

Chapter Jus 9

DEOXYRIBONUCLEIC ACID (DNA) DATA BANK

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Note: Corrections made under s. 13.93 (2m) (b) 7., Stats., Register, July, 1997, No. 499.

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, 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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; **EmR1510: emerg. am., eff. 4–1–15; CR 14–070: am. Register September 2015 No. 717, eff. 10–1–15.**

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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; correction made under s. 13.93 (2m) (b) 7., Stats., Register September 2001 No. 549.

Jus 9.03 Definitions. In this chapter:

(1) “Department” means the Wisconsin department of justice.

(2) “DNA” means deoxyribonucleic acid.

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

(3) “Law enforcement agency” means a governmental unit of one or more persons employed full time by the federal government, a state or a political subdivision of a state for the purpose of preventing and detecting crime, enforcing federal or state laws or local ordinances, and making arrests for crimes.

(4) “Offender” means any person who meets any of the criteria in ss. 165.76 (1), 938.34 (15), and 973.047 (1f), 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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; correction in (4) made under s. 13.93 (2m) (b) 7., Stats., Register September 2001 No. 549; **EmR1510: emerg. cr. (2m), (5), (6), eff. 4–1–15; CR 14–070: cr. (2m), (5), (6) Register September 2015 No. 717, eff. 10–1–15.**

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 (1) (c), Stats.

12. Is or was in institutional care on or after January 1, 2000, under circumstances provided in s. 165.76 (1) (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 sub. (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 48 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.

Note: In determining the 48-hour time period for submitting a biological specimen and fingerprints to a state crime laboratory under this section, time should be computed in accordance with s. 990.001 (4), Stats.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; corrections in (1) (a) 4. and 6. made under s. 13.93 (2m) (b) 7., Stats., Register September 2001 No. 549; corrections in (2) (f) made under s. 13.92 (4) (b) 6., Stats., Register March 2013 No. 687; **EmR1510: emerg. r. and recr., eff. 4–1–15; CR 14–070: r. and recr. Register September 2015 No. 717, eff. 10–1–15; correction in (1) (a) 11., 12., (3) (c) 1. made under s. 13.92 (4) (b) 7., Stats., Register September 2015 No. 717.**

Jus 9.05 Use of human biological specimens for DNA data bank. 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), Stats., 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), Stats., the state crime laboratories shall destroy the biological specimen.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; **EmR1510: emerg. r. and recr., eff. 4–1–15; CR 14–070: r. and recr. Register September 2015 No. 717, eff. 10–1–15; correction in (2), (3) made under s. 13.92 (4) (b) 7., Stats., Register September 2015 No. 717.**

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), 938.21 (1m), 938.30 (2m), or 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., Stats., 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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; **EmR1510: emerg. r. and recr., eff. 4–1–15; CR 14–070: r. and recr. Register September 2015 No. 717, eff. 10–1–15; correction in (2) (e) made under s. 35.17, Stats., Register September 2015 No. 717.**

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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; **EmR1510: emerg. r. and recr., eff. 4–1–15; CR 14–070: r. and recr. Register September 2015 No. 717, eff. 10–1–15.**

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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; correction in (1) (b) made under s. 13.93 (2m) (b) 7., Stats., Register September 2001 No. 549; **EmR1510: emerg. r. and recr., eff. 4–1–15; CR 14–070: r. and recr. Register September 2015 No. 717, eff. 10–1–15.**

Note: In *State v. Elward*, 2015 WI App 51, 363 Wis. 2d 628, the court held that the DNA surcharge imposed on misdemeanants under s. 973.046, Stats., as applied to a defendant who was sentenced after the surcharge was legally required (January 1, 2014) but before DNA samples could be collected from misdemeanants (April 1, 2015), does not correspond to the cost of DNA analysis activities and thus is a punitive fine, rather than a fee; therefore, such an application of the DNA surcharge to a misdemeanant who committed the underlying offense before January 1, 2014, is an unconstitutional ex post facto violation.

In *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, the court held that the imposition on a single defendant of multiple DNA surcharges for multiple felony or misdemeanor convictions under s. 973.046, Stats., does not correspond to the cost of DNA analysis activities and thus is a punitive fine, rather than a fee; therefore, the application of the multiple DNA surcharge requirement to a defendant who committed the underlying offenses before that requirement was in effect (January 1, 2014) is an unconstitutional ex post facto violation.

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.

History: Cr. Register, July, 1997, No. 499, eff. 8–1–97; correction made under s. 13.92 (4) (b) 6., Stats., Register March 2013 No. 687; **EmR1510: emerg. am., eff. 4–1–15; CR 14–070: am. Register September 2015 No. 717, eff. 10–1–15.**

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.

History: **EmR1510: emerg. cr., eff. 4–1–15; CR 14–070: cr. Register September 2015 No. 717, eff. 10–1–15.**