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DEPARTMENT OF JUSTICE

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December 30, 2009 OAG—11—09

Mr. Winn S. Collins
District Attorney
Green Lake County
Post Office Box 3188
Green Lake, WI 54941

Dear Mr. Collins:

¶ 1. You have requested my opinion on the scope of 2007 Wisconsin Act 84 ("Act 84"), which became effective March 27, 2008.

QUESTION PRESENTED

¶ 2. You ask:

> Does 2007 Wisconsin Act 84 prohibit a prosecutor from engaging in a settlement discussion with a defendant or defendant's attorney related to a defendant reimbursing a police department for the actual expenses incurred by the department with respect to blood withdrawals following an OWI arrest?

Act 84 amended Wis. Stat. §§ 778.027 and 967.057. Those provisions, as amended, are set forth below:

> Prosecution decisions based on contributions to certain organizations or agencies and government attorney conduct. A prosecutor or an attorney representing the state or a political subdivision of the state may not, in exchange for a person's payment of money, other than restitution, to any organization or agency, dismiss or amend a citation or complaint alleging a violation that provides for a forfeiture or elect not to initiate an action or special proceeding based on such a violation.

Wis. Stat. § 778.027.

> Prosecution decisions based on contributions to organizations and agencies. A prosecutor may not, in exchange for a person's payment of money, other than restitution, to any organization or agency, dismiss or amend a charge alleging a criminal offense or elect not to commence a criminal prosecution.

Wis. Stat. § 967.057.

SHORT ANSWER

¶ 3. Your question is directed to discussions that may occur during settlement negotiations. However, Act 84 does not address negotiation or discussion. Rather, it addresses actual agreements which provide for certain specific prosecutorial acts that are provided "in exchange for" impermissible consideration. For the reasons that follow, it is my opinion that arrests for operating a motor vehicle under the influence of alcohol or other drugs ("OWI"), as proscribed by Wis. Stat. § 346.63, may *not* be resolved by a settlement agreement that would require the defendant to pay money to a law enforcement agency for the actual expenses incurred by the agency in a blood withdrawal and blood analysis of the defendant, if that settlement agreement also includes a promise by the prosecutor to dismiss or amend the charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation. *See* Wis. Stat. §§ 778.027 and 967.057. It is also my opinion that Act 84 does not prohibit agreements involving reimbursement of blood withdrawal expenses if the agreement does not include a promise by the prosecutor to dismiss or amend the charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation. *A fortiori*, a prosecutor may engage in negotiations relating to a defendant's reimbursement of blood withdrawal expenses, but a prosecutor may not, as a result of a defendant's payment or offer of payment of blood withdrawal expenses, dismiss or amend the charge, citation, or complaint or forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation.

ANALYSIS

¶ 4. All statutory interpretation begins with the text of the statute; if the meaning of the statute is plain, the inquiry ordinarily stops there. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 754 N.W.2d 439. It is my opinion that the plain language of Wis. Stat. §§ 778.027 and 967.057, as amended by Act 84, clearly and unambiguously precludes a prosecutor or government attorney from dismissing, amending, or forgoing prosecution of a criminal or civil forfeiture action, in exchange for the payment of money to an organization or agency. The phrase "organization or agency," as used in these provisions, including in the OWI statutes, is properly understood to encompass a police department or sheriff's department, which are commonly referred to as law-enforcement "agencies." *See, e.g.*, Wis. Stat. § 343.305; *see also Black's Law Dictionary* 67 (8th ed. 2004) (defining "agency" as "[a] governmental body with the authority to

implement and administer particular legislation"). Likewise, "a person's payment of money" would include reimbursement of blood withdrawal and analysis costs.

¶ 5. Although Wis. Stat. §§ 778.027 and 967.057 do not preclude a defendant's agreement to pay "restitution" under Wis. Stat. § 973.20(1r) to a "victim" of a "'[c]rime considered at [the defendant's] sentencing' . . .," Wis. Stat. § 973.20(1g)(a), the cost to a law-enforcement agency of blood withdrawal and blood analysis stemming from an OWI arrest is *not* recoverable as "restitution," because the agency is not a crime "victim" for purposes of incurring such cost. *Cf., e.g.*, *State v. Ortiz*, 2001 WI App 215, ¶¶ 20, 23, 247 Wis. 2d 836, 634 N.W.2d 860 (overtime costs of SWAT team and negotiating team not assessable as restitution); *State v. Storlie*, 2002 WI App 163, ¶¶ 11-12, 256 Wis. 2d 500, 647 N.W.2d 926 (cost of "stop sticks" used to apprehend defendant not assessable as restitution).

¶ 6. The legislative history confirms this plain reading interpretation of Act 84. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 (stating legislative history may be properly consulted to confirm or verify a plain-meaning interpretation). Before Act 84 was enacted, Wis. Stat. §§ 778.027 and 967.057 only barred a prosecutor from eliciting a defendant's contributions to either a private nonprofit crime-prevention organization or a law enforcement agency's crime-prevention fund. At the time, circuit courts had authority to require a convicted defendant "to make a reasonable contribution surcharge" to such entities when taxing costs, if the defendant possessed "the financial ability" to do so. Wis. Stat. § 973.06(1)(f)1. (2005-06); *see also* Wis. Stat. §§ 753.40 and 973.09(1x) (2005-06) (also governing the circuit court's authority on this subject).

¶ 7. When the Legislature enacted Act 84 and thereby expanded the bar on settlement agreements, it also expressly *repealed* the statutes that gave a circuit court the authority in criminal actions to order a convicted defendant to make a reasonable contribution surcharge to a crime-prevention organization or a law enforcement agency's crime-prevention fund. The Legislative Reference Bureau analysis to 2007 Senate Bill 244, which became Act 84, describes the current revisions of Wis. Stat. §§ 778.027 and 967.027 as follows:

> Current law prohibits a prosecutor from dismissing or amending a criminal charge in exchange for a person's payment of a contribution to a crime prevention organization or a law enforcement agency's crime prevention fund. Current law similarly prohibits a prosecutor or an attorney representing the state or a local government from dismissing or amending a citation or complaint in a civil case in exchange for such a payment if the citation or complaint alleges a violation punishable by a forfeiture. This bill extends the scope of these prohibitions so that they apply to a decision by a prosecutor or other government attorney not to commence a criminal prosecution or an action for a forfeiture, not just to a decision to dismiss or amend a charge, citation, or complaint that is already filed. ***The bill also extends the scope of the prohibitions so that they apply in cases***

involving payments other than restitution to any type of organization or agency, not just those involved in crime prevention.

Under the circumstances, it is clear that one of the specific purposes of Act 84 was to stop payments to local law enforcement agencies in exchange for (1) either not bringing a criminal or forfeiture action, or (2) dismissing or amending a charge citation or complaint that has already been filed.

¶ 8. The plain language of Act 84 also leads to my second conclusion, which is that it does not apply to a situation where a prosecutor is not negotiating and agreeing to forego a criminal or forfeiture action or dismiss or amend a charge, citation, or complaint that has been filed. The Legislature described three specific prosecutorial acts that may not be promised in exchange for a payment of money. Those acts are: (1) dismissal of a charge, citation, or complaint; (2) amendment of a charge, citation, or complaint; and (3) an election not to commence a criminal or civil action. Because sentencing recommendations are not mentioned, they are not prohibited by Act 84. *See, e.g.*, *State v. Popenhagen*, 2008 WI 55, ¶ 43 n.23, 309 Wis. 2d 601, 749 N.W.2d 611 (*Expressio unius est exclusio alterius* is a rule of statutory interpretation which means that the express mention of one matter in a statute excludes other similar matters not mentioned. The rule applies "when a statute lists, for example, persons, things, or forms of conduct").

¶ 9. Therefore, as long as a prosecutor or government attorney does not agree to amend, dismiss, or forgo issuing a charge, citation, or complaint, he or she may discuss and enter into an agreement in which the defendant promises to reimburse the costs of blood withdrawal and analysis. Such an agreement may, for example, be negotiated and entered into with respect to a prosecutor's sentence or penalty recommendation in an OWI case (or any other criminal case) in

exchange for the defendant's agreement to reimburse a law enforcement agency for the actual expenses incurred by the agency in a blood withdrawal and blood analysis.[1]

¶ 10. Although other potential limitations on prosecutorial agreements are outside the scope of this opinion, it is important to recognize that such limits likely exist and must be considered by a prosecutor. For example, prosecutors should be mindful of ethical rules and laws relating to the use of public positions for private benefit. Likewise, prosecutors should be mindful of the requirements for entering into a valid plea agreement that will not be subject to a collateral challenge. Finally, Act 84 appears to reflect a public policy judgment that favors the equal treatment of defendants by prosecutors, regardless of wealth or indigency. Thus, a prosecutor may wish to consider this underlying policy concern when exercising his or her discretion.

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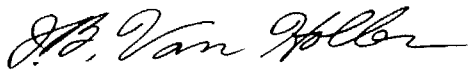
[1]While you have not inquired as to the court's ability to make the defendant's offer to pay for blood withdrawal and analysis enforceable, my opinion should not be construed as holding a court, as part of its sentencing powers under Wis. Stat. ch. 973, may order the defendant to make such a payment. As I have stated elsewhere in this opinion, these moneys are not restitution. *See supra*, ¶ 5. A prosecutor might ask the trial court, at sentencing, to tax a convicted defendant for such costs—under either Wis. Stat. § 973.06(1)(a) or 973.06(1)(c). But whether taxation of such costs is permissible under these provisions is an open question. Under Wis. Stat. § 973.06(1)(a), a sentencing court may tax a convicted defendant for "[t]he necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, preliminary examination and trial of the defendant . . . ." To the extent that OWI blood analysis expenses are paid by a law enforcement agency to a private medical facility, they may arguably qualify under this subsection. Under Wis. Stat. § 973.06(1)(c), a sentencing court may tax a convicted defendant for the "[f]ees and disbursements allowed by the court to expert witnesses," a provision that has been construed to cover the cost of a sexual assault examination done at a private hospital, even though no expert witness testified as to the results, *see State v. Rohe*, 230 Wis. 2d 294, 297-300, 602 N.W.2d 125 (Ct. App. 1999), and the cost of DNA analysis at a private laboratory. *See State v. Beiersdorf*, 208 Wis. 2d 492, 504-08, 561 N.W.2d 749 (Ct. App. 1997).

CONCLUSION

¶ 11. In summary, it is my opinion that Act 84, codified at Wis. Stat. §§ 778.027 and 967.027, does not allow prosecutors to resolve OWI charges by entering into an agreement to dismiss or amend a charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding in exchange for a defendant's agreement to reimburse a law enforcement agency for blood withdrawal and analysis expenses. However, it does not preclude agreements where a defendant provides reimbursement in exchange for other consideration.

Sincerely,



J.B. Van Hollen
Attorney General

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