Testimony of Rick Raemisch, Secretary
Department of Corrections

Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
Senate Bill 631

Tuesday, March 23, 2010

Good morning Chairperson Taylor and members of the Committee.
I appreciate the opportunity to be with you today to testify in support of Senate Bill 631. With me today is Chuck Cole. He is co-chair of our agency's DNA Task Force and a top advisor to me. He marshaled a team of key DOC staff and law enforcement stakeholders, including representatives from the WI Department of Justice (DOJ), who are charged with identifying systemic issues and potential solutions to the current DNA collection process in an effort to further strengthen DNA collection processes in this state.

First, I would like to compliment this committee on your swift efforts to bring forth this important piece of legislation. As a former Sheriff, Prosecutor and Detective, I understand fully the importance of a complete and accurate databank of DNA for law enforcement. This bill sets forth a specific ongoing obligation for individuals who are required to provide a DNA sample and outlines each agency's responsibility for collecting and tracking DNA samples.

There are thousands of offenders per year who are required to provide a DNA sample including those who are released from an institution, placed on probation or sentenced directly to the county jail. It is essential that we have a DNA sample collected and entered into the databank for each of these individuals. This bill has several key provisions. Let me highlight a few of them:

1) SB 631 specifies that a requirement to provide a DNA sample does not expire when a person completes his/her sentence or term of probation. This bill provides the Department of Corrections clear authority to compel individuals who have not previously provided a

DNA sample as required by law to do so-even if they have completely discharged from their term with DOC;

2) It also closes the loophole for situations when a person has already provided a DNA sample, but DOJ does not have DNA analysis results on the person in their databank. Under this bill, DOJ may now require the person to provide another DNA sample;

3) Another major component of this bill is that it establishes a process under which a district attorney may petition the court to compel a person to provide a DNA sample if the person is required to provide a DNA sample, but refuses or fails to do so;

4) And, finally, this bill outlines the manner in which each individual required to provide a DNA sample must do so. Establishing these clear and specific processes and procedures will enable all agencies involved in DNA collections to hold individuals who are required to provide a DNA sample more accountable than the current law provides.

This bill focuses on the victims of unsolved crimes and provides for better investigative tools to prevent future victimization. Additionally, we anticipate the opportunity to continue to forge strong relationships with other critical law enforcement partners around the state and across the country. In partnership with the district attorneys, we will be able to bring out-of-state offenders back to Wisconsin, when needed, to provide a DNA sample required by law. We look forward to working closely with DOJ, district attorneys and sheriffs on the implementation of this law.

In closing, this bill ensures that we focus on results, while requiring further collaboration among the agencies involved to effectively address the scale and complexity of DNA collection across the state.

Thank you for your time and we are happy to address any questions you have at this time.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Attorney General J.B. Van Hollen

DT: March 23, 2010

Attachments: Letter from Attorney General Van Hollen to Department of Corrections Secretary, *DNA Biological Specimen Collection Initiative* (February 25, 2010).

RE: Testimony in Support of 2009 Senate Bill 631

Chairperson Taylor, members of the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing, thank you for the opportunity to submit this testimony in favor of Senate Bill 631. This bill will make changes and clarifications to statutes relating to collecting DNA from convicted offenders. I believe these changes will facilitate additional compliance with the legislature's existing policy to have DNA from all individuals convicted of felonies in the state.

At the Department of Justice, we operate the state's crime laboratories. There, we process evidence from crime scenes using a variety of forensic techniques, including DNA analysis. DNA analysis is important to the criminal justice system because it is an incredibly accurate and powerful tool for identification. DNA analysis can lead to the identification and successful prosecution of offenders – even in cases that are otherwise without leads. It can also lead to the exoneration of the innocent.

Here's how it works. Law enforcement submits evidence to the crime lab. When scientists at the crime lab are able to extract biological material from a piece of evidence and generate a DNA profile, that profile is compared against the suspect's DNA (if one has been obtained through consent or warrant) and against profiles that are contained in the offender and forensic data banks. These data banks are maintained on an ongoing basis. When there is a match, then there is a connection between that person and the crime being investigated.

Who is required to submit a biological sample to authorities so that a DNA profile can be maintained in the offender data bank? There are several categories under current law. Some

arise due to a person's status. For example, the most common of these being convicted felons who were in prison after January 1, 2000, (back to August 12, 1993, if convicted of certain sex offenses). Others depend on a court order. Current law requires a court to order anyone convicted of a felony after January 1, 2000, (and certain sex offenses before that date) to submit a biological specimen for the data bank. These categories overlap to a degree, but not completely. Persons convicted before January 1, 2000, for a felony such as homicide would not have been ordered by a court to submit a sample. Also persons convicted of a felony after January 1, 2000, may be subject to a court order but might not have ever gone to prison because their sentence did not impose that requirement.

Who collects the sample? Under current law, the majority of the DNA collection for inclusion in the DNA data bank is performed or directed by the Department of Corrections (when the individual is in DOC custody on DOC supervision) or county sheriffs (when the offender is in jail or self-reports). An offender, regardless of their custodial status, has an ongoing obligation to submit a specimen through the office of the county sheriff if they have not done so. Those specimens are then delivered to the crime lab for analysis and inclusion in the data bank.

In September 2009, following the arrest of Walter Ellis for a number of murders in Milwaukee it was discovered that his DNA profile was not in Wisconsin's DNA data bank, but should have been. At that time, I ordered an audit of the DNA data bank. Based on information readily available to the crime lab, preliminary results indicated that there were at least 12,000 offenders who never had their DNA collected and sent to the crime lab. The Department of Corrections conducted further review based on additional information available to them going back to 1993 which indicated there may be as many as 18,000 individuals who should have had their DNA collected and submitted to the lab but had not done so.

Since my announcement of the deficit, the state crime laboratory has received almost 12,000 convicted offender biological samples for analysis and inclusion in the data bank. This is about 8,500 more samples than we would have normally received during a similar time period. It is the manifestation of the Department of Corrections and county sheriffs' efforts to find those that had slipped through the cracks. Today, because this problem was identified and because of their efforts, a significant number of samples that that should have been collected previously are now with the crime lab and either in the data bank or are being processed.

Working with staff, I also put together a legal memorandum outlining the legal responsibilities of individuals to submit samples and the state's ability to persuade or compel compliance. I am attaching that memo. My legal conclusions are as follows:

- If an individual was required by law at any time to submit a specimen and has not done so, he or she remains under an ongoing obligation to submit a sample.
- Individuals who have not submitted a sample are subject to prosecution for the misdemeanor crime of failure to submit a biological specimen; the statute of limitations should not present a hurdle to prosecution because the offense is ongoing.
- The state's ability to compel an individual to produce a specimen is at its greatest when the offender is in custody or under supervision; for those no longer in custody or on

supervision, options include persuasion and, while indirect at compelling compliance, criminal prosecution or contempt proceedings.

Nothing in existing law impedes the ability of the Department of Corrections or sheriffs from collecting samples from inmates who are in their custody or control due to an offense giving rise to the obligation to submit a specimen. To the extent that many offenders have not submitted a sample, these numbers can be minimized in the future through improved processes and increased diligence by collecting entities. I know that the Department of Corrections and sheriffs have a heightened appreciation that a problem existed and are working hard to make sure it does not happen again.

There are, however, places where the law can be strengthened to facilitate the collection of DNA. This bill contains our recommendations. Here are its key components:

- **Creates an overlap of "status offenders" with all instances where a court is statutorily mandated to require a convicted offender to submit a specimen under Wis. Stat. § 973.047.** In certain cases, we understand that courts did not enter the statutorily required order requiring the submission of DNA. While court orders might be reopened, this statutory change will achieve the same result.

- **Creates a special proceeding, which is not a criminal proceeding, to obtain an order from the court that allows law enforcement to compel the submission of a biological sample from individuals no longer in custody.** By creating a summary, non-criminal action to compel compliance with existing law, the state's options to collect the DNA will be enhanced. Criminal proceedings are likely more expensive, have a higher burden, and create another criminal history record for an individual where that may not be in the interest of justice. Where the state's primary interest is compliance and not punishment, this option provides an efficient means to obtain a sample.

- **Closes loophole regarding convictions for failure to provide a sample.** Under existing law, a conviction for failure to submit a biological sample does not independently give rise to the requirement to provide a sample. Because of this loophole, an individual who is in custody for such a conviction cannot be compelled to provide a sample. This is changed.

- **Closes loophole regarding not guilty by reason of mental disease or defect.** When the original bill passed requiring certain sex offenders to submit biological samples for DNA analysis, those convicted of the offenses and those found not guilty by reason of mental disease or defect were required to submit a sample. When the categories of offenders were expanded in the 1999 budget bill to include all felons, those found not guilty by reason of mental defect or disease were not included, likely due to an oversight. This is changed.

- **Creates mechanism to allow state to request a second sample from an individual.** This change will allow the state to request a sample from individuals who previously

submitted or claimed to have previously submitted a sample where none exists at the crime lab.

- **Clarifies ongoing nature of obligation and codifies existing rules with respect to collection options.** These changes clarify existing law with regard to the ongoing obligation of individuals to submit DNA and codifies in statute existing rules relating to who may collect.

These changes do not make substantial changes to existing policy. Instead, they close loopholes, provide additional options to the state to collect samples from those who have evaded the system, and clarify existing law.

It would not be reasonable to expect that these changes will result in the collection of DNA from each and every person who has failed to submit a sample. Some of these offenders are no longer alive or no longer in Wisconsin. Others may be difficult to locate. Even when they are located, law enforcement and prosecutors will need to balance the public safety interest in strengthening the data bank against the public safety interest in continuing to enforce other laws. However, my office is willing to assist prosecutors and law enforcement to the extent we can. I also know that other state agencies, such as the Department of Corrections and the Office of Justice Assistance, have dedicated resources to the identification of individuals who are no longer on supervision. I expect this leveraging of resources to continue in an attempt to make Wisconsin safer and solve more crimes.

The discovery that so many samples had not been submitted to the crime lab over the last 17 years was deeply troubling. But I have been encouraged by the response of the Department of Corrections and law enforcement to this problem, which has been halved in a few short months. This bill can assist all of us in continuing to improve the data bank and strengthen crime fighting in this state.

I encourage you to support this bill.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 25, 2010

Secretary Richard F. Raemisch
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Re: DNA Biological Specimen Collection Initiative

Dear Secretary Raemisch:

I. INTRODUCTION

During an audit of the DNA data bank performed at my direction, the Wisconsin Department of Justice (DOJ) determined that numerous offenders obligated to provide a biological specimen for inclusion in the DNA data bank have failed to provide such a specimen. DOJ shared information relating to the audit with the Wisconsin Department of Corrections (DOC), and DOC, together with sheriffs, began the process to collect biological specimens from offenders who were in custody or under supervision and who were under a legal obligation to provide a sample. DOC, together with the Office of Justice Assistance's (OJA) SAFE Initiative, also worked to identify offenders who were legally required to provide a biological specimen for the DNA data bank, but were no longer in custody or on supervision, and to notify those persons of their ongoing legal obligations in an attempt to secure voluntary compliance with the law. Throughout this process, DOC and DOJ staffs have worked together to identify the issues associated with, and the cause of, the failure to obtain samples, and identify solutions, both practical and legal, for securing biological specimens from those who have a legal obligation to provide them and to ensure that in the future all persons legally obligated to provide a sample will do so.

This letter is intended to provide additional legal guidance to DOC in its efforts to collect biological specimens from those offenders who are legally obligated to provide such specimens.

II. SUMMARY

In summary, I reach the following conclusions:

1. The Obligation to Submit a Biological Specimen does not Expire

   - Both "court-ordered offenders" and "status offenders" - defined below - have an ongoing and affirmative obligation to submit a biological specimen. However, there are limited options available to obtain the submission of a specimen, and available options depend on an offender's custodial status and whether the offender's obligation arises from statute or court order. For some offenders no longer in custody or on supervision, encouraging voluntary compliance or criminal prosecution in the absence of voluntary compliance are the only available options to attempt to obtain a sample. Further, certain offenders who should have received a court order requiring the submission of a specimen did not receive such an order. Those offenders are not legally required to submit a specimen unless they are otherwise a "status offender" or the offender's sentence is subsequently amended.

2. Consequences for Non-Submission

   - The intentional failure to provide a biological specimen constitutes a misdemeanor. *See* Wis. Stat. § 165.765. Because this crime is a continuing offense, the statute of limitations should not impede prosecutions of offenders previously required to submit a biological specimen but who have failed to do so. A law enforcement officer with probable cause that an individual is violating Wis. Stat. § 165.765 may place the offender under arrest (as with any other misdemeanor).

   - DOC may use appropriate sanctions, including revocation or alternatives to revocation, in an attempt to obtain a biological specimen from an offender under DOC custody or supervision who has failed to provide a specimen. This may be true even for an offender who was obligated to provide a sample based on a past court order or status, yet is currently on probation for an offense that does not independently give rise to the obligation to submit a biological specimen.

   - The State may seek a contempt of court sanction against any offender who has failed to submit a biological specimen and is required to do so by virtue of a court order. The State may seek to amend a sentencing order if a court failed

to comply with the statutory obligation to order an offender to provide a biological specimen.

3. Obtaining a Biological Specimen

- DOC may compel the production of DNA from an offender while the offender is in DOC custody or under DOC supervision for an offense giving rise to a duty to submit a biological specimen.

- If the offender is not under DOC control, DOC may attempt to secure an offender's voluntary compliance by directing the offender to the county sheriff for submission of a biological specimen.

- Offenders who fail to provide a biological specimen who have received prior notice of their legal obligation may be referred to the district attorney for criminal prosecution or contempt proceedings when the judgment of conviction required an offender to submit a specimen.

III. GENERAL LEGAL PRINCIPLES: COLLECTION OF DNA FROM OFFENDERS IS CONSTITUTIONAL

As a general proposition, appellate courts have upheld statutory schemes designed to collect biological specimens for DNA purposes. *See Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (rejecting Fourth Amendment challenge to Wis. Stat. § 165.75 and upholding collection as a legitimate special needs search). State and federal courts in other jurisdictions have generally considered and rejected a wide variety of constitutional challenges to these DNA specimen laws, including claims grounded on substantive and procedural due process, equal protection, *ex post facto* laws, privilege against self-incrimination, and cruel and unusual punishment. *See* Robin Cheryl Miller, Annotation, "Validity, Construction, and Operation of State DNA Database Statutes," 76 A.L.R.5th 239 (2000) (collecting cases).

IV. SOURCE OF OBLIGATION TO PROVIDE DNA SPECIMEN

Adult and juvenile offenders whom courts have found to have committed certain criminal offenses must provide a biological specimen for development of a DNA profile and inclusion in the DNA data bank (maintained by DOJ pursuant to Wis. Stat. § 165.77). Offenders obligated to provide a biological specimen fall within one of two broad categories:

(a) "Status offenders." These offenders have an obligation to provide a biological specimen because they were in custody or on supervision for certain specific offenses on or after a specific date. *See* Wis. Stat. § 165.76(1). For example, this would include a person who is in prison for a felony committed on or after January 1, 2000. *See* Wis. Stat. § 165.76(1)(ar) and (2); or

(b) "Court-ordered offenders." These offenders are subject to a court order requiring the production of a biological specimen imposed as part of a case's disposition occurring on or after a statutorily specified date. These offenders would include any felon sentenced or placed on probation on or after January 1, 2000, as well as certain misdemeanants. *See* Wis. Stat. § 973.047(1f).

In addition to felons, Wisconsin law recognizes that other classes of offenders may also have an obligation to provide a biological specimen. These include persons convicted of selected misdemeanors, juvenile offenders adjudicated delinquent for selected sex offenses, persons found not guilty by reason of mental disease or defect for selected sex offenses, persons in institutional care for selected sex offenses, and persons committed under Chapter 980.[1] In relative terms, the vast majority of offenders required to provide a biological specimen are obligated to do so as a result of a felony conviction. As such, the following analysis focuses primarily on the State's authority to compel qualified felons to provide a biological specimen.

Under the current statutory scheme, the categories of status offenders and court-ordered offenders are mutually exclusive. Wisconsin Stat. § 165.76(3) provides, "If a person is required to submit a biological specimen under s. 51.20(13)(cr), 938.34(15), 971.17(1m)(a), 973.047 or 980.063, he or she shall comply with that requirement and is not required to comply with this section." In other words, if a court-ordered offender is required to provide a biological specimen pursuant to Wis. Stat. § 973.047, then the offender has no obligation to provide a biological specimen under Wis. Stat. § 165.76.

V. CONTINUING OBLIGATION TO PROVIDE A BIOLOGICAL SPECIMEN

Furthermore, I have concluded that, once an offender becomes obligated to provide a biological specimen, that obligation remains until he or she discharges it through the submission of a biological specimen.

[1] A complete list of the different types of offenders required to submit a specimen either due to status or a court order is contained in the Appendix.

A status offender who falls within any of the categories under Wis. Stat. § 165.76(1) "shall provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis." Wis. Stat. § 165.76(2)(a); *see generally Watton v. Hegerty*, 2008 WI 74, ¶ 19 n.13, 311 Wis. 2d 52, 751 N.W.2d 369 (appellate courts generally interpret the word "shall" in a statute as reflecting a mandatory legal obligation). This subsection places an affirmative obligation on the offender to provide the specimen to the State crime laboratories, which are operated by DOJ.

The statute empowers DOC, for example, to obtain a sample from an offender in prison or have a probation and parole agent direct the offender to provide a sample. Wis. Stat. § 165.76(2)(b)1., 2. While these provisions direct the offender to provide the specimen at the office of the county sheriff as soon as practicable after release or placement, "as directed by his or her probation, extended supervision and parole agent," Wis. Stat. § 165.76(2)(6)1 does not convert a mandatory obligation placed on the status offender to submit a sample to DOJ under Wis. Stat. § 165.76(2)(a) into a discretionary obligation. The text of Wis. Stat. § 165.76 is clear: qualifying offenders are to submit samples. Subsection (2)(b) merely grants DOC and other agencies the authority to direct submissions and allows DOC to set the "applicable time" for submission of samples by status offenders in DOC custody or on supervision. If those agencies do not direct the submission, the status offender remains under a residual obligation to provide a sample by going to the office of the county sheriff. *See also* Wis. Admin. Code § JUS 9.04(2) (September 2001) (rules related to the collection of specimens pursuant to this subsection, providing DOC may direct the provision of a sample but specifying that in all circumstances, the offender has a residual responsibility to provide a sample at the office of the county sheriff). While Subsection (2)(b) contemplates that offenders will provide their specimens "as soon as practicable," nothing within this section places a time limit on the State's authority to collect it or the offender's obligation to provide it.

Likewise, court-ordered offenders also have an affirmative obligation to provide a biological specimen. Wisconsin Stat. § 165.76(3) mandates that court-ordered offenders "shall comply" with the obligation to provide a biological specimen if required to do so under Wis. Stat. §§ 51.20(13)(cr), 938.34(15), 971.17(1m)(a), 973.047, or 980.063. Wisconsin Admin. Code § JUS 9.04(2) (September 2001) provides a mechanism for authorities to collect court-ordered specimens and requires the samples to be provided "as soon as ... practicable." The sections requiring courts to order offenders to submit biological specimens and the administrative rule implementing procedures do not discharge an offender's obligation to provide the specimen or the State's authority to collect it merely because of the passage of time.

Had the Legislature intended to place time limits on the State's authority to obtain a biological specimen from either status or court-ordered offenders, it could have easily done so. *See, e.g., Brauneis v. State*, 2000 WI 69, ¶ 27, 236 Wis. 2d 27, 612 N.W.2d 635 ("We should not read into the statute language that the legislature did not put in"). An interpretation that limits

the offender's obligation to provide, or the State's authority to collect, a specimen to a specific time frame would defeat the legislative purpose of collecting biological specimens for inclusion in the DNA databank. *See State v. Leitner*, 2002 WI 77, ¶ 36, 253 Wis. 2d 449, 646 N.W.2d 341 ("A cardinal rule in interpreting statutes is that an interpretation supporting the purpose of the statute is favored over an interpretation that will defeat the manifest objective of the statute"). "Public policy considerations exert a significant influence on the process of statutory interpretation by the courts." *In Interest of R.W.S.*, 162 Wis. 2d 862, 873 n.5, 471 N.W.2d 16. In *United States v. Kincade*, 379 F.3d 813, 838-99 (9th Cir. 2004) (*en banc*), the court recognized the "undeniably compelling" and "monumental" public policy interest furthered by a comprehensive DNA database, including more effective offender supervision, rehabilitation, reduction of recidivism, and solving past crimes.

The Legislature has imposed other continuing restrictions or requirements on convicted felons that extend beyond the period of an offender's sentence. *See* Wis. Const. art. XIII, § 3(2) (prohibiting felons from running for political office); Wis. Stat. § 941.29 (prohibiting felons from ever possessing firearms); Wis. Stat. ch. 980 (permitting the commitment of a sex offender who has otherwise been discharged from a sentence); and Wis. Stat. §§ 301.45, 973.048 (requiring sex offenders to register and provide information for inclusion in the sex offender registry). The obligation to provide a specimen is no more intrusive or onerous than these other legal restrictions or requirements placed upon offenders who have completed their sentences. Arguably, it is less so. Unlike these other obligations which may continue for the remainder of an offender's life, an offender who submits his or her specimen has complied with his or her obligation and has discharged this obligation.

VI. INTENTIONAL FAILURE TO PROVIDE A BIOLOGICAL SPECIMEN CONSTITUTES A CRIME

Failure to provide a biological specimen is a misdemeanor offense, punishable by a fine of not less than $10,000 nor imprisonment for not more than nine months, or both. *See* Wis. Stat. § 165.765. Before a district attorney would consider charging an offender with this crime, the district attorney would need to prove that: (a) the offender had a specific obligation to provide the specimen, either due to a court order actually issued pursuant to Wis. Stat. § 973.047 or a specific status under Wis. Stat. § 165.76(1); and (b) the offender "intentionally" failed to provide the specimen. Whether an offender "intentionally" failed to provide a specimen is ultimately a question for the fact-finder to resolve. However, in demonstrating an "intentional" failure, evidence that authorities notified the offender of the obligation and the offender failed to produce a specimen upon receiving notice would be sufficient. Such notice may occur when a sentencing court orders an offender to provide a biological specimen pursuant to Wis. Stat. § 973.047. In the case of offenders obligated to provide a specimen pursuant to Wis. Stat.

§ 165.76(1), notice may come in the form of verbal notification from law enforcement or DOC probation, parole, or extended supervision agents, or in written notification, *e.g.* certified letters sent to the offenders.

The crime of intentionally failing to submit a biological specimen is a misdemeanor offense. As such, the statute of limitations is three years. Wis. Stat. § 939.74(1). However, when that time period commences depends upon whether this offense is a continuing offense. A continuing offense is one that consists of a course of conduct enduring over a course of time. *John v. State*, 96 Wis. 2d 183, 188, 291 N.W.2d 502 (1980). Often a continuing offense may be distinguished by a duty to perform an act which the defendant fails to do. *Id.* In reaching its conclusion, the *John* court relied heavily upon the analysis in *Duncan v. State*, 282 Md. 385, 390, 384 A.2d 456 (1978): "Ordinarily, a continuing offense is marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty." *Id.* A failure to provide a biological specimen constitutes a continuing offense because the offender has a mandatory duty to perform an act which he or she has failed to do. In turn, because this is a continuing offense, the statute of limitations does not run until the last act is done which, viewed alone, is a crime. *John v. State*, 96 Wis. 2d 188; *see also* 5 Wayne R. LaFave, Criminal Procedure § 18.5(a) (the time begins to run only when a defendant's course of conduct terminates). As such, I believe that the offender's continued failure to fulfill his or her statutory obligation to provide a biological specimen constitutes a continuing crime for which the statute of limitations does not begin to run until the offender complies with the obligation.

Wisconsin Stat. § 973.047 does not expressly authorize a sentencing court to compel the production of a biological specimen upon conviction for the crime of the intentional failure to submit a biological specimen pursuant to Wis. Stat. § 165.765. However, a court could order the offender to comply with his or her ongoing duty to provide a specimen as a reasonable and appropriate condition of probation. *See* Wis. Stat. § 973.09(1)(a) (authorizing a court to impose "reasonable and appropriate conditions of probation"); *see also State v. Miller*, 2005 WI App 114, ¶ 11, 283 Wis. 2d 465, 701 N.W.2d 47 ("Whether a condition of extended supervision is reasonable and appropriate is determined by how well it serves the dual goals of supervision: rehabilitation of the defendant and the protection of a state or community interest."). Requiring status offenders and court-ordered offenders to provide a biological specimen as a condition of supervision serves these goals. It is already a standard practice to require persons on supervision to refrain from violating any criminal laws. Requiring the submission of a specimen may also act as a deterrent against offenders committing additional offenses in the future, since offenders' DNA is on file with DOJ. This requirement would also permit law enforcement to identify and apprehend criminals more quickly, before they could commit additional offenses, thereby better protecting the public.

VII. PROCEDURES STATE MAY USE TO OBTAIN A BIOLOGICAL SPECIMEN

A. Offender Under DOC Control

In some cases, an offender who has failed to provide a biological specimen remains in DOC custody or supervision. In those cases, DOC has the authority to compel production of the biological specimen. Wisconsin Stat. § 165.76(2)(b) provides statutory authority to DOC to compel production of biological specimens for offenders who fall within the categories specified under Wis. Stat. § 165.76(1). In appropriate cases, DOC may sanction a confined offender who fails to produce a biological specimen through the issuance of a major conduct report. *See Shelton v. Gudmanson,* 934 F. Supp. 1048, 1049 (W.D. Wis. 1996). In appropriate circumstances, DOC employees may collect a biological specimen without the offender's consent and under threat of force or punishment. *Id.* at 1050. In addition, Wis. Admin. Code § JUS 9.04(2) also provides authority to DOC to direct individuals under its supervision or in its custody to produce a specimen. With respect to an offender on supervision, DOC may initiate revocation proceedings for failing to comply with rules of supervision.

In some cases, an offender is no longer on DOC supervision for the offense that triggered the obligation to provide a biological specimen. The question arises whether a sentencing court or DOC may order submission of a biological specimen as a condition of probation for a subsequent, unrelated misdemeanor offense, if that offense is not one which statutorily requires provision of a biological specimen. In Wisconsin, probationers are subject to court-imposed conditions of probation, as well as DOC- and agent-imposed rules of probation. *State ex rel. Kaminksi v. Schwarz,* 2001 WI 94, 245 Wis. 2d 310, 321, 630 N.W.2d 164.

Wisconsin Stat. § 973.09(1)(a) authorizes courts to impose reasonable and appropriate conditions of probation. As noted previously, "Whether a condition of extended supervision is reasonable and appropriate is determined by how well it serves the dual goals of supervision: rehabilitation of the defendant and the protection of a state or community interest." *See also State v. Miller,* 283 Wis. 2d 465, ¶ 11. For the previously stated reasons, I believe these goals are served by requiring offenders to provide biological specimens.

Pursuant to Wis. Stat. § 973.10(1), DOC may also establish rules and regulations for probationers that supplement court-imposed conditions of probation. Applying the same rationale as used by the courts, DOC could order as one of its rules of supervision that a status offender or court-ordered offender provide a biological specimen since such a requirement would rehabilitate the offender and protect the public. Failure to comply with this obligation as a rule of supervision may form a basis for revocation or alternative sanctions in addition to a criminal prosecution pursuant to Wis. Stat. § 165.765. DOC has also developed standard rules of supervision that a probation, parole, or extended supervision agent explains to the offender and

implements. Wis. Admin. Code § DOC 328.04(3) (May 2001).[2] Wisconsin Admin Code § DOC 328.04(3)(a) requires offenders to "avoid all conduct which is in violation of state statute. . . ." Because the obligation to provide a biological specimen is ongoing and intentional failure to do so constitutes a crime and is violation of State statute, DOC could appropriately sanction an offender who intentionally fails to comply with this obligation.

The ability to impose conditions of supervision is not unlimited. A court may not impose a condition of supervision when the challenged condition directly conflicts with other statutes. *See, e.g., State v. Oakley*, 2000 WI 37, ¶ 2, 234 Wis. 2d 528, 609 N.W.2d 786 (payment of a fine from prior unrelated case prohibited as a condition of probation because Wis. Stat. § 973.07 specifically limits the court's means of collecting fines by incarceration), and *State v. Torpen*, 2001 WI App 273, ¶¶ 14, 16, 248 Wis. 2d 951, 637 N.W.2d 481 (payment of restitution owing on prior cases prohibited as a condition of probation because Wis. Stat. § 973.20 controls restitution). However, unlike the restitution and fine statutes which provide for a specific outcome if an offender does not pay the fine (no more than six months in the county jail) or restitution (conversion of the restitution order to a civil judgment), a condition on a new case requiring compliance with a past but continuing obligation to provide a biological specimen does not directly conflict with other statutes. As previously noted, requiring submission of a biological specimen furthers the goals of supervision, by protecting the public and preventing the commission of future crime. *See also* Wis. Admin. Code § DOC 328.04(1) (recognizing that supervising agents are expected to "attempt to help the client be successfully re-assimilated into the community, help the client adjust to and cope with community living, reduce crime, and protect the public.").

B. Offender Not Under DOC Control

In some cases, an offender is not subject to DOC control, but, nonetheless, has an obligation to provide a biological specimen. This situation may arise because the offender received a fine or county jail term for a felony sentence and therefore did not come under DOC control. Alternatively, the person may have been placed on DOC supervision, but that supervision has terminated. I believe that the State may utilize a variety of means to promote compliance under these circumstances.

1. DOC or Law Enforcement Efforts to Secure Voluntary Compliance

First, DOC may attempt to secure an offender's biological specimen through voluntary compliance. Once DOC has identified a person who has an affirmative obligation to provide a biological specimen based either upon status or a court order, DOC may provide notice to that

[2] In addition, DOC could also amend its administrative rules governing the standard rules of supervision by incorporating an express requirement that status offenders and court ordered offenders comply with their obligations to provide a biological specimen.

person of their legal obligation to provide a biological specimen. I understand that DOC has already begun sending letters to offenders. These letters inform the offender that DOC believes the offender has a statutory obligation to provide a biological specimen due either to a court order or an offender's DOC status. It identifies the relatively noninvasive process that DOC will use to collect the biological specimen. It directs the offender to a county sheriff for the collection of the specimen. *See* Wis. Admin Code § JUS 9.04(2) (authorizing collection by the office of the county sheriff). It also informs the recipient that intentional failure to provide a biological specimen is a crime and that noncompliance may result in the offender's name being referred to the district attorney for potential criminal charges. A specimen submitted in response to this informed consent would not be considered coerced for Fourth Amendment purposes. *See generally State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998).

Other entities, such as county sheriffs, could similarly apprise offenders of this obligation.

2. Referral to the District Attorney for Criminal Prosecution

As outlined in Section VI above, an offender who intentionally fails to provide a biological specimen is in violation of Wis. Stat. § 165.765. Depending upon the circumstances, a district attorney may exercise his/her prosecutorial discretion and either elect to charge the offender, or if the offender voluntarily provides the specimen, decline charges or dismiss previously filed charges. The authority to criminally prosecute offenders for intentional failure to provide a biological specimen applies to both court-ordered offenders and status offenders.

3. Offender Subject to Court Order to Provide a Biological Specimen

If an offender is subject to a court order to provide a biological specimen and is no longer on supervision, the State may, nonetheless, seek to secure voluntary compliance. If a court directed an offender to submit a specimen through a court order or a judgment, and the offender has failed to do so, the State may take steps to obtain relief through the contempt procedures set forth in Wis. Stat. ch. 785. In most cases, this relief would entail a "remedial sanction," which would be imposed for purposes of getting the offender to comply with the order as opposed to punishing the offender for not complying. *See* Wis. Stat. § 785.01(3) (defining "remedial sanction"). This could take the form of a daily monetary sanction until the offender complies or imprisonment until the sample is provided. *Id.*, § 785.04(1). Likewise, the remedial sanction could include a more specific directive to the offender regarding the time and place for providing the sample. *Id.*, § 785.01(1)(d). The prosecutorial entity responsible for securing the judgment would have the authority to pursue a contempt of court motion before the court that issued the order.

Because contempt of court requires proof that the offender's failure to comply with the order is "intentional," Wis. Stat. § 785.01(1), it will likely be necessary in some cases to lay some additional groundwork for a contempt motion before proceeding. In particular, it may be necessary to show not only that an order was entered, but that the offender knows of the order and is intentionally disobeying it. There is no specific formula for determining what a court will find sufficient to establish intent. For example, some courts may find intent to disobey the order if it can be shown that an offender received a letter reminding him or her of the requirement to submit a sample and a subsequent passage of time without compliance. Ultimately, the prosecutor pursuing a contempt order will have to exercise his or her judgment as to what is needed.

4. A Court was Statutorily Obligated to Order Offender to Provide a Biological Specimen but Failed to Do So

As noted above, circumstances arise in which a circuit court has an obligation to require a criminal defendant or other person to provide a biological specimen to the State crime laboratory for DNA analysis. *See* Wis. Stat. § 973.047(1f); *see also* Wis. Stat. §§ 51.20(13)(cr); 938.34(15); 971.17(1m)(a); 980.063. In an unknown number of cases, judges neglected to order offenders to provide specimens as required. Despite this oversight, I believe that these offenders may, nonetheless, have an obligation to provide a biological specimen as required by law.

As a general rule, if a court orders an offender to submit a biological specimen pursuant to Wis. Stat. § 973.047, then the offender is relieved of any duty he or she may have to provide a specimen under Wis. Stat. § 165.76(3). However, if the court did not comply with its duties under Wis. Stat. § 973.047, an offender falling within a category under Wis. Stat. § 165.76(1) may, nonetheless, have a duty to provide a specimen. For example, if an offender is convicted of a felony on or after January 1, 2000, did not receive an order pursuant to Wis. Stat. § 973.047 but was in prison as part of his or her sentence, the offender must still provide a biological specimen to the State crime laboratories because he or she was in prison on or after January 1, 2000 for a felony committed in this state. Wis. Stat. § 165.76(2)(ar). In these cases, the State may secure a biological specimen following the procedures outlined above for status offenders who fall within a category under Wis. Stat. § 165.76(1).

However, not every offender whom a judge should have ordered to provide a biological specimen under Wis. Stat. § 973.047 will fall within a category under Wis. Stat. § 165.76(1). For example, a person convicted of a felony and sentenced to a fine or the county jail does not fall within any categories under Wis. Stat. § 165.76(1). Likewise, offenders placed on probation supervision would not fall within a category under Wis. Stat. § 165.76(1), unless the offender was placed on supervision for certain sex offenses. *See* Wis. Stat. § 165.76(1)(a). In these cases, I believe that the State could petition the sentencing court to amend its sentencing order based upon an illegal sentence.

Under Wisconsin law, a court's failure to comply with a mandatory, statutorily-imposed sentencing duty, results in an "illegal" sentence. *See State v. Borst*, 181 Wis. 2d 118, 510 N.W.2d 739 (Ct. App. 1993). In *Borst*, the court of appeals held that a sentencing court's failure to comply with the mandatory language in Wis. Stat. § 973.20(1f) which provides that "the court . . . shall order the defendant to make full or partial restitution" resulted in an illegal sentence. "The original sentence was unlawful, in the sense that the court failed in its mandatory duty to order restitution. . . ." *Borst*, 181 Wis. 2d at 123. As such, the sentencing court had the authority to amend its sentencing order and address the offender's restitution obligation. Similarly, a sentencing court that fails to follow a statutory directive to require submission of a biological specimen would have the authority upon submission of a proper motion, to amend its sentence to require the specimen. *See Hayes v. State*, 46 Wis. 2d 93, 101-102, 175 N.W.2d 625 (1970) ("There seems to be no question that a court has the power to correct formal or clerical errors or an illegal or a void sentence at anytime."), *overruled on other grounds, State v. Taylor*, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973); *see also State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis. 2d 57, 681 N.W.2d 524.

Once a court issues an order authorizing collection of the biological specimen, authorities may proceed as outlined above through a process of written notification, referral to the district attorney, or a contempt proceeding.

VIII. CONCLUSIONS

In conclusion, I make the following observations about existing law and its implementation.

First, the collection of a biological specimen is best performed at the onset, when an offender is in DOC's custody or under its supervision for an offense that gives rise to the obligation to provide it. At that point, the State's authority to compel the submission of a biological specimen is most effective. For those offenders who are no longer under DOC's custody or control, the State's ability to secure a biological specimen is limited. Offenders may voluntarily comply or be encouraged to comply. Other options include the possibility of a criminal prosecution or the initiation of contempt proceedings for court-ordered offenders – options that do not necessarily directly result in the production of a specimen. These alternatives are resource intensive, imposing additional burdens on DOC, county sheriffs, and district attorneys.

Second, by making the court-ordered and status-based obligations to submit DNA mutually exclusive under current statutes, convicted offenders whom the legislature intended to

require to submit DNA may not be obligated to do so if the court failed to make an appropriate order and the offender did not receive a prison sentence. While I believe that a court may correct its sentencing order to require submission of a specimen, this is a potentially time-consuming and resource-intensive process.

Third, I recognize that no Wisconsin appellate court has had the opportunity to consider many of the issues discussed in this letter, including the ongoing obligation to submit a DNA sample, the opportunity to amend an illegal sentence, and the ability to seek contempt sanctions for the failure to comply with an obligation after an offender has been discharged. If these matters are challenged in a given case, litigation through the circuit court and appellate process will take considerable time and may not comprehensively resolve all of the issues identified above.

For these reasons, I have directed my staff to work with the Legislative Reference Bureau to develop legislation that would do the following:

- Clarify ongoing nature of obligation to submit a biological specimen and ensure that category of "status offenders" overlaps with all instances where a court is statutorily mandated to require a convicted offender to submit a specimen under Wis. Stat. § 973.047.

- Create a non-criminal mechanism to obtain an order from the court that allows law enforcement to compel the submission of a biological sample from individuals no longer in custody.

- Require the submission of a biological sample upon conviction of the misdemeanor offense for failure to submit a biological specimen.

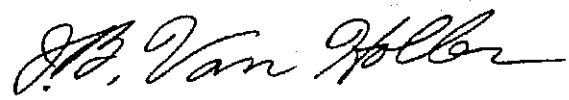
In addition, these proposals would create a mechanism for the State to request an additional sample from a status or court-ordered offender in instances where the State crime laboratories do not presently have a specimen sufficient to generate a profile. This might occur in case where a sample is defective (an no profile could be developed) or where an offender claims (truthfully or untruthfully) that he or she provided the sample, yet one was never received by the State crime laboratories. These proposals would close a loophole in the authority to collect DNA from individuals who are found not guilty by reason of mental defect or disease. These proposals are currently being drafted as a single bill.

While these proposals will not eliminate the need for DOC and sheriffs to expend time and resources tracking down offenders who should have provided or been required to provide biological samples earlier and will not eliminate the need for district attorneys to file necessary legal actions, the adoption of these proposals would enhance and make more efficient the State's

ability to procure biological samples from those whom the statutes currently contemplate should have provided or been required to provide those specimens. As always, adding options in the law will not displace the need for actors in the criminal justice system to exercise their discretion and appropriately allocate resources in a manner that best enhances public safety.

I hope this letter has answered the questions you have posed to us about this subject. Because this letter raises items for legislative consideration, it is being copied to the Governor and members of the Legislature.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBV:RPT:KMS:SPM:DVL:jjn/pss

Attachment

c: Governor James E. Doyle, Jr.
Members, Wisconsin State Legislature
Wisconsin District Attorneys
Wisconsin Sheriffs
Administrator Kevin C. Potter, DOJ-Division of Legal Services
Administrator Gary H. Hamblin, DOJ-Division of Law Enforcement Services
Director Bob Lang, Legislative Fiscal Bureau
State Auditor Janice Mueller, Legislative Audit Bureau

APPENDIX

OFFENDERS REQUIRED TO SUBMIT SPECIMENS FOR DNA ANALYSIS

A. Offenders pursuant to a court order.

1. Felons and certain misdemeanor offenders

Wisconsin Stat. § 973.047(1f) requires sentencing courts to order DNA testing as a condition of sentencing any time it sentences or places a person on probation for felonies. In addition, the obligation also extends to the following misdemeanor violations: fourth degree sexual assault (Wis. Stat. § 940.225(3m)), lewd and lascivious behavior (Wis. Stat. § 944.20), or exposing genitals or public areas to a child (Wis. Stat. § 948.10) to provide a biological specimen.

The following offenders fall within this category:

a. Sentenced or placed on probation.

AND EITHER

b. If the sentencing occurred on or after January 1, 2000, and is for any felony or misdemeanor under Wis. Stat. §§ 940.225(3m), 944.20, and 948.10. (Through 2005 Act 275, the Legislature expanded the requirements in § 973.047 to these misdemeanors, effective June 1, 2006).

OR

c. If the sentencing occurred between on or after August 12, 1993, and before January 1, 2000, for the following offenses: Wis. Stat. § 940.225(1) or (2), 948.02 (1), or (2) or 948.025.

2. Offenders found not guilty by reason of mental disease or defect

Wisconsin Stat. § 971.17(1m)(a) requires offenders to provide a specimen who were found not guilty by reason of mental disease or defect for a violation of §§ 940.225(1) or (2) and 948.02(1) or (2). The finding occurred on or after December 25, 1993. The Legislature subsequently added Wis. Stat. §§ 948.025 and 948.085 to this list.

3. Involuntary commitment for treatment

Wisconsin Stat. § 51.20(13)(cr) requires juvenile offenders involuntarily committed to provide a sample if they were committed for treatment under a court order under § 938.30(5)(c)1. AND is found to have committed a violation of §§ 940.225(1) or (2) or 948.02(1) or (2). The finding occurred on or after December 25, 1993. The Legislature subsequently added Wis. Stat. §§ 948.025 and 948.085 to this list.

4. Juvenile Offender.

a. Pursuant to Wis. Stat. § 938.34(15)(a)1., a shall order a juvenile adjudicated delinquent to provide a specimen on the basis of a violation of §§ 940.225 or 948.02(1) or (2). The finding occurred on or after August 12, 1993. The Legislature subsequently added Wis. Stat. §§ 948.025 and 948.085(2) to this list.

b. Pursuant to Wis. Stat. § 938.34(15)(a)2., a court may order a juvenile adjudicated delinquent to provide a specimen on the basis of any violation under chs. 940, 944 or 948 or §§ 943.01 to 943.15. The adjudication occurred on or after August 12, 1993.

B. Offenders in a custodial or supervisory status as of a certain date.

1. Imprisoned offenders. The following imprisoned offenders must provide DNA samples:

a. Any person in prison on or after January 1, 2000, for any felony conviction. Wis. Stat. § 165.76(1)(ar).

b. Any person in prison on or after August 12, 1993, and before January 1, 2000, for a conviction for any violation of §§ 940.225(1) or (2), 948.02 (1), or (2) or 948.025. Wis. Stat. § 165.76(1)(ag).

2. Offenders on parole, probation, or extended supervision from other states if either

a. The offender is released on parole, ES or placed on probation in another state before January 1, 2000, and is on parole, probation , ES in this state from the other state under Interstate Compact on or after July 9, 1996, for

a violation of the law of the other state that DOC determines is comparable to a violation of §§ 940.225(1) or (2), 948.02(1) or (2), 948.025 and 948.085. Wis. Stat. § 65.76(1)(e).

b. The offender is released on parole, ES or placed on probation in another state on or after January 1, 2000, and is on parole, ES or probation in this state from the other state under Interstate Compact for a violation of the law of the other state that DOC determines would constitute a felony if committed by an adult in this state. Wis. Stat. § 165.76(1)(f).

3. Offenders found not guilty by reason of mental disease must provide a specimen if they meet the following criteria:

a. were committed under §§ 51.20 or 971.17;

b. which occurred on or after August 12, 1993;

c. for a violation of § 940.225(1) or (2), 948.02(1) or (2), 948.025, or 948.085.

See Wis. Stat. § 165.76(1)(b).

4. For an offender who is in institutional care

a. on or after August 12, 1993,

b. for any violation of § 940.225(1) or (2), 948.02(1) or (2), 948.025, or 948.085.

See Wis. Stat. § 165.76(1)(c).

5. Any offender found to be a sexually violent person under Wis. Stat. ch. 980 on or after June 2, 1994. Wis. Stat. §§ 165.76(1)(d) and 980.063.

6. Juvenile offenders. Juvenile offenders must provide a DNA sample if each of the following are present:

a. Adjudicated for an offense under Wis. Stat. §§ 940.225(1) or (2), 948.02(1) or (2), 948.025, or 948.085.

b. Under some form of juvenile supervision including placement in a juvenile correctional facility, secure residential care facility, or on probation, parole, supervision, or aftercare supervision.

c. On or after August 12, 1993.

Wis. Stat. § 165.76; Wis. Jus. 9.04.