LETTER OPINION
2000-L-6

January 20, 2000

Mr. John J. Mahoney
Oliver County State's Attorney
PO Box 355
Center, ND 58530-0355

Dear Mr. Mahoney:

Thank you for your letter asking whether the provisions of North Dakota Century Code (N.D.C.C.) § 31-13-03 relating to DNA testing for sexual offenders are applicable to a defendant who was convicted prior to the enactment of the statute, but was in the custody of the Department of Corrections and Rehabilitation on or after August 1, 1995.

In 1995, the Fifty-fourth Legislative Assembly enacted Senate Bill No. 2358 providing for a DNA data base and requiring persons convicted of specific offenses to submit samples of blood and other body fluids for DNA law enforcement identification purposes and inclusion in law enforcement identification data bases. Senate Bill No. 2358 became effective August 1, 1995. 1995 N.D. Sess. Laws ch. 325.

N.D.C.C. § 31-13-03 requires persons convicted of the following offenses to submit a sample of blood or body fluids for DNA testing: 1) gross sexual imposition (N.D.C.C. § 12.1-20-03); 2) continuous sexual abuse (N.D.C.C. § 12.1-20-03.1); 3) sexual imposition (N.D.C.C. § 12.1-20-04); 4) corruption or solicitation of a minor (N.D.C.C. § 12.1-20-05); 5) sexual abuse of a ward (N.D.C.C. § 12.1-20-06); 6) sexual assault (victim aged 15-17, N.D.C.C. § 12.1-20-07(1)(e) or (f); 7) incest (N.D.C.C. § 12.1-20-11); or 8) any other offense when the court found at sentencing that the defendant had engaged in a nonconsensual sexual act or sexual contact with another person during, in the course of, or as the result of the offense.

N.D.C.C. § 31-13-03 requires the following persons to submit a sample of blood and other bodily fluids for DNA testing:

1. Any person who was convicted on or after August 1, 1995, of one of the above offenses.

2. Any person who is in the custody of the Department of Corrections and Rehabilitation on or after August 1, 1995, as a result of a conviction of one of the above offenses.

<PAGE NAME="p.L-7">3. Any person convicted on or after August 1, 1995, for one of the above offenses but not

> sentenced to a term of confinement is required to submit a DNA sample as a condition of probation at a time and place specified by the sentencing court.

The first issue which arises is whether N.D.C.C. § 31-13-03 was intended to apply retroactively. N.D.C.C. § 1-02-10 provides that no part of the code is retroactive unless it is expressly declared to be so. The rule in this statute "is merely one of statutory construction." State v. Davenport, 536 N.W.2d 686, 688 (N.D. 1995) (citing Gofor Oil, Inc. v. State, 427 N.W.2d 104, 108 (N.D. 1988); State v. Cummings, 386 N.W.2d 468, 471-472 (N.D. 1986); Caldis v. Board of County Commissioners, 279 N.W.2d 665, 669 (N.D. 1979)). A statute does not need to include the word "retroactive" in order for it to be applied to events that occurred prior to the effective date of the statute. Intent of retroactive application may be implied. State v. Davenport, 536 N.W.2d at 688 (citing In re W.M.V., 268 N.W.2d 781, 783-784 (N.D. 1978)). N.D.C.C. § 1-02-10 is a rule of statutory construction to aid in interpreting statutes to ascertain legislative intent. State v. Cummings, 386 N.W.2d at 471-472. "Like any rule of construction, N.D.C.C. sec. 1-02-10 is subservient to the goal of statutory interpretation: to ascertain and effectuate legislative intent." Id.

N.D.C.C. § 31-13-03 provides, in part, that "[t]he court shall order . . . any person who is in the custody of the department on or after August 1, 1995, as a result of a conviction of one of these offenses to have a sample of blood and other body fluids taken by the department for DNA law enforcement identification purposes and inclusion in law enforcement identification data bases." In order for a person to have been in the custody of the Department of Corrections and Rehabilitation on August 1, 1995, for one of the above offenses, that person would necessarily have committed the offense before that date and would have been convicted on or before August 1, 1995. Therefore, the legislative intent that this part of the statute is to be applied retroactively to offenders in custody as of August 1, 1995, for offenses committed before the effective date of the statute is necessarily implied from the language of the statute. The legislative history to Senate Bill No. 2358 also indicates legislative intent that the statute be applied retroactively. Senator DeMers, a prime sponsor of Senate Bill No. 2358, in her March 7, 1995, written testimony to the House Judiciary Committee, stated that Section 3 of the bill required "all persons in custody at the time of the effective date of this act . . . to provide the DNA blood sample." The plain language of the statute, as well as the legislative history, shows the legislative intent that N.D.C.C. § 31-13-03 be applied retroactively to persons whose convictions occurred before the effective date of the statute and who were in the <PAGE NAME="p.L-8">custody of the Department of Corrections and Rehabilitation on that date.

Although you did not expressly ask whether there may be an ex post facto violation problem in the retroactive application of this statute, I will address that issue as well. "The legislature is free to apply statutes retroactively unless doing so would result in ex post facto application." State v. Burr, 598 N.W.2d 147, 152 (N.D. 1999) (citing State v. Cummings, above). In State v. Burr, the court dealt with the issue of whether the ten-year retroactive application of the sex offender registration requirements of N.D.C.C. § 12.1-32-15(3)(c) violated the ex post facto clause found in both the federal and state constitutions.[1] The court concluded the registration provisions of the statute were regulatory and not punitive and held there was no ex post facto violation. Id. at 158-59. Virtually every jurisdiction, including the federal courts, has held that the registration requirements of state sex offender registration laws are regulatory and not punitive. See, e.g., Artway v. Attorney General of State of New Jersey, 81 F.3d 1235, 1267 (3rd Cir. 1996); Doe v. Pataki, 120 F.3d 1263 (2nd Cir. 1997); State v. Manning, 532 N.W.2d 244 (Minn. App. 1995); State v. Pickens, 558 N.W.2d 396 (Iowa 1997).

The issue of whether the retroactive application of DNA testing violates the ex post facto clause has also been addressed in several federal appellate courts. Each circuit court of appeals that has considered the issue has held that retroactive application of DNA testing requirements is regulatory and not punitive and thus not in violation of the ex post facto clause. In Jones v. Murray, 962 F.2d 302, 310 (4th Cir. 1992), the court held that Virginia legislation requiring convicted felons to submit blood samples for DNA testing and authorizing prison punishment, including denial of good-time credits, and consideration by the Parole Board of an inmate's refusal to provide a DNA sample in granting discretionary parole, did not violate the ex post facto clause. In Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993), cert. denied, 511 U.S. 1111 (1994), the court held that Virginia did not violate the ex post facto clause by depriving inmates of good-time credits for failure to submit to DNA testing. In Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995), the court held that Illinois' DNA statute requiring convicted sex offenders to submit a blood specimen to the Department of State Police prior to discharge or parole, even though convicted before the effective date of the statute, did not violate the ex post facto clause. In Rise v. State of Oregon, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996), the court held that an Oregon law requiring offenders convicted of sex offenses before the enactment of the DNA testing statutes to submit a blood sample for DNA testing did not violate the ex post facto clause. In Shaffer v. <PAGE NAME="p.L-9">Saffle, 148 F.3d 1180 (10th Cir. 1998), cert. denied, 67 U.S.L.W. 3336 (1998), the court held Oklahoma's DNA sample process

[1] U.S. Const. art. 1, § 10; N.D. Const. art. I, § 18.

could be retroactively applied without violating the ex post facto clause. Consequently, it is my opinion that there is no ex post facto violation in the retroactive application of N.D.C.C. § 31-13-03 to persons whose convictions occurred before August 1, 1995.

Based on the above discussion, it is my opinion that the provisions of N.D.C.C. § 31-13-03 relating to DNA testing for sexual offenders are applicable to a defendant who was convicted prior to the effective date of the statute, but who was in the custody of the Department of Corrections and Rehabilitation on or after August 1, 1995.

Sincerely,

Heidi Heitkamp
Attorney General

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