

**2001 DRAFTING REQUEST**

**Assembly Amendment (AA-AB435)**

Received: 02/22/2002

Received By: mdsida

Wanted: As time permits

Identical to LRB:

For: Wayne Wood (608) 266-7503

By/Representing: Shaun Haas

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters:

Subject: Criminal Law - miscellaneous

Extra Copies: rlr

Submit via email: YES

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

Carbon copy (CC:) to: shaun.haas@legis.state.wi.us

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Lawfully placed and used security or surveillance devices

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**Instructions:**

See Attached

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**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>
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02/25/2002 02:47:21 PM

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***LRBa1332***

FE Sent For:

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1/?	mdsida 02/25/2002	lrb_editor 1-2/25 KMG	2/25	Self 2/25			

FE Sent For:

<END>

**Dsida, Michael**

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**To:** Haas, Shaun  
**Subject:** RE:

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

**From:** Haas, Shaun  
**Sent:** Friday, February 22, 2002 1:04 PM  
**To:** Dsida, Michael  
**Subject:**

Mike- The Assembly Committee on Criminal Justice had a hearing on 2001 AB 435 (LRB-2192/1) on Wednesday, Feb. 20. Rep. Wood asked that I have drafted for him, two amendments for consideration by the Committee when it takes executive action on the Bill:

2. The other amendment is not so simple and I would like your expertise on how best to draft it. The amendment should respond to the issue raised at the public hearing that, although the Bill contains an affirmative defense provision (sub. (4)) relating to a device installed or used in violation of s. 948.08 (2), relating to using a device to observe a nude person without the person's consent, it does not address the situation where a person wants to tamper with a security device or, more likely, a surveillance device that has been unlawfully placed, except for the nudity-related device discussed in the previous sentence. The suggestion was made that the Bill's prohibition be made applicable only to lawfully placed security or surveillance devices. It was suggested that this could be accomplished in the Bill's definitions of key terms but I think it should be accomplished by either additional language in the substantive prohibition or by additional clarifying language in sub. (4). Please call if you would like to discuss this issue with me as I may have not described the issue clearly.

Please send copies of the amendments to me or, if you prefer, have them drafted for me at the Legislative Council and I'll take care of the review and distribution to Rep. Wood.

Thanks.

## Dsida, Michael

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**From:** Haas, Shaun  
**Sent:** Monday, February 25, 2002 11:48 AM  
**To:** Dsida, Michael  
**Subject:** RE:

Well, if its an element of the offense, the state would have the burden of proving beyond a reasonable doubt. Right? Maybe that is the way to go. I don't want to become an advocate for a particular point of view. Since the bill creates new crimes and members of the Committee, such as Rep. Wood, have expressed concerns that the bill may be overreaching, I would draft the amendment so that the state has the burden of proving beyond a reasonable doubt all elements of the offense. I think that's what Rep. Wood would prefer, based on his comments at the hearing.

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

**From:** Dsida, Michael  
**Sent:** Monday, February 25, 2002 11:32 AM  
**To:** Haas, Shaun  
**Subject:** RE:

What burden should the state have to show it is legally installed and operated? Preponderance? Clear and convincing evidence? Beyond a reasonable doubt?

One other thing that I was wrong about earlier -- it doesn't have to be an element of the offense to place the burden on the state. For example, I can draft a nonapplicability provision ("X doesn't apply if the device was not legally installed or used") and include a provision placing the burden of proving that fact on the state. That doesn't make it an element of the offense. (By contrast, incorporating the requirement into the definition would make it an element.)

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

**From:** Haas, Shaun  
**Sent:** Monday, February 25, 2002 11:10 AM  
**To:** Dsida, Michael  
**Subject:** RE:

Well, I was troubled by the apparent inconsistency and you are probably right. Sub. (4) bothered me because the defendant had to show that the device was installed or used in violation of s. 948.08 (2). Seems like an unreasonable burden. Thus, requiring the prohibition to apply only to devices lawfully placed seems reasonable and consistent with Rep. Wood's intent.

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

**From:** Dsida, Michael  
**Sent:** Monday, February 25, 2002 10:07 AM  
**To:** Dsida, Michael; Haas, Shaun  
**Subject:** RE:

On second thought, the question isn't moot. I think his preference for incorporating the provision created by the amendment as an element of the offense (as opposed to as an affirmative defense) makes the existing affirmative defense unnecessary.

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

**From:** Dsida, Michael  
**Sent:** Monday, February 25, 2002 9:09 AM  
**To:** Haas, Shaun  
**Subject:** RE:

In view of Rep. Wood's preference for imposing the burden on the state (which would entail including the provision as an element of the offense, not as an affirmative defense), I think this question is moot.

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

**From:** Haas, Shaun  
**Sent:** Monday, February 25, 2002 7:35 AM  
**To:** Dsida, Michael  
**Subject:** RE:

Yes, I thought about that, too. I think consistency makes some sense. I don't know how Rep. would feel about it, but I assume he would favor consistency. I'll be in today. Give me a call at 7-9025 and we can discuss how to proceed.

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

**From:** Dsida, Michael  
**Sent:** Friday, February 22, 2002 4:17 PM  
**To:** Haas, Shaun  
**Subject:** RE:

One other point -- if we include the "lawfully placed" provision as an affirmative defense, that may eliminate the need for the affirmative defense that's already in the bill.

## **Dsida, Michael**

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**From:** Haas, Shaun  
**Sent:** Monday, February 25, 2002 7:32 AM  
**To:** Dsida, Michael  
**Subject:** RE:

Based on my brief conversation with Rep. Wood, I think he would prefer that the burden be placed on the state.

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

**From:** Dsida, Michael  
**Sent:** Friday, February 22, 2002 4:03 PM  
**To:** Haas, Shaun  
**Subject:** RE:

The second amendment can be drafted any of the ways you mention. Which one would be best for Rep. Wood turns on how the burden of proof is to be allocated. If the "legally installed" is part of the definition or the prohibition, the burden is on the state to prove it so. If it's part of the affirmative defense, the burden is on the defendant.



State of Wisconsin  
2001 - 2002 LEGISLATURE

LRBa1332/1

MGD:.....  
*King*

ASSEMBLY AMENDMENT ,  
TO 2001 ASSEMBLY BILL 435

*500m*

1 At the locations indicated, amend the bill as follows:

2 ✓ **1.** Page 3, line 4: after "security alarm" insert "; that, if installed, has been  
3 installed legally; and that is not being unlawfully used".

4 ✓ **2.** Page 3, line 7: after "person" insert "; that, if installed, has been installed  
5 legally; and that is not being unlawfully used".

6 ✓ **3.** Page 3, line 18: delete lines 18 to 22.

7 (END)