

2005 Assembly Bill 648

Date of enactment: **December 16, 2005**
Date of publication*: **December 30, 2005**

2005 WISCONSIN ACT 60

AN ACT *to repeal* 165.77 (2m) (a); *to amend* 165.77 (2m) (b), 165.81 (3) (b), 165.81 (3) (c) (intro.), 165.81 (3) (c) 1., 165.81 (3) (c) 2. a. and b., 165.81 (3) (c) 3., 165.81 (3) (d), 165.81 (3) (e), 165.85 (3) (d), 757.05 (1) (a), 757.54 (2) (b), 757.54 (2) (c) (intro.), 757.54 (2) (c) 1., 757.54 (2) (c) 2. a. and b., 757.54 (2) (c) 3., 757.54 (2) (d), 757.54 (2) (e), 939.74 (2d) (b) and (c), 968.205 (2), 968.205 (3) (intro.), 968.205 (3) (a), 968.205 (3) (b) 1. and 2., 968.205 (3) (c), 968.205 (4), 968.205 (5), 974.07 (8), 978.08 (2), 978.08 (3) (intro.), 978.08 (3) (a), 978.08 (3) (b) 1. and 2., 978.08 (3) (c), 978.08 (4) and 978.08 (5); and *to create* 16.964 (10), 20.455 (2) (i) 16., 20.505 (6) (kc), 165.75 (3) (g), 165.81 (3) (bm), 175.50, 757.54 (2) (bm), 938.195, 938.31 (3), 939.74 (2d) (am), 968.073, 968.205 (2m), 972.115, 974.07 (12) (c) and 978.08 (2m) of the statutes; **relating to:** retention and testing of evidence that includes biological material, time limits for prosecuting a crime that is related to a sexual assault, law enforcement procedures for using an eyewitness to identify a person suspected of committing a crime, making audio or audio and visual recordings of custodial interrogations, limitations on admitting unrecorded statements into evidence in juvenile delinquency and criminal proceedings, and creating a grant program for digital recording equipment and training for digital recording of custodial interrogations.

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) From the appropriation under s. 20.505 (6) (kc), the office shall provide grants to law enforcement agencies 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 reimburse law

enforcement agencies for expenses incurred or payments made on or after July 7, 2005. 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.

2. Procedures to be followed when recording equipment fails to operate correctly, including procedures for

* Section 991.11, WISCONSIN STATUTES 2003–04 : Effective date of acts. “Every act and every portion of an act enacted by the legislature over the governor’s partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated” by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

reporting failures, using alternative recording equipment, and repairing or replacing the equipment.

3. Procedures for storing recordings of custodial interrogations, including storage format, storage loca-

tion, and indexing of recordings for retrieval.

4. Measures to prevent or detect tampering with recordings of custodial interrogations.

5. Any other information required by the office.

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

		2005-06	2006-07
20.505	Administration, department of		
(6)	OFFICE OF JUSTICE ASSISTANCE		
(kc)	Grants for digital recording of custodial interrogations	PR-S A 312,500	750,000

SECTION 3. 20.455 (2) (i) 16. of the statutes is created to read:

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 4. 20.505 (6) (kc) of the statutes is created to read:

20.505 (6) (kc) *Grants for digital recording of custodial interrogations.* The amounts in the schedule for grants to law enforcement agencies under s. 16.964 (10) for equipment or training used to digitally record custodial interrogations. All moneys transferred from the appropriation account under s. 20.455 (2) (i) 16. shall be credited to this appropriation account.

SECTION 5. 165.75 (3) (g) of the statutes is created to read:

165.75 (3) (g) Deoxyribonucleic acid testing ordered under s. 974.07 shall have priority, consistent with the right of a defendant or the state to a speedy trial and consistent with the right of a victim to the prompt disposition of a case.

SECTION 6. 165.77 (2m) (a) of the statutes is repealed.

SECTION 7. 165.77 (2m) (b) of the statutes is amended to read:

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

SECTION 8. 165.81 (3) (b) of the statutes is amended to read:

165.81 (3) (b) Except as provided in par. (c), if physical evidence that is in the possession of the laboratories includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, a delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the laboratories shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

SECTION 9. 165.81 (3) (bm) of the statutes is created to read:

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

SECTION 10. 165.81 (3) (c) (intro.) of the statutes is amended to read:

165.81 (3) (c) (intro.) Subject to par. (e), the department may destroy evidence that includes biological material before the expiration of the time period specified in par. (b) if all of the following apply:

SECTION 11. 165.81 (3) (c) 1. of the statutes is amended to read:

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

SECTION 12. 165.81 (3) (c) 2. a. and b. of the statutes are amended to read:

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

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

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

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

SECTION 14. 165.81 (3) (d) of the statutes is amended to read:

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

SECTION 15. 165.81 (3) (e) of the statutes is amended to read:

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

SECTION 16. 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.

SECTION 17. 175.50 of the statutes is created to read:

175.50 Eyewitness identification procedures. (1)

In this section:

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

(b) “Suspect” means a person suspected of committing a crime.

(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 policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.

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

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

(5) A law enforcement agency shall consider including in policies adopted under this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:

(a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness’ viewing of individuals or representations.

(b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness.

(c) Minimizing factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the person administering the eyewitness’ viewing of individuals or representations.

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

SECTION 18. 757.05 (1) (a) of the statutes, as affected by 2005 Wisconsin Act 25, is amended to read:

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

suspended in whole or in part, the penalty surcharge shall be reduced in proportion to the suspension.

SECTION 19. 757.54 (2) (b) of the statutes is amended to read:

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

SECTION 20. 757.54 (2) (bm) of the statutes is created to read:

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

SECTION 21. 757.54 (2) (c) (intro.) of the statutes is amended to read:

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

SECTION 22. 757.54 (2) (c) 1. of the statutes is amended to read:

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

SECTION 23. 757.54 (2) (c) 2. a. and b. of the statutes are amended to read:

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

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

SECTION 24. 757.54 (2) (c) 3. of the statutes is amended to read:

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

SECTION 25. 757.54 (2) (d) of the statutes is amended to read:

757.54 (2) (d) A notice provided under par. (c) 1. shall clearly inform the recipient that the ~~biological material exhibit~~ will be destroyed unless, within 90 days after the date on which the person receives the notice, either a

motion for testing of the ~~material exhibit~~ is filed under s. 974.07 (2) or a written request to ~~preserve for retention of the material exhibit~~ is submitted to the court.

SECTION 26. 757.54 (2) (e) of the statutes is amended to read:

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

SECTION 27. 938.195 of the statutes is created to read:
938.195 Recording custodial interrogations. (1) In this section:

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

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

(c) "Place of detention" means 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.

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

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

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

SECTION 28. 938.31 (3) of the statutes is created to read:

938.31 (3) (a) In this subsection:

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

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

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

4. "Statement" has the meaning given in s. 972.115 (1) (d).

(b) Except as provided under par. (c), a statement made by the juvenile during a custodial interrogation is

not admissible in evidence against the juvenile in any court proceeding alleging the juvenile to be delinquent unless an audio or audio and visual recording of the interrogation was made as required under s. 938.195 (2) and is available.

(c) A juvenile's statement is not inadmissible in evidence under par. (b) if any of the following applies or if other good cause exists for not suppressing a juvenile's statement under par. (b):

1. The juvenile refused to respond or cooperate in the custodial interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer or agent of a law enforcement agency made a contemporaneous audio or audio and visual recording or written record of the juvenile's refusal.

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

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

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

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

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

SECTION 29. 939.74 (2d) (am) of the statutes is created to read:

939.74 (2d) (am) For purposes of this subsection, 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.

SECTION 30. 939.74 (2d) (b) and (c) of the statutes are amended to read:

939.74 (2d) (b) If before the time limitation under sub. (1) expired, the state collected biological material that is evidence of the identity of the person who committed a violation of s. 940.225 (1) or (2), the state identified a deoxyribonucleic acid profile from the biological material, and comparisons of that deoxyribonucleic acid profile to deoxyribonucleic acid profiles of known per-

sons did not result in a probable identification of the person who is the source of the biological material, the state may commence prosecution of the person who is the source of the biological material for the violation of s. 940.225 (1) or (2) or a crime that is related to the violation or both within 12 months after comparison of the deoxyribonucleic acid profile relating to the violation results in a probable identification of the person.

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

SECTION 31. 968.073 of the statutes is created to read:
968.073 Recording custodial interrogations. (1)
In this section:

(a) "Custodial interrogation" means 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 or should be 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.

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

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

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

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

SECTION 32. 968.205 (2) of the statutes is amended to read:

968.205 (2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement

agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

SECTION 33. 968.205 (2m) of the statutes is created to read:

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

SECTION 34. 968.205 (3) (intro.) of the statutes is amended to read:

968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy evidence that includes biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

SECTION 35. 968.205 (3) (a) of the statutes is amended to read:

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

SECTION 36. 968.205 (3) (b) 1. and 2. of the statutes are amended to read:

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

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

SECTION 37. 968.205 (3) (c) of the statutes is amended to read:

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

SECTION 38. 968.205 (4) of the statutes is amended to read:

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

SECTION 39. 968.205 (5) of the statutes is amended to read:

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

SECTION 40. 972.115 of the statutes is created to read:
972.115 Admissibility of defendant's statement.

(1) In this section:

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

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

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

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

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

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

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

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

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

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

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

(b) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a proceeding heard by the court without a jury in a felony case 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 relating to the interrogation and the statement unless the court determines that one of the conditions under par. (a) 1. to 6 applies.

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

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

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

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

SECTION 41. 974.07 (8) of the statutes is amended to read:

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

SECTION 42. 974.07 (12) (c) of the statutes is created to read:

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

SECTION 43. 978.08 (2) of the statutes is amended to read:

978.08 (2) Except as provided in sub. (3), if physical evidence that is in the possession of a district attorney includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the district attorney shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

SECTION 44. 978.08 (2m) of the statutes is created to read:

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

SECTION 45. 978.08 (3) (intro.) of the statutes is amended to read:

978.08 (3) (intro.) Subject to sub. (5), a district attorney may destroy evidence that includes biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

SECTION 46. 978.08 (3) (a) of the statutes is amended to read:

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

SECTION 47. 978.08 (3) (b) 1. and 2. of the statutes are amended to read:

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

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

SECTION 48. 978.08 (3) (c) of the statutes is amended to read:

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

SECTION 49. 978.08 (4) of the statutes is amended to read:

978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the ~~biological material~~ evidence will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the ~~material~~ evidence is filed under

s. 974.07 (2) or a written request to ~~preserve~~ for retention of the material evidence is submitted to the district attorney.

SECTION 50. 978.08 (5) of the statutes is amended to read:

978.08 (5) If, after providing notice under sub. (3) (a) of its intent to destroy ~~biological material evidence~~, a district attorney receives a written request to ~~preserve~~ for retention of the material evidence, the district attorney shall ~~preserve~~ retain the ~~material evidence~~ until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the ~~biological material evidence~~ under s. 974.07 (9) (b) or (10) (a) 5.

SECTION 51. Initial applicability.

(1) RECORDING INTERROGATIONS OF JUVENILES. The treatment of sections 938.195 and 938.31 (3) of the statutes first applies to custodial interrogations, as defined in

section 968.073 (1) (a) of the statutes, as created by this act, conducted on the effective date of this subsection.

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

(3) PENALTY SURCHARGE INCREASE. The treatment of section 757.05 (1) (a) of the statutes first applies to acts or omissions committed on the effective date of this subsection.

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

SECTION 52. Effective date.

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