

**STATE OF WISCONSIN  
Department of Justice**

**ORDER ADOPTING EMERGENCY RULES**

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INTRODUCTORY CLAUSE

The State of Wisconsin Department of Justice (“DOJ”) proposes an order to amend ss. Jus 9.01 and 9.09; to repeal and recreate ss. Jus 9.04, 9.05, 9.06, 9.07, and 9.08; and to create ss. Jus 9.03 (2m), (5), and (6) and 9.10 relating to procedures and standards for the submission of human biological specimens, the analysis of DNA in those specimens, the maintenance of a data bank of DNA analysis data, and the use and disposition of specimens and data in the data bank.

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ANALYSIS BY THE DEPARTMENT OF JUSTICE

The State of Wisconsin Department of Justice proposes to promulgate emergency administrative rules to amend Jus 9.01 and 9.09; to repeal and recreate ss. Jus 9.04, 9.05, 9.06, 9.07, and 9.08; and to create s. Jus 9.03 (2m), (5) and (6) and 9.10 relating to the procedures for the collection of human biological specimens, the submission of such specimens to the Department of Justice crime laboratories for DNA analysis, the analysis of specimens, the maintenance of a data bank of DNA analysis data, the use of the DNA data bank, the expungement of biological specimens and DNA analysis data, the confidentiality of some DNA data bank records, and the imposition of a DNA analysis surcharge in certain cases.

The proposed emergency rules will bring Wis. Admin. Code ch. Jus 9 into compliance and consistency with the provisions in 2013 Wisconsin Act 20 (“Act 20”) and 2013 Wisconsin Act 214 (“Act 214”) that amended various statutes related to the collection and handling of biological samples, the conduct of DNA analysis, and the handling of DNA analysis data.

The proposed emergency rules will correspond to and have the same scope as the proposed permanent rules that are in the process of being promulgated by DOJ. *See* Clearinghouse Rule 14-070. The scope of the proposed permanent rules was described in a scope statement that was approved by the Governor on July 28, 2014, published in the Administrative Register on August 15, 2014, and given final written approval by the Attorney General on August 25, 2014. The proposed permanent rules were submitted for the Governor’s approval under s. 227.185, Stats., on February 25, 2015.

The scope of the proposed emergency rules was described in a scope statement that was approved by the Governor on February 26, 2015, published in the Administrative Register on March 2, 2015, and given final written approval by the Attorney General on March 12, 2015.

**Statutes interpreted:** ss. 165.76, 165.77, and 165.84, Stats.

**Statutory authority:** ss. 165.76(4), 165.77(8), and 227.11(2)(a), Stats.

**Explanation of Statutory authority:**

A. Section 165.76(4), Stats.

Acts 20 and 214 revised the administrative rulemaking requirements imposed on DOJ under s. 165.76(4), Stats. As revised, the statute requires DOJ to promulgate rules that accomplish a variety of enumerated tasks and that carry out all of DOJ's other duties under s. 165.76, Stats.

Section 165.76(4), Stats., authorizes the portions of the proposed rules that establish procedures and time limits for obtaining and submitting biological specimens, specify whether particular individuals are required to provide a biological specimen, provide for the analysis of biological specimens by the state crime laboratories, provide for the submission of DNA profile data for inclusion in the Federal Bureau of Investigation's National DNA Identification System, provide for state reimbursement to law enforcement agencies for costs incurred in collecting and submitting biological specimens, and provide for DOJ to carry out any other duties under s. 165.76, Stats. Section 165.76(4), Stats., states as follows:

The department of justice shall promulgate rules to do all of the following:

(a) Establish procedures and time limits for obtaining and submitting biological specimens under this section and ss. 51.20(13)(cr), 165.84(7), 938.21(1m), 938.30(2m), 938.34 (15), 970.02 (8), 971.17 (1m) (a), 973.047, and 980.063.

(b) Specify whether an individual who is required under this section or s. 51.20(13)(cr), 165.84(7), 938.21(1m), 938.30(2m), 938.34(15), 970.02(8), 971.17(1m)(a), 973.047, or 980.063 to provide a biological specimen for deoxyribonucleic acid analysis must provide a new biological specimen if the crime laboratories already have a biological specimen from the individual or if data obtained from deoxyribonucleic acid analysis of the individual's biological specimen are already included in the data bank under s. 165.77(3).

(c) Allow a biological specimen, or data obtained from analysis of a biological specimen, obtained under this section, under s. 51.20(13)(cr), 938.21(1m), 938.30(2m), 938.34(15), 970.02(8), 971.17(1m)(a), 973.047, or 980.063, or, if the specimen is required to be analyzed under s. 165.84(7)(am)1m., under s. 165.84(7)(ah), to be submitted for inclusion in an index established under 42 USC 14132(a) or in another national index system.

(d) Provide reimbursement from s. 20.455(2)(Lm) to a person in charge of a law enforcement agency or tribal law enforcement agency at a rate of \$10 per specimen except that, if the department already has a biological specimen, or data obtained from analysis of a biological specimen, from the individual, the department may not reimburse the person in charge of the agency.

(e) Carry out the department's duties under this section.

B. Section 165.77(8), Stats.

Acts 20 and 214 also revised some of the statutory requirements related to DNA analysis and the maintenance of the DNA data bank in s. 165.77, Stats. Section 165.77(8), Stats., says: "The department shall promulgate rules to administer this section." That statute thus authorizes those portions of the proposed rules that provide for DOJ to carry out its duties under s. 165.77, Stats.,

C. Section 227.11(2)(a), Stats.

Those portions of the proposed rules that are not specifically authorized by ss. 165.76(4) and 165.77(8), Stats., as described above, are authorized by s. 227.11(2)(a), Stats., which provides:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or

threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

This statute expressly confers on DOJ the general power to determine whether administrative rules interpreting statutory provisions that are to be enforced or administered by DOJ are necessary to effectuate the purpose of those statutory provisions and, if such necessity is found, to promulgate such administrative rules, as long as those rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the rules here proposed are necessary to effectuate the statutory objective described in detail above.

DOJ further finds that the rules here proposed:

- do not exceed the bounds of correct interpretation of the pertinent statutes;
- are authorized by those statutes and are not based on authority derived from any other statutory or non-statutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of specific statutory requirements and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in the pertinent statutes.

For these reasons, those portions of the proposed rules that are not specifically authorized ss. 165.76(4) and 165.77(8), Stats., are authorized by s. 227.11(2)(a), Stats.

**Related statutes or rules:** Prior to the enactment of Acts 20 and 214, ss. 165.76, 165.77, and 165.84, Stats., and Wis. Admin. Code ch. Jus 9 already governed matters related to the collection, handling, and analysis of human biological specimens for law enforcement purposes. The proposed rules will bring Wis. Admin. Code ch. Jus 9 into compliance and consistency with the revisions to ss. 165.76, 165.77, and 165.84, Stats., made by Acts 20 and 214.

**Plain language analysis:** In Acts 20 and 214, the State of Wisconsin substantially revised existing statutes related to the requirement that certain persons submit biological specimens to the crime laboratories in DOJ for DNA analysis and that the resulting data be included in a DNA data bank. Acts 20 and 214 expanded the range of categories of persons who are required to submit DNA samples to law enforcement, required courts to order the submission of DNA samples by persons from whom samples were not obtained at the time of arrest or custody, expanded the categories of persons immune from civil or criminal liability arising out of the statutorily-mandated acquisition of DNA samples, authorized certain officials to use reasonable force in obtaining a DNA sample in some circumstances, and expanded the circumstances in which specimens and information in the data bank may or must be expunged.

The rules proposed here will not themselves establish new policies, but rather will carry into effect the legislative directives set forth in Acts 20 and 214 by providing specific procedures, time limits, and standards for carrying out various statutorily prescribed policy objectives.

Section by section analysis:

Proposed s. Jus 9.02 specifies to whom, by statute, the requirements of ch. Jus 9 apply.

Proposed s. Jus 9.03(2m) incorporates into the rules the definition of “juvenile” used in Wisconsin’s Juvenile Justice Code, ch. 938, Stats.

Proposed s. Jus. 9.03(5) incorporates into the rules the definition of “tribal law enforcement agency” used for purposes of criminal identification, records, and statistics in s. 165.83(1)(e), Stats.

Proposed s. Jus 9.03(6) incorporates into the rules the definition of “violent crime” created by Act 214 and codified at s. 165.84(7)(ab), Stats.

Proposed s. Jus 9.04(1)(a) sets forth what persons are required to submit biological specimens.

Proposed s. Jus 9.04(1)(b) provides that a person required to provide a specimen shall do so upon the occurrence of the underlying event that triggers the requirement, without need for a court order.

Proposed s. Jus 9.04(2) sets forth the locations and times at which different categories of persons shall provide required biological specimens.

Proposed s. Jus 9.04(3) supplies procedures for the collection of human biological specimens by law enforcement agencies and for the submission of those specimens to the state crime laboratories.

Proposed s. Jus 9.04(3)(a) indicates who may perform the collection of biological specimens and prescribes that specimens shall be collected by the oral swab method.

Proposed s. Jus 9.04(3)(b) provides that the collection of a human biological specimen may include the collection of any source of DNA approved by the state crime laboratories.

Proposed s. Jus 9.04(3)(c)1. and 2. provides a method for avoiding the collection of unnecessary duplicate specimens from the same person. Before a specimen is collected, the person’s criminal history must be checked to determine if conviction DNA data for the person is already on file. If such data is on file, no additional specimen shall be collected. If the specimen is being collected at a time other than the time of arrest, then the collecting law enforcement agency must also determine whether a biological specimen for the person was already collected at the time of arrest. If so, no additional specimen shall be collected.

Proposed s. Jus 9.04(c)3. requires the collecting law enforcement agency to complete a submission form that indicates the reason for the submission of each biological specimen submitted to the state crime laboratories. The form shall be prescribed and provided by the state crime laboratories.

Proposed s. Jus 9.04(c)5. requires the collecting law enforcement agency to obtain a full set of fingerprints from the person whose biological specimen is being collected.

Proposed s. Jus 9.04(d) requires the collecting agency to submit each specimen and the fingerprints of the person to a state crime laboratory within 24 hours of collection and further provides that procedures for making such submissions shall be supplied by the state crime laboratories.

Proposed s. Jus 9.05 governs the use of human biological specimens by the state crime laboratories for the creation and maintenance of a DNA data bank. If a law enforcement agency submits to the crime laboratories a biological specimen obtained from a person at any time other than when the person is arrested for a violent crime or taken into custody for a juvenile offense that would be a violent crime, the crime laboratories shall analyze the DNA in the biological specimen and maintain the resulting DNA data in a data bank. If a biological specimen is submitted to the crime laboratories when a person is arrested for a violent crime or taken into custody for a juvenile offense that would be a violent crime, the crime laboratories shall analyze the DNA in the specimen and maintain the resulting DNA data in a data bank only if the crime laboratories receive statutorily required notice from a court within one year of the date on which the biological specimen was submitted. If the statutorily required notice from a court is not received within the one year period, the crime laboratories shall destroy the biological specimen.

Proposed s. Jus 9.06(1) authorizes the state crime laboratories to compare the DNA data from different biological specimens and to share DNA data and comparison data with law enforcement agencies or with the FBI's combined DNA identification system. Such sharing of data may take place in connection with criminal or delinquency investigations or upon the request of any prosecutor, any defense attorney, or the subject of the data. This subsection further provides that DNA data and comparison data may be used in criminal and delinquency actions and proceedings, subject to applicable statutory requirements.

Proposed s. Jus 9.06(2) governs the expungement of DNA analysis data and the destruction of biological samples collected pursuant to these rules.

Proposed s. Jus 9.06(2)(a)1. provides that a person who has been required to submit a biological specimen pursuant to specified statutory provisions based on a criminal conviction, adjudication of delinquency, or certain court findings may request expungement of his or her DNA analysis data if the relevant convictions, adjudications or findings have been reversed, set aside, or vacated.

Proposed s. Jus 9.06(2)(a)2. and 3. provide that a person who has been required to submit a biological specimen at the time of arrest or initial appearance before a judge for a violent crime

or at the time of being taken into juvenile custody for conduct which would be a violent crime if committed by an adult may request expungement of his or her DNA analysis data if all relevant charges against the person have been dismissed, if a trial court has reached a final disposition for all such charges and the person has not been adjudged guilty of a violent crime or equivalent juvenile conduct, if the person has not been charged with a violent crime or equivalent juvenile conduct within one year of the arrest or juvenile custody in question, or if all of the person's pertinent convictions or delinquency adjudications for violent crimes or equivalent juvenile conduct have been reversed, set aside, or vacated.

Proposed s. Jus 9.06(2)(b) provides that all expungement requests must be made in writing on a form provided by the state crime laboratories and, if the expungement request is based on a court order reversing, setting aside, or vacating a criminal conviction, adjudication of delinquency, or other specified court findings, then the request must be accompanied by a certified copy of that court order.

Proposed s. Jus 9.06(2)(c) requires the state crime laboratories, upon receipt of a proper and complete expungement request, to destroy all human biological specimens from the person making the request and to purge from the databank all records and identifiable information related to the person that are required to be expunged under s. 165.77(4)(bm), Stats.

Proposed s. Jus 9.06(2)(d) requires the state crime laboratories to destroy a biological specimen obtained on the basis of a person's being arrested for a violent crime or taken into juvenile custody for equivalent juvenile conduct if, within one year after the sample is submitted, the pertinent court has not notified the state crime laboratories that the person was arrested or taken into custody under a warrant, that the court has found probable cause that the individual committed a violent crime or equivalent juvenile conduct, that the person failed to appear at his or her initial appearance or preliminary examination or waived the preliminary examination, or that the person failed to appear for a delinquency proceeding.

Proposed s. Jus 9.06(2)(e) provides that a fingerprint expungement request made by a person who has been required to provide a biological specimen at the time the person was arrested or taken into juvenile custody for a violent crime, will be granted only under the same conditions that apply to a request for expungement of the person's biological specimen. This prevents a person's fingerprints from being expunged prior to the time when the person's biological specimen could be expunged—which, if not prevented, would result in the creation of a biological specimen with no accompanying identifying fingerprints.

Proposed s. Jus 9.06(2)(f) provides for the expungement of information and biological specimens obtained from a person if the administrator of DOJ's division of law enforcement services or his or her designee determines that the specimen was collected by mistake and that the person was not statutorily required to provide a specimen.

Proposed s. Jus 9.06(3) provides for the confidentiality of all DNA analysis data, except for the uses specified in these rules and in s. 165.77, Stats. However, information concerning the fact that a person has provided a specimen for the DNA data bank is not confidential.

Proposed s. Jus 9.07 provides that, in addition to any statutory criminal penalties, failure to provide a biological specimen as required under these rules may constitute a disciplinary offense or probation or parole violation.

Proposed s. Jus 9.08(1) requires a court that imposes a sentence or places a person on probation to impose a DNA analysis surcharge of \$250 for each felony conviction and \$200 for each misdemeanor conviction, as provided under s. 973.046, Stats.

Proposed s. Jus 9.08(2) requires the department of corrections to collect any unpaid DNA surcharges owed by an inmate and to transmit any amount collected to the secretary of administration.

Proposed s. Jus 9.09 requires the department of corrections, the department of health services, county departments of social or human services, law enforcement agencies, tribal law enforcement agencies, and county sheriffs to cooperate fully with DOJ in meeting the requirements of these rules.

Proposed s. Jus 9.10 provides for DOJ, pursuant to s. 165.76(4)(d), Stats., to reimburse law enforcement and tribal law enforcement agencies for each biological specimen collected and sent to the state crime laboratories, with the exception of duplicate specimens.

**Summary of, and comparison with, existing or proposed federal regulation:** The activities regulated by the proposed rules are also affected by the federal statutes and regulations that govern the Combined DNA Index System (“CODIS”), which is the program of support for state and local criminal justice DNA databases operated by the Federal Bureau of Investigation, pursuant to 42 U.S.C. § 14132 and 28 C.F.R. Part 28.

CODIS includes the National DNA Index System (“NDIS”), a national database that contains DNA analysis data contributed by forensic laboratories at the federal, state, and local levels. Under s. 165.76(4)(c), Stats., DOJ is expressly authorized to submit biological specimens or DNA analysis data for inclusion in NDIS.

Forensic laboratories participating in NDIS are required to be accredited by a nationally recognized forensic science association, to undergo an external audit every two years to demonstrate compliance with quality assurance standards established by the FBI, and to disclose DNA samples or analyses only in accordance with federal privacy requirements. *See* 42 U.S.C. § 14132(b)(2) and (3). Access to NDIS is subject to cancellation if the quality control and privacy requirements are not met. 42 U.S.C. § 14132(c).

#### **Comparison with rules in adjacent states:**

##### **A. Illinois**

Illinois requires the collection of DNA samples from a person convicted of, found guilty of, or who received a disposition of court supervision for a felony, an offense requiring registration as a sex offender, or any other statutorily enumerated qualifying offense. The

collection requirement also applies to a person found guilty or given supervision for the same offenses under the state's juvenile court act. Any person arrested for first degree murder, home invasion, predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault must submit a DNA sample once a judge finds that there was probable cause for the arrest. It does not appear that juvenile arrestees are subject to DNA testing. DNA records of convicted offenders are expunged upon receipt of notification of a reversal of conviction based on actual innocence or the granting of a pardon based on actual innocence. DNA records of arrestees are expunged upon receipt of a court order stating that the charge was dismissed, the person was acquitted, or the charge was not filed within the applicable time period. *See* 730 Ill. Comp. Stat. 5/5-4-3 and Ill. Admin. Code tit. 20, §§ 1285.10 through 1285.90.

#### B. Iowa

Iowa requires the collection of DNA samples from sexually violent predators, sex offenders, persons convicted of felonies, and persons convicted of aggravated misdemeanors other than those related to gambling, hazardous waste, agricultural production, and certain traffic offenses. The collection requirement also applies to juveniles adjudicated delinquent for an offense that requires DNA profiling of an adult offender. Iowa does not require the collection of DNA samples from arrestees who have not been convicted of a crime. A person may request expungement of DNA records by submitting a certified copy of a court order showing that the conviction, adjudication or civil commitment that caused the submission of the person's DNA sample has been reversed on appeal and the case dismissed. *See* Iowa Code §§ 81.1 through 81.10 and Iowa Admin Code 61-8.1 through 61-8.5.

#### C. Michigan

Michigan requires the collection of DNA samples from offenders who are arrested or convicted of a qualifying offense, inmates who have not already provided a sample, juvenile offenders who are found responsible for a qualifying offense, and juvenile offenders who are public wards and have not already provided a sample. Qualifying offenses include felony assault, first or second degree murder, manslaughter, kidnapping, hostage taking, certain offenses against children, mayhem, certain sex offenses, carjacking, and robbery. A person may request expungement by submitting a written request accompanied by a certified copy of a final court order stating that the charge was dismissed, the person was acquitted, or the charge was not filed. *See* Mich. Comp. Laws §§ 28.171 through 28.176 and Mich. Admin. Code R. 28.5051 through 28.5059.

#### D. Minnesota

Minnesota requires the collection of DNA samples from adults or juveniles who have had a judicial probable cause determination on a charge of committing a qualifying offense or persons who have been convicted of committing or attempting to commit a qualifying offense. Qualifying offenses include murder, manslaughter, assault, robbery or aggravated robbery, kidnapping, false imprisonment, criminal sexual conduct, incest, burglary, and indecent exposure. DNA samples are also collected from persons sentenced as patterned sex offenders. A

person may request expungement if acquitted or if the charges are dismissed. *See* Minn. Stat. § 299C.105.

**Summary of factual data and analytical methodologies:** The proposed rules are predicated on (1) analysis by DOJ legal staff of the language and requirements of the relevant statutes, as amended by Acts 20 and 214; and (2) analysis by DOJ law enforcement staff of the existing procedures for the collecting, handling, and analysis of biological specimens and what is needed to make those procedures compliant and consistent with the changes in the relevant statutes made by Acts 20 and 214. Based on the above analyses, DOJ has determined that the proposed rules are necessary for DOJ to carry out its responsibilities under ss. 165.76, 165.77, and 165.84, Stats., as amended by Acts 20 and 214.

**Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:** DOJ does not anticipate any economic or fiscal impact on specific businesses, business sectors, public utility rate payers, or the State's economy as a whole. There is minimal affect on local governmental units, as the new law requires law enforcement to collect more biological specimens than it has collected in previous years—from approximately 12,000 specimens to an estimated 65,000 specimens. However, the collections require minimal additional time—approximately 3-5 minutes—and law enforcement will be reimbursed, pursuant to s. 165.76(4)(d), Stats.

Fiscal and economic costs associated with implementing the program are not driven by the proposed administrative rules, but rather are driven by the statutory requirements established in Acts 20 and 214. DOJ does not believe the proposed rules impose additional costs beyond those necessary to fulfill the requirements of Acts 20 and 214.

Act 20 requires that if a court imposes a sentence or places a person on probation, the court shall impose a DNA analysis surcharge of \$200 for each misdemeanor conviction and \$250 for each felony conviction. All moneys received are utilized to pay for costs of the program, to include: (1) DNA analysis; (2) program administration; (3) costs of mailing and materials for the submission of biological specimens by the departments of corrections and health services and by persons in charge of law enforcement and tribal law enforcement agencies; and (4) law enforcement reimbursement.

DOJ performed an analysis of prior year data and estimated that there are approximately 43,000 misdemeanor convictions and 12,000 felony convictions annually for persons who do not currently have DNA in the data bank. Based on a conservative analysis, DOJ projects surcharge revenue of 2.7 million in FY 2016 and 4.7 million in FY 2017-2020.

From November 14 through November 28, 2014, DOJ also solicited comments on the economic impact of its corresponding proposed permanent rules, pursuant to s. 227.137, Stats., and Executive Order 50. One comment was provided in response to DOJ's solicitation. The comment was made by a law enforcement officer who was concerned about the requirement in the proposed rules that biological specimens be sent to a state crime laboratory within 24 hours of collection and feared that this requirement might be cost prohibitive. DOJ reviewed and discussed this issue and concluded that the requirement in question should have minimal

economic impact on law enforcement agencies. As discussed above, the collection of biological specimens requires only a small amount of time and DOJ anticipates that costs associated with sending samples to a state crime laboratory will be adequately reimbursed, pursuant to s. 165.76(4)(d), Stats.

Based on all of the considerations discussed above, DOJ concludes that the proposed emergency rules will not have any adverse material impact on the economy, a sector of the economy, productivity, jobs, private businesses, public utilities, or the overall economic competitiveness of the state.

**Effect on small business:** Based on agency staff analysis and the comment and review process discussed above and in the economic impact report that is being simultaneously submitted by DOJ, pursuant to s. 227.137, Stats., DOJ has concluded that the proposed emergency rules will not have a significant effect on small business.

**Other reporting requirements:** The requirements of s. 227.116, Stats., are not applicable here because the proposed emergency rules do not include any permit requirements for businesses.

The requirements of s. 227.137(6), Stats., are not applicable here because the implementation and compliance costs of the proposed emergency rules do not exceed \$20,000,000.

The requirements of § 227.117 are not applicable here because the proposed emergency rules will have no impact on energy availability.

**Public hearings and public comments:** Pursuant to s. 227.18, Stats., DOJ held a public hearing on the corresponding proposed permanent rules on February 16, 2015, in Madison. The public hearing notice also solicited written public comments via mail, email, fax, or electronic submission at <http://adminrules.wisconsin.gov>. Pursuant to s. 227.19(3)(b), Stats., a summary of the public comments received and DOJ's response to those comments is included in DOJ's Report to the Legislature regarding the proposed permanent rules. DOJ has not made any modifications to the proposed permanent rules or to these proposed emergency rules in response to public comments.

**Recommendations of the Legislative Council Staff:** On January 8, 2015, DOJ received the Wisconsin Legislative Council Clearinghouse Report on the proposed permanent rules. Modifications to the proposed permanent rules recommended by the Legislative Council staff and adopted by DOJ have been incorporated into the text of those permanent rules and of these proposed emergency rules. Pursuant to s. 227.19(3)(d), a written response by DOJ to the recommendations of the Legislative Council Staff is included in DOJ's Report to the Legislature regarding the proposed permanent rules.

**Other germane modifications to proposed rules:** Under s. 227.19(4)(b)3., Stats., an agency may, on its own initiative, submit a germane modification to a proposed rule to be considered during legislative committee review under s. 227.19(4), Stats. DOJ has made two

such modifications to the corresponding proposed permanent rules and those modifications are also reflected in these proposed emergency rules.

First, in s. Jus 9.04(1)(a), which enumerates the categories of persons who are required to submit biological specimens, the categories have been broken down into a larger number of categories that track the corresponding statutory provisions in a way that will be easier to follow for readers of the rules. This modification only rearranges the categories that were in the draft of the permanent rules that was submitted to the Legislative Council staff and does not make any substantive change to that draft.

Second, an error in s. Jus 9.04(3)(c)1. has been corrected. Proposed s. Jus 9.04(3)(c)1. and 2. provides a method for avoiding the collection of unnecessary duplicate specimens from the same person. In the draft of the proposed permanent rules that was submitted to the Legislative Council staff, s. Jus 9.04(3)(c)1. omitted the circumstances under which a law enforcement agency is to proceed under s. Jus 9.04(3)(c)2. Accordingly, s. Jus 9.04(3)(c)1. has now been modified to make it clear that a law enforcement agency is to proceed under s. Jus 9.04(3)(c)2. if “conviction DNA” is not on file and the specimen is being collected pursuant to a conviction under s. Jus 9.04(1)(a)6. This modification was necessary to enable s. Jus 9.04(3)(c)1. to perform its intended function.

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### FINDING OF EMERGENCY

These emergency rules are necessary because s. 9426 of 2013 Wisconsin Act 20 established an effective date of April 1, 2015, for the new requirements related to DNA specimen collection created by that act. Those requirements include requirements that DOJ promulgate administrative rules for carrying out its duties under ss. 165.76 and 165.77, Stats. In order to comply with those rulemaking requirements, DOJ must have administrative rules in place for carrying out those statutory duties by the effective date of April 1, 2015.

DOJ is in the process of promulgating permanent administrative rules for that purpose. *See* Clearinghouse Rule 14-070. On February 25, 2015, the final draft of the proposed permanent rules and accompanying reports were submitted for the Governor’s review and approval,

pursuant to Wis. Stat. § 227.185. The permanent rulemaking process, however, is not likely to be completed prior to the statutory deadline of April 1, 2015. The public welfare thus requires that emergency rules be promulgated, in order to ensure that there is no interruption in DOJ's ability to carry out all of its statutory responsibilities related to the collection, analysis, and handling of DNA specimens for law enforcement purposes. The emergency rules proposed here will correspond to and have the same scope as the proposed permanent rules. the promulgation of these emergency rules will would prevent discontinuity and ensure timely, continuous, and uniform operation of the DNA program through the completion of the permanent rulemaking process that is under way.

#### TEXT OF THE PROPOSED PERMANENT RULES

SECTION 1. Chapter Jus 9 (title) is repealed and recreated to read:

#### CHAPTER JUS 9: DEOXYRIBONUCLEIC ACID (DNA) DATA BANK

SECTION 2. Jus 9.01 is amended to read:

**Jus 9.01 Purpose.** This chapter is promulgated under ss. 165.76(4), 165.77(8), 938.34(15), 973.047(2), and 980.063(2), Stats., to specify the procedures for carrying out the submission of human biological specimens ~~under s. 165.76, Stats., the DNA analysis and data bank under s. 165.77, Stats., and the DNA analysis under ss. 938.34(15) and 973.047(2), Stats.,~~ the analysis of DNA in those specimens, the maintenance of a data bank of DNA analysis data, and the use and disposition of specimens and data in the data bank under ss. 165.76, 165.77, 938.34(15), and 973.047(2), Stats.

SECTION 3. Jus 9.02 is repealed and recreated to read:

**Jus 9.02 Applicability.** This chapter applies to any person who meets any of the criteria listed in ss. 165.76(1), 938.34(15), and 973.047(1f), Stats.

SECTION 4. Jus 9.03(2m), (5), and (6) are created to read:

**(2m)** “Juvenile” has the meaning given in s. 938.02(10m), Stats.

**(5)** “Tribal law enforcement agency” has the meaning given in s. 165.83(1)(e), Stats.

**(6)** “Violent crime” has the meaning given in s. 165.84(7)(ab), Stats.

SECTION 5. Jus 9.04 is repealed and recreated to read:

**Jus 9.04 Submission of human biological specimen for DNA data bank.**

**(1)** PERSONS REQUIRED TO SUBMIT HUMAN BIOLOGICAL SPECIMEN.

**(a)** An offender, whether or not he or she is a resident of this state, who meets any of the following conditions shall provide a biological specimen to the state crime laboratories for DNA analysis:

1. Is or was in a juvenile correctional facility, in a secured residential care center for children and youth, or on probation, extended supervision, parole, supervision, or aftercare supervision after August 12, 1993, under circumstances provided in s. 165.76(1)(a), Stats.

2. Is or was in prison after August 12, 1993, under circumstances provided in s. 165.76(1)(ag), Stats.

3. Is or was adjudicated delinquent under circumstances provided in s. 165.76(1)(am), Stats.

4. Is or was in prison on or after January 1, 2000, under circumstances provided in s. 165.76(1)(ar), Stats.

5. Is or was found guilty of any misdemeanor on or after April 1, 2015, as provided in s. 165.76(1)(as)., Stats.

6. Is or was found guilty of any felony on or after January 1, 2000, as provided in s. 165.76(1)(av)1., Stats.

7. Is or was found guilty on or after January 1, 2000, and before April 1, 2015, of an offense under circumstances provided in s. 165.76(1)(av)2. or (aw), Stats.

8. Is or was sentenced or placed on probation on or after August 12, 1993, under circumstances provided in s. 165.76(1)(bg), Stats.

9. Has been found not guilty or not responsible by reason of mental disease or defect on or after August 12, 1993, and committed under circumstances provided in s. 165.76(1)(bm), Stats.

10. Has been found not guilty or not responsible by reason of mental disease or defect on or after January 1, 2000, and committed under circumstances provided in s. 165.76(1)(br), Stats.

11. Is or was in institutional care on or after August 12, 1993, under circumstances provided in s. 165.76(c), Stats.

12. Is or was in institutional care on or after January 1, 2000, under circumstances provided in s. 165.76(cr), Stats.

13. Has been found to be a sexually violent person under ch. 980 on or after June 2, 1994, as provided in s. 165.76(1)(d), Stats.

14. Is or was released on parole or extended supervision or placed on probation in another state before January 1, 2000, and is or was on parole, extended supervision, or probation in this state from the other state on or after July 9, 1996, under circumstances provided in s. 165.76(1)(e), Stats.

15. Is or was released on parole or extended supervision or placed on probation in another state on or after January 1, 2000, and is or was on parole, extended supervision, or probation in this state from the other state under circumstances provided in s. 165.76(1)(f), Stats.

16. Has been required by a court to provide a biological specimen under circumstances provided in s. 165.76(1)(g), Stats.

17. Is arrested for a violent crime, or is taken into custody for a juvenile offense that would be a violent crime, as defined in s. 165.84(7)(ab), Stats., as provided in s. 165.76(1)(gm), Stats.

18. Is notified that the person is required to provide a biological specimen under circumstances provided in s. 165.76(1)(h) or (1m), Stats.

**(b)** An offender required to provide a biological specimen under par. (a) shall provide a biological specimen to the state crime laboratories whether or not the court orders such submission on the offender's commitment, judgment of conviction or adjudication of delinquency.

**(2)** PLACE FOR SUBMISSION OF HUMAN BIOLOGICAL SPECIMEN. Each offender required to provide a human biological specimen shall do so at the place specified in this subsection as follows:

**(a)** 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, he or she shall provide the specimen at the office of a county sheriff as soon after the placement as practicable, or as directed by his or her probation or parole agent in conformity with sub. (3).

**(b)** If the offender has been placed on supervision as a juvenile, he or she shall provide the specimen as soon after the placement as practicable at a location as directed by the agency providing supervision for the juvenile in conformity with sub. (3).

**(c)** If the offender has been placed in a secured correctional facility as a juvenile, he or she shall provide the specimen while in the secured correctional facility as directed by the department of corrections. If the specimen has not been provided in the secured correctional facility, the offender shall provide the specimen as directed by the agency providing supervision in conformity with sub. (3).

**(d)** If the offender has been found guilty of a misdemeanor or felony and is present in court for said finding, the offender shall contemporaneously provide the specimen to the office of the county sheriff exercising jurisdiction within the venue of the court in conformity with sub. (3).

**(e)** 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 specimen as directed by the department of health services in conformity with sub. (3).

**(f)** If the offender has been arrested or taken into custody for a violent crime, he or she shall contemporaneously provide the specimen to the law enforcement or tribal law enforcement agency that obtains the person's fingerprints or other identifying data in conformity with sub. (3).

**(g)** If pars. (a) to (f) do not apply, the offender shall provide the specimen as directed by the office of a county sheriff or as directed by the agent or agency providing supervision or having legal or physical custody of the offender in conformity with sub. (3).

(3) PROCEDURE FOR SUBMISSION OF HUMAN BIOLOGICAL SPECIMEN. Human biological specimens shall be collected and sent to the state crime laboratories in accordance with all of the following procedures:

(a) The collection of a human biological specimen by oral swab may be done by any person and does not require special medical training. Licensed or certified medical staff shall perform all procedures requiring medical expertise.

(b) The collection of a human biological specimen includes the collection of any source of DNA approved by the state crime laboratories.

(c) Before a human biological specimen is collected from a person required to submit such a specimen under sub. (1), the law enforcement agency responsible for collecting the specimen shall do all of the following in the sequence listed:

1. Review the Crime Information Bureau's Computerized Criminal History to determine if "Conviction DNA" is on file for the person in question. If "Conviction DNA" is on file, no additional biological specimen shall be collected. If "Conviction DNA" is not on file and the specimen is being collected pursuant to par. (1)(a)3., 5., or 6., proceed under subd. 2., otherwise proceed under subd. 3.

2. Determine whether the biological specimen to be collected is the result of a conviction of a violent crime for which a biological specimen was taken at arrest. If a biological specimen was taken at arrest, no additional biological specimen shall be collected. If a biological specimen was not taken at arrest, proceed under subd. 3.

3. Complete a DNA buccal swab submission form as provided by the state crime laboratories indicating the reason for the submission.

4. Collect the human biological specimen as provided in this section and in accordance with department procedures and with methods approved by the state crime laboratories.

5. Obtain a full set of fingerprints from the person from whom the human biological specimen is being collected.

(d) Within 24 hours of the collection of each human biological specimen collected under this section, the specimen and the full set of fingerprints of the person from whom it was collected shall be sent to a state crime laboratory in accordance with department procedures approved by the state crime laboratories.

SECTION 6. Jus 9.05, 9.06, 9.07, and 9.08 are repealed and recreated to read:

**Jus 9.05 Use of human biological specimens for DNA data bank.**

(1) Upon receiving a human biological specimen under any provision of this chapter other than s. Jus 9.04(1)(a)17., the state crime laboratories shall analyze the DNA in the specimen and shall maintain a data bank based on the data obtained from the DNA analysis of those specimens.

(2) If the state crime laboratories, within one year after receiving a human biological specimen under s. Jus 9.04(1)(a)17., receive notice from a court under s. 165.84(7)(bm), the state crime laboratories shall analyze the DNA in the specimen and shall maintain a data bank based on the data obtained from the DNA analysis of those specimens.

(3) If the state crime laboratories, within one year after receiving a human biological specimen under s. Jus 9.04(1)(a)17., do not receive notice from a court under s. 165.84(7)(bm), the state crime laboratories shall destroy the biological specimen.

**Jus 9.06 Use of DNA data bank.**

(1) USE. The state crime laboratories may compare the data obtained from one human biological specimen with the data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies and the combined DNA identification system in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings, subject to s. 971.23(9), Stats.

(2) EXPUNGEMENT OF DNA ANALYSIS DATA.

(a) A person may request expungement of his or her DNA analysis data submitted under this chapter on any of the following grounds:

1. The DNA analysis data was included in the data bank pursuant to s. 165.77(4)(am)1., Stats., and all convictions, findings, or adjudications for which the person was required to submit a biological sample have been reversed, set aside or vacated.

2. The DNA analysis data was included in the data bank pursuant to s. 165.77(4)(am)2., Stats., and one of the circumstances provided for in s. 165.77(4)(am)2.a., b., c., or d., Stats., applies to the person.

3. The DNA analysis data was included in the data bank pursuant to s. 165.77(4)(am)3., Stats., and one of the circumstances provided for in s. 165.77(4)(am)3.a. b., c., or d., Stats., applies to the person.

(b) A request for expungement of DNA analysis data under par. (a) must be made in writing on a form provided by the state crime laboratories. If par. (a)1. applies to the person making the request, then the request must be accompanied by a certified copy of the court order reversing, setting aside or vacating the person's conviction or adjudication.

(c) Upon receipt of a complete expungement request meeting the requirements of pars. (a) and (b), the state crime laboratories shall expunge all records and identifiable information in the databank pertaining to the person that are required to be purged under s. 165.77(4)(bm), Stats., and destroy all human biological specimens from the person.

(d) The state crime laboratories shall destroy a biological specimen under the circumstances provided in s. 165.84(7)(am)2m., Stats.

(e) If a person who was required to provide a biological specimen under s. 165.84(7)(ah), s. 938.21(1m), s. 938.30(2m), or s. 970.02(8), Stats., makes a fingerprint expungement request pursuant to s. 165.84(1), Stats., that expungement request will be granted if one of the conditions in s. 165.77(4)(am)2. or 3. applies to the person.

(f) If the administrator of the department's division of law enforcement services or his or her designee determines that a human biological specimen was collected from a person by mistake and that the person is not subject to the submission requirements of this chapter, the state crime laboratories shall expunge all records and identifiable information in the databank pertaining to the person that are required to be purged under s. 165.77(4)(bm), Stats., and destroy all human biological specimens from the person.

(3) CONFIDENTIALITY. Except for the uses listed in this chapter and s. 165.77, Stats., DNA analysis data collected under this chapter for the DNA data bank shall remain confidential. Information concerning the fact that a person has submitted a human biological specimen for the DNA data bank is not confidential and may be released.

**Jus 9.07 Compliance and penalties.** In addition to any criminal penalties under s. 946.52, Stats., failure to provide a human biological specimen under this chapter may also constitute a disciplinary offense or probation or parole violation.

**Jus 9.08 DNA analysis surcharge.**

(1) If a court imposes a sentence or places a person on probation, the court shall impose a DNA analysis surcharge of \$250 for each felony conviction and \$200 for each misdemeanor conviction as provided under s. 973.046, Stats.

(2) If a court imposes a DNA surcharge under sub. (1) on a person who is an inmate in a state prison and the inmate has not paid the surcharge, the department of corrections shall collect the amount owed from the income earned by or received for the benefit of the inmate. The department of corrections shall transmit any amount collected to the secretary of administration.

SECTION 7. Jus 9.09 is amended to read:

**Jus 9.09 Cooperation.** The department of corrections, department of health services, county departments under ss. 46.215, 46.22 and 46.23, Stats., law enforcement agencies, tribal law enforcement agencies, and county sheriffs shall cooperate fully with the department to meet the requirements of this chapter.

SECTION 8. Jus 9.10 is created to read:

**Jus 9.10 Reimbursements to law enforcement agencies.** The department shall reimburse law enforcement and tribal law enforcement agencies for each human biological specimen collected and received by the state crime laboratories as provided in s. 165.76(4)(d), Stats. The department shall not reimburse for duplicate biological specimens. The department shall make payment on an annual basis or more often as it deems necessary.

SECTION 9. EFFECTIVE DATE. These emergency rules shall take effect on April 1, 2015.

Dated this 25th day of March, 2015.

WISCONSIN DEPARTMENT OF JUSTICE

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Brad D. Schimel, Attorney General

These permanent rules were approved in writing by the Governor on \_\_\_\_\_, 2015,  
pursuant to Wis. Stat. § 227.135(2).