

2009 DRAFTING REQUEST

Bill

Received: **02/02/2010**

Received By: **rryan**

Wanted: **As time permits**

Companion to LRB:

For: **Justice**

By/Representing: **Mark Rinehart**

May Contact:

Drafter: **rryan**

Subject: **Justice - criminal**

Addl. Drafters: **rnelson2**

Extra Copies:

Submit via email: **YES**

Requester's email: **rinehartmw@doj.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Submission of DNA samples to DOJ

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?				_____			S&L
/P1	rryan 02/15/2010	nnatzke 02/16/2010	jfrantze 02/16/2010	_____	lparisi 02/16/2010		S&L
/P2	rryan 03/10/2010 rryan 03/11/2010	kfollett 03/11/2010 kfollett 03/11/2010	rschluet 03/11/2010	_____ _____ _____	cduerst 03/11/2010		S&L

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1			rschluet 03/12/2010	_____	sbasford 03/12/2010		S&L
/2	rryan 03/15/2010	kfollett 03/15/2010	rschluet 03/15/2010	_____	lparisi 03/15/2010		S&L
/3	rryan 03/17/2010	kfollett 03/17/2010	rschluet 03/17/2010	_____	sbasford 03/17/2010	cduerst 03/17/2010	

FE Sent For: "/3" @ intra 3/18/10

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Addl. Drafters: RPN

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Submit via email: YES

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3/11/10
3/2/10*

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May Contact:

Addl. Drafters:

Subject: **Justice - criminal**

Extra Copies:

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Requester's email: **rinehartmw@doj.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

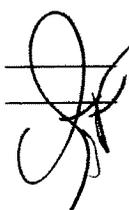
Topic:

Submission of DNA samples to DOJ

Instructions:

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1P2/gf
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1?	rryan	/PI nwn 2/15	2/16	2/16 ph/jc			S&L

FE Sent For:

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Bill Request Form

Legislative Reference Bureau
One East Main Street, Suite 200
Legal Section 266-3561

You may use this form or talk directly with the LRB attorney who will draft the bill.

Date 2/1/10

Legislator, agency, or other person requesting this draft WI. DOJ

Person submitting request (name and phone number) Mark Linehart 264-9463

Persons to contact for questions about this draft (names and phone numbers) Kevin St. John
267-1312

Describe the problem, including any helpful examples. How do you want to solve the problem?

Please see attached ^(DOJ) draft & comments.
Initial ^(LRB) draft should probably be a preliminary draft as
DOJ will likely have additional changes & comments to attached
draft.

Please attach a copy of any correspondence or other material that may help us. If you know of any statute sections that might be affected, list them or provide a marked-up copy.

You may attach a marked-up copy of any LRB draft or provide its number (e.g., 2005 LRB-2345/1 or 2003 AB-67).

Requests are confidential unless stated otherwise. May we tell others that we are working on this for you? YES NO

If yes: Anyone who asks? YES NO
Any legislator? YES NO

Only the following persons _____

Do you consider this request urgent? YES NO If yes, please indicate why Critical issue & little time left

Should we give this request priority over any pending request of this legislator, agency, or person? in 2009 Session
YES NO

165.76 Submission of human biological specimen.

(1) Except as otherwise provided in sub. ~~(3)~~ this section, a person shall comply with the requirements under this section if he or she meets any of the following criteria:

DOJ COMMENT: Change removes provision that arguably makes provisions such as Wis. Stat. § 973.047 (requiring court to order convicted felon to submit DNA) to be mutually exclusive to operation of § 165.76. In cases where court did not specify DNA collection in judgment, changing law eliminates arguments that felon offenders can not be compelled to submit DNA.

✓(a) Is in or was in a juvenile correctional facility, as defined in s. 938.02 (10p), or a secured residential care center for children and youth, as defined in s. 938.02 (15g), or on probation, extended supervision, parole, supervision, or aftercare supervision on or after August 12, 1993, for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

DOJ COMMENT: Proposal adds past tense to clarify original legislative intent that the obligation to provide a sample is ongoing and based on the status of an individual. This change is made throughout § 165.76(1).

✓(ag) Is in or was in prison on or after August 12, 1993, and before January 1, 2000, for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025.

✓(ar) Is in or was in prison on or after January 1, 2000, for a felony committed in this state.

(b) Is found or has been found not guilty or not responsible by reason of mental disease or defect on or after August 12, 1993, and committed under s. 51.20 or 971.17 for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

✓(br) Is found or has been found not guilty or not responsible by reason of mental disease or defect and on or after January 1, 2000 and is or was committed under s. 51.20 or 971.17 for any violation that would constitute a felony or a violation of ss. 940.225(3m), 944.20, 948.10, or 165.765.

✓(c) Is in or was in institutional care on or after August 12, 1993, for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

✓(cr) Is in or was in institutional care on or after January 1, 2000, for any violation that would constitute a felony or a violation of ss. 940.225(3m), 944.20, 948.10, or 165.765.

DOJ COMMENT ON subs. (br) and (cr): In 1993, the legislature's clear design was to include those found not guilty or not responsible by reason of mental disease or defect in the DNA data bank. At that time, only certain sex offenders were required to submit DNA. When the categories of individuals was expanded to include all felons in budget bill passing in fall 1999, this category was not expanded. We believe this was likely an oversight. Proposal corrects apparent oversight. Intent is to capture all individuals who were found NGI on or after January

1, 2000 and subsequently committed or in institutional care after January 1, 2000. Language tracks sub. (b) and sub. (c), however we note that those individuals who are presently committed yet found NGI before January 1, 2000 would not be covered. If they are presently in "institutional care," however, they would be required to submit a DNA sample.

✓ (d) Is found **or has been found** to be a sexually violent person under ch. 980 on or after June 2, 1994.

✓ (e) Is **or was** released on parole or extended supervision or placed on probation in another state before January 1, 2000, and is on parole, extended supervision, or probation in this state from the other state under s. 304.13 (1m), 304.135, or 304.16 on or after July 9, 1996, for a violation of the law of the other state that the department of corrections determines, under s. 304.137 (1), is comparable to a violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

✓ (f) Is **or was** released on parole or extended supervision or placed on probation in another state on or after January 1, 2000, and is on parole, extended supervision, or probation in this state from the other state under s. 304.13 (1m), 304.135, or 304.16 for a violation of the law of the other state that the department of corrections determines, under s. 304.137 (2), would constitute a felony if committed by an adult in this state.

✓ (g) **Is or was found guilty of any felony or a violation of ss. 940.225(3m), 944.20, 948.10, or 165.765 on or after January 1, 2000.**

DOJ COMMENT: Incorporates intent of s. 973.047, which is arguably mutually exclusive in application under current law. This clarifies that an offender's status is conditioned upon a conviction as opposed to a judgment.

(h) Has previously provided a biological specimen under this subsection, s. 51.20 (13) (cr), 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063 and is notified by the department of justice, department of corrections, district attorney, or office of county sheriff that an additional specimen is required. The department of justice, department of corrections, district attorney, or office of county sheriff may make such a notification to any person who is or has been required to submit a biological specimen under this subsection, s. 51.20 (13) (cr), 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063 if the state crime laboratories do not have data from the person's biological specimen necessary to maintain the data bank specified in s. 165.77(3) and that data has not been expunged pursuant to s. 165.77(4).

separate

DOJ Comment: This covers those whose DNA is not on file, even if offender claims sample was submitted. If offender does not claim a sample is submitted, other elements of proposal ensures that the obligation is ongoing. Makes clear that the only reason law enforcement can ask for an additional sample is when state crime lab does not have sample on file.

(2) (a) Except as provided in sub. (3), a person subject to sub. (1) shall provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

(b) Except as provided in sub. (4), the person shall comply with par. (a) at the following applicable time: by providing the specimen at the office of a county sheriff as soon as practicable and without delay. In addition:

time and place

1. The department of corrections may require the person to provide the specimen while he or she is in prison or in the juvenile correctional facility or secured residential care center for children and youth.
2. The department of corrections may require the person to provide the specimen if the person is on parole, extended supervision, or probation in this state.
3. The department of health services may require a person to provide the specimen if the person has been committed to the department of health services under s. 51.20 or 971.17 or found to be a sexually violent person under ch. 980.

just place

to an agency

DOJ COMMENT: This subsection streamlines the current provision and removes ambiguity as to whether a sample must only be submitted when directed by DOC. Like contemplated by current law, the sheriff has primary responsibility for collecting specimens under this proposal. However, when persons are in DOC or DHS facilities, DOC or DHS have taken primary responsibility for collecting the specimens, as contemplated by current law and as is most efficient. The proposal is not intended to change current practice in this area. Specification for primary responsibilities could be coordinated by DOJ rule per sub. (4), if ultimately necessary.

Note: Intent of sub. (2)(b)2. is to be broad enough to cover those on supervision for an act specified in sub. (1) in this state as well as those who were placed on supervision in other states and come to Wisconsin from another state.

~~1. If the person has been placed on probation or supervision, he or she shall provide the specimen under par. (a) at the office of a county sheriff as soon after the placement as practicable, as directed by his or her probation, extended supervision and parole agent or, if a child, the agency providing supervision for the child.~~

~~2. If the person has been sentenced to prison or placed in a juvenile correctional facility or a secured residential care center for children and youth, he or she shall provide the specimen under par. (a) at the office of a county sheriff as soon as practicable after release on parole, extended supervision, or aftercare supervision, as directed by his or her probation, extended supervision, and parole agent or aftercare agent, except that the department of corrections may require the person to provide the specimen while he or she is in prison or in the juvenile correctional facility or secured residential care center for children and youth.~~

~~3. If the person has been committed to the department of health services under s. 51.20 or 971.17 or found to be a sexually violent person under ch. 980, he or she shall provide the specimen under par. (a) as directed by the department of health services.~~

~~3m. If the person is on parole, extended supervision, or probation in this state from another state under s. 304.13 (1m), 304.135, or 304.16, he or she shall provide the specimen under par. (a) at~~

the office of a county sheriff as soon as practicable after entering this state, as directed by his or her probation, extended supervision, and parole agent.

~~4. If subds. 1. to 3m. do not apply, the department of justice shall specify in its order the time and procedure for the person to provide the specimen under par. (a).~~

~~5. Notwithstanding subds. 1. to 3., for persons who are subject to sub. (1) and who are in prison, a juvenile correctional facility, or a secured residential care center for children and youth or on probation, extended supervision, parole, supervision, or aftercare supervision on August 12, 1993, the departments of justice, corrections, and health services shall cooperate to have these persons provide specimens under par. (a) before July 1, 1998.~~

~~6. Notwithstanding subd. 3m., for a person who is subject to sub. (1) (e) and who is on parole, extended supervision or probation in this state from another state on July 9, 1996, the department of justice and the department of corrections shall cooperate to have these persons provide specimens under par. (a) before July 1, 2000.~~

(3) If the county sheriff, department of corrections, or department of health services determines that a person subject to this section is required to has previously submitted a biological specimen under this section or s. 51.20 (13) (cr), 938.34 (15), 971.17 (1m) (a), 973.047 or 980.063 and that the biological specimen or data from the biological specimen is part of the data bank identified in s. 165.77(3), then the person is not required to submit an additional biological sample unless otherwise specified by a rule promulgated under sub. (4).

DOJ COMMENT: Under (3)'s current language, §165.76 arguably creates two mutually exclusive categories of offenders required to provide specimens: (a) those who have status as of a certain date, and (b) those who should have been ordered to provide a specimen. The mutual exclusivity created the potential for non-uniform collection. Under the proposed language, the two categories are no longer mutually exclusive. However, if a person has already submitted a viable biological specimen as required pursuant to a dispositional order, this section allows authorities to decline to collect a sample where DNA is on record and it would be unnecessary to collect an additional sample.

(4) The department of justice shall may promulgate rules establishing procedures and timelines for collecting, processing, and submitting biological specimens pursuant to this section necessary to carry out its duties under this section.

DOJ COMMENT: Current law specifies that DOJ rules relate to "its" duties under this section. The authorities placed in current s. 165.76 go beyond DOJ responsibilities. This revision expands DOJ rulemaking authority to be consistent with its authority under other DNA collection statutes (see, e.g., s. 973.047) while appropriately limiting subject matter to areas necessary for DNA data bank to operate. In addition, language is changed from mandatory to permissive because proposal does not require rulemaking to be fully operational.

(5) The departments of corrections and health services, county departments under ss. 46.215, 46.22 and 46.23 and county sheriffs shall cooperate with the department of justice in obtaining specimens under this section.

(6) Upon an ex parte application of the district attorney showing that a person under sub. (1) has failed to provide a biological specimen, a circuit court shall order the person to provide a biological specimen. The court may issue any additional orders necessary to facilitate the production of a biological specimen, including the detention and reasonable use of force necessary to collect the specimen. Failure to comply with an order under this subsection is punishable as a contempt under ch. 785.

DOJ COMMENT: DOJ drafted this in ch. 165, but recognizes that the drafter may elect to place this within a different chapter relating to courts. That should not alter effect.

(7) The failure of a person to provide a specimen as soon as practicable and without delay, or of any person or agency to collect a specimen, shall in no way alter the obligation of the person to submit such specimen, or the authority of office of a county sheriff, the department of corrections, or the department of health services, or any other person authorized by law to collect the specimen, or the authority of the state crime laboratories to accept, analyze and maintain the specimen or to maintain or upload results of genetic marker grouping analysis information into a State or national database.

DOJ COMMENT: This language is modeled on Illinois's statute, (730 ILCS 5/5-4-3) (from Ch. 38, par. 1005-4-3), which provides:

(1) The failure of a person to provide a specimen, or of any person or agency to collect a specimen, within the 45 day period shall in no way alter the obligation of the person to submit such specimen, or the authority of the Illinois Department of State Police or persons designated by the Department to collect the specimen, or the authority of the Illinois Department of State Police to accept, analyze and maintain the specimen or to maintain or upload results of genetic marker grouping analysis information into a State or national database.

Intention is to make sure that this section authorizes collection of biological specimens from offenders who are no longer under supervision or custody of a state agency but should have submitted one in the past. This accomplishes a similar purpose as s. 165.76(1)(h) above.

165.765 Biological specimen; penalty and immunity.

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

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

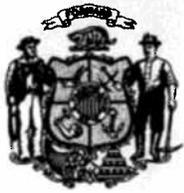
(b) Any employer of the physician, nurse, technologist, assistant or person under par. (a) or any hospital where blood is withdrawn by that physician, nurse, technologist, assistant or person has the same immunity from liability under par. (a).

971.17 (1m) (a) "If the defendant under sub. (1) is found not guilty by reason of mental disease or defect for a violation of ~~s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085~~, **that would constitute a felony or a violation of ss. 940.225(3m), 944.20, 948.10, or 165.765**, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis."

973.047 Deoxyribonucleic acid analysis requirements.

(1f) If a court imposes a sentence or places a person on probation for a felony conviction or for a conviction for a violation of s. 940.225 (3m), 944.20, ~~or~~ 948.10, **or 165.765**, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

***DOJ COMMENT:** A conviction for failure to submit a DNA sample is added this list (and elsewhere in this revision) to provide an additional mechanism to probation agents to collect. Under current law, a person who fails to submit and has been discharged cannot be compelled to submit specimen upon conviction of the offense. This addition appears throughout this proposal, and we intend for it to apply in all cases where DNA-eligible misdemeanors are mentioned.*



State of Wisconsin
2009 - 2010 LEGISLATURE

PI
LRB-4251A
RLR:|:....
nwn

Wanted Tues

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

RMR

SAV
x-ref ✓

Gen.

- 1 AN ACT ...; relating to: submission of biological specimens for deoxyribonucleic
- 2 acid analysis. ✓

have been

Analysis by the Legislative Reference Bureau

Since +

Under current law, certain people are required to submit a deoxyribonucleic acid (DNA) sample to the Department of Justice, and the department is required to analyze the sample and include results of the analysis in a DNA data bank. Beginning in 1993, persons sentenced, or in prison, for certain sexual assaults were required to provide DNA samples. Since 2000, persons sentenced, or in prison, for any felony and several specified misdemeanors have been required to provide DNA samples. In addition, persons committed as sexually violent persons, persons found not guilty by reason of mental disease or defect for certain sexual assaults, and juveniles adjudicated delinquent for certain sexual assaults or, at the discretion of the court, certain other offenses, are required to provide a DNA sample.

A

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Currently, a person who is sentenced to prison generally must provide the DNA sample while in prison. A person, who is sentenced to jail must provide the DNA sample as directed by the sheriff. A person who is placed on probation for a crime committed in this state or who is on probation, parole, or extended supervision for a crime committed in another state must provide the DNA sample at the sheriff's office, as directed by his or her probation, parole, or extended supervision agent. A juvenile placed in a secured correctional facility must generally provide the DNA sample while at the facility. A juvenile on supervision must provide the DNA sample as directed by the agency supervising him or her. A person found not responsible by reason of mental disease or defect or found to be a sexually violent person must provide the DNA sample as directed by the Department of Health Services.

commitment

must provide a sample at the prison or facility if directed by the Department of Corrections to do so

This bill specifies that a requirement to provide a DNA sample does not expire when a person completes serving a sentence or delinquency disposition or is released from commitment. For example, if a person is required to provide a DNA sample because he or she was in prison for a felony on or after January 1, 2000, and the person does not provide the sample before leaving prison, he or she is still required to provide a sample. In addition the bill provides that regardless of whether a person already provided a DNA sample, if the Department of Justice does not have DNA analysis results for the person, the department may require the person to provide another DNA sample.

The bill provides that all persons who are required to provide a DNA sample must do so at the office of the sheriff as as soon as practicable after the requirement applies, except that a person who is in prison or in a correctional facility for juveniles or a person who is probation, parole, or extended supervision, must provide a sample as specified by the Department of Corrections if directed by the Department of Corrections to do so, and a person committed to the Department of Health Services must provide a sample as specified by the the Department of Health Services if directed by the Department of Health Services to do so.

Finally, the bill provides that a person found not guilty by reason of disease or defect on or after January 1, 2000, for a felony or certain specified misdemeanors must provide a DNA sample. In addition a person convicted, found not guilty by reason or mental disease or defect, or placed in institutional care for failure to provide a DNA sample must provide a DNA sample as a result of the conviction, finding, or placement.

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. 165.76 (1) (intro.) of the statutes is amended to read:
2 165.76 (1) (intro.) ~~Except as provided in sub. (3), a~~ A person shall comply with
3 the requirements under this section provide a biological specimen to the state crime
4 laboratories for deoxyribonucleic acid analysis if he or she meets any of the following
5 criteria:

History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

6 SECTION 2. 165.76 (1) (a) of the statutes is amended to read:
7 165.76 (1) (a) Is or was in a juvenile correctional facility, as defined in s. 938.02
8 (10p), or a secured residential care center for children and youth, as defined in s.

on or after January 1, 2000

1 938.02 (15g), or on probation, extended supervision, parole, supervision, or aftercare
2 supervision on or after August 12, 1993, for any violation of s. 940.225 (1) or (2),
3 948.02 (1) or (2), 948.025, or 948.085.✓

4 **History:** 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

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

5 165.76 (1) (ag) Is or was in prison on or after August 12, 1993, and before
6 January 1, 2000, for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), or 948.025.✓

7 **History:** 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

SECTION 4. 165.76 (1) (ar) of the statutes is amended to read:

8 165.76 (1) (ar) Is or was in prison on or after January 1, 2000, for a felony
9 committed in this state.✓

10 **History:** 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

SECTION 5. 165.76 (1) (av) of the statutes is created to read:

11 165.76 (1) (av) Is or was found guilty on or after January 1, 2000, of any felony
12 or any violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.✓

SECTION 6. 165.76 (1) (b) of the statutes is amended to read:

14 165.76 (1) (b) Is Has been found not guilty or not responsible by reason of
15 mental disease or defect on or after August 12, 1993, and committed under s. 51.20
16 or 971.17 for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.✓

17 **History:** 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

SECTION 7. 165.76 (1) (br) of the statutes is created to read:

18 165.76 (1) (br) Has been found not guilty or not responsible by reason of mental
19 disease or defect on or after January 1, 2000, and committed under s. 51.20 or 971.17,
20 for any felony or a violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.✓

SECTION 8. 165.76 (1) (c) of the statutes is amended to read:

22 165.76 (1) (c) Is or was in institutional care on or after August 12, 1993, for any
23 violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.✓

History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

1 SECTION 9. 165.76^h (1) (cr) of the statutes is created to read:

2 165.76 (1) (cr) Is or was in institutional care on or after January 1, 2000, for
3 a felony or any violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.

4 SECTION 10. 165.76 (1) (d) of the statutes is amended to read:

5 165.76 (1) (d) Is Has been found to be a sexually violent person under ch. 980
6 on or after June 2, 1994.

7 History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

8 SECTION 11. 165.76 (1) (e) of the statutes is amended to read:

9 165.76 (1) (e) Is or was released on parole or extended supervision or placed on
10 probation in another state before January 1, 2000, and is or was on parole, extended
11 supervision, or probation in this state from the other state under s. 304.13 (1m),
12 304.135, or 304.16 on or after July 9, 1996, for a violation of the law of the other state
13 that the department of corrections determines, under s. 304.137 (1), is comparable
to a violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

14 History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

15 SECTION 12. 165.76 (1) (f) of the statutes is amended to read:

16 165.76 (1) (f) Is or was released on parole or extended supervision or placed on
17 probation in another state on or after January 1, 2000, and is or was on parole,
18 extended supervision, or probation in this state from the other state under s. 304.13
19 (1m), 304.135, or 304.16 for a violation of the law of the other state that the
20 department of corrections determines, under s. 304.137 (2), would constitute a felony
if committed by an adult in this state.

21 History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

22 SECTION 13. 165.76 (1) (h) of the statutes is created to read:

23 165.76 (1) (h) Is notified by the department of justice, ^{the} department of
24 corrections, a district attorney, or a county sheriff under sub. (1m) that the person
is required to provide a biological specimen.

1 SECTION 14. 165.76 (1m) of the statutes is created to read:

2 165.76 (1m) If a person is required to provide a biological specimen under sub.
3 (1) (a) to (g) and the department of justice does not have the data obtained from
4 analysis of a biological specimen from the person that the department is required to
5 maintain in the data bank under s. 165.77 (3), the department may require the
6 person to provide a biological specimen, regardless of whether the person previously
7 provided a biological specimen under this section or s. 51.20 (13) (cr), 938.34 (15),
8 971.17 (1m) (a), 973.047, or 980.63. The department of justice, or the department of
9 corrections, a district attorney, or a county sheriff, shall notify any person whom the
10 department of justice requires to provide a biological specimen under this subsection.

11 SECTION 15. 165.76 (2) of the statutes is repealed.

12 SECTION 16. 165.76 (2m) of the statutes is created to read:

13 165.76 (2m) (a) Except as provided in par. (b), (c), or (d), or by rule under sub.
14 (4), a person who is required to provide a biological specimen under sub. (1) shall
15 provide the specimen at the office of a county sheriff as soon as practicable after the
16 requirement accrues.

> ****NOTE: I didn't require "without delay" in addition to "as soon as practicable,"
because a person who acts as soon as practicable will always satisfy the requirement to
to act without delay unless he or she is not the cause of the delay.

17 (b) A person in a prison, juvenile correctional facility, or secured residential
18 care center for children and youth, shall provide the biological specimen at the
19 prison, juvenile correctional facility, or secured residential care center for children
20 and youth if required to do so by the department of corrections.

21 (c) A person who is on parole, extended supervision, or probation in this state,
22 shall provide the biological specimen at a time and place specified by the department
23 of corrections if directed to do so by the department of corrections.

INS
note
from
p. 6

pars. (c) and (d)

move to p. 5 after line 20

g
****NOTE: Should par. (c) instead state that the person shall provide the specimen in at a place and time required by DOC if DOC imposes such a requirement, as in par. (d)?

person

1 (d) A who has been committed to the department of health services under s.
2 51.20 971.17 or 980 shall provide the biological specimen at a time and place
3 specified by the department of health services if directed to do so by the department
4 of health services.

****NOTE: Does sub. (2m) accomplish your intent? The drafting instructions for this provision state a general requirement for when and where a person must submit a specimen. The additional qualifications provided in the drafting instructions give DOC and DHS authority but don't modify the person's responsibility.

5 SECTION 17. 165.76 (3) of the statutes is amended to read:

6 165.76 (3) If Notwithstanding sub. (1) and except as provided by rule under
7 sub. (4), if a county sheriff, the department of corrections, or the department of health
8 services determines that a person who is required to submit a biological specimen
9 under sub. (1) or s. 51.20 (13) (cr), 938.34 (15), 971.17 (1m) (a), 973.047, or 980.063,
10 he or she shall comply with that requirement and is not required to comply with this
11 section has submitted a biological specimen and that data obtained from analysis of
12 the person's biological specimen is included in the data bank under s. 165.77 (3), the
13 person is not required to submit a biological specimen under sub. (1).

14 History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

SECTION 18. 165.76 (4) of the statutes is amended to read:

15 165.76 (4) The department of justice shall may promulgate rules necessary to
16 carry out its duties establishing procedures and times for collecting, processing, and
17 submitting biological specimens under this section.

History: 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 77, 440; 1997 a. 35, 283; 1999 a. 9; 2001 a. 96; 2005 a. 277, 344; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97.

****NOTE: Does "submitting" under sub. (4) refer to the act of a person providing his or her own specimen, or does it refer to the act of a collector, such as a sheriff, transferring the specimen to the crime laboratories?

> ****NOTE: The rule-making provisions under ss. 938.34 (15) (b), 973.047 (2), and 980.063 (2) are mandatory rather than permissive. Do you want to keep them mandatory? There are no rule-making provisions under ss. 51.20 (13) (cr) and 971.17 (1m) (a). Do you want to add rule-making requirements or authority in those sections? Alternatively, do you want to centralize the rule-making direction here under 165.76 (4) and either delete

?

the rule-making provisions under ^{SS.} ~~s.~~ 938.34 (15), 973.047, and 980.63, or amend them to simply cross reference 165.76 (4)?

SECTION 19. 165.76 (6) of the statutes is created to read:

165.76 (6) On motion of a district attorney ^{IF} with or without notice to the person, ^{files a motion} and a showing that a person is required to submit a biological specimen under sub. (1) and has not, the circuit court shall order the person to provide a biological specimen. The court may issue any order necessary to facilitate provision of the biological specimen, including detention of the person or the use of reasonable force that is necessary to collect the biological specimen. Intentional failure to comply with an order under this subsection constitutes a contempt of court, punishable under ch. 785.

for an order requiring the person to provide a biological specimen and

****NOTE: I did not include the language proposed as sub. (7) in the drafting instructions, because it does not impose any requirements or prohibitions, or grant any authority, that is not already provided for in the statutes as amended by this draft. The amendments to s. 165.76 (1) and the creation of s. 165.76 (1m) clarify that a person's obligation to provide a biological specimen and the state's authority to collect a specimen, are ongoing. Section 165.77 (3) already requires the crime laboratories to analyze any specimen they receive under s. 165.76 (1) and include the results in the data bank.

SECTION 20. 971.17 (1m) (a) of the statutes is amended to read:

971.17 (1m) (a) If the defendant under sub. (1) is found not guilty by reason of mental disease or defect for a felony or a violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085 165.765 (1), 940.225 (3m), 944.20, or 948.10, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

History: 1975 c. 430; 1977 c. 353; 1977 c. 428 s. 115; 1983 a. 359; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 394; 1989 a. 31, 142, 334, 359; Sup. Ct. Order, 158 Wis. 2d xvii (1990); 1991 a. 39, 189, 269; 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 417, 425, 440, 448; 1997 a. 35, 130, 181, 252, 275; 1999 a. 89; 2001 a. 95, 109; 2003 a. 50; 2005 a. 277, 431; 2007 a. 20 ss. 3875, 9121 (6) (a); 2007 a. 116; 2009 a. 26, 28.

SECTION 21. 973.047 (1f) of the statutes is amended to read:

973.047 (1f) If a court imposes a sentence or places a person on probation for a felony conviction or for a conviction for a violation of s. 165.765 (1), 940.225 (3m),

done so
IF

1 944.20, or 948.10, the court shall require the person to provide a biological specimen
2 to the state crime laboratories for deoxyribonucleic acid analysis. ✓

3 **History:** 1993 a. 16, 98, 227; 1995 a. 440; 1999 a. 9; 2005 a. 275.

(END)

Date: March 1, 2010

To: Robin Ryan
Senior Attorney, Legislative Reference Bureau

From: Kevin St. John
Special Assistant Attorney General for Public Relations and Policy

Subject: LRB-4251/P1, submission of biological specimens for DNA analysis

Thank you very much for so promptly turning around a preliminary draft of a bill to revise certain statutes relating to the submission of biological evidence.

As indicated at Section (VI) of this memo, we are trying to work through some concerns we have about the procedure drafted at what is now Section 19. We will provide you with that language as soon as we are able. In the interim, we would very much appreciate it if you could consider the following comments and instructions.

Please contact DOJ Legislative Liaison Mark Rinehart if you have any questions.

* * * * *

1. Comments on LRB Analysis

We understand that the analysis section is your interpretation of existing law and the bill, but we feel that it would benefit from three additions.

- Could we add to the analysis in paragraph 2 a reference to the existing DOJ Administrative rule? See below for an example:

The Department of Justice's administrative rule promulgated under ss. 165.76(4), 165.77(8), 938.34(15), 9723.047(2), and 980.063(2) directs offenders who have been placed on probation to submit DNA at the office of the county sheriff or as directed by his or her probation and parole agent. The Department's rule also specifies that if an offender has been sentenced to prison, the department of corrections may order the offender to provide the specimen while in prison. If the specimen has not been provided while in prison, the offender shall provide the specimen at the office of a county sheriff or as directed by his or her parole agent.

This corrects no current law in analysis

- In paragraph 3, we believe that the word “clarifies” is preferable to “specifies.” Our legal analysis of existing law concludes that the obligation to submit a sample is ongoing today and legislative history indicating this is a change in the obligation is not our intent. Our intent is to make the statutes clearer on this point. Mark Rinehart has provided you with a copy of the Attorney General’s analysis that further explains our position.

- We believe that the component of the bill allowing for a district attorney to apply for an order to compel the submission of DNA is a significant addition to the options available under current law and respectfully suggest that a description of these proceedings be included in the analysis.

2. Comments on Bill Text and Notes

- ✓(I). We now recommend adding an additional subpart under Wis. Stat. § 165.76(1) [the statuses for which one is required to submit a sample] to include:

Has been ordered by a court to provide a biological specimen under 51.20(13)(cr), 938.34(15), 971.17(1m)(a), 973.047 or 980.63.

COMMENT: This change would be to create a new subsection between (a) – (f) [or Section 14, pg. 5, line 6 would need to be modified accordingly]. The reason for this change is that it makes clear that the opportunity to seek an order compelling the submission of a sample includes a prior order as a prerequisite. Although the other changes theoretically will encompass all of these individuals, if current law is subsequently interpreted in an adverse fashion, the state would lose its opportunity to efficiently compel submission from certain individuals absent this addition.

- ✓(II). Note at pg. 5, b/n line 19-20 – we agree.

- ✓(III). Remaining portions of Section 16, beginning at page 5 line 15 and ending at page 6 line 7 and notes – we have concerns.

COMMENT. The attempt of the draft language we provided was to make it absolutely clear that the obligation to submit DNA to the office of county sheriff continues to exist, regardless of whether DOC or any other agency required it while the offender was in custody. This is clear under current law in the DOJ Admin Rule, and we believe that is the case under statute as well, as discussed in the Attorney General's letter on the matter. Our design was to clearly state the manner of fulfilling the obligation in our proposed 165.76(2)(b) [by providing specimen to county sheriff as soon as practicable] and then the subparts provided authorities to DOC and DHS to require the sample be provided – authorities they have under current law though we recommended slightly broader language to increase flexibility. The structure was intended to be: (1) offender has obligation; (2) they must comply with that obligation by going to the county sheriff; (3) DOC (or DHS) can direct them to give a sample. All we were trying to do is find a way to simply codify the rules in Wis. Admin. JUS § 9.04(2) in statute.

We do not object to placing the requirement currently in (2)(a) in (1)(a) as LRB—4251/P1 does. However, we fear that LRB—4251/P1 could be interpreted to effect a change in the opposite direction – offenders in prison who have an obligation to submit must do so *only if* DOC requires it.

Since our purpose is merely to clarify current obligations, maybe the best approach is to scrap what has been drafted (by us and in the LRB--4251/P1) and codify the rule in statute (some amendments to that rule are included for consistency):

165.76(2m) Unless otherwise specified by rule under sub. (4), a person who is required to provide a biological specimen under sub.(1) shall do so as soon as practicable as specified in this subsection as follows:

(a) If the offender has been placed on probation, or if the offender is on parole or probation in this state from another state and the department of corrections directs the probationer or parolee to provide a biological

specimen, as soon after the placement as practicable, he or she shall provide the specimen at the office of a county sheriff or as directed by his or her probation and parole agent.

(b) If the offender has been placed on supervision as a juvenile, he or she shall provide the biological specimen, as soon after the placement as practicable, at the office of county sheriff or as directed by the agency providing supervision for the juvenile.

(c) If the offender has been sentenced to prison, he or she shall provide the specimen while in prison as directed by the department of corrections. If the specimen has not been provided while in prison, the offender shall provide the biological specimen, as soon as practicable, after release at the office of a county sheriff or as directed by his or her parole agent.

(d) If the offender has been placed in a secured correctional facility as a juvenile, he or she shall provide the biological specimen while in the secured correctional facility as directed by the department of corrections. If the biological specimen has not been provided in the secured correctional facility, the offender shall provide the biological specimen, as soon as practicable after release, at the office of a county sheriff or as directed by the agency providing supervision.

(e) If the offender has been sentenced to a county jail or county house of corrections, the offender shall provide the biological specimen, as soon as practicable after sentencing, as directed by the office of a county sheriff. If the biological specimen has not been provided while in the county jail or county house of corrections, the offender shall provide the biological specimen as soon as practicable after release, at the office of county sheriff.

(f) If the offender has been committed to the department of health services under s. 51.20 or 971.17, Stats., or found to be a sexually violent person under ch. 980, Stats., he or she shall provide the biological specimen as directed by the department of health services.

(g) If subs. (a) to (f) do not apply, the offender shall provide the biological specimen, as soon as practicable after the obligation accrues, at the office of county sheriff, or as directed by the agent or agency providing supervision or having legal or physical custody of the offender.

(IV). Section 17, pg. 6, ln. 6-16. If the change is made as indicated in comment (I), the references to the court-ordered provisions can be deleted as they are incorporated by reference. Also, the meaning would be plainer if in line 16 everything after "submit" was stricken and in its place was added "another biological specimen."

(V). Section 18 and notes.

Comment: On the second note, we do not wish to change DOJ's existing rule-making authority in other sections. We agree that consolidation is preferable, but we are concerned that proposing consolidation might create a problem if the bill is amended. We do not need those other authorities to be amended to be discretionary. Our interest in permissive rulemaking in 165.76 is that we believe this revision covers the process from beginning to end, and that rulemaking is not necessary, but a need to promulgate rules may become apparent in the future.

On the first note, we appreciate your point. The act of the person seems to be "providing" DNA to DOC or sheriffs; the act of the agencies is "collecting" or "receiving" from those person and sending them to DOJ

•• (“transporting?” “submitting”). What we are looking to do is ensure that DOJ has broad authority to cover all of those facets. Could you amend what is there so it reads:

The department of justice may promulgate rules to implement this section.

✓ (VI). **Section 19, pg. 7, ln. 1-10.** As noted in the introduction, we have developed concerns about our proposal from a constitutional (due process) and policy perspective. We are currently working on drafting a replacement that would contain additional specifications relating to procedures. We will provide you with this as soon as it is finished.

VII). **Note following Section 19, between lines 10-11 on page 7.**

✓ **Comment:** We appreciate your point and we agree with your analysis. However, we still believe that to the degree there is *any* ambiguity, it would be beneficial to add this concept after the new 165.76(2m) as follows:

165.76(2r) The failure of a person to provide a specimen as soon as practicable shall in no way alter the obligation of the person to provide such specimen.

Thank you.

CORRESPONDENCE/MEMORANDUM

DEPARTMENT OF JUSTICE

Date: March 8, 2010

To: Robin Ryan
Senior Attorney, Legislative Reference Bureau

From: Kevin St. John
Special Assistant Attorney General for Public Relations and Policy

Subject: LRB-4251/P1, submission of biological specimens for DNA analysis

After further consideration of due process and related concerns of Section 19 of LRB—4251/P1 (pg. 7, lines 1-10), we would like to delete those provisions and substitute with the proposal that follows. Additional comments and instructions follow the proposal and the form of the order contemplated.

* * * * *

[a] Special Proceeding to Compel Submission of DNA. If a person required to provide a biological specimen under s. 165.76 fails or refuses to provide a specimen, a district attorney may bring a special proceeding in the name of the state to compel the person to produce a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis. The special proceeding shall be commenced by filing an application, supported by one or more affidavits, as provided in sub. [b].

[b] Application for Order To Submit or Show Cause. An application under sub. [a] shall establish reasonable cause to believe that the respondent against whom the order is sought is required to submit a biological specimen under s. 165.76, and that the state crime laboratories' deoxyribonucleic acid data base does not include data relating to the respondent. An application under sub. [a] must also establish the circumstances under which the respondent's requirement to submit a biological specimen arose.

[c] Issuance of Order To Submit or Show Cause. If the application meets the requirements of sub. [b], the court shall issue an order commanding the respondent to either appear in court on a specified date to show cause why he or she is not obligated to provide a biological specimen or, by the specified date, to provide a biological specimen at the office of county sheriff. The specified date shall be no less than 10 days and no more than 45 days from the date the order is entered. The order, together with a copy of the application and any supporting material, shall be personally served upon the respondent in the manner provided under ch. 801 for service in civil actions in circuit court, or by a law enforcement officer. The order shall be substantially in the form specified below:

[form of order is below] 7

[d] Hearing. At the hearing to show cause scheduled pursuant to the sub. [c], the respondent bears the burden of rebutting the matters established in the district attorney's application by demonstrating that he or she is not required to submit biological specimen pursuant to [s. 165.76].

[e] Issuance of Order To Compel. If the court determines, after a hearing specified in sub. [d], that the respondent is legally obligated to submit a sample pursuant to s. 165.76, the court shall issue an order which facilitates provision of the biological specimen, including, in the court's discretion, authorization to detain or use reasonable force against the respondent to collect the biological specimen.

[f] Venue. (1) If the requirement to provide a biological sample arises from a court order, a district attorney may commence a special proceeding under subsection [a] in the county where the original order was issued, or in the county where the person resides.

(2) If the requirement to provide a biological sample exists pursuant to s. 165.76, 938.34 (15), 973.047 or 980.063, a district attorney may commence a special proceeding under subsection [a] in the county where any related proceedings were held, or in the county where the person resides.

Ryan, Robin

From: St. John, Kevin M. [stjohnkm@doj.state.wi.us]
Sent: Tuesday, March 09, 2010 5:34 PM
To: Ryan, Robin; Rinehart, Mark W - DOJ
Subject: RE: DNA collection

Robin:

To your question – yes and no. The DA should be able to get the initial order to show cause or produce without demonstrating that a person failed to supply the sample but merely by showing that the crime lab doesn't have one and that they were obligated to submit one. Certainly that's a prima facie showing they didn't comply, and there really isn't any other evidence available to a DA to establish this fact in an initial application.

Now if the person at the hearing presents evidence they've complied with their statutory obligation by previously submitting a sample, that's a situation where we contemplate an offender might be able to rebut the presumption that there is an obligation under 165.76. Note, however, that the other portions of our proposal (Bill draft Section 14) would impose a new obligation on an individual to submit another sample even if they submitted one previously if they are provided notice that the state doesn't have a sample. Thus, one has an obligation to submit a sample under the proposed 165.76 even if they have tried to do so in the past (or claim they have tried in the past) but it was lost, corrupted, etc – so long as the state makes the proper notification. A defense of "I submitted a sample" doesn't work if another obligation to submit is triggered.

The bottom line is that I think the text and structure work as its written. Having said that, I am not sure the draft we sent is clear that we'd like Section 14 of draft (notice to offender that state doesn't have a sample and requiring them to provide a sample) to be enforceable through this special proceeding. We do want this.

Let me know if this doesn't clarify things.

Kevin

From: Ryan, Robin [mailto:Robin.Ryan@legis.wisconsin.gov]
Sent: Tuesday, March 09, 2010 4:16 PM
To: Rinehart, Mark W.; St. John, Kevin M.
Subject: DNA collection

Kevin and Mark,

This question relates to the memo from March 8th. Should a DA be able to get an order compelling person to provide a DNA sample if the person has already provided a sample but it didn't end up in the DOJ databank? Paragraph (a) in the memo suggests that the special proceeding applies only if the person fails or refuses to provide a sample. But the requirements for the content of the petition require that the DA show only that DOJ does not have a sample. The DA is not required to show that the person did not provide a sample.

Thanks

Robin
261-6927

03/10/2010



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-4251/P1

RLR:nwn:jf

P2

Wanted Thurs NOON

↓
EJF

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-N
RMIR

Regen. Cat.

1 AN ACT *to repeal* 165.76 (2); *to amend* 165.76 (1) (intro.), 165.76 (1) (a), 165.76
2 (1) (ag), 165.76 (1) (ar), 165.76 (1) (b), 165.76 (1) (c), 165.76 (1) (d), 165.76 (1) (e),
3 165.76 (1) (f), 165.76 (3), 165.76 (4), 971.17 (1m) (a) and 973.047 (1f); and *to*
4 *create* 165.76 (1) (av), 165.76 (1) (br), 165.76 (1) (cr), 165.76 (1) (g), 165.76 (1m),
5 165.76 (2m) and 165.76 (6) of the statutes; **relating to:** submission of biological
6 specimens for deoxyribonucleic acid analysis.

Analysis by the Legislative Reference Bureau

Under current law, certain people are required to submit a deoxyribonucleic acid (DNA) sample to the Department of Justice, and the department is required to analyze the sample and include results of the analysis in a DNA data bank. Since 1993, persons sentenced, or in prison, for certain sexual assaults have been required to provide DNA samples. Since 2000, persons sentenced, or in prison, for any felony and several specified misdemeanors have been required to provide DNA samples. In addition, persons committed as sexually violent persons, persons found not guilty by reason of mental disease or defect for certain sexual assaults, and juveniles adjudicated delinquent for certain sexual assaults or, at the discretion of the court, certain other offenses, are required to provide a DNA sample.

Currently, a person who is sentenced to prison generally must provide the DNA sample while in prison. A person who is sentenced to jail must provide the DNA sample as directed by the sheriff. A person who is placed on probation for a crime

(DOJ)

provide

DOJ

INS AA

INS A

committed in this state or who is on probation, parole, or extended supervision for a crime committed in another state must provide the DNA sample at the sheriff's office, as directed by his or her probation, parole, or extended supervision agent. A juvenile placed in a secured correctional facility must generally provide the DNA sample while at the facility. A juvenile on supervision must provide the DNA sample as directed by the agency supervising him or her. A person found not responsible by reason of mental disease or defect or found to be a sexually violent person must provide the DNA sample as directed by the Department of Health Services.

probation,
DNA

This bill specifies that a requirement to provide a DNA sample does not expire when a person completes serving a sentence, or delinquency disposition or is released from commitment. For example, if a person is required to provide a DNA sample because he or she was in prison for a felony on or after January 1, 2000, and the person does not provide the sample before leaving prison, he or she is still required to provide a sample. In addition, the bill provides that regardless of whether a person already provided a DNA sample, if the Department of Justice does not have DNA analysis results for the person, the department may require the person to provide another DNA sample.

DOJ

The bill provides that all persons who are required to provide a DNA sample must do so at the office of the sheriff as soon as practicable after the requirement applies, except that a person who is in prison or in a correctional facility for juveniles must provide a sample at the prison or facility if directed by the Department of Corrections to do so, a person who is on probation, parole, or extended supervision, must provide a sample as specified by the Department of Corrections if directed by the Department of Corrections to do so, and a person committed to the Department of Health Services must provide a sample as specified by the Department of Health Services if directed by the Department of Health Services to do so.

mental

Finally, the bill provides that a person found not guilty by reason of disease or defect on or after January 1, 2000, for a felony or certain specified misdemeanors must provide a DNA sample. In addition a person convicted, found not guilty by reason or mental disease or defect, or placed in institutional care on or after January 1, 2000 for failure to provide a DNA sample must provide a DNA sample as a result of the conviction, finding, or placement.

FNS B

case in institutional care

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. 165.76 (1) (intro.) of the statutes is amended to read:
- 2 165.76 (1) (intro.) ~~Except as provided in sub. (3), a~~ A person shall comply with
- 3 ~~the requirements under this section provide a biological specimen to the state crime~~

1 laboratories for deoxyribonucleic acid analysis if he or she meets any of the following
2 criteria:

3 **SECTION 2.** 165.76 (1) (a) of the statutes is amended to read:

4 165.76 (1) (a) Is or was in a juvenile correctional facility, as defined in s. 938.02
5 (10p), or a secured residential care center for children and youth, as defined in s.
6 938.02 (15g), or on probation, extended supervision, parole, supervision, or aftercare
7 supervision on or after August 12, 1993, for any violation of s. 940.225 (1) or (2),
8 948.02 (1) or (2), 948.025, or 948.085.

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

10 165.76 (1) (ag) Is or was in prison on or after August 12, 1993, and before
11 January 1, 2000, for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), or 948.025.

12 **SECTION 4.** 165.76 (1) (ar) of the statutes is amended to read:

13 165.76 (1) (ar) Is or was in prison on or after January 1, 2000, for a felony
14 committed in this state.

15 **SECTION 5.** 165.76 (1) (av) of the statutes is created to read:

16 165.76 (1) (av) Is or was found guilty on or after January 1, 2000, of any felony
17 or any violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.

18 **SECTION 6.** 165.76 (1) (b) of the statutes is amended to read:

19 165.76 (1) (b) Is Has been found not guilty or not responsible by reason of
20 mental disease or defect on or after August 12, 1993, and committed under s. 51.20
21 or 971.17 for any violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

22 **SECTION 7.** 165.76 (1) (br) of the statutes is created to read:

23 165.76 (1) (br) Has been found not guilty or not responsible by reason of mental
24 disease or defect on or after January 1, 2000, and committed under s. 51.20 or 971.17,
25 for any felony or a violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.

1 SECTION 8. 165.76 (1) (c) of the statutes is amended to read:

2 165.76 (1) (c) Is or was in institutional care on or after August 12, 1993, for any
3 violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

4 SECTION 9. 165.76 (1) (cr) of the statutes is created to read:

5 165.76 (1) (cr) Is or was in institutional care on or after January 1, 2000, for
6 a felony or any violation of s. 165.765 (1), 940.225 (3m), 944.20, or 948.10.

7 SECTION 10. 165.76 (1) (d) of the statutes is amended to read:

8 165.76 (1) (d) Is Has been found to be a sexually violent person under ch. 980
9 on or after June 2, 1994.

10 SECTION 11. 165.76 (1) (e) of the statutes is amended to read:

11 165.76 (1) (e) Is or was released on parole or extended supervision or placed on
12 probation in another state before January 1, 2000, and is or was on parole, extended
13 supervision, or probation in this state from the other state under s. 304.13 (1m),
14 304.135, or 304.16 on or after July 9, 1996, for a violation of the law of the other state
15 that the department of corrections determines, under s. 304.137 (1), is comparable
16 to a violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, or 948.085.

17 SECTION 12. 165.76 (1) (f) of the statutes is amended to read:

18 165.76 (1) (f) Is or was released on parole or extended supervision or placed on
19 probation in another state on or after January 1, 2000, and is or was on parole,
20 extended supervision, or probation in this state from the other state under s. 304.13
21 (1m), 304.135, or 304.16 for a violation of the law of the other state that the
22 department of corrections determines, under s. 304.137 (2), would constitute a felony
if committed by an adult in this state.

23 SECTION 13. 165.76 (1) (g) of the statutes is created to read:

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24

✓
(h)

1 165.76 (1) ^(h) ~~(g)~~ Is notified by the department of justice, the department of
2 corrections, a district attorney, or a county sheriff under sub. (1m) that the person
3 is required to provide a biological specimen.

4 SECTION 14. 165.76 (1m) of the statutes is created to read:

5 165.76 (1m) If a person is required to provide a biological specimen under sub.
6 ^(g) (1) (a) to ~~(f)~~ and the department of justice does not have the data obtained from
7 analysis of a biological specimen from the person that the department is required to
8 maintain in the data bank under s. 165.77 (3), the department may require the
9 person to provide a biological specimen, regardless of whether the person previously
10 provided a biological specimen under this section or s. 51.20 (13) (cr), 938.34 (15),
11 971.17 (1m) (a), 973.047, or 980.63. The department of justice, the department of
12 corrections, a district attorney, or a county sheriff, shall notify any person whom the
13 department justice requires to provide a biological specimen under this subsection.

14 SECTION 15. 165.76 (2) of the statutes is repealed.

15 SECTION 16. 165.76 (2m) of the statutes is created to read:

16 165.76 (2m) (a) Except as provided in par. (b), (c), or (d), or by rule under sub.
17 (4), a person who is required to provide a biological specimen under sub. (1) shall
18 provide the specimen at the office of a county sheriff as soon as practicable after the
19 requirement accrues.

****NOTE: I didn't require "without delay" in addition to "as soon as practicable,"
because a person who acts as soon as practicable will always satisfy the requirement to
to act without delay unless he or she is not the cause of the delay.

20 (b) A person in a prison, juvenile correctional facility, or secured residential
21 care center for children and youth, shall provide the biological specimen at the
22 prison, juvenile correctional facility, or secured residential care center for children
23 and youth if required to do so by the department of corrections.

INS
5-14

****NOTE: Should par. (b) instead state that the person shall provide the specimen at a place and time required by DOC if DOC imposes such a requirement, as in pars. (c) and (d)?

1 (c) A person who is on parole, extended supervision, or probation in this state,
2 shall provide the biological specimen at a time and place specified by the department
3 of corrections if directed to do so by the department of corrections.

4 (d) A person who has been committed to the department of health services
5 under s. 51.20 or 971.17 or ch. 980 shall provide the biological specimen at a time and
6 place specified by the department of health services if directed to do so by the
7 department of health services.

****NOTE: Does sub. (2m) accomplish your intent? The drafting instructions for this provision state a general requirement for when and where a person must submit a specimen. The additional qualifications provided in the drafting instructions give DOC and DHS authority but don't modify the person's responsibility.

8 SECTION 17. 165.76 (3) of the statutes is amended to read:

9 165.76 (3) If Notwithstanding sub. (1) and except as provided by rule under
10 sub. (4) if a county sheriff, the department of corrections, or the department of health
11 services determines that a person who is required to submit a biological specimen
12 under sub. (1) or s. 51.20 (13) (cr), 988.34 (15), 971.17 (1m) (a), 973.047, or 980.062,
13 he or she shall comply with that requirement and is not required to comply with this
14 section) has submitted a biological specimen and that data obtained from analysis of
15 the person's biological specimen is included in the data bank under s. 165.77 (3), the
16 person is not required to submit a biological specimen under sub. (1).

17 SECTION 18. 165.76 (4) of the statutes is amended to read:

18 165.76 (4) The department of justice shall may promulgate rules necessary to
19 carry out its duties establishing procedures and times for collecting, processing, and
20 submitting biological specimens under this section.

to implement

INS 6-20 →

sub. (1)
another

****NOTE: Does "submitting" under sub. (4) refer to the act of a person providing his or her own specimen, or does it refer to the act of a collector, such as a sheriff, transferring the specimen to the crime laboratories?

****NOTE: The rule-making provisions under ss. ~~938.34~~ (15) (b), 973.047 (2), and 980.063 (2) are mandatory rather than permissive. Do you want to keep them mandatory? There are no rule-making provisions under ss. 51.20 (13) (cr) and 971.17 (1m) (a). Do you want to add rule-making requirements or authority in those sections? Alternatively, do you want to centralize the rule-making direction here under 165.76 (4) and either delete the rule-making provisions under ss. ~~938.34~~ (15), 973.047, and 980.63, or amend them to simply cross reference 165.76 (4)?

1 **SECTION 19.** 165.76 (6) of the statutes is created to read:

2 165.76 (6) If a district attorney files a motion, with or without notice to the
3 person, for an order requiring the person to provide a biological specimen and makes
4 a showing that a person is required to submit a biological specimen under sub. (1)
5 and has not done so, the circuit court shall order the person to provide a biological
6 specimen. The court may issue any order necessary to facilitate provision of the
7 biological specimen, including detention of the person or the use of reasonable force
8 that is necessary to collect the biological specimen. Intentional failure to comply with
9 an order under this subsection constitutes a contempt of court, punishable under ch.
10 785.

****NOTE: I did not include the language proposed as sub. (7) in the drafting instructions, because it does not impose any requirements or prohibitions, or grant any authority, that is not already provided for in the statutes as amended by this draft. The amendments to s. 165.76 (1) and the creation of s. 165.76 (1m) clarify that a person's obligation to provide a biological specimen and the state's authority to collect a specimen, are ongoing. Section 165.77 (3) already requires the crime laboratories to analyze any specimen they receive under s. 165.76 (1) and include the results in the data bank.

11 **SECTION 20.** 971.17 (1m) (a) of the statutes is amended to read:

12 971.17 (1m) (a) If the defendant under sub. (1) is found not guilty by reason of
13 mental disease or defect for a felony or a violation of s. 940.225 (1) or (2), 948.02 (1)
14 or (2), 948.025, or 948.085 165.765 (1), 940.225 (3m), 944.20, or 948.10, the court shall
15 require the person to provide a biological specimen to the state crime laboratories for
16 deoxyribonucleic acid analysis.

1

2

Ins AA:

~~f~~ ~~not~~ A person who intentionally fails to comply with a requirement to provide a DNA sample is guilty of a misdemeanor.

3

4

Ins A:

~~f~~ ~~x~~ ~~x~~ Current statutes specify when and where each category of people required to provide a DNA sample must provide the DNA sample. Administrative rules also specify when and where people must provide DNA samples, although the rule requirements are somewhat different than the statutory requirements for certain categories. For example, under both the statute and the rule a person sentenced to prison must provide a DNA sample while in prison if directed to do so by ~~DOJ~~ ^{the Department of Corrections}. If the person does not provide the DNA sample while in prison, under the statute the person must provide the sample at the sheriff's office as ~~as~~ soon as practicable after release as directed by a probation and parole agent; and under the rule the person must provide the sample at the sheriff's office or as directed by his parole or extended supervision agent. Under the statutes, a person placed on probation must provide the DNA sample at the office of a county sheriff as soon after placement as practicable, as directed by his or her probation agent. Under the rule, a person placed on probation must provide the DNA sample at the office of a county sheriff as soon after the placement as practicable, or as directed by his or her probation agent.

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Ins B:

~~x~~ ~~x~~ ~~x~~ The bill 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. Under the bill, if the district attorney demonstrates reasonable cause to believe that a person is required to provide a DNA sample and that DOJ does not have DNA analysis results from the person, and further establishes the circumstances under which the requirement for the person to provide a DNA sample arose, the court must order the person to appear for a hearing to show cause why he or she is not required to provide a DNA ^{sample} or to provide a DNA sample before the hearing date. If the person does not provide a DNA sample before the hearing and, at the hearing, the person does not disprove the district attorney's claim that the person is required to provide a DNA sample, the court must issue an order to facilitate collection of a DNA sample from the person, which may include detention of the person or use of reasonable force.

Supervising use 4 times

The bill provides that people who are required to provide a DNA sample must provide it as follows: 1. A person sentenced to prison or a juvenile correction facility must provide the DNA sample while in prison or the facility, as directed by DOC; and if the person does not provide the DNA sample while in prison or the facility, then as soon as practicable after release, at a sheriff's office or as directed by the person's supervising agent. 2. A person placed on probation by a court in this state must provide the DNA sample as soon as practicable after placement, at the sheriff's office or as directed by the person's supervising agent. 3. A person placed on parole or probation in this state from another state, if directed by DOC to provide a DNA sample, must provide the DNA sample, as soon as practicable after release, at the office of the county sheriff or as directed by the person's supervising agent. 4. A juvenile placed on supervision shall provide the DNA sample as soon as practicable after placement, at the sheriff's office or as directed by the agency providing supervision. 5. A person sentenced to jail or a county house of corrections must provide the DNA sample as directed by the sheriff as soon as practicable after sentencing; and if the person does not provide the biological specimen while in jail or the house of corrections, as soon as practicable after release at a sheriff's office. 6. A person committed to the Department of Health Services, must provide the DNA sample as directed by the Department of Health Services. 7. If none of the above applies, the person must provide the DNA sample as soon as practicable after the obligation to provide a DNA sample arise, at the sheriff's office or as directed by the agency providing supervision or having custody of the person.

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DHS

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(DH)

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2 **Ins 4-23:**

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

4 165.76 (1) (g) Has been required by a court under s. 51.20 (13) (cr), 938.34

5 (15m), or 971.17 (1m) (a), 973.047, or 980.063 to provide a biological specimen to the

6 state crime laboratories for deoxyribonucleic acid analysis.

7

8

9 **Ins 5-14:**

10 **SECTION 2.** 165.76 (2m) of the statutes is created to read:

✓

1 165.76 (2m) Unless otherwise provided by rule under sub. (4), a person who is
2 required to provide a biological specimen under sub. (1) shall provide the biological
3 specimen at the following time and place:

4 (a) If the person has been ~~on placed~~ [✓] probation by a court in this state, as soon
5 as practicable after placement, at the office of a county sheriff or as directed by the
6 person's probation, extended supervision, and parole agent.

7 (b) If the person has been on probation, parole, [✓] or extended supervision in this
8 state from another state and the department of corrections directs the person to
9 provide a biological specimen, as soon as practicable after placement, at the office of
10 a county sheriff or as directed by the person's probation, extended supervision, and
11 parole agent.

12 (c) If the person has been placed on supervision as a juvenile, [✓] as soon as
13 practicable after placement, at the office of a county sheriff or as directed by the
14 agency providing supervision.

15 (d) If the person has been sentenced to prison, while in prison as directed by
16 the department of corrections; and if the person does not provide the biological
17 sample while in prison, then as soon as practicable after release from the prison, at
18 the office of a county sheriff or as directed by his or her probation, parole, and
19 extended supervision agent.

20 (e) If the person has been placed in a juvenile correctional facility, while in the
21 juvenile correctional facility as directed by the department of corrections; and if the
22 juvenile does not provide the biological specimen while in the juvenile correctional
23 facility, then as soon as practicable after release from the juvenile correction^a facility,
24 at the office of a county sheriff or as directed by the agency providing supervision.

1 (f) If the person has been sentenced to a county jail or county house of
 2 corrections, as directed by the office of the county sheriff ^{as} soon as practicable after
 3 sentencing; and if the person does not provide the biological specimen while ⁱⁿ the
 4 county jail ^{or} county house of corrections, as soon after release from the county jail
 5 or county house of correction ^{as} practicable, at the office of a county sheriff.

6 (g) If the person has been committed to the department of health services under
 7 s. 51.20[✓] or 971.17[✓] or found to be a sexually violent person under ch. 980, as directed
 8 by the department of health services.

9 (h) If pars. (a) to (g) do not apply, as soon as practicable after the obligation to
 10 provide a biological specimen accrues, at the office of a county sheriff or as directed
 11 by the agent or agency providing supervision or having legal or physical custody of
 12 the person.

13 **SECTION 3.** 165.76 (2r) of the statutes is created to read:

14 165.76 (2r) Failure by a person who is required to provide a biological specimen
 15 under sub. (1) to provide the biological specimen in the manner and time provided ^{at the}
 16 under sub. (2m) does not relieve the person of the obligation to provide a biological ^{and}
 17 specimen to the state crime laboratories for deoxyribonucleic acid analysis. ^{place}

18
 19 **Ins 6-20:**

20 **SECTION 4.** 165.76 (6) of the statutes is created to read:

21 165.76 (6) (a) If a person who is required to provide a biological specimen under
 22 sub. (1) refuses or fails to provide a biological specimen, a district attorney may file
 23 a petition with the circuit court for an order compelling the person to provide a
 24 biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
 25 A petition under this paragraph shall establish reasonable cause to believe that the

1 the person is required to provide a biological specimen under sub. (1) and that the
2 person's biological specimen is not included in the databank under s. 165.77 (3), and
3 shall establish the circumstances under which the requirement to provide the
4 biological specimen arose.

5 (b) If the court determines that a district attorney's petition satisfies the
6 conditions under par. (a), the court shall issue an order requiring the person to
7 appear in court at a specified time for a hearing to show cause why he or she is not
8 required to provide a biological specimen under sub. (1) or to provide a biological
9 specimen at the office of the county sheriff before the time for which the hearing is
10 scheduled. The hearing shall be schedule^d for not less than 10 and not more than 45
11 days after the date the court enters the order. The order, together with a copy of the
12 petition and any supporting material, shall be personally served upon the person in
13 the manner provided for serving a summons under s. 801.11.

14 (c) At a hearing on a petition under par. (a), the person has the burden of
15 rebutting the matters established in the petition by demonstrating that he or she is
16 not required to submit a biological specimen under sub. (1).

17 (d) If the court determine^s after the hearing under par. (c) that the person is
18 required to submit a biological specimen under sub. (1) and that the person's
19 specimen is not included in the databank^s under s. 165.77 (3), the court shall issue an order
20 to facilitate collection of a biological specimen from the person, which may authorize
21 detention of the person or use of reasonable force against the person to collect the
22 biological specimen.

23 **SECTION 5.** 801.50 (5v) of the statutes is created to read:

24 801.50 (5v) Venue of an action under s. 165.76 (6) shall be in any of the following
25 counties:

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- (a) The county where the respondent resides.
- (b) The county in which a court order requiring the respondent to submit a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis was entered.
- (c) The county in which any court proceeding was held that resulted in a requirement that the respondent submit a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

D-Note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4251/P2dn

RLR:...

Date

X 1. In proposed s. 165.76 (1) (g), the draft refers to persons who are "required" rather than "ordered" to provide a biological specimen under s. 51.20 (13) (cr), 938.34 (15m), 971.17 (1m) (a), 973.047, or 980.063 because those sections use the term "require."

X 2. All of the provisions under proposed s. 165.76 (2m) that direct a person to provide a specimen at the office of the county sheriff or as directed by the agency that has supervision could be read to allow the person to make the choice as to which method to follow. Do you instead want to say that the person shall provide a specimen at the office of the county sheriff, except, if the supervising agency directs the person to provide the sample at a different place or to a different person, the person shall provide the sample as directed?

3. 4. Did you intentionally omit reference to juveniles placed in a secured residential care center for children and youth under proposed s. 165.76 (2m) (e)? Are such juveniles covered under proposed s. 165.76 (2m) (c)?

4. 5. The drafting instructions for proposed s. 165.76 (6) state that the order shall be personally served upon the respondent in the manner provided under ch. 801. Do you mean to allow service in any manner provided under s. 801.11 (1) or (2) or only personal service as provided under 801.11 (1) (a) or (2).

5. 6. I did not include a form for an order under proposed s. 165.76 (6). If you have language you would like to use, please provide it.

6. 7. I did not change "specify" to "clarify" in the analysis. The analysis briefly describes current law requirement to provide a DNA sample. Readers may draw their own conclusions as to whether the requirement to provide a DNA sample is a continuing requirement. By using the term "specify" to describe what the bill does rather than stating that the bill "provides for" or "authorizes" collection of DNA after a person has served a sentence, I am not drawing a conclusion as to whether the current law requirement to provide a DNA sample is ongoing.

Robin Ryan
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E-mail: robin.ryan@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4251/P2dn
RLR:kjf:rs

March 11, 2010

1. In proposed s. 165.76 (1) (g), the draft refers to persons who are "required" rather than "ordered" to provide a biological specimen under s. 51.20 (13) (cr), 938.34 (15m), 971.17 (1m) (a), 973.047, or 980.063 because those sections use the term "require."
2. All of the provisions under proposed s. 165.76 (2m) that direct a person to provide a specimen at the office of the county sheriff or as directed by the agency that has supervision could be read to allow the person to make the choice as to which method to follow. Do you instead want to say that the person shall provide a specimen at the office of the county sheriff, except, if the supervising agency directs the person to provide the sample at a different place or to a different person, the person shall provide the sample as directed?
3. Did you intentionally omit reference to juveniles placed in a secured residential care center for children and youth under proposed s. 165.76 (2m) (e)? Are such juveniles covered under proposed s. 165.76 (2m) (c)?
4. The drafting instructions for proposed s. 165.76 (6) state that the order shall be personally served upon the respondent in the manner provided under ch. 801. Do you mean to allow service in any manner provided under s. 801.11 (1) or (2) or only personal service as provided under 801.11 (1) (a) or (2).
5. I did not include a form for an order under proposed s. 165.76 (6). If you have language you would like to use, please provide it.
6. I did not change "specify" to "clarify" in the analysis. The analysis briefly describes current law requirements to provide a DNA sample. Readers may draw their own conclusions as to whether the requirement to provide a DNA sample is a continuing requirement. By using the term "specify" to describe what the bill does rather than stating that the bill "provides for" or "authorizes" collection of DNA after a person has served a sentence, I am not drawing a conclusion as to whether the current law requirement to provide a DNA sample is ongoing.

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Ryan, Robin

From: Rinehart, Mark W. [RinehartMW@DOJ.STATE.WI.US]
Sent: Thursday, March 11, 2010 11:54 AM
To: Ryan, Robin
Subject: FW: dna Special Proceeding
Attachments: dna Special Proceeding.doc

Thanks again for turning the DNA draft around quickly. Unfortunately, when I cut and pasted the latest changes into the memo I sent you last week, I mistakenly omitted some material. As you will see the attached word document has all of the comments I meant to send you. It is 5 pages total because of sizable page-breaks. Please make sure you scroll through the entire document to see all of the comments.

Sorry about the mix-up.

From: St. John, Kevin M.
Sent: Thursday, March 11, 2010 11:47 AM
To: Rinehart, Mark W.
Subject: FW: dna Special Proceeding

Here it is. The Form of the Order is pages 3-4; we had comments on page 5 and additional instructions (which we will also recommunicate) in the follow – but the sooner she has them, the better. Hopefully we can get we all comments by COB today or tomorrow.

Kevin

From: St. John, Kevin M.
Sent: Friday, March 05, 2010 2:45 PM
To: Rinehart, Mark W.
Subject: dna Special Proceeding

Here's the remaining piece of the DNA response to the drafter. Please format and send along to the drafter. Also, please advise that if there is any way to get this by mid-week next week, we would appreciate it. There is a conference of chief judges next Friday and we'd like to be able to have an opportunity to share a draft if it is close enough.

Thanks,

Kevin

After further consideration of due process and related concerns of Section 19 of LRB—4251/P1 (pg. 7, lines 1-10), we would like to delete those provisions and substitute with the proposal that follows. Additional comments and instructions follow the proposal and the form of the order contemplated.

* * * * *

[a] Special Proceeding to Compel Submission of DNA. If a person required to provide a biological specimen under s. 165.76 fails or refuses to provide a specimen, a district attorney may bring a special proceeding in the name of the state to compel the person to produce a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis. The special proceeding shall be commenced by filing an application, supported by one or more affidavits, as provided in sub. [b].

[b] Application for Order To Submit or Show Cause. An application under sub. [a] shall establish reasonable cause to believe that the respondent against whom the order is sought is required to submit a biological specimen under s. 165.76, and that the state crime laboratories' deoxyribonucleic acid data base does not include data relating to the respondent. An application under sub. [a] must also establish the circumstances under which the respondent's requirement to submit a biological specimen arose.

[c] Issuance of Order To Submit or Show Cause. If the application meets the requirements of sub. [b], the court shall issue an order commanding the respondent to either appear in court on a specified date to show cause why he or she is not obligated to provide a biological specimen or, by the specified date, to provide a biological specimen at the office of county sheriff. The specified date shall be no less than 10 days and no more than 45 days from the date the order is entered. The order, together with a copy of the application and any supporting material, shall be personally served upon the respondent in the manner provided under ch. 801 for service in civil actions in circuit court, or by a law enforcement officer. The order shall be substantially in the form specified below:

[form of order is below]

[d] Hearing. At the hearing to show cause scheduled pursuant to the sub. [c], the respondent bears the burden of rebutting the matters established in the district attorney's application by demonstrating that he or she is not required to submit biological specimen pursuant to [s. 165.76].

[e] Issuance of Order To Compel. If the court determines, after a hearing specified in sub. [d], that the respondent is legally obligated to submit a sample pursuant to s. 165.76, the court shall issue an order which facilitates provision of the biological specimen,

including, in the court's discretion, authorization to detain or use reasonable force against the respondent to collect the biological specimen.

[f] Venue. (1) If the requirement to provide a biological sample arises from a court order, a district attorney may commence a special proceeding under subsection **[a]** in the county where the original order was issued, or in the county where the person resides.

(2) If the requirement to provide a biological sample exists pursuant to s. 165.76, 938.34 (15), 973.047 or 980.063, a district attorney may commence a special proceeding under subsection **[a]** in the county where any related proceedings were held, or in the county where the person resides.

STATE OF WISCONSIN
COUNTY

CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff,

v.

_____,
Respondent,

ORDER

To: Name
Address
City, State, Zip Code

THE STATE OF WISCONSIN, to the Respondent named above:

If you wish to contest this order, you may do so by appearing in person at the time, date and place set forth below, at which time you will have the opportunity to show cause to the court why you should not be required to provide a biological specimen for deoxyribonucleic acid analysis:

[Court information]

Unless you choose to contest this Order, by appearing at the time, date and place set forth above, you are hereby commanded to present yourself to the _____ county sheriff, [ADDRESS], no later than _____, between the hours of _____ and _____, for the collection of a biological specimen, obtained by buccal swab, for deoxyribonucleic acid analysis and inclusion of the results of that analysis in the state crime laboratory's DNA database. **YOU MUST BRING A COPY OF THIS ORDER WITH YOU. YOU MUST ALSO BRING TWO FORMS OF IDENTIFICATION, INCLUDING ONE FORM OF GOVERNMENT-ISSUED, PHOTOGRAPHIC IDENTIFICATION.** A copy of the application submitted to obtain this order is attached hereto.

If, you do not appear in person to contest this order at the time, date and place set forth above, and you do not either present yourself for collection of a biological specimen as directed herein:

- ▶ You may be held in contempt of court and be subject to sanctions as provided in chapter 785 of the Wisconsin Statutes; and
- ▶ The court will issue an order which facilitates provision of the biological specimen, including, in the court's discretion, authorization to detain or use reasonable force against the respondent to collect the biological specimen.

This Order is hereby entered pursuant to section ____ of the Wisconsin Statutes. A copy of that section is attached hereto.

DOJ COMMENTS:

The overall purpose of these provisions is to provide for an efficient, non-criminal process to obtain an order from the court allowing for the collection of a biological specimen from those individuals under an obligation to provide a sample who have not done so and are no longer in custody of the Department of Corrections or under supervision. The provision's intent to allow individuals who the state claims in under an obligation to provide a biological specimen to have the opportunity to be heard, should they choose.

The phrasing of the language moves from "person" to respondent. We recognize that there may be a need to either include a definition of respondent or change the language to make it uniform.

The intent of the venue provision is to ensure that a DA could bring the proceeding in either the county where the person lives or in the county where an obligation to provide DNA was initially ordered by a court. There are some cases in which the obligation to provide a sample is statutory only. In these cases we would expect venue to be in the place where the person resides.

In addition to the language below, we would request that the draft do the following:

- ✓ ▪ Exempt special proceedings described below from court fees. (As this is a special proceeding, I would understand that civil rules would apply and civil rules create a presumption for fees, unless otherwise exempted. *See* Wis. Stat. § 814.61).
- ✓ ▪ Exempt these proceedings from the rules of evidence by modifying Wis. Stat. § 911.01(4)(c) to reference the procedure below.
- 2 ▪ Specify power to bring action in District Attorneys section, by amending Wis. Stat. § 978.05(6).