

2005 BILL

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), 165.85 (3) (d), 757.05 (1) (a), 757.54 (2) (b), 757.54 (2) (c)
4 (intro.), 757.54 (2) (c) 1., 757.54 (2) (c) 2. a. and b., 757.54 (2) (c) 3., 757.54 (2)
5 (d), 757.54 (2) (e), 939.74 (2d) (b) and (c), 968.205 (2), 968.205 (3) (intro.),
6 968.205 (3) (a), 968.205 (3) (b) 1. and 2., 968.205 (3) (c), 968.205 (4), 968.205 (5),
7 974.07 (8), 978.08 (2), 978.08 (3) (intro.), 978.08 (3) (a), 978.08 (3) (b) 1. and 2.,
8 978.08 (3) (c), 978.08 (4) and 978.08 (5); and *to create* 16.964 (10), 20.455 (2)
9 (i) 16., 20.505 (6) (kc), 165.75 (3) (g), 165.81 (3) (bm), 175.50, 757.54 (2) (bm),
10 938.195, 938.31 (3), 939.74 (2d) (am), 968.073, 968.205 (2m), 972.115, 974.07
11 (12) (c) and 978.08 (2m) of the statutes; **relating to:** retention and testing of
12 evidence that includes biological material, time limits for prosecuting a crime
13 that is related to a sexual assault, law enforcement procedures for using an
14 eyewitness to identify a person suspected of committing a crime, making audio

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1 or audio and visual recordings of custodial interrogations, limitations on
2 admitting unrecorded statements into evidence in juvenile delinquency and
3 criminal proceedings, and creating a grant program for digital recording
4 equipment and training for digital recording of custodial interrogations.

Analysis by the Legislative Reference Bureau***Recording custodial interrogations***

The Wisconsin Supreme Court, on July 7, 2005, exercised its supervisory authority over the court system to require that law enforcement agencies electronically record custodial interrogations of juveniles if they are conducted at a place of detention and to require that, if feasible, law enforcement agencies also electronically record custodial interrogations of juveniles that are conducted at a place other than a place of detention. (See *State v. Jerrell*, 2005 WI 105.)

This bill codifies the *Jerrell* recording requirement. The bill requires that law enforcement agencies make an audio or audio and visual recording (recording) of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. The bill also requires law enforcement agencies to make a recording, if feasible, of a custodial interrogation of a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention. The bill allows several exceptions (listed below) to the recording requirements.

The bill defines “custodial interrogation” 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 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.”

The bill defines “place of detention” as “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.”

The bill provides that a statement made by a juvenile during a custodial interrogation that was not recorded is not admissible in evidence in a delinquency proceeding unless one of several exceptions apply. The exceptions to inadmissibility of unrecorded statements and to the requirement that custodial interrogations of juveniles be recorded are: that the juvenile refused to cooperate if the interrogation was recorded; the statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody; the interrogator in good faith failed to make a recording due to equipment malfunction or improper operation

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of the recording equipment; the statement was made spontaneously and not in response to a question by the interrogator; or exigent public safety circumstances prevented recording.

The bill further provides that it is the policy of the state to make a recording of a custodial interrogation of an adult suspected of committing a felony (a crime punishable by confinement for one year or more in a state prison), unless good cause is shown for not making a recording, or unless certain exceptions apply. The exceptions are those applicable to a juvenile delinquency case plus that the interrogator was not aware at the time of the interrogation that his or her investigation concerned a felony offense.

The bill provides that if a statement made by an adult during a custodial interrogation that was not recorded is admitted into evidence at a felony trial before a jury, the judge shall instruct the jury that it is the policy of the state to record custodial interrogations related to felonies and that the jury may consider the absence of a recording in weighing the evidence unless the judge finds that one of the above listed exception applies or there is other good cause for not giving such an instruction. In a felony proceeding heard by a judge without a jury, the judge may consider the absence of a recording of a custodial interrogation in weighing the evidence unless one of the exceptions apply.

The provisions relating to recording custodial interrogations of juveniles and admissibility in evidence of statements made by juveniles during custodial interrogations first apply to custodial interrogations conducted on the day after this bill is enacted as an act. The provisions relating to recording custodial interrogations of adults and admissibility in evidence of statements made by an adult during a custodial interrogation first apply to custodial interrogations conducted on January 1, 2007.

The bill creates a grant program administered by the Office of Justice Assistance to provide law enforcement agencies funding for the purchase, installation, or maintenance of equipment for making digital recordings of custodial interrogations and for training personnel to use such equipment. The grant program is funded by increasing the penalty surcharge amount from 25 percent to 26 percent of the amount of fines or forfeitures assessed by a court.

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.

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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 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

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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.** 16.964 (10) of the statutes is created to read:

2 16.964 **(10)** (a) In this subsection:

3 1. “Custodial interrogation” has the meaning given in s. 968.073 (1) (a).

4 2. “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

5 (b) The office shall provide grants from the appropriation under s. 20.505 (6)
6 (kc) to law enforcement agencies to fund or reimburse expenses incurred on or after
7 July 7, 2005, for the purchase, installation, or maintenance of digital recording
8 equipment for making audio or audio and visual recordings of custodial
9 interrogations or for training personnel to use such equipment. Grants awarded
10 under this subsection may be used to support recording of custodial interrogations
11 of either juveniles or adults and of interrogations related to either misdemeanor or
12 felony offenses. The office may award more than one grant under this subsection to
13 a law enforcement agency. The office shall develop criteria and procedures to
14 administer this subsection. Notwithstanding s. 227.10 (1), the criteria and
15 procedures need not be promulgated as rules under ch. 227.

16 (c) A law enforcement agency shall include the following information in an
17 application for a grant under this subsection:

18 1. How the agency proposes to use the grant funds.

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1 **SECTION 5.** 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 6.** 165.77 (2m) (a) of the statutes is repealed.

5 **SECTION 7.** 165.77 (2m) (b) of the statutes is amended to read:

6 165.77 **(2m)** (b) ~~The~~ If the laboratories analyze biological material pursuant to
7 an order issued under s. 974.07 (8), the laboratories may compare the data obtained
8 from the material received under par. (a) with data obtained from other specimens.
9 The laboratories may make data obtained from any analysis and comparison
10 available to law enforcement agencies in connection with criminal or delinquency
11 investigations and, upon request, to any prosecutor, defense attorney, or subject of
12 the data. The data may be used in criminal and delinquency actions and proceedings.
13 The laboratories shall not include data obtained from deoxyribonucleic acid analysis
14 of material ~~received under par. (a)~~ that is tested pursuant to an order under s. 974.07
15 (8) in the data bank under sub. (3).

16 **SECTION 8.** 165.81 (3) (b) of the statutes is amended to read:

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

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1 **SECTION 9.** 165.81 (3) (bm) of the statutes is created to read:

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

6 **SECTION 10.** 165.81 (3) (c) (intro.) of the statutes is amended to read:

7 165.81 (3) (c) (intro.) Subject to par. (e), the department may destroy evidence
8 that includes biological material before the expiration of the time period specified in
9 par. (b) if all of the following apply:

10 **SECTION 11.** 165.81 (3) (c) 1. of the statutes is amended to read:

11 165.81 (3) (c) 1. The department sends a notice of its intent to destroy the
12 ~~biological material~~ evidence to all persons who remain in custody as a result of the
13 criminal conviction, delinquency adjudication, or commitment, and to either the
14 attorney of record for each person in custody or the state public defender.

15 **SECTION 12.** 165.81 (3) (c) 2. a. and b. of the statutes are amended to read:

16 165.81 (3) (c) 2. a. Files a motion for testing of the ~~biological material~~ evidence
17 under s. 974.07 (2).

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

20 **SECTION 13.** 165.81 (3) (c) 3. of the statutes is amended to read:

21 165.81 (3) (c) 3. No other provision of federal or state law requires the
22 department to ~~preserve~~ retain the ~~biological material~~ evidence.

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

24 165.81 (3) (d) A notice provided under par. (c) 1. shall clearly inform the
25 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90

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1 days after the date on which the person receives the notice, either a motion for testing
2 of the material evidence is filed under s. 974.07 (2) or a written request ~~to preserve~~
3 for retention of the material evidence is submitted to the department.

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

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

12 **SECTION 16.** 165.85 (3) (d) of the statutes is amended to read:

13 165.85 (3) (d) Establish minimum curriculum requirements for preparatory
14 courses and programs, and recommend minimum curriculum requirements for
15 recertification and advanced courses and programs, in schools operated by or for this
16 state or any political subdivision of the state for the specific purpose of training law
17 enforcement recruits, law enforcement officers, tribal law enforcement recruits,
18 tribal law enforcement officers, jail officer recruits, jail officers, secure detention
19 officer recruits, or secure detention officers in areas of knowledge and ability
20 necessary to the attainment of effective performance as an officer, and ranging from
21 ~~traditional~~ subjects such as first aid, patrolling, statutory authority, techniques of
22 ~~arrest and, firearms, and recording custodial interrogations~~ to subjects designed to
23 provide a better understanding of ever-increasing complex problems in law
24 enforcement such as human relations, civil rights, constitutional law, and
25 supervision, control, and maintenance of a jail or secure detention facility. The board

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1 shall appoint a 13-member advisory curriculum committee consisting of 6 chiefs of
2 police and 6 sheriffs to be appointed on a geographic basis of not more than one chief
3 of police and one sheriff from any one of the 8 state administrative districts together
4 with the director of training of the Wisconsin state patrol. This committee shall
5 advise the board in the establishment of the curriculum requirements.

6 **SECTION 17.** 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 18.** 757.05 (1) (a) of the statutes, as affected by 2005 Wisconsin Act 25,
9 is amended to read:

10 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of
11 state law or for a violation of a municipal or county ordinance except for a violation
12 of s. 101.123 (2) (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s.
13 23.33 (4c) (a) 2., 30.681 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who
14 committed the violation had a blood alcohol concentration of 0.08 or more but less
15 than 0.1 at the time of the violation, or for a violation of state laws or municipal or
16 county ordinances involving nonmoving traffic violations or safety belt use violations
17 under s. 347.48 (2m), there shall be imposed in addition a penalty surcharge under
18 ch. 814 in an amount of ~~25%~~ 26 percent of the fine or forfeiture imposed. If multiple
19 offenses are involved, the penalty surcharge shall be based upon the total fine or
20 forfeiture for all offenses. When a fine or forfeiture is suspended in whole or in part,
21 the penalty surcharge shall be reduced in proportion to the suspension.

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

23 757.54 (2) (b) Except as provided in par. (c), if an exhibit in a criminal action
24 or a delinquency proceeding under ch. 938 includes any biological material that was
25 collected in connection with the action or proceeding and that is either from a victim

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1 of the offense that was the subject of the action or proceeding or may reasonably be
2 used to incriminate or exculpate any person for the offense, the court presiding over
3 the action or proceeding shall ensure that the exhibit is ~~preserved~~ retained until
4 every person in custody as a result of the action or proceeding, or as a result of
5 commitment under s. 980.06 that is based on a judgment of guilty or not guilty by
6 reason of mental disease or defect in the action or proceeding, has reached his or her
7 discharge date.

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

9 757.54 (2) (bm) The court shall ensure that an exhibit to which par. (b) applies
10 is retained in an amount and manner sufficient to develop a deoxyribonucleic acid
11 profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or
12 included on the exhibit.

13 **SECTION 21.** 757.54 (2) (c) (intro.) of the statutes is amended to read:

14 757.54 (2) (c) (intro.) Subject to par. (e), the court may destroy an exhibit that
15 includes biological material before the expiration of the time period specified in par.
16 (b) if all of the following apply:

17 **SECTION 22.** 757.54 (2) (c) 1. of the statutes is amended to read:

18 757.54 (2) (c) 1. The court sends a notice of its intent to destroy the ~~biological~~
19 ~~material~~ exhibit to all persons who remain in custody as a result of the criminal
20 action, delinquency proceeding, or commitment under s. 980.06 and to either the
21 attorney of record for each person in custody or the state public defender.

22 **SECTION 23.** 757.54 (2) (c) 2. a. and b. of the statutes are amended to read:

23 757.54 (2) (c) 2. a. Files a motion for testing of the ~~biological material~~ exhibit
24 under s. 974.07 (2).

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1 b. Submits a written request to ~~preserve the biological material for retention~~
2 of the exhibit to the court.

3 **SECTION 24.** 757.54 (2) (c) 3. of the statutes is amended to read:

4 757.54 (2) (c) 3. No other provision of federal or state law requires ~~the court to~~
5 preserve retention of the biological material exhibit.

6 **SECTION 25.** 757.54 (2) (d) of the statutes is amended to read:

7 757.54 (2) (d) A notice provided under par. (c) 1. shall clearly inform the
8 recipient that the ~~biological material exhibit~~ will be destroyed unless, within 90 days
9 after the date on which the person receives the notice, either a motion for testing of
10 the ~~material exhibit~~ is filed under s. 974.07 (2) or a written request to ~~preserve for~~
11 retention of the material exhibit is submitted to the court.

12 **SECTION 26.** 757.54 (2) (e) of the statutes is amended to read:

13 757.54 (2) (e) If, after providing notice under par. (c) 1. of its intent to destroy
14 ~~biological material an exhibit~~, a court receives a written request to ~~preserve for~~
15 retention of the material exhibit, the court shall ~~preserve the material ensure that~~
16 the exhibit is retained until the discharge date of the person who made the request
17 or on whose behalf the request was made, subject to a court order issued under s.
18 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the
19 ~~biological material exhibit~~ under s. 974.07 (9) (b) or (10) (a) 5.

20 **SECTION 27.** 938.195 of the statutes is created to read:

21 **938.195 Recording custodial interrogations. (1)** In this section:

22 (a) “Custodial interrogation” has the meaning give in s. 968.073 (1) (a).

23 (b) “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

24 (c) “Place of detention” means a secure detention facility, jail, municipal lockup
25 facility, or secured correctional facility, or a police or sheriff’s office or other building

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1 under the control of a law enforcement agency, at which juveniles are held in custody
2 in connection with an investigation of a delinquent act.

3 **(2)** (a) A law enforcement agency shall make an audio or audio and visual
4 recording of any custodial interrogation of a juvenile that is conducted at a place of
5 detention unless a condition under s. 938.31 (3) (c) 1. to 5. applies.

6 (b) If feasible, a law enforcement agency shall make an audio or audio and
7 visual recording of any custodial interrogation of a juvenile that is conducted at a
8 place other than a place of detention unless a condition under s. 938.31 (3) (c) 1. to
9 5. applies.

10 **(3)** A law enforcement officer or agent of a law enforcement agency conducting
11 a custodial interrogation is not required to inform the subject of the interrogation
12 that the officer or agent is making an audio or audio and visual recording of the
13 interrogation.

14 **SECTION 28.** 938.31 (3) of the statutes is created to read:

15 938.31 **(3)** (a) In this subsection:

- 16 1. “Custodial interrogation” has the meaning given in 968.073 (1) (a).
17 2. “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).
18 3. “Law enforcement officer” has the meaning given in s. 165.85 (2) (c).
19 4. “Statement” has the meaning given in s. 972.115 (1) (d).

20 (b) Except as provided under par. (c), a statement made by the juvenile during
21 a custodial interrogation is not admissible in evidence against the juvenile in a case
22 alleging the juvenile to be delinquent unless an audio or audio and visual recording
23 of the interrogation was made as required under s. 938.195 (2) and is available.

24 (c) A juvenile’s statement is not inadmissible in evidence under par. (b) if any
25 of the following applies:

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1 1. The juvenile refused to respond or cooperate in the custodial interrogation
2 if an audio or audio and visual recording was made of the interrogation so long as a
3 contemporaneous audio or audio and visual recording or written record was made of
4 the juvenile's refusal.

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

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

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

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

17 (d) Notwithstanding ss. 968.28 to 968.37, a juvenile's lack of consent to having
18 an audio or audio and visual recording made of a custodial interrogation does not
19 affect the admissibility in evidence of an audio or audio and visual recording of a
20 statement made by the juvenile during the interrogation.

21 **SECTION 29.** 939.74 (2d) (am) of the statutes is created to read:

22 939.74 **(2d)** (am) For purposes of this subsection, crimes are related if they are
23 committed against the same victim, are proximate in time, and are committed with
24 the same intent, purpose, or opportunity so as to be part of the same course of
25 conduct.

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1 **SECTION 30.** 939.74 (2d) (b) and (c) of the statutes are amended to read:

2 939.74 **(2d)** (b) If before the time limitation under sub. (1) expired, the state
3 collected biological material that is evidence of the identity of the person who
4 committed a violation of s. 940.225 (1) or (2), the state identified a deoxyribonucleic
5 acid profile from the biological material, and comparisons of that deoxyribonucleic
6 acid profile to deoxyribonucleic acid profiles of known persons did not result in a
7 probable identification of the person who is the source of the biological material, the
8 state may commence prosecution of the person who is the source of the biological
9 material for the violation of s. 940.225 (1) or (2) or a crime that is related to the
10 violation or both within 12 months after comparison of the deoxyribonucleic acid
11 profile relating to the violation results in a probable identification of the person.

12 (c) If before the time limitation under sub. (2) (c) expired, the state collected
13 biological material that is evidence of the identity of the person who committed a
14 violation of s. 948.02 (1) or (2) or 948.025, the state identified a deoxyribonucleic acid
15 profile from the biological material, and comparisons of that deoxyribonucleic acid
16 profile to deoxyribonucleic acid profiles of known persons did not result in a probable
17 identification of the person who is the source of the biological material, the state may
18 commence prosecution of the person who is the source of the biological material for
19 the violation of s. 948.02 (1) or (2) or 948.025 or a crime that is related to the violation
20 or both within 12 months after comparison of the deoxyribonucleic acid profile
21 relating to the violation results in a probable identification of the person.

22 **SECTION 31.** 968.073 of the statutes is created to read:

23 **968.073 Recording custodial interrogations. (1)** In this section:

24 (a) “Custodial interrogation” means an interrogation by a law enforcement
25 officer or an agent of a law enforcement agency of a person suspected of committing

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1 a crime from the time the suspect is informed of his or her rights to counsel and to
2 remain silent until the questioning ends, during which the officer or agent asks a
3 question that is reasonably likely to elicit an incriminating response and during
4 which a reasonable person in the suspect's position would believe that he or she is
5 in custody or otherwise deprived of his or her freedom of action in any significant way.

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

7 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

8 **(2)** It is the policy of this state to make an audio or audio and visual recording
9 of a custodial interrogation of a person suspected of committing a felony unless a
10 condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making
11 an audio or audio and visual recording of the interrogation.

12 **(3)** A law enforcement officer or agent of a law enforcement agency conducting
13 a custodial interrogation is not required to inform the subject of the interrogation
14 that the officer or agent is making an audio or audio and visual recording of the
15 interrogation.

16 **SECTION 32.** 968.205 (2) of the statutes is amended to read:

17 968.205 **(2)** Except as provided in sub. (3), if physical evidence that is in the
18 possession of a law enforcement agency includes any biological material that was
19 collected in connection with a criminal investigation that resulted in a criminal
20 conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and
21 the biological material is from a victim of the offense that was the subject of the
22 criminal investigation or may reasonably be used to incriminate or exculpate any
23 person for the offense, the law enforcement agency shall preserve the physical
24 evidence until every person in custody as a result of the conviction, adjudication, or
25 commitment has reached his or her discharge date.

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1 **SECTION 33.** 968.205 (2m) of the statutes is created to read:

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

6 **SECTION 34.** 968.205 (3) (intro.) of the statutes is amended to read:

7 968.205 (**3**) (intro.) Subject to sub. (5), a law enforcement agency may destroy
8 evidence that includes biological material before the expiration of the time period
9 specified in sub. (2) if all of the following apply:

10 **SECTION 35.** 968.205 (3) (a) of the statutes is amended to read:

11 968.205 (**3**) (a) The law enforcement agency sends a notice of its intent to
12 destroy the ~~biological material~~ evidence to all persons who remain in custody as a
13 result of the criminal conviction, delinquency adjudication, or commitment, and to
14 either the attorney of record for each person in custody or the state public defender.

15 **SECTION 36.** 968.205 (3) (b) 1. and 2. of the statutes are amended to read:

16 968.205 (**3**) (b) 1. Files a motion for testing of the ~~biological material~~ evidence
17 under s. 974.07 (2).

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

20 **SECTION 37.** 968.205 (3) (c) of the statutes is amended to read:

21 968.205 (**3**) (c) No other provision of federal or state law requires the law
22 enforcement agency to ~~preserve~~ retain the ~~biological material~~ evidence.

23 **SECTION 38.** 968.205 (4) of the statutes is amended to read:

24 968.205 (**4**) A notice provided under sub. (3) (a) shall clearly inform the
25 recipient that the ~~biological material~~ evidence will be destroyed unless, within 90

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1 days after the date on which the person receives the notice, either a motion for testing
2 of the material evidence is filed under s. 974.07 (2) or a written request to preserve
3 for retention of the material evidence is submitted to the law enforcement agency.

4 **SECTION 39.** 968.205 (5) of the statutes is amended to read:

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

12 **SECTION 40.** 972.115 of the statutes is created to read:

13 **972.115 Admissibility of defendant's statement. (1)** In this section:

14 (a) "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).

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

16 (c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

17 (d) "Statement" means an oral, written, sign language, or nonverbal
18 communication.

19 **(2)** (a) If a statement made by a defendant during a custodial interrogation is
20 admitted into evidence in a trial for a felony before a jury and if an audio or audio
21 and visual recording of the interrogation is not available, upon a request made by the
22 defendant as provided in s. 972.10 (5) and unless the state asserts and the court finds
23 that one of the following conditions applies or that good cause exists for not providing
24 an instruction, the court shall instruct the jury that it is the policy of this state to
25 make an audio or audio and visual recording of a custodial interrogation of a person

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1 suspected of committing a felony and that the jury may consider the absence of an
2 audio or audio and visual recording of the interrogation in evaluating the evidence
3 in the case:

4 1. The person refused to respond or cooperate in the interrogation if an audio
5 or audio and visual recording was made of the interrogation so long as a
6 contemporaneous audio or audio and visual recording or written record was made of
7 the subject's refusal.

8 2. The statement was made in response to a question asked as part of the
9 routine processing of the person.

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

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

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

20 6. The law enforcement officer conducting the interrogation or the law
21 enforcement officer responsible for observing an interrogation conducted by an agent
22 of a law enforcement agency reasonably believed at the time of the interrogation that
23 the offense for which the person was taken into custody or for which the person was
24 being investigated, was not a felony.

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1 (b) If a statement made by a defendant during a custodial interrogation is
2 admitted into evidence in a proceeding heard by the court without a jury in a felony
3 case and if an audio or audio and visual recording of the interrogation is not
4 available, the court may consider the absence of an audio or audio and visual
5 recording of the interrogation in evaluating the evidence in the case unless the court
6 determines that one of the conditions under par. (a) 1. to 6 applies.

7 **(4)** Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to
8 having an audio or audio and visual recording made of a custodial interrogation does
9 not affect the admissibility in evidence of an audio or audio and visual recording of
10 a statement made by the defendant during the interrogation.

11 **(5)** An audio or audio and visual recording of a custodial interrogation shall not
12 be open to public inspection under ss. 19.31 to 19.39 before one of the following
13 occurs:

14 (a) The person interrogated is convicted or acquitted of an offense that is a
15 subject of the interrogation.

16 (b) All criminal investigations and prosecutions to which the interrogation
17 relates are concluded.

18 **SECTION 41.** 974.07 (8) of the statutes is amended to read:

19 974.07 **(8)** The court may impose reasonable conditions on any testing ordered
20 under this section in order to protect the integrity of the evidence and the testing
21 process. ~~If appropriate and if stipulated to by the movant and the district attorney,~~
22 the court may order the state crime laboratories to perform the testing as provided
23 under s. 165.77 (2m) or, after consulting with the movant and the district attorney,
24 may order that the material be sent to a facility other than the state crime
25 laboratories for testing. If ordered to perform testing under this section, the crime

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1 laboratories may, subject to the approval of the movant and the district attorney,
2 arrange for another facility to perform the testing.

3 **SECTION 42.** 974.07 (12) (c) of the statutes is created to read:

4 974.07 (12) (c) The state crime laboratories shall pay for testing ordered under
5 this section and performed by a facility other than the state crime laboratories if the
6 court does not order the movant to pay for the testing.

7 **SECTION 43.** 978.08 (2) of the statutes is amended to read:

8 978.08 (2) Except as provided in sub. (3), if physical evidence that is in the
9 possession of a district attorney includes any biological material that was collected
10 in connection with a criminal investigation that resulted in a criminal conviction,
11 delinquency adjudication, or commitment under s. 971.17 or 980.06 and the
12 biological material is from a victim of the offense that was the subject of the criminal
13 investigation or may reasonably be used to incriminate or exculpate any person for
14 the offense, the district attorney shall preserve the physical evidence until every
15 person in custody as a result of the conviction, adjudication, or commitment has
16 reached his or her discharge date.

17 **SECTION 44.** 978.08 (2m) of the statutes is created to read:

18 978.08 (2m) A district attorney shall retain evidence to which sub. (2) applies
19 in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as
20 defined in s. 939.74 (2d) (a), from the biological material contained in or included on
21 the evidence.

22 **SECTION 45.** 978.08 (3) (intro.) of the statutes is amended to read:

23 978.08 (3) (intro.) Subject to sub. (5), a district attorney may destroy evidence
24 that includes biological material before the expiration of the time period specified in
25 sub. (2) if all of the following apply:

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1 **SECTION 46.** 978.08 (3) (a) of the statutes is amended to read:

2 978.08 (3) (a) The district attorney sends a notice of its intent to destroy the
3 ~~biological material~~ evidence to all persons who remain in custody as a result of the
4 criminal conviction, delinquency adjudication, or commitment and to either the
5 attorney of record for each person in custody or the state public defender.

6 **SECTION 47.** 978.08 (3) (b) 1. and 2. of the statutes are amended to read:

7 978.08 (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 district attorney.

11 **SECTION 48.** 978.08 (3) (c) of the statutes is amended to read:

12 978.08 (3) (c) No other provision of federal or state law requires the district
13 attorney to ~~preserve~~ retain the ~~biological material~~ evidence.

14 **SECTION 49.** 978.08 (4) of the statutes is amended to read:

15 978.08 (4) A notice provided under sub. (3) (a) shall clearly inform the recipient
16 that the ~~biological material~~ evidence will be destroyed unless, within 90 days after
17 the date on which the person receives the notice, either a motion for testing of the
18 ~~material~~ evidence is filed under s. 974.07 (2) or a written request to ~~preserve~~ for
19 retention of the material evidence is submitted to the district attorney.

20 **SECTION 50.** 978.08 (5) of the statutes is amended to read:

21 978.08 (5) If, after providing notice under sub. (3) (a) of its intent to destroy
22 ~~biological material~~ evidence, a district attorney receives a written request to
23 ~~preserve~~ for retention of the material evidence, the district attorney shall ~~preserve~~
24 retain the ~~material~~ evidence until the discharge date of the person who made the
25 request or on whose behalf the request was made, subject to a court order issued

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

3 **SECTION 51. Initial applicability.**

4 (1) RECORDING INTERROGATIONS OF JUVENILES. The treatment of sections 938.195
5 and 938.31 (3) of the statutes first applies to custodial interrogations, as defined in
6 section 968.073 (1) (a) of the statutes, as created by this act, conducted on the
7 effective date of this subsection.

8 (2) RECORDING INTERROGATIONS OF ADULTS. The treatment of sections 968.073
9 and 972.115 of the statutes first applies to custodial interrogations, as defined in
10 section 968.073 (1) (a) of the statutes, as created by this act, conducted on January
11 1, 2007.

12 (3) PENALTY SURCHARGE INCREASE. The treatment of section 757.05 (1) (a) of the
13 statutes first applies to acts or omissions committed on the effective date of this
14 subsection.

15 (4) 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 52. 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)