



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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

Appendix A ... Part 02 of 03

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



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

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



State of Wisconsin
2005--2006 LEGISLATURE

LRB-1609/1

RLR:wlj

In 3/15/05

Wanted Soon

2005 BILL

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1 AN ACT *to repeal* 165.77 (2m) (a); *to amend* 165.77 (2m) (b), 165.81 (3) (c) (intro.),
2 165.81 (3) (c) 1., 165.81 (3) (c) 2. a. and b., 165.81 (3) (c) 3., 165.81 (3) (d), 165.81
3 (3) (e), 757.54 (2) (b), 757.54 (2) (c) (intro.), 757.54 (2) (c) 1., 757.54 (2) (c) 2. a.
4 and b., 757.54 (2) (c) 3., 757.54 (2) (d), 757.54 (2) (e), 939.74 (2d) (b) and (c),
5 968.205 (3) (intro.), 968.205 (3) (a), 968.205 (3) (b) 1. and 2., 968.205 (3) (c),
6 968.205 (4), 968.205 (5), 974.07 (8), 978.08 (3) (intro.), 978.08 (3) (a), 978.08 (3)
7 (b) 1. and 2., 978.08 (3) (c), 978.08 (4) and 978.08 (5); *to repeal and recreate*
8 165.81 (3) (b), 968.205 (2) and 978.08 (2); and *to create* 165.75 (3) (g), 165.81
9 (3) (bm), 175.50, 757.54 (2) (bm), 939.74 (2d) (am), 968.205 (2m), 974.07 (12) (c)
10 and 978.08 (2m) of the statutes; **relating to:** retention and testing of evidence
11 that includes biological material, time limits for prosecuting a crime that is

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- 1 related to a sexual assault, and law enforcement procedures for using an
2 eyewitness to identify a person suspected of committing a crime.

Analysis by the Legislative Reference Bureau***Retention of evidence containing DNA***

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

This bill provides that a law enforcement agency, DA, court, or crime laboratory must retain evidence that includes biological material and was collected in connection with a criminal investigation that resulted in a conviction, delinquency adjudication, or commitment order only if the biological material is either from the victim of the offense for which the conviction, adjudication, or commitment order was imposed or the biological material may be used to incriminate or exculpate any person for the offense. Also, a law enforcement agency, DA, court, or crime laboratory need retain the evidence only in an amount and manner sufficient to develop a DNA profile from the evidence.

Testing of DNA evidence

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

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

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laboratories prioritize postconviction DNA testing ordered by a court over other work of the laboratories.

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

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

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

Eyewitness identification of a suspect

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

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

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

- 1 **SECTION 1.** 165.75 (3) (g) of the statutes is created to read:
- 2 165.75 (3) (g) Deoxyribonucleic acid testing ordered under s. 974.07 shall have
- 3 priority over other work of the laboratories.
- 4 **SECTION 2.** 165.77 (2m) (a) of the statutes is repealed.
- 5 **SECTION 3.** 165.77 (2m) (b) of the statutes is amended to read:
- 6 165.77 (2m) (b) The If the laboratories analyze biological material pursuant to
- 7 an order issued under s. 974.07 (8), the laboratories may compare the data obtained
- 8 from the material received under par. (a) with data obtained from other specimens.

are proximate in time and are committed

Not The policies must be designed to reduce the potential of erroneous identifications by eyewitnesses

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

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

9 165.81 (3) (b) Except as provided under par. (c), the laboratories shall retain
10 physical evidence that includes biological material and to which all of the following
11 apply:

- 12 1. The evidence is in the possession of the laboratories.
- 13 2. The evidence was collected in connection with a criminal investigation that
14 resulted in a criminal conviction, delinquency adjudication, or commitment under s.
15 971.17 or 980.06 and a person remains in custody as a result of the conviction,
16 adjudication, or commitment.
- 17 3. The evidence includes biological material that is from a victim of the offense
18 that was the subject of the criminal investigation or biological material that may be
19 used to incriminate or exculpate any person for the offense.

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

21 165.81 (3) (bm) The laboratories shall retain evidence to which par. (b) applies
22 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
23 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
24 the evidence.

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

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

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

6 165.81 (3) (c) 1. The department sends a notice of its intent to destroy the
7 biological material evidence to all persons who remain in custody as a result of the
8 criminal conviction, delinquency adjudication, or commitment, and to either the
9 attorney of record for each person in custody or the state public defender.

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

11 165.81 (3) (c) 2. a. Files a motion for testing of the biological material evidence
12 under s. 974.07 (2).

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

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

16 165.81 (3) (c) 3. No other provision of federal or state law requires the
17 department to ~~preserve~~ retain the biological material evidence.

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

19 165.81 (3) (d) A notice provided under par. (c) 1. shall clearly inform the
20 recipient that the biological material evidence will be destroyed unless, within 90
21 days after the date on which the person receives the notice, either a motion for testing
22 of the material evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~
23 for retention of the material evidence is submitted to the department.

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

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1 165.81 (3) (e) If, after providing notice under par. (c) 1. of its intent to destroy
 2 ~~biological material evidence~~, the department receives a written request to ~~preserve~~
 3 for retention of the material evidence, the department shall ~~preserve~~ retain the
 4 ~~material evidence~~ until the discharge date of the person who made the request or on
 5 whose behalf the request was made, subject to a court order issued under s. 974.07
 6 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the
 7 ~~biological material evidence~~ under s. 974.07 (9) (b) or (10) (a) 5.

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

9 **175.50 Eyewitness identification procedures.** (1) In this section:

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

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

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

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

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

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

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

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

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To the extent feasible
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1 (b) Showing individuals or representations sequentially rather than
2 simultaneously to an eyewitness.

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

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

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

11 757.54 (2) (b) Except as provided in par. (c), if an exhibit in a criminal action
12 or a delinquency proceeding under ch. 938 includes any biological material that was
13 collected in connection with the action or proceeding and that is either from a victim
14 of the offense that was the subject of the action or proceeding or may be used to
15 incriminate or exculpate any person for the offense, the court presiding over the
16 action or proceeding shall ensure that the exhibit is ~~preserved~~ retained until every
17 person in custody as a result of the action or proceeding, or as a result of commitment
18 under s. 980.06 that is based on a judgment of guilty or not guilty by reason of mental
19 disease or defect in the action or proceeding, has reached his or her discharge date.

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20 **SECTION 14.** 757.54 (2) (bm) of the statutes is created to read:

21 757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies
22 is retained in an amount and manner sufficient to develop a deoxyribonucleic acid
23 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
24 included on the exhibit.

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

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1 757.54 (2) (c) (intro.) Subject to par. (e), the court may destroy biological
2 material an exhibit before the expiration of the time period specified in par. (b) if all
3 of the following apply:

4 **SECTION 16.** 757.54 (2) (c) 1. of the statutes is amended to read:

5 757.54 (2) (c) 1. The court sends a notice of its intent to destroy the biological
6 material exhibit to all persons who remain in custody as a result of the criminal
7 action, delinquency proceeding, or commitment under s. 980.06 and to either the
8 attorney of record for each person in custody or the state public defender.

9 **SECTION 17.** 757.54 (2) (c) 2. a. and b. of the statutes are amended to read:

10 757.54 (2) (c) 2. a. Files a motion for testing of the biological material exhibit
11 under s. 974.07 (2).

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

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

15 757.54 (2) (c) 3. No other provision of federal or state law requires ~~the court to~~
16 ~~preserve~~ retention of the biological material exhibit.

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

18 757.54 (2) (d) A notice provided under par. (c) 1. shall clearly inform the
19 recipient that the biological material exhibit will be destroyed unless, within 90 days
20 after the date on which the person receives the notice, either a motion for testing of
21 the material exhibit is filed under s. 974.07 (2) or a written request to ~~preserve for~~
22 retention of the material exhibit is submitted to the court.

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

24 757.54 (2) (e) If, after providing notice under par. (c) 1. of its intent to destroy
25 biological material an exhibit, a court receives a written request to ~~preserve for~~

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1 retention of the material exhibit, the court shall ~~preserve the material~~ ensure that
2 the exhibit is retained until the discharge date of the person who made the request
3 or on whose behalf the request was made, subject to a court order issued under s.
4 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the
5 ~~biological material~~ exhibit under s. 974.07 (9) (b) or (10) (a) 5.

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

7 939.74 (2d) (am) For purposes of this subsection, crimes are related if they are
8 committed against the same victim and with the same intent, purpose, or
9 opportunity so as to be part of the same course of conduct.

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

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

21 (c) If before the time limitation under sub. (2) (c) expired, the state collected
22 biological material that is evidence of the identity of the person who committed a
23 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid
24 profile from the biological material, and comparisons of that deoxyribonucleic acid
25 profile to deoxyribonucleic acid profiles of known persons did not result in a probable

are proximate in time and are committed

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1 identification of the person who is the source of the biological material, the state may
2 commence prosecution of the person who is the source of the biological material for
3 the violation of s. 948.02 (1) or (2) or 948.025 or a crime that is related to the violation
4 within 12 months after comparison of the deoxyribonucleic acid profile relating to the
5 violation results in a probable identification of the person.

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

7 968.205 (2) Except as provided under sub. (3), a law enforcement agency shall
8 retain physical evidence that includes biological material and to which all of the
9 following apply:

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

11 (b) The evidence was collected in connection with a criminal investigation that
12 resulted in a criminal conviction, delinquency adjudication, or commitment under s.
13 971.17 or 980.06 and a person remains in custody as a result of the conviction,
14 adjudication, or commitment.

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

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

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

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

24 968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy
25 ~~biological material before the expiration of the time period specified in sub. (2) if all~~

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

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

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

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

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

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

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

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

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

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

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

23 968.205 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
24 ~~biological material~~ evidence, a law enforcement agency receives a written request to
25 preserve for retention of the material evidence, the law enforcement agency shall

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1 ~~preserve~~ retain the material evidence until the discharge date of the person who
2 made the request or on whose behalf the request was made, subject to a court order
3 issued under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction
4 or transfer of the ~~biological material~~ evidence under s. 974.07 (9) (b) or (10) (a) 5.

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

6 974.07 (8) The court may impose reasonable conditions on any testing ordered
7 under this section in order to protect the integrity of the evidence and the testing
8 process. ~~If appropriate and if stipulated to by the movant and the district attorney,~~
9 the court may order the state crime laboratories to perform the testing as provided
10 under s. 165.77 (2m) ~~or, after consulting with the movant and the district attorney,~~
11 may order that the material be sent to a facility other than the state crime
12 laboratories for testing. If ordered to perform testing under this section, the crime
13 laboratories may, subject to the approval of the movant and the district attorney,
14 arrange for another facility to perform the testing.

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

16 974.07 (12) (c) The state crime laboratories shall pay for testing ordered under
17 this section and performed by a facility other than the state crime laboratories if the
18 court does not order the movant to pay for the testing.

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

20 978.08 (2) Except as provided under sub. (3), a district attorney shall retain
21 physical evidence that includes biological material and to which all of the following
22 apply:

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

24 (b) The evidence was collected in connection with a criminal investigation that
25 resulted in a criminal conviction, delinquency adjudication, or commitment under s.

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1 971.17 or 980.06 and a person remains in custody as a result of the conviction,
2 adjudication, or commitment.

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

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

7 978.08 (2m) A district attorney shall retain evidence to which sub. (2) applies
8 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
9 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
10 the evidence.

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

12 978.08 (3) Subject to sub. (5), a district attorney may destroy biological
13 material before the expiration of the time period specified in sub. (2) if all of the
14 following apply evidence to which sub. (2) (a) to (c) applies if all of the following
15 conditions are satisfied:

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

17 978.08 (3) (a) The district attorney sends a notice of its intent to destroy the
18 biological material evidence to all persons who remain in custody as a result of the
19 criminal conviction, delinquency adjudication, or commitment and to either the
20 attorney of record for each person in custody or the state public defender.

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

22 978.08 (3) (b) 1. Files a motion for testing of the biological material evidence
23 under s. 974.07 (2).

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

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

2 978.08 (3) (c) No other provision of federal or state law requires the district
3 attorney to ~~preserve~~ retain the ~~biological material~~ evidence.

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

5 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient
6 that the ~~biological material~~ evidence will be destroyed unless, within 90 days after
7 the date on which the person receives the notice, either a motion for testing of the
8 material evidence is filed under s. 974.07 (2) or a written request ~~to preserve~~ for
9 retention of the material evidence is submitted to the district attorney.

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

11 978.08 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
12 ~~biological material~~ evidence, a district attorney receives a written request ~~to~~
13 preserve for retention of the material evidence, the district attorney shall ~~preserve~~
14 retain the ~~material~~ evidence until the discharge date of the person who made the
15 request or on whose behalf the request was made, subject to a court order issued
16 under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or
17 transfer of the ~~biological material~~ evidence under s. 974.07 (9) (b) or (10) (a) 5.

18 **SECTION 41. Initial applicability.**

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

22 **SECTION 42. Effective date.**

Ryan, Robin

From: Dyke, Don
Sent: Thursday, March 31, 2005 2:55 PM
To: Ryan, Robin
Subject: FW: DNA retention bill

Robin -- FYI Don

-----Original Message-----
From: Churchill, Jolene
Sent: Thursday, March 31, 2005 2:18 PM
To: Dyke, Don
Subject: FW: DNA retention bill

Mark wanted you to have a copy of this.

-----Original Message-----
From: Keith Findley [mailto:kafindle@wisc.edu]
Sent: Wednesday, March 30, 2005 11:49 AM
To: Gundrum, Mark; Gahn, Norm
Subject: DNA retention bill

I was just looking over the LRB's version of our DNA retention bill, and noticed something that we might want to address. Under section 968.205(1), the current statute provides definitions of "custody" and "discharge date." Section 968.02(2) then requires preservation of "the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date."

The LRB's revised bill retains the definitions of "custody" and "discharge date" under 968.02(1), but it repeals and re-enacts section 968.02(2). The new sub. (2) requires retention of biological evidence if "[t]he evidence 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 a person remains in custody as a result of the conviction, adjudication, or commitment." This new language drops any reference to "discharge date." I am concerned about this because, (1) it appears to make the definition of "discharge date" in sub. (1) useless, and (2) it might be read as intending to change the statute's current requirement that biological evidence be retained until discharge. No one has suggested changing that feature of the statute; that certainly was not what the Avery Task Force recommended. I'm not sure why the LRB rewrote the language in this way; it seemed to me that the version approved by the Task Force was clearer on this point.

Keith

→ Task Force draft placed important conditions in definition of "biological material." I felt that the conditions would be more readily apparent if not buried in the definitions section



State of Wisconsin
2005-2006 LEGISLATURE

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LRB-1609/2
RLR:wlj/ps

In 7/12/05
Wanted by ~~Thurs~~ 7/14/05

2005 BILL

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Legen - cat.

1 AN ACT *to repeal* 165.77 (2m) (a); *to amend* 165.77 (2m) (b), 165.81 (3) (c) (intro.),
2 165.81 (3) (c) 1., 165.81 (3) (c) 2. a. and b., 165.81 (3) (c) 3., 165.81 (3) (d), 165.81
3 (3) (e), 757.54 (2) (b), 757.54 (2) (c) (intro.), 757.54 (2) (c) 1., 757.54 (2) (c) 2. a.
4 and b., 757.54 (2) (c) 3., 757.54 (2) (d), 757.54 (2) (e), 939.74 (2d) (b) and (c),
5 968.205 (3) (intro.), 968.205 (3) (a), 968.205 (3) (b) 1. and 2., 968.205 (3) (c),
6 968.205 (4), 968.205 (5), 974.07 (8), 978.08 (3) (intro.), 978.08 (3) (a), 978.08 (3)
7 (b) 1. and 2., 978.08 (3) (c), 978.08 (4) and 978.08 (5); *to repeal and recreate*
8 165.81 (3) (b), 968.205 (2) and 978.08 (2); and *to create* 165.75 (3) (g), 165.81
9 (3) (bm), 175.50, 757.54 (2) (bm), 939.74 (2d) (am), 968.205 (2m), 974.07 (12) (c)
10 and 978.08 (2m) of the statutes; **relating to:** retention and testing of evidence
11 that includes biological material, time limits for prosecuting a crime that is

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- 1 related to a sexual assault, and law enforcement procedures for using an
2 eyewitness to identify a person suspected of committing a crime.
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Analysis by the Legislative Reference Bureau***Retention of evidence containing DNA***

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

This bill provides that a law enforcement agency, DA, court, or crime laboratory must retain evidence that includes biological material and was collected in connection with a criminal investigation that resulted in a conviction, delinquency adjudication, or commitment order only if the biological material is either from the victim of the offense for which the conviction, adjudication, or commitment order was imposed or the biological material may reasonably be used to incriminate or exculpate any person for the offense. Also, a law enforcement agency, DA, court, or crime laboratory need retain the evidence only in an amount and manner sufficient to develop a DNA profile from the evidence.

Testing of DNA evidence

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

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

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laboratories prioritize postconviction DNA testing ordered by a court over other work of the laboratories.

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

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

This bill applies the time limits for prosecuting felony sexual assaults as well as the DNA exception from those time limits to crimes that are related to a felony sexual assault. Under the bill, crimes are related if they are committed against the same victim, 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.

Eyewitness identification of a suspect

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

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

- 1 **SECTION 1.** 165.75 (3) (g) of the statutes is created to read:
2 165.75 (3) (g) Deoxyribonucleic acid testing ordered under s. 974.07 shall have
3 priority over other work of the laboratories.
4 **SECTION 2.** 165.77 (2m) (a) of the statutes is repealed.
5 **SECTION 3.** 165.77 (2m) (b) of the statutes is amended to read:
6 165.77 (2m) (b) The If the laboratories analyze biological material pursuant to
7 an order issued under s. 974.07 (8), the laboratories may compare the data obtained

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

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

10 165.81 (3) (b) Except as provided under par. (c), the laboratories shall retain
11 physical evidence that includes biological material and to which all of the following
12 apply:

- 13 1. The evidence is in the possession of the laboratories.
- 14 2. The evidence was collected in connection with a criminal investigation that
15 resulted in a criminal conviction, delinquency adjudication, or commitment under s.
16 971.17 or 980.06 and a person remains in custody as a result of the conviction,
17 adjudication, or commitment.
- 18 3. The evidence includes biological material that is from a victim of the offense
19 that was the subject of the criminal investigation or biological material that may
20 reasonably be used to incriminate or exculpate any person for the offense.

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

22 165.81 (3) (bm) The laboratories shall retain evidence to which par. (b) applies
23 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
24 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
25 the evidence.

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SECTION 6. 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 biological material before the expiration of the time period specified in par. (b) if all of the following apply evidence to which par. (b) 1. to 3. applies if all of the following conditions are satisfied:

SECTION 7. 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 8. 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 9. 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 10. 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 11. 165.81 (3) (e) of the statutes is amended to read:

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1 165.81 (3) (e) If, after providing notice under par. (c) 1. of its intent to destroy
2 ~~biological material evidence~~, the department receives a written request to ~~preserve~~
3 for retention of the material evidence, the department shall ~~preserve~~ retain the
4 ~~material evidence~~ until the discharge date of the person who made the request or on
5 whose behalf the request was made, subject to a court order issued under s. 974.07
6 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the
7 ~~biological material evidence~~ under s. 974.07 (9) (b) or (10) (a) 5.

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

9 **175.50 Eyewitness identification procedures.** (1) In this section:

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

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

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

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

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

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

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

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

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

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

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

11 757.54 (2) (b) Except as provided in par. (c), if an exhibit in a criminal action
12 or a delinquency proceeding under ch. 938 includes any biological material that was
13 collected in connection with the action or proceeding and that is either from a victim
14 of the offense that was the subject of the action or proceeding or may reasonably be
15 used to incriminate or exculpate any person for the offense, the court presiding over
16 the action or proceeding shall ensure that the exhibit is ~~preserved~~ retained until
17 every person in custody as a result of the action or proceeding, or as a result of
18 commitment under s. 980.06 that is based on a judgment of guilty or not guilty by
19 reason of mental disease or defect in the action or proceeding, has reached his or her
20 discharge date.

21 **SECTION 14.** 757.54 (2) (bm) of the statutes is created to read:

22 757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies
23 is retained in an amount and manner sufficient to develop a deoxyribonucleic acid
24 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
25 included on the exhibit.

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an exhibit that includes

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

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

5 **SECTION 16.** 757.54 (2) (c) 1. of the statutes is amended to read:

6 757.54 (2) (c) 1. The court sends a notice of its intent to destroy the biological
7 material exhibit to all persons who remain in custody as a result of the criminal
8 action, delinquency proceeding, or commitment under s. 980.06 and to either the
9 attorney of record for each person in custody or the state public defender.

10 **SECTION 17.** 757.54 (2) (c) 2. a. and b. of the statutes are amended to read:

11 757.54 (2) (c) 2. a. Files a motion for testing of the biological material exhibit
12 under s. 974.07 (2).

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

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

16 757.54 (2) (c) 3. No other provision of federal or state law requires the court to
17 preserve retention of the biological material exhibit.

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

19 757.54 (2) (d) A notice provided under par. (c) 1. shall clearly inform the
20 recipient that the biological material exhibit will be destroyed unless, within 90 days
21 after the date on which the person receives the notice, either a motion for testing of
22 the material exhibit is filed under s. 974.07 (2) or a written request to preserve for
23 retention of the material exhibit is submitted to the court.

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

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1 757.54 (2) (e) If, after providing notice under par. (c) 1. of its intent to destroy
2 ~~biological material~~ an exhibit, a court receives a written request ~~to preserve for~~
3 ~~retention of the material~~ exhibit, the court shall ~~preserve the material~~ ensure that
4 ~~the exhibit is retained~~ until the discharge date of the person who made the request
5 or on whose behalf the request was made, subject to a court order issued under s.
6 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the
7 ~~biological material~~ exhibit under s. 974.07 (9) (b) or (10) (a) 5.

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

9 939.74 (2d) (am) For purposes of this subsection, crimes are related if they are
10 committed against the same victim, are proximate in time, and are committed with
11 the same intent, purpose, or opportunity so as to be part of the same course of
12 conduct.

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

14 939.74 (2d) (b) If before the time limitation under sub. (1) expired, the state
15 collected biological material that is evidence of the identity of the person who
16 committed a violation of s. 940.225 (1) or (2), the state identified a deoxyribonucleic
17 acid profile from the biological material, and comparisons of that deoxyribonucleic
18 acid profile to deoxyribonucleic acid profiles of known persons did not result in a
19 probable identification of the person who is the source of the biological material, the
20 state may commence prosecution of the person who is the source of the biological
21 material for the violation of s. 940.225 (1) or (2) or a crime that is related to the
22 violation within 12 months after comparison of the deoxyribonucleic acid profile
23 relating to the violation results in a probable identification of the person.

24 (c) If before the time limitation under sub. (2) (c) expired, the state collected
25 biological material that is evidence of the identity of the person who committed a

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1 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid
2 profile from the biological material, and comparisons of that deoxyribonucleic acid
3 profile to deoxyribonucleic acid profiles of known persons did not result in a probable
4 identification of the person who is the source of the biological material, the state may
5 commence prosecution of the person who is the source of the biological material for
6 the violation of s. 948.02 (1) or (2) or 948.025 or a crime that is related to the violation
7 within 12 months after comparison of the deoxyribonucleic acid profile relating to the
8 violation results in a probable identification of the person.

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

10 968.205 (2) Except as provided under sub. (3), a law enforcement agency shall
11 retain physical evidence that includes biological material and to which all of the
12 following apply:

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

14 (b) The evidence was collected in connection with a criminal investigation that
15 resulted in a criminal conviction, delinquency adjudication, or commitment under s.
16 971.17 or 980.06 and a person remains in custody as a result of the conviction,
17 adjudication, or commitment.

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

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

22 968.205 (2m) A law enforcement agency shall retain evidence to which sub. (2)
23 applies in an amount and manner sufficient to develop a deoxyribonucleic acid
24 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
25 included on the evidence.

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SECTION 25. 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 biological material before the expiration of the time period specified in sub. (2) if all of the following apply evidence to which sub. (2) (a) to (c) applies if all of the following conditions are satisfied:

SECTION 26. 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 27. 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 28. 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 29. 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 30. 968.205 (5) of the statutes is amended to read:

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

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

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

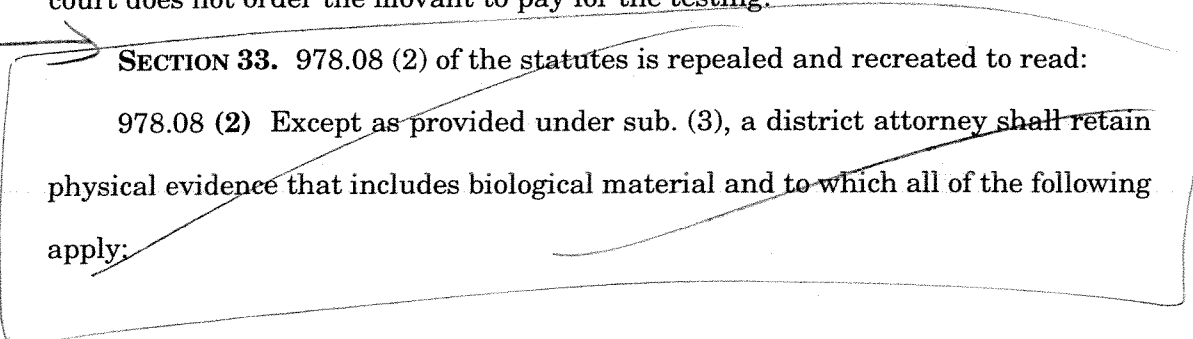
18 **SECTION 32.** 974.07 (12) (c) of the statutes is created to read:

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

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

23 978.08 (2) Except as provided under sub. (3), a district attorney shall retain
 24 physical evidence that includes biological material and to which all of the following
 25 apply:

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

(b) The evidence 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 a person remains in custody as a result of the conviction, adjudication, or commitment.

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

SECTION 34. 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 35. 978.08 (3) (intro.) of the statutes is amended to read:

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

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SECTION 36. 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 37. 978.08 (3) (b) 1. and 2. of the statutes are amended to read:

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

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

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

6 978.08 (3) (c) No other provision of federal or state law requires the district
7 attorney to ~~preserve~~ retain the ~~biological material~~ evidence.

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

9 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient
10 that the ~~biological material~~ evidence will be destroyed unless, within 90 days after
11 the date on which the person receives the notice, either a motion for testing of the
12 ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~ for
13 retention of the material evidence is submitted to the district attorney.

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

15 978.08 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
16 ~~biological material~~ evidence, a district attorney receives a written request to
17 ~~preserve~~ for retention of the material evidence, the district attorney shall ~~preserve~~
18 retain the ~~material~~ evidence until the discharge date of the person who made the
19 request or on whose behalf the request was made, subject to a court order issued
20 under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or
21 transfer of the ~~biological material~~ evidence under s. 974.07 (9) (b) or (10) (a) 5.

22 **SECTION 41. Initial applicability.**

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

2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1609/3ins
RLR:.....

1 **Ins 4-8:**

2 SECTION ~~#~~ 165.81 (3) (b) of the statutes is amended to read:

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

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

13 **Ins 5-1:**

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

15 165.81 (3) (c) (intro.) Subject to par. (e), the department may destroy evidence
16 that includes biological material before the expiration of the time period specified in
17 par. (b) if all of the following apply:

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

19 **Ins 10-8:**

20 SECTION ~~#~~ 968.205 (2) of the statutes is amended to read:

21 968.205 (2) Except as provided in sub. (3), if physical evidence that is in the
22 possession of a law enforcement agency includes any biological material that was
23 collected in connection with a criminal investigation that resulted in a criminal

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

7 History: 2001 a. 16.

8 **Ins 11-2:**

9 968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy
10 evidence that includes biological material before the expiration of the time period
11 specified in sub. (2) if all of the following apply:

12 History: 2001 a. 16.

13
14 **Ins 12-21:**

15 **SECTION ~~9~~ 978.08 (2)** [✓] of the statutes is amended to read:

16 978.08 (2) Except as provided in sub. (3), if physical evidence that is in the
17 possession of a district attorney includes any biological material that was collected
18 in connection with a criminal investigation that resulted in a criminal conviction,
19 delinquency adjudication, or commitment under s. 971.17 or 980.06 and the
20 biological material is from a victim of the offense that was the subject of the criminal
21 investigation or may reasonably be used to incriminate or exculpate any person for
22 the offense, the district attorney shall preserve the physical evidence until every

1 person in custody as a result of the conviction, adjudication, or commitment has
2 reached his or her discharge date.

History: 2001 a. 16.

3

4

5

Ins 13-14:

6

SECTION ~~9~~ 978.08 (3) (intro.) of the statutes is amended to read:

7

978.08 (3) (intro.) Subject to sub. (5), a district attorney may destroy evidence

8

that includes biological material before the expiration of the time period specified in

9

sub. (2) if all of the following apply:

History: 2001 a. 16.

10

11

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

LRB-1609/3dn

RLR: /.....

Wlj

July 12, 2005

Representative Gundrum and Don Dyke:

This redraft is in response to Keith Findley's March 31, 2005 e-mail message. Mr. Findley was concerned that LRB 1609/2 eliminated the express requirement that DNA evidence be preserved until the "discharge date" of a person who is in custody. This redraft keeps the current law references to retaining evidence until the discharge date. *

Robin Ryan
Legislative Attorney
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E-mail: robin.ryan@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1609/3dn
RLR:wlj:ch

July 13, 2005

Representative Gundrum and Don Dyke:

This redraft is in response to Keith Findley's March 31, 2005, e-mail message. Mr. Findley was concerned that LRB-1609/2 eliminated the express requirement that DNA evidence be preserved until the "discharge date" of a person who is in custody. This redraft keeps the current law references to retaining evidence until the discharge date.

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

Ryan, Robin

From: Ryan, Robin
Sent: Tuesday, August 09, 2005 1:22 PM
To: Dyke, Don
Subject: And/or

Don,

Here is my response to Norm Gahn's comment on LRB-1609/3:

The drafting manual provision on use of "and" or "or" is at 2.01 (9) (a).

Basically the drafting manual provides that if it is not clear from the context whether "or" can mean both, that the drafter can specify "x or y or both." There are other places in the criminal code where this is done (ss. 941.299 (3)(c) and 961.455 (4)). Given that Norm is raising the question, I would say it is not sufficiently clear that the current language can mean both.

Dyke, Don

From: Gahn, Norm
Sent: Tuesday, August 09, 2005 10:32 AM
To: Gundrum, Mark; Staskunas, Tony; Colon, Pedro; 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; 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)

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 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
> 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;
> 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)