

2009 DRAFTING REQUEST

Bill

Received: 10/01/2009

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Ann Hraychuck (608) 267-2365

By/Representing: Maggie Gau

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters:

Subject: Criminal Law - miscellaneous

Extra Copies:

Submit via email: YES

Requester's email: Rep.Hraychuck@legis.wisconsin.gov

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Collecting DNA from persons arrested for a felony

Instructions:

Same as LRB-1911/3

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>
/?	rryan 10/02/2009	nmatzke 10/05/2009		_____			S&L Crime
/1			mduchek 10/05/2009	_____	lparisi 10/05/2009	lparisi 10/05/2009	

FE Sent For:

at
intro

<END>

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By/Representing: **Maggie Gau**

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/?	rryan	/1 ^{nwn} 10/5	M 10/5	by J7	10 /5		

FE Sent For:

<END>

Ryan, Robin

From: Gau, Maggie
Sent: Thursday, October 01, 2009 1:20 PM
To: Ryan, Robin
Subject: LRB 1991/3

Hi Robin,

Would it be possible to get a companion bill drafted for LRB 1911/3?

Thanks!

Maggie

Maggie Gau
Office of Rep. Ann Hraychuck
608.267.2365 or 1.888.529.0028
Room 6 North State Capitol

Ryan, Robin

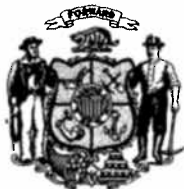
From: Wuebke, Matt
Sent: Thursday, October 01, 2009 2:51 PM
To: Ryan, Robin
Cc: Gau, Maggie
Subject: LRB 1911/3

Hi Robin,

Maggie Gau from Rep. Hraychuck's office will likely be in touch with you to have a copy of our bill on DNA testing on arrest (LRB 1911/3) drafted for introduction to the Assembly.

Thanks,
Matt

Matt Wuebke
Office of Sen. Sheila Harsdorf



State of Wisconsin
2009 - 2010 LEGISLATURE

3595/1

LRB-1011/3

RLR:nwn:jf

In Soon 10/2/09

2009 BILL

D-N

RMNR

SAV

Regen.

1 AN ACT *to amend* 165.76 (3), 165.76 (4), 165.765 (1), 165.765 (2) (a) and 165.77
2 (3); *to repeal and recreate* 165.77 (4); and *to create* 165.84 (7) of the statutes;
3 **relating to:** requiring a person arrested for a felony or a juvenile taken into
4 custody for certain sexual assault offenses to provide a biological specimen for
5 deoxyribonucleic acid analysis, inclusion of the analysis results in the
6 Department of Justice deoxyribonucleic acid data bank, requiring the exercise
7 of rule-making authority, and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, the following people are required to submit biological specimens to the crime laboratories for deoxyribonucleic acid (DNA) analysis: a person sentenced or placed on probation in Wisconsin for a felony (a crime for which a person may be sentenced to prison) or one of the several specified misdemeanors; a person found to be a sexually violent person; a person on probation, parole, or extended supervision in Wisconsin for a crime committed in another state that would be a felony if committed in Wisconsin; and a person found not guilty by reason of mental disease or defect or adjudicated delinquent for certain felony sexual assaults. In addition, a court may order a juvenile who is adjudicated delinquent for certain other offenses to provide a biological specimen for DNA analysis. The crime laboratories are required to analyze the DNA in the biological specimens and

BILL

maintain a DNA data bank of information obtained from the analyses. The crime laboratories may compare data obtained from the analysis of specimens and may share the results of analyses or comparisons with law enforcement agencies, prosecutors, the person who submitted a specimen, and defense attorneys. The crime laboratories must expunge all data relating to a person from the data bank if the person's conviction or adjudication is reversed, set aside, or vacated and the person requests that the data be expunged. A person who is required to submit a biological specimen for DNA analysis, except a person who is committed for mental health reasons, and intentionally fails to provide a specimen is subject to a criminal penalty.

This bill requires law enforcement agencies to collect a biological specimen for DNA analysis from every adult who is arrested for a felony and every juvenile who is taken into custody for certain sexual assault offenses that would be felonies if committed by an adult. The bill further requires the crime laboratories to analyze the specimens and include information obtained from the analyses in the DNA data bank. Under the bill, the crime laboratories must expunge information about a person from the DNA data bank, at the person's request, if the person was required to submit a biological specimen only in connection with an arrest and the person is not charged with a crime within one year after the arrest, criminal charges are dismissed, or the court reaches final disposition with respect to charges in connection with the arrest and the person is not found guilty of a crime or, if found guilty of a crime, the conviction is later reversed, set aside, or vacated. Similarly, the crime laboratories must expunge information about a person from the DNA data bank, at the person's request, if the person was required to submit a biological specimen only in connection with being taken into custody as a juvenile and the state does not file a criminal complaint or delinquency petition alleging certain sexual assault offenses within a year after taking the juvenile into custody, sexual assault allegations are dismissed, or the court reaches final disposition with respect to allegations in connection with the taking into custody and the person is not found to have committed certain sexual offenses or, if found to have committed such an offense, the finding is later reversed, set aside, or vacated. A person who is required under the bill to provide a biological specimen for DNA analysis and intentionally fails to do so is subject to a fine not to exceed \$10,000 or imprisonment not to exceed nine months or both.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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:

BILL

1 **SECTION 1.** 165.76 (3) of the statutes is amended to read:

2 165.76 (3) If a person is required to submit a biological specimen under s. 51.20
3 (13) (cr), 165.84 (7), 938.34 (15), 971.17 (1m) (a), 973.047, or 980.063, he or she shall
4 comply with that requirement and is not required to comply with this section.

5 **SECTION 2.** 165.76 (4) of the statutes is amended to read:

6 165.76 (4) The department of justice shall promulgate rules necessary to carry
7 out its duties under this section, including rules specifying whether a person who is
8 required under this section or s. 51.20 (13) (cr), 165.84 (7), 938.34 (15), 971.17 (1m)
9 (a), 973.047, or 980.063 to provide a biological specimen for deoxyribonucleic acid
10 analysis must provide a new biological specimen if the crime laboratories already
11 have a biological specimen from the person or if data obtained from deoxyribonucleic
12 acid analysis of the person's biological specimen is already included in the data bank
13 under s. 165.77 (3).

14 **SECTION 3.** 165.765 (1) of the statutes is amended to read:

15 165.765 (1) Whoever intentionally fails to comply with a requirement to submit
16 a biological specimen under s. 165.76, 165.84 (7), 938.34 (15), 973.047, or 980.063
17 may be fined not more than \$10,000 or imprisoned for not more than 9 months or
18 both.

19 **SECTION 4.** 165.765 (2) (a) of the statutes is amended to read:

20 165.765 (2) (a) Any physician, registered nurse, medical technologist,
21 physician assistant or person acting under the direction of a physician who obtains
22 a biological specimen under s. 165.76, 165.84 (7), 938.34 (15), 973.047, or 980.063 is
23 immune from any civil or criminal liability for the act, except for civil liability for
24 negligence in the performance of the act.

25 **SECTION 5.** 165.77 (3) of the statutes is amended to read:

BILL

1 165.77 (3) If the laboratories receive a human biological specimen under s.
2 51.20 (13) (cr), 165.76, 165.84 (7), 938.34 (15), 971.17 (1m) (a), 973.047, or 980.063,
3 the laboratories shall analyze the deoxyribonucleic acid in the specimen. The
4 laboratories shall maintain a data bank based on data obtained from
5 deoxyribonucleic acid analysis of those specimens. The laboratories may compare
6 the data obtained from one specimen with the data obtained from other specimens.
7 The laboratories may make data obtained from any analysis and comparison
8 available to law enforcement agencies in connection with criminal or delinquency
9 investigations and, upon request, to any prosecutor, defense attorney or subject of
10 the data. The data may be used in criminal and delinquency actions and proceedings.
11 The laboratories shall destroy specimens obtained under this subsection after
12 analysis has been completed and the applicable court proceedings have concluded.

13 **SECTION 6.** 165.77 (4) of the statutes is repealed and recreated to read:

14 165.77 (4) (a) A person whose deoxyribonucleic acid analysis data has been
15 included in the data bank under sub. (3) may request expungement on the grounds
16 that all of the following conditions are satisfied:

17 1. All convictions or adjudications for which the person was required to submit
18 a biological specimen under s. 51.20 (13) (cr), 165.76, 938.34 (15), 971.17 (1m) (a),
19 973.047, or 980.063 have been reversed, set aside, or vacated.

20 2. If the person was required to provide a biological specimen under s. 165.84
21 (7) in connection with an arrest for a felony, one of the following applies:

22 a. All charges filed in connection with the arrest have been dismissed.

23 b. The trial court reached final disposition for all charges in connection with
24 the arrest and the person was not adjudged guilty of a crime in connection with the
25 arrest.

BILL

1 c. At least one year has passed since the arrest and the person has not been
2 charged with a crime in connection with the arrest.

3 d. The person was adjudged guilty of a crime in connection with the arrest and
4 the conviction has been reversed, set aside, or vacated.

5 3. If the person was required to provide a biological specimen under s. 165.84
6 (7) in connection with being taken into custody under s. 938.19, one of the following
7 applies:

8 a. All criminal complaints or delinquency petitions alleging that the person
9 violated s. 940.225, 948.02 (1) or (2), 948.025, or 948.085 (2) in connection with the
10 taking into custody have been dismissed.

11 b. The trial court reached final disposition for all allegations of a violation of
12 s. 940.225, 948.02 (1) or (2), 948.025, or 948.085 (2) in connection with the taking into
13 custody and the person was not convicted or adjudged delinquent for a violation of
14 s. 940.225, 948.02 (1) or (2), 948.025, or 948.085 (2) in connection with the taking into
15 custody.

16 c. At least one year has passed since the person was taken into custody and no
17 criminal complaint or delinquency petition alleging a violation of s. 940.225, 948.02
18 (1) or (2), 948.025, or 948.085 (2) has not been filed against the person in connection
19 with the taking into custody.

20 d. The person was convicted or adjudged delinquent for a violation of s. 940.225,
21 948.02 (1) or (2), 948.025, or 948.085 (2) in connection with the taking into custody
22 and the conviction or delinquency adjudication has been reversed, set aside, or
23 vacated.

24 (b) If the conditions under par. (a) are satisfied, the laboratories shall purge all
25 records and identifiable information in the data bank pertaining to the person and

BILL

1 destroy all specimens from the person upon receiving the person's written request
2 for expungement and any documentation required by the department of justice
3 under rules promulgated under sub. (8).

4 **SECTION 7.** 165.84 (7) of the statutes is created to read:

5 165.84 (7) (a) Subject to rules promulgated under s. 165.76 (4), all persons in
6 charge of law enforcement and tribal law enforcement agencies shall obtain, or cause
7 to be obtained, a biological specimen for deoxyribonucleic acid analysis from each
8 adult arrested for a felony and each minor taken into custody for an offense under
9 s. 940.225, 948.02 (1) or (2), 948.025, or 948.085 (2). The person in charge of the law
10 enforcement or tribal law enforcement agency shall submit the specimen to the crime
11 laboratories for deoxyribonucleic acid analysis and inclusion of the adult or minor's
12 deoxyribonucleic acid profile in the data bank under s. 165.77 (3).

13 (b) The department of justice shall promulgate rules establishing procedures
14 and time limits for providing, collecting, and submitting biological specimens under
15 this section.

16 (c) Biological specimens collected under this section may only be used as
17 provided under s. 165.77.

18 **SECTION 8. Initial applicability.**

19 (1) This act first applies to persons arrested or taken into custody on the
20 effective date of this subsection.

21 **SECTION 9. Effective date.**

22 (1) This act takes effect on January 1, 2011.

23 (END)

D-note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3595/1dn

RLR: f:...

nwn

Date

Representative Hraychuck:

→ JWS from LRB 1911/1dn

> This year, a U.S. district court upheld a federal law that requires a person who is arrested for a felony to provide a DNA sample as a condition of pre-trial release. See *U.S. v. Pool*, 2009 U.S. Dist. LEXIS 64149 (2009). The court in *Pool* stated that its ruling was limited to cases in which a judge or grand jury has determined that there is probable cause to believe that the person committed a felony. The court further noted that it was not addressing cases in which a person is required to provide DNA upon arrest for a felony and before a probable cause finding is made by a judge or grand jury. The court specifically disagreed with the Minnesota court of appeals decision in *In the Matter of the Welfare of: C.T.L., Juvenile*.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1911/1dn

RLR:nwn:rs

March 18, 2009

Insert for
LRB-3595/1dn

Senator Harsdorf

1. Over the last decade, more than one-fifth of the states, and the U.S. government, have enacted laws requiring the taking of a DNA sample from people arrested for various felonies, and requiring that the DNA profiles of these people be included in a DNA database. Since most of these laws are relatively new, there is little case law discussing whether taking a DNA sample from a person before he or she is convicted without consent and without a warrant constitutes an unlawful search. The Virginia Supreme Court in *Anderson v. Commonwealth of Virginia*, 274 Va. 469, 650 S.E.2d 702 (2007), found that taking DNA samples from a person upon arrest for a felony without consent and without a warrant does not constitute an unlawful search. The Virginia court determined that taking a DNA sample is akin to taking fingerprints and photographs upon arrest.

A Minnesota court of appeals reached the opposite conclusion. The relevant Minnesota law is different from this bill and different from the Virginia law in that it requires taking a DNA sample from a person who is charged with a felony, not from all persons arrested for a felony. The Minnesota Court of Appeals found that requiring a person who has not been convicted to provide a sample for DNA analysis without consent and without a warrant constitutes an unlawful search, even after the court makes the probable cause finding necessary to sustain a felony charge. The Minnesota court reasoned that the privacy interests of a defendant who has not been convicted outweigh the state's interest in taking and analyzing the defendant's DNA. *In the Matter of the Welfare of: C.T.L., Juvenile*, 722 N.W.2d 484 (2006). This Minnesota case relates to a juvenile, but there is no indication in the opinion that the outcome would have been different for an adult.

Please let me know if you would like an update on court opinions published on this topic as you proceed with this bill.

2. I added a requirement that DOJ promulgate rules to specify whether a person has to submit a new biological specimen for DNA analysis if the crime laboratories already have a specimen from the person or already have the person's DNA profile in the data bank. I assume that if law enforcement agencies are required to collect a specimen in connection with arrest, the crime laboratories will not want a new specimen upon conviction. However, the laboratories may want new specimens in some cases to

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3595/1dn
RLR:nwn:md

October 5, 2009

Representative Hraychuck:

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Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.wisconsin.gov

Duerst, Christina

From: Rep.Hraychuck
Sent: Monday, October 05, 2009 2:00 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-3595/1 Topic: Collecting DNA from persons arrested for a felony

Please Jacket LRB 09-3595/1 for the ASSEMBLY.

Thanks,
Rep. Hraychuck
6 North