



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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

☞ Appendix A ... Part 03 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 a 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-1609/2
RLR:wlj:ch

Now
2005 BILL

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

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- 1 enforcement procedures for using an eyewitness to identify a person suspected
2 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 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).

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

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

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

20 165.81 (3) (bm) The laboratories shall retain evidence to which par. (b) applies
21 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
22 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
23 the evidence.

24 **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 evidence
2 that includes biological material before the expiration of the time period specified in
3 par. (b) if all of the following apply:

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

5 165.81 (3) (c) 1. The department sends a notice of its intent to destroy the
6 ~~biological material~~ evidence to all persons who remain in custody as a result of the
7 criminal conviction, delinquency adjudication, or commitment, and to either the
8 attorney of record for each person in custody or the state public defender.

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

10 165.81 (3) (c) 2. a. Files a motion for testing of the ~~biological material~~ evidence
11 under s. 974.07 (2).

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

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

15 165.81 (3) (c) 3. No other provision of federal or state law requires the
16 department to ~~preserve~~ retain the ~~biological material~~ evidence.

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

18 165.81 (3) (d) A notice provided under par. (c) 1. shall clearly inform the
19 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90
20 days after the date on which the person receives the notice, either a motion for testing
21 of the ~~material~~ evidence is filed under s. 974.07 (2) or a written request ~~to preserve~~
22 for retention of the material evidence is submitted to the department.

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

24 165.81 (3) (e) If, after providing notice under par. (c) 1. of its intent to destroy
25 ~~biological material~~ evidence, the department receives a written request ~~to preserve~~

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

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

7 **175.50 Eyewitness identification procedures.** (1) In this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

20 757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies
21 is retained in an amount and manner sufficient to develop a deoxyribonucleic acid
22 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
23 included on the exhibit.

24 **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 an exhibit that
2 includes biological material before the expiration of the time period specified in par.
3 (b) if all 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, are proximate in time, and are committed with
9 the same intent, purpose, or opportunity so as to be part of the same course of
10 conduct.

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

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

22 (c) If before the time limitation under sub. (2) (c) expired, the state collected
23 biological material that is evidence of the identity of the person who committed a
24 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid
25 profile from the biological material, and comparisons of that deoxyribonucleic acid

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

7 **SECTION 23.** 968.205 (2) of the statutes is amended to read:

8 968.205 (2) Except as provided in sub. (3), if physical evidence that is in the
9 possession of a law enforcement agency includes any biological material that was
10 collected in connection with a criminal investigation that resulted in a criminal
11 conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and
12 the biological material is from a victim of the offense that was the subject of the
13 criminal investigation or may reasonably be used to incriminate or exculpate any
14 person for the offense, the law enforcement agency shall preserve the physical
15 evidence until every person in custody as a result of the conviction, adjudication, or
16 commitment has reached his or her discharge date.

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

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

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

23 968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy
24 evidence that includes biological material before the expiration of the time period
25 specified in sub. (2) if all of the following apply:

or both

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

2 968.205 (3) (a) The law enforcement agency sends a notice of its intent to
3 destroy the ~~biological-material~~ evidence to all persons who remain in custody as a
4 result of the criminal conviction, delinquency adjudication, or commitment, and to
5 either the attorney of record for each person in custody or the state public defender.

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

7 968.205 (3) (b) 1. Files a motion for testing of the ~~biological-material~~ evidence
8 under s. 974.07 (2).

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

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

12 968.205 (3) (c) No other provision of federal or state law requires the law
13 enforcement agency to ~~preserve~~ retain the ~~biological-material~~ evidence.

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

15 968.205 (4) A notice provided under sub. (3) (a) shall clearly inform the
16 recipient that the ~~biological-material~~ evidence will be destroyed unless, within 90
17 days after the date on which the person receives the notice, either a motion for testing
18 of the ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~
19 for retention of the material evidence is submitted to the law enforcement agency.

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

21 968.205 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
22 ~~biological-material~~ evidence, a law enforcement agency receives a written request to
23 ~~preserve~~ for retention of the material evidence, the law enforcement agency shall
24 ~~preserve~~ retain the ~~material~~ evidence until the discharge date of the person who
25 made the request or on whose behalf the request was made, subject to a court order

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

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

4 974.07 (8) The court may impose reasonable conditions on any testing ordered
5 under this section in order to protect the integrity of the evidence and the testing
6 process. ~~If appropriate and if stipulated to by the movant and the district attorney,~~
7 the court may order the state crime laboratories to perform the testing as provided
8 under s. 165.77 (2m) or, after consulting with the movant and the district attorney,
9 may order that the material be sent to a facility other than the state crime
10 laboratories for testing. If ordered to perform testing under this section, the crime
11 laboratories may, subject to the approval of the movant and the district attorney,
12 arrange for another facility to perform the testing.

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

14 974.07 (12) (c) The state crime laboratories shall pay for testing ordered under
15 this section and performed by a facility other than the state crime laboratories if the
16 court does not order the movant to pay for the testing.

17 **SECTION 33.** 978.08 (2) of the statutes is amended to read:

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

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

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

4 978.08 (2m) A district attorney shall retain evidence to which sub. (2) applies
5 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
6 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
7 the evidence.

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

9 978.08 (3) (intro.) Subject to sub. (5), a district attorney may destroy evidence
10 that includes biological material before the expiration of the time period specified in
11 sub. (2) if all of the following apply:

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

13 978.08 (3) (a) The district attorney sends a notice of its intent to destroy the
14 biological material evidence to all persons who remain in custody as a result of the
15 criminal conviction, delinquency adjudication, or commitment and to either the
16 attorney of record for each person in custody or the state public defender.

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

18 978.08 (3) (b) 1. Files a motion for testing of the biological material evidence
19 under s. 974.07 (2).

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

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

23 978.08 (3) (c) No other provision of federal or state law requires the district
24 attorney to ~~preserve~~ retain the ~~biological material~~ evidence.

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

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1 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient
2 that the ~~biological material~~ evidence will be destroyed unless, within 90 days after
3 the date on which the person receives the notice, either a motion for testing of the
4 material evidence is filed under s. 974.07 (2) or a written request ~~to preserve for~~
5 retention of the material evidence is submitted to the district attorney.

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

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

14 **SECTION 41. Initial applicability.**

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

18 **SECTION 42. Effective date.**

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

22

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1609/4dn

RLR: /:....

Wlj

Representative Gundrum and Don Dyke:

This redraft clarifies that the DNA exception to the statute of limitations applies to prosecution of a felony sexual assault or a related crime or both.

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

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August 16, 2005

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State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-1609/4
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2005 BILL

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

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- 1 enforcement procedures for using an eyewitness to identify a person suspected
2 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 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).

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

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

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

20 165.81 (3) (bm) The laboratories shall retain evidence to which par. (b) applies
21 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
22 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
23 the evidence.

24 **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 evidence
2 that includes biological material before the expiration of the time period specified in
3 par. (b) if all of the following apply:

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

5 165.81 (3) (c) 1. The department sends a notice of its intent to destroy the
6 ~~biological material~~ evidence to all persons who remain in custody as a result of the
7 criminal conviction, delinquency adjudication, or commitment, and to either the
8 attorney of record for each person in custody or the state public defender.

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

10 165.81 (3) (c) 2. a. Files a motion for testing of the ~~biological material~~ evidence
11 under s. 974.07 (2).

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

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

15 165.81 (3) (c) 3. No other provision of federal or state law requires the
16 department to ~~preserve~~ retain the ~~biological material~~ evidence.

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

18 165.81 (3) (d) A notice provided under par. (c) 1. shall clearly inform the
19 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90
20 days after the date on which the person receives the notice, either a motion for testing
21 of the ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~
22 for retention of the material evidence is submitted to the department.

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

24 165.81 (3) (e) If, after providing notice under par. (c) 1. of its intent to destroy
25 ~~biological material~~ evidence, the department receives a written request to ~~preserve~~

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

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

7 **175.50 Eyewitness identification procedures.** (1) In this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

20 757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies
21 is retained in an amount and manner sufficient to develop a deoxyribonucleic acid
22 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
23 included on the exhibit.

24 **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 an exhibit that
2 includes biological material before the expiration of the time period specified in par.
3 (b) if all 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, are proximate in time, and are committed with
9 the same intent, purpose, or opportunity so as to be part of the same course of
10 conduct.

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

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

22 (c) If before the time limitation under sub. (2) (c) expired, the state collected
23 biological material that is evidence of the identity of the person who committed a
24 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid
25 profile from the biological material, and comparisons of that deoxyribonucleic acid

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

7 **SECTION 23.** 968.205 (2) of the statutes is amended to read:

8 968.205 (2) Except as provided in sub. (3), if physical evidence that is in the
9 possession of a law enforcement agency includes any biological material that was
10 collected in connection with a criminal investigation that resulted in a criminal
11 conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and
12 the biological material is from a victim of the offense that was the subject of the
13 criminal investigation or may reasonably be used to incriminate or exculpate any
14 person for the offense, the law enforcement agency shall preserve the physical
15 evidence until every person in custody as a result of the conviction, adjudication, or
16 commitment has reached his or her discharge date.

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

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

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

23 968.205 (3) (intro.) Subject to sub. (5), a law enforcement agency may destroy
24 evidence that includes biological material before the expiration of the time period
25 specified in sub. (2) if all of the following apply:

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

2 968.205 (3) (a) The law enforcement agency sends a notice of its intent to
3 destroy the ~~biological material~~ evidence to all persons who remain in custody as a
4 result of the criminal conviction, delinquency adjudication, or commitment, and to
5 either the attorney of record for each person in custody or the state public defender.

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

7 968.205 (3) (b) 1. Files a motion for testing of the ~~biological material~~ evidence
8 under s. 974.07 (2).

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

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

12 968.205 (3) (c) No other provision of federal or state law requires the law
13 enforcement agency to ~~preserve~~ retain the ~~biological material~~ evidence.

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

15 968.205 (4) A notice provided under sub. (3) (a) shall clearly inform the
16 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90
17 days after the date on which the person receives the notice, either a motion for testing
18 of the ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~
19 for retention of the material evidence is submitted to the law enforcement agency.

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

21 968.205 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
22 ~~biological material~~ evidence, a law enforcement agency receives a written request to
23 preserve for retention of the material evidence, the law enforcement agency shall
24 preserve ~~retain~~ the ~~material~~ evidence until the discharge date of the person who
25 made the request or on whose behalf the request was made, subject to a court order

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

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

4 974.07 (8) The court may impose reasonable conditions on any testing ordered
5 under this section in order to protect the integrity of the evidence and the testing
6 process. ~~If appropriate and if stipulated to by the movant and the district attorney,~~
7 the court may order the state crime laboratories to perform the testing as provided
8 under s. 165.77 (2m) or, after consulting with the movant and the district attorney,
9 may order that the material be sent to a facility other than the state crime
10 laboratories for testing. If ordered to perform testing under this section, the crime
11 laboratories may, subject to the approval of the movant and the district attorney,
12 arrange for another facility to perform the testing.

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

14 974.07 (12) (c) The state crime laboratories shall pay for testing ordered under
15 this section and performed by a facility other than the state crime laboratories if the
16 court does not order the movant to pay for the testing.

17 **SECTION 33.** 978.08 (2) of the statutes is amended to read:

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

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

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

4 978.08 (2m) A district attorney shall retain evidence to which sub. (2) applies
5 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
6 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
7 the evidence.

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

9 978.08 (3) (intro.) Subject to sub. (5), a district attorney may destroy evidence
10 that includes biological material before the expiration of the time period specified in
11 sub. (2) if all of the following apply:

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

13 978.08 (3) (a) The district attorney sends a notice of its intent to destroy the
14 ~~biological material~~ evidence to all persons who remain in custody as a result of the
15 criminal conviction, delinquency adjudication, or commitment and to either the
16 attorney of record for each person in custody or the state public defender.

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

18 978.08 (3) (b) 1. Files a motion for testing of the ~~biological material~~ evidence
19 under s. 974.07 (2).

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

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

23 978.08 (3) (c) No other provision of federal or state law requires the district
24 attorney to ~~preserve~~ retain the ~~biological material~~ evidence.

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

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1 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient
2 that the ~~biological material~~ evidence will be destroyed unless, within 90 days after
3 the date on which the person receives the notice, either a motion for testing of the
4 material evidence is filed under s. 974.07 (2) or a written request to ~~preserve for~~
5 retention of the material evidence is submitted to the district attorney.

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

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

14 **SECTION 41. Initial applicability.**

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

18 **SECTION 42. Effective date.**

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

22

(END)