WISCONSIN LEGISLATIVE COUNCIL
ACT MEMO

2005 Wisconsin Act 60 **[2005 Assembly Bill 648]**	**Recording of Custodial Interrogations, Policies on Eyewitness Identification, and Various Provisions Related to DNA Evidence**

2005 Wisconsin Act 60 includes provisions that relate to: law enforcement agency policies on eyewitness identification; recording of custodial interrogations; retention of biological evidence; post-conviction DNA testing; and time limits for prosecution of certain crimes related to sexual assault when a DNA profile of the perpetrator is available.

Law Enforcement Agency Policies on Eyewitness Identification

Act 60 requires Wisconsin law enforcement agencies to adopt written policies for using an eyewitness to identify a person suspected of committing a crime ("suspect") in live lineups and photo lineups. For purposes of this requirement, "law enforcement agency" is defined as "a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority." [s. 165.83 (1) (b), Stats.]

Under the Act, the required policies are to be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases. To this end, a law enforcement agency is required to consider including in the policies practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including:

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

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

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

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

The eyewitness identification policy requirement takes effect January 1, 2007. Law enforcement agencies must biennially review their policies. In developing and revising policies, a law enforcement agency is directed to consider model policies and polices adopted by other jurisdictions.

Recording of Custodial Interrogations

Juveniles

In July of 2005, the Wisconsin Supreme Court, in the exercise of its supervisory authority over the court system, required law enforcement agencies to electronically record custodial interrogations of juveniles when conducted at a place of detention and required law enforcement agencies also to electronically record, if feasible, custodial interrogations of juveniles conducted at a place other than a place of detention. *State v. Jerrell*, 2005 WI 105.

Act 60 codifies the general requirements of *Jerrell* and provides additional detail and guidance concerning those requirements. For purposes of the recording requirements, "custodial interrogation" is defined as "an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is or should be informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way." Also defined is "place of detention": "a secure detention facility, jail, municipal lockup facility, or secured correctional facility, or a police or sheriff's office or other building under the control of a law enforcement agency, at which juveniles are held in custody in connection with an investigation of a delinquent act."

Under the Act, a law enforcement agency must make an audio or audio and visual recording of any custodial interrogation of a juvenile that is conducted at a place of detention unless a specified exception applies. Further, if feasible, a law enforcement agency must make an audio or audio and visual recording of any custodial interrogation of a juvenile that is conducted at a place other than a place of detention unless a specified exception applies. The Act expressly provides that a law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation of a juvenile is not required to inform the subject of the interrogation that the officer or agent is recording the interrogation.

The Act's exceptions to the recording requirements are:

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

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

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

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

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

The Act provides that a statement made by a juvenile during a custodial interrogation is not admissible in evidence against the juvenile in any court proceeding alleging the juvenile to be delinquent unless a required audio or audio and visual recording of the interrogation was made and is available. "Statement" is defined as an oral, written, sign language, or nonverbal communication. If a juvenile's unrecorded statement falls within one of the exceptions to the recording requirements, the statement is not inadmissible in evidence; in addition, a juvenile's unrecorded statement is not inadmissible in evidence if other good cause exists for not suppressing the statement.

Custodial Interrogations of Adult Felony Suspects

The Act provides that it is the policy of the state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a specific exception applies or good cause is shown for not making a recording of the interrogation. For purposes of this policy, "custodial interrogation" is defined identically to the definition of the term as applied to custodial interrogations of juveniles. As with custodial interrogations of juveniles, the officer or agent conducting the interrogation is not required to inform the subject of the interrogation that the officer or agent is making a recording of the interrogation.

The same exceptions that apply to recording requirements for custodial interrogations of juveniles also apply to the state policy on recording custodial interrogations of suspected felons. However, there is an additional exception that applies to the latter custodial interrogations: the law enforcement officer conducting the interrogation, or the law enforcement officer responsible for observing an interrogation conducted by an agent of a law enforcement agency, reasonably believed at the commencement of the interrogation that the offense for which the person was taken into custody or for which the person was investigated was not a felony.

Under the Act, if a statement by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and an audio or audio and visual recording of the interrogation is not available, upon request by the defendant the court is required to instruct the jury concerning the absence of a recording unless the state asserts and the court finds that an exception to the recording policy applies or that good cause exists for not providing an instruction. The jury is to be instructed that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case. In felony proceedings heard by the court without a jury, if a

statement made by a defendant during a custodial interrogation is admitted into evidence and if an audio or audio and visual recording of the interrogation is not available, the court may consider the absence of the recording in evaluating the evidence relating to the interrogation and the statement unless the court determines that one of the exceptions to the recording policy applies.

The Act provides that an audio or audio and visual recording of a custodial interrogation is not open to public inspection under the Public Records Law before one of the following occurs:

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

2. All criminal investigations and prosecutions to which the interrogation relates are concluded.

Grants for Digital Recording of Custodial Interrogations

Act 60 creates a grant program, administered by the Office of Justice Assistance (OJA) in the Department of Administration, to provide grants to law enforcement agencies for the purchase, installation, or maintenance of digital recording equipment for making audio or audio and visual recordings of custodial interrogations or for training personnel to use the equipment. Grants awarded may be used to support recording custodial interrogations of either juveniles or adults and of interrogations related to either misdemeanor or felony offenses.

The OJA is required to develop criteria and procedures to administer the grant program. The office may award more than one grant to a law enforcement agency. Grants may be awarded to reimbursement law enforcement agencies for expenses incurred or payments made on or after July 7, 2005.

Under the Act, a law enforcement agency must include the following information in applying for a grant: (1) how the agency proposes to use the grant funds; (2) procedures to be followed when recording equipment fails to operate correctly, including procedures for reporting failures, using alternative recording equipment, and repairing or replacing equipment; (3) procedures for storing recordings of custodial interrogations including storage format, storage location, and indexing of recordings for retrieval; (4) measures to prevent or detect tampering with recordings of custodial information; and (5) any other information required by the OJA.

The grant program is funded by an increase of 1% in the penalty surcharge under s. 757.05 (1), Stats., that applies to the amount of fine or forfeiture assessed by a court.

Retention of Biological Evidence

Under law in effect prior to Act 60, law enforcement agencies, district attorneys, courts, and the state crime laboratories are required to preserve evidence that includes biological material and collected in connection with a criminal investigation that resulted in a conviction, delinquency adjudication, or commitment order for as long as any person remains in custody as a result. However, if a law enforcement agency, district attorney, 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 person's notified requests preservation of the evidence or files a motion for DNA testing of the biological material contained in or included in the evidence, the evidence may be destroyed.

Act 60 modifies prior law by providing that evidence which includes biological material and is collected in connection with a criminal investigation that resulted in a conviction, delinquency adjudication, or commitment order must be retained only if the biological material is either from the victim of the offense for which the conviction, adjudication, or commitment order was imposed or if the biological material may reasonably be used to incriminate or exculpate any person for the offense. Further, evidence that must be retained need be retained only in an amount and manner sufficient to develop a DNA profile from the evidence.

Post-Conviction DNA Testing

Under law in effect prior to Act 60 a person who has been convicted, adjudicated delinquent, or found not guilty by mental disease or defect, may petition a court to order DNA testing of evidence that was relevant to the investigation or prosecution of that crime. If a court grants the person's petition for post-conviction DNA testing, the court may order the state crime laboratories to perform the DNA testing if the petitioner and the district attorney agree that the laboratory should conduct the testing. The court may order the petitioner to pay for testing if the petitioner is not indigent.

Act 60 provides that when a court grants a petition for post-conviction DNA testing the court may, after consulting with the petitioner and district attorney, order the state crime laboratories to conduct the testing, regardless of whether the petitioner or district attorney consents to the selection of the laboratories. When ordered to conduct post-conviction DNA testing, the state crime laboratories are authorized to arrange for another facility to conduct the testing; if that is done and the court has not ordered the petitioner to pay for testing, the laboratories must pay for the testing. The Act provides, with respect to state crime laboratories services, that post-conviction DNA testing has priority, consistent with the right of a defendant or the state to a speedy trial and consistent with the right of a victim to the prompt disposition of a case.

Time Limits for Prosecution of Certain Crimes Related to Sexual Assault When a DNA Profile of the Perpetrator is Available

Commencement of prosecution for most crimes must occur within specified time limits. However, if the state has DNA evidence in connection with a first- or second-degree sexual assault before the time for prosecution expires and the state fails to match that evidence with an identified person until after that time expires, the state may initiate prosecution for the assault within one-year after making a match.

Act 60 applies the time extension to crimes that are "related" to the sexual assault. Under the Act, 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.

Effective Date: Act 60 became effective December 31, 2005. The provision relating to law enforcement agency policies on eye witness identification takes effect January 1, 2007. Other provisions in the Act specify the initial applicability of those provisions relating to recording of custodial interrogations, the penalty surcharge increase, and time limits for prosecuting crimes related to sexual assaults.

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