recording
6 equipment, and repairing or replacing the equipment.
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BILL

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BILL**SECTION 6**

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8 under s. 347.48 (2m), there shall be imposed in addition a penalty surcharge under
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17 (c) "Place of detention" means a secure detention facility, jail, municipal lockup
18 facility, or secured correctional facility, or a police or sheriff's office or other building
19 under the control of a law enforcement agency, at which juveniles are held in custody
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8 938.31 (3) (a) In this subsection:

- 9 1. "Custodial interrogation" has the meaning given in 968.073 (1) (a).
- 10 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).
- 11 3. "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).
- 12 4. "Statement" has the meaning given in s. 972.115 (1) (d).

13 (b) Except as provided under par. (c), a statement made by the juvenile during
14 a custodial interrogation is not admissible in evidence against the juvenile in a case
15 alleging the juvenile to be delinquent unless an audio or audio and visual recording
16 of the interrogation was made as required under s. 938.195 (2) and is available.

17 (c) A juvenile's statement is not inadmissible in evidence under par. (b) if any
18 of the following applies:

19 1. The juvenile refused to respond or cooperate in the custodial interrogation
20 if an audio or audio and visual recording was made of the interrogation so long as a
21 contemporaneous audio or audio and visual recording or written record was made of
22 the juvenile's refusal.

23 2. The statement was made in response to a question asked as part of the
24 routine processing after the juvenile was taken into custody.

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1 3. The law enforcement officer or agent of a law enforcement agency conducting
2 the interrogation in good faith failed to make an audio or audio and visual recording
3 of the interrogation because the recording equipment did not function, the officer or
4 agent inadvertently failed to operate the equipment properly, or, without the officer's
5 or agent's knowledge, the equipment malfunctioned or stopped operating.

6 4. The statement was made spontaneously and not in response to a question
7 by a law enforcement officer or agent of a law enforcement agency.

8 5. Exigent public safety circumstances existed that prevented the making of
9 an audio or audio and visual recording or rendered the making of such a recording
10 infeasible.

11 (d) Notwithstanding ss. 968.28 to 968.37, a juvenile's lack of consent to having
12 an audio or audio and visual recording made of a custodial interrogation does not
13 affect the admissibility in evidence of an audio or audio and visual recording of a
14 statement made by the juvenile during the interrogation.

15 **SECTION 9.** 968.073 of the statutes is created to read:

16 **968.073 Recording custodial interrogations.** (1) In this section:

17 (a) "Custodial interrogation" means an interrogation by a law enforcement
18 officer or an agent of a law enforcement agency of a person suspected of committing
19 a crime from the time the suspect is informed of his or her rights to counsel and to
20 remain silent until the questioning ends, during which the officer or agent asks a
21 question that is reasonably likely to elicit an incriminating response and during
22 which a reasonable person in the suspect's position would believe that he or she is
23 in custody or otherwise deprived of his or her freedom of action in any significant way.

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

25 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

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1 (2) It is the policy of this state to make an audio or audio and visual recording
2 of a custodial interrogation of a person suspected of committing a felony unless a
3 condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making
4 an audio or audio and visual recording of the interrogation.

5 (3) A law enforcement officer or agent of a law enforcement agency conducting
6 a custodial interrogation is not required to inform the subject of the interrogation
7 that the officer or agent is making an audio or audio and visual recording of the
8 interrogation.

9 **SECTION 10.** 972.115 of the statutes is created to read:

10 **972.115 Admissibility of defendant's statement.** (1) In this section:

11 (a) "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).

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

13 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

14 (d) "Statement" means an oral, written, sign language, or nonverbal
15 communication.

16 (2) (a) If a statement made by a defendant during a custodial interrogation is
17 admitted into evidence in a trial for a felony before a jury and if an audio or audio
18 and visual recording of the interrogation is not available, upon a request made by the
19 defendant as provided in s. 972.10 (5) and unless the state asserts and the court finds
20 that one of the following conditions applies or that good cause exists for not providing
21 an instruction, the court shall instruct the jury that it is the policy of this state to
22 make an audio or audio and visual recording of a custodial interrogation of a person
23 suspected of committing a felony and that the jury may consider the absence of an
24 audio or audio and visual recording of the interrogation in evaluating the evidence
25 in the case:

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1 1. The person refused to respond or cooperate in the interrogation if an audio
2 or audio and visual recording was made of the interrogation so long as a
3 contemporaneous audio or audio and visual recording or written record was made of
4 the subject's refusal.

5 2. The statement was made in response to a question asked as part of the
6 routine processing of the person.

7 3. The law enforcement officer or agent of a law enforcement agency conducting
8 the interrogation in good faith failed to make an audio or audio and visual recording
9 of the interrogation because the recording equipment did not function, the officer or
10 agent inadvertently failed to operate the equipment properly, or, without the officer's
11 or agent's knowledge, the equipment malfunctioned or stopped operating.

12 4. The statement was made spontaneously and not in response to a question
13 by a law enforcement officer or agent of a law enforcement agency.

14 5. Exigent public safety circumstances existed that prevented the making of
15 an audio or audio and visual recording or rendered the making of such a recording
16 infeasible.

17 6. The law enforcement officer conducting the interrogation or the law
18 enforcement officer responsible for observing an interrogation conducted by an agent
19 of a law enforcement agency reasonably believed at the time of the interrogation that
20 the offense for which the person was taken into custody or for which the person was
21 being investigated, was not a felony.

22 (b) If a statement made by a defendant during a custodial interrogation is
23 admitted into evidence in a proceeding heard by the court without a jury in a felony
24 case and if an audio or audio and visual recording of the interrogation is not
25 available, the court may consider the absence of an audio or audio and visual

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1 recording of the interrogation in evaluating the evidence in the case unless the court
2 determines that one of the conditions under par. (a) 1. to 6 applies.

3 (4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to
4 having an audio or audio and visual recording made of a custodial interrogation does
5 not affect the admissibility in evidence of an audio or audio and visual recording of
6 a statement made by the defendant during the interrogation.

7 (5) An audio or audio and visual recording of a custodial interrogation shall not
8 be open to public inspection under ss. 19.31 to 19.39 before one of the following
9 occurs:

10 (a) The person interrogated is convicted or acquitted of an offense that is a
11 subject of the interrogation.

12 (b) All criminal investigations and prosecutions to which the interrogation
13 relates are concluded.

14 **SECTION 11. Initial applicability.**

15 (1) RECORDING INTERROGATIONS OF JUVENILES. The treatment of sections 938.195
16 and 938.31 (3) of the statutes first applies to custodial interrogations, as defined in
17 section 968.073 (1) (a) of the statutes, as created by this act, conducted on the
18 effective date of this subsection.

19 (2) RECORDING INTERROGATIONS OF ADULTS. The treatment of sections 968.073
20 and 972.115 of the statutes first applies to custodial interrogations, as defined in
21 section 968.073 (1) (a) of the statutes, as created by this act, conducted on January
22 1, 2007.

