

2005 DRAFTING REQUEST

Assembly Amendment (AA-AB648)

Received: **09/08/2005**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Mark Gundrum (608) 267-5158**

By/Representing: **Don Dyke**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - law enforcement**

Extra Copies:

Submit via email: **YES**

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

Carbon copy (CC:) to: **don.dyke@legis.state.wi.us
michael.dsida@legis.state.wi.us
cathlene.hanaman@legis.state.wi.us
jolene.churchill@legis.state.wi.us**

Pre Topic:

No specific pre topic given

Topic:

Witness identification; custodial interrogations; DNA testing

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/1	rryan 09/08/2005	kfollett 09/08/2005	pgreensl 09/08/2005	_____	Inorthro 09/08/2005	Inorthro 09/08/2005	

FE Sent For:

<END>

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/?	rryan	11/16/jf 9/8	9/8 ps	9/8 ps ee			

FE Sent For:

<END>

Don Syke

9/7/05

Amend to AB 698

(1) Judy Schwaemk items # 1 & 4

(2) p. 5, L. 6 incurred "or paid for"

(3) p. 20
"relating to the interrogation of
the D and the credibility and
trustworthiness of any resulting
statement"

lang for AG's office
also amend § on judge's consideration
of evidence in bench trial

(4) p. 2, L 4 - § in 938
"by the law enforcement
officers"

(5) p. 7 lines 2-3
"consistent with the right of
a D or a victim to a speedy
trial"

(6) Good Cause exception for
admissibility of statement in
jury proceeding - like
good cause exception to
suppressing evidence in
adult section (p 19, L 23)

(7) Approps 05-06 = 312,500 06-07 = 750,000

Dyke, Don

From: Schwaemle, Judy
Sent: Wednesday, August 10, 2005 11:11 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)
Attachments: Avery.legis.corr.doc



Avery.legis.corr.doc
(20 KB)

Attached are some suggested corrections. Some are mere language, others have some substance. Otherwise, looks good.

<<Avery.legis.corr.doc>>

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

> From: Gundrum, Mark [mailto:Mark.Gundrum@legis.state.wi.us]
> Sent: Friday, August 05, 2005 9:04 AM
> To: Staskunas, Tony; Colon, Pedro; Gundrum, Mark; Dyke, Don; Bertelle, Sandra; Bies, Garey; jfbbrook@aol.com; dallosto@grgblaw.com; Donohoo, Bob
> - DDA; kafindle@wisc.edu; Sen.Fitzgerald; fleishf@co.portage.wi.us;
> Gahn, Norm; Horne, Scott; Randy.Koschnick@wicourts.gov;
> ReedT@mail.opd.state.wi.us; Schwaemle, Judy;
> 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

> Procédurés)

Suggested Corrections:

Page 7

(1)

14 against the juvenile in any court proceeding alleging . . .

(2)

17 An unrecorded juvenile's statement is admissible

Too broad a statement on admissibility goes beyond exceptions

Page 8

(3)

17 I hate to raise this now, but I'm a little concerned about the definition of custodial interrogation. Specifically, my concern is that it could be construed (by judges I have in mind) to include questioning during "investigative detention." Should we make clear that we mean interrogations requiring Miranda warnings?

?

Page 10

(4)

18 reasonably believed at the commencement of the interrogation

My concern here is that during the course of the interrogation, evidence is obtained that transforms the misdemeanor into a felony (e.g. the defendant says he's on bail for a felony, the defendant admits to a greater crime, etc.) There will be judges that will strictly construe this language to require that the officer immediately stop the interrogation and start recording. That's just stupid, and we should preclude that construction by this language change.

*Draft - ... to ...
... up to ... should*

*4/6
...
...*

Excerpt from AG's testimony at 9/7/05 hearing

have no budget to pay for such work.

Under s. 165.75 of the bills, post conviction DNA testing ordered by a court shall have priority over other work of the laboratories. This has the potential to severely delay our work on pending homicides, sexual assaults, and other serious felonies.

The current backlog at the crime labs is approximately 900 cases. Management of these cases is a daily challenge. The labs must make sure that testing is completed in time for scheduled court dates. There are also instances when law enforcement agencies desperately need DNA test results as part of on-going criminal investigations. The labs are mindful of these needs and try to manage their caseloads to meet these priorities. With the crime labs mandated to perform post-conviction testing first, they may not be able to test other DNA samples prior to trial. District Attorneys may have to move for adjournment in serious felony cases or local law enforcement agencies may have their investigations slowed because the labs can't get testing done in their cases. In some instances, these changing priorities will delay the exoneration of innocent suspects as well as prolong the search for perpetrators. Should the testing of DNA in a case involving an unidentified serial rapist be put on hold because the crime labs are with these post-conviction requests, law enforcement and the public will be outraged.

I believe the electronic recording of custodial interrogations will help to secure convictions of the guilty and avoid convictions of the innocent. These recordings will provide an accurate record of a defendant's questioning, will reduce the number of pretrial challenges to the voluntariness of Miranda waivers and resulting confessions, and will assist the jury in evaluating the credibility and trustworthiness of the defendant's statement.

However, as drafted, the bills would require circuit court judges to instruct jurors that they may consider the unexcused failure to record an interrogation in evaluating all of the evidence in the criminal case. A prosecutor may present testimony and other evidence from dozens of witnesses in a criminal case. Most of that testimony and evidence has nothing to do with the voluntariness of a defendant's Miranda waiver and his resulting confession.

A number of states have taken different approaches to protecting against improperly coerced and unreliable confessions. As an alternative to the new jury instruction proposed in s. 972.115(2)(a), I strongly encourage the legislature to review Maine's statute, which requires state law enforcement officials to establish and promulgate minimum standards for a law enforcement policy of recording custodial interrogations in serious criminal cases. The Wisconsin Department of Justice has already begun the process of establishing such standards. That would allow continued reliance on WIS-JI CRIMINAL 180, a copy of which is attached to this testimony. This jury instruction already allows jurors to consider the absence of a contemporaneous recording when considering the probative value of a defendant's statement.

Should the legislature choose to proceed with the version of the bill as drafted, proposed s. 972.115(2)(a) and (2)(b) should be amended so that the jury would be instructed to "consider the absence of an audio or audio visual recording of the interrogation in evaluating the evidence relating to the interrogation of the defendant and the credibility and trustworthiness of any resulting statement in the case[.]" This amendment would also make it clear that subsections

Just add relating to the interrogation or statement - addresses concern of breadth

clear from context

Focuses on credibility of actual statement not on method of interrogation & reliability of recording/reporting

(2)(a) and (2)(b) only apply when a defendant's own custodial statement is admitted against him at trial, and would not prevent the admission of unrecorded statements made by other witnesses and offered against the defendant. Lastly, additional direction should be given as to what type of argument to the jury is permissible if the circuit court judge decides that one or more of the stated exceptions to the recording policy applies.

Further, s. 938.31(3)(c)1 and s. 972.115(2)(a)1 provide the exception for admissibility of an unrecorded statement when the suspect refuses to cooperate with recording. These sections require that the refusal either be recorded or that a "contemporaneous written record" of the refusal be made. The bills should be amended to specifically provide that the contemporaneous written record be made "by the law enforcement officer". The current language is potentially problematic if it is read to require that the uncooperative suspect sign a form refusing the recording when the refusal is not itself recorded. S/He will be unlikely to sign it. Admittedly, this potential problem would rarely arise even under the current language. However, this is an example of the advantage of crystal clarity.

Regarding time limits for prosecuting certain crimes, s. 939.74(2d)(am) defines "related crimes" for purposes of the expansion of the statute of limitations for crimes associated with a sexual assault. I believe it would be wise to have this definition match or incorporate the language of current s. 971.12(1). Section 971.12(1) defines which crimes can be "joined" in the same criminal complaint. The advantage of defining "related crimes" in 939.74(2d)(am) consistently with s. 971.12(1) is that there is already a large body of decisional law defining the parameters of the "joinder" language. Therefore, the analysis of which crimes are "related" under s. 939.74(2d)(am) should be more clear for practitioners and courts, resulting in less dramatic and less voluminous appellate litigation.

Finally, the bill requires law enforcement agencies to adopt written policies governing the use of an eyewitness to identify a person suspected of committing a crime. Already the Bureau of Training and Standards of the Department of Justice has published, and done extensive training for law enforcement, on a new eyewitness identification protocol. This new protocol has been embraced by law enforcement throughout the state and is preferable to the adoption of varied individual department policies.

Again, thank you for the opportunity to submit testimony today on Assembly Bill 648 and Senate bill 315.



State of Wisconsin
2005 - 2006 LEGISLATURE

LRBa0953/1

RLR: kjf

Wanted For AM

ASSEMBLY AMENDMENT,
TO 2005 ASSEMBLY BILL 648

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

2 **1.** Page 5, line 5: delete lines 5 to 9 and substitute:

3 “(b) From the appropriation under s. 20.505 (6) (kc), the office shall provide
4 grants to law enforcement agencies for the purchase, installation, or maintenance
5 of digital recording equipment for making audio or audio and visual recordings of
6 custodial interrogations or for training personnel to use such equipment. Grants
7 awarded under this subsection may be used to reimburse law enforcement agencies
8 for expenses incurred or payments made on or after July 1, 2007. Grants awarded”.

9 **2.** Page 6, line 15: delete that line and substitute:

10 “ custodial interrogations 312,500 750,000 ”.

11 **3.** Page 7, line 3: after “laboratories” insert “, consistent with the right of a
12 defendant or a victim to a speedy trial”.

13 **4.** Page 14, line 21: delete “a case” and substitute “any court proceeding”.

CCC

AAI

to 2005 Assembly Bill
648

(September 15, 2005)

Page 1, line 10: delete
that line and substitute:

x:ch 20:par

FF "custodial interrogations PR-S A 312,500

750,000"

(End)

LRB0953/1
KJF



**ASSEMBLY AMENDMENT 1,
TO 2005 ASSEMBLY BILL 648**

September 9, 2005 - Offered by Representative GUNDRUM.

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

2 **1.** Page 5, line 5: delete lines 5 to 9 and substitute:

3 “(b) From the appropriation under s. 20.505 (6) (kc), the office shall provide
4 grants to law enforcement agencies for the purchase, installation, or maintenance
5 of digital recording equipment for making audio or audio and visual recordings of
6 custodial interrogations or for training personnel to use such equipment. Grants
7 awarded under this subsection may be used to reimburse law enforcement agencies
8 for expenses incurred or payments made on or after July 7, 2005. Grants awarded”.

9 **2.** Page 6, line 15: delete that line and substitute:

10 “custodial interrogations PR-S A 312,500 750,000”.

11 **3.** Page 7, line 3: after “laboratories” insert “, consistent with the right of a
12 defendant or a victim to a speedy trial”.

13 **4.** Page 14, line 21: delete “a case” and substitute “any court proceeding”.



State of Wisconsin
2005-2006 LEGISLATURE

CORRECTIONS IN:

**ASSEMBLY AMENDMENT 1,
TO 2005 ASSEMBLY BILL 648**

Prepared by the Legislative Reference Bureau
(September 15, 2005)

1. Page 1, line 10: delete that line and substitute:

“custodial interrogations PR-S A 312,500 750,000”.

(END)