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109

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred: March 19, 1993

FURTHER REFERRALS:

Date of Committee Action: 4/01/93

The FINANCE Committee considered:

HB 109

HOUSE BILL NO. 109

BLOOD TESTS ON SEX CRIME PERPETRATORS

"An Act relating to blood tests for persons charged with sex offenses; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS HB 109 (JUD) the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

fiscal impact _____

fiscal note(s) DHS

zero fiscal note _____

zero fiscal note(s) law corrections 3/19/93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Ronald J. Larson</i>	x	<i>EP Mckeon</i> ^{McLean}		✓	
<i>Terry Martin</i>	✓	<i>Mark Hanley</i> ^{Hanley}		✓	
		<i>Sean Parnell</i> ^{Parnell}		✗	
		<i>Ben Grussendorf</i> ^{Grussendorf}		x	
		<i>Ann Hoffman</i> ^{Hoffman}		✓	
		<i>Tay Brown</i> ^{Brown}			✓

Ronald J. Larson *EP Mckeon*
 CO-CHAIRMAN'S SIGNATURE
 LARSON MCKEAN

FISCAL NOTE

BILL NO. CSHB 109 (JUD)

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Revision Date: March 24, 1993
Title: "...relating to blood tests for persons charged with sex offenses."
Sponsor: Representative Kott
Requestor: Representative Kott

Department Affected: Department of Law
BRU: Prosecution, Legal Services
Component: Prosecution - All Legal Services - Operations
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
The Judiciary Committee substitute for HB 109 makes just a few minor changes to the HES version that we commented about on February 23, 1993. These minor clarifications will not have a fiscal impact for the Department of Law.

Prepared by: Richard I. Peques, Director Phone: 465-3672
Division: Administrative Services Division Date: March 24, 1993
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law Date: March 24, 1993

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FISCAL NOTE

No. 6

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: CSHB 109 (JUD)
(H) Publish Date: 3/19/93

Revision Date: 2-22-93 Dept. Affected: Corrections
 Title: "An Act relating to blood tests for persons charged with sex offenses...." BRU: Statewide Programs
 Sponsor: Rep. Kott Component: Inmate Health Care
 Requestor: House HESS Committee COMPONENT SERIAL NO. 705

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 SF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS:

(Attach a separate page if necessary)

This legislation does not have a fiscal impact on the Department of Corrections. The Department has staff who can draw the blood for the tests. Collecting the cost of the blood test from inmate earnings can be achieved without additional cost.

Prepared by: Dana LaTour, Special Assistant
 Division: Office of the Commissioner
 Approved by Commissioner: Lloyd G. Rupp
 Agency: Department of Corrections

Phone: 465-3376
 Date: 2-22-93
 Date: 2-22-93

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS HB 109 (JUD)

Revision Date: 3/23/93 Dept. Affected: Health and Social Services
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services
 Sponsor: Kott Component: Laboratories
 Requestor: House Judiciary COMPONENT SERIAL I.O. #291

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES	27.9	27.9	27.9	27.9	27.9	27.9
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	27.9	27.9	27.9	27.9	27.9	27.9

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	27.9	27.9	27.9	27.9	27.9	27.9
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	27.9	27.9	27.9	27.9	27.9	27.9

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

This fiscal note is based on the costs for the laboratory testing alone. It does not take into account the costs of medical personnel to perform the requisite counseling and testing, travel for medical personnel to communities where qualified personnel are unavailable, shipment of specimens, cost to ensure chain of evidence, and documentation of procedures and test results.

In 1992, 339 charges were made for arrests for sex offenses. Using 350 as the base, the laboratory costs associated with HB 109 is as follows:

Prepared by: Peter M. Nakamura, MD, MPH
 Division: Division of Public Health

Phone: (907) 465-3090
 Date: _____

Approved by Commissioner: Theodore A. Mala, MD, MPH
 Agency: Department of Health & Social Services

Date: 3/23/93

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ANALYSIS (cont.):

1. Cost for initial HIV screening @ \$16.30/test	5,705
2. Assuming that 0.9% initially screened were positive, the cost for HIV Western blot for making a positive diagnosis is \$93.15/test	293
3. Cost for screening negative results after the six month window period for 347 @ \$16.30/test	5,656
4. Cost for Western Blot for the 0.9% of those persons which tested positive after the 6 month window period	293
5. Cost of Hepatitis B screening @ \$16.30/test	5,705
6. Cost of Hepatitis B testing on the 11.2% that will test positive @ \$114.10/test	4,473
7. Cost of RPR test for syphilis @ \$16.30/test	5,705
TOTAL	\$27,830

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS HB109 (JUD)

Revision Date: 3/23/93 Dept. Affected: Health and Social Services
 Title: Blood tests for persons charged with sex offenses BRU: State Health Services
 Sponsor: Kott Component: Nursing
 Requestor: House Judiciary COMPONENT SERIAL NO. #288

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	45.5	45.5	45.5	45.5	45.5	45.5
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	45.5	45.5	45.5	45.5	45.5	45.5

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

FUNDING	FY94	FY95	FY96	FY97	FY98	FY99
1002 Federal Receipts						
1003 GF Match						
1004 GF	45.5	45.5	45.5	45.5	45.5	45.5
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	45.5	45.5	45.5	45.5	45.5	45.5

POSITIONS:

POSITIONS	FY94	FY95	FY96	FY97	FY98	FY99
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

Assuming a base of 200 individuals who would need testing and counseling and who would be presenting themselves to the Public Health Center for referral for these services, the costs of this bill for the Nursing Component are as follows:

Line 300 Contractual Services

200 draws & pre- & post-test counseling @ 1.5 hours x \$65/hr for initial tests	19,500
400 draws & pre- & post-test counseling @ 1.0 hr x \$65/hr follow-up testing	26,000
	45,500

Prepared by: Peter M. Nakamura, MD, MPH
 Division: Division of Public Health

Phone: (907) 465-3090
 Date: _____

Approved by Commissioner: Theodore A. Mala, MD, MPH
 Agency: Department of Health & Social Services

Date: 3/23/93

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ANALYSIS (cont.):

This fiscal note assumes:

- 1) testing and counseling is for individuals who are not being detained by the Department of Corrections or the Division of Family and Youth Services; and
- 2) individuals will present themselves to a Public Health Center for testing and counseling either through a court order or voluntarily will be referred to private providers for counseling.

3/24/93

BRIEFING PAPER
FOR

CS HOUSE BILL NO. 109 (JUD)

Prepared by Department of Public Safety

“An Act relating to blood tests for persons charged with sex offenses; and providing for an effective date.”

Since 1987, Alaska has received Drug Control and System Improvement Formula Grant Funds through the Office of Justice Programs, Bureau of Justice Assistance. The grant program is authorized by the Anti-Drug Abuse Act of 1988. The purpose of the funds is to provide assistance to the states for their law enforcement efforts to control the drug and violent crime problem. The allocation for each state and territory is primarily based on population.

For the first year, the allocation to Alaska was \$823,000. In 1993, the allocation is \$1,870,000.

Within the State, these funds are shared by state agencies and local units of government for the purpose of addressing the drug control problem through law enforcement, prosecution, and court system improvement programs.

In 1992, with federal allocation of \$1,852,000, there were 5 state agency projects and 9 local government projects funded. Through these projects the funds provided 14 law enforcement officers throughout the State, enforcing the State's controlled substance laws through multi-jurisdictional task force, street level enforcement, and financial investigation efforts. These funds provided for two prosecuting attorneys to specialize in the prosecution of individuals violating the State's controlled substance laws. In addition, the funds provided for timely court processing and the identification of individuals with prior drug offense incidents through improvement of the court and criminal history record systems.

Beginning October 1, 1993, the Crime Control Act of 1990 requires that in order for the states to continue to receive their identified Drug Control and System Improvement Grant allocation amount, the states must have laws in place related to HIV testing of individuals convicted of a sexual offense. The result of a state not having such legislation enacted will be a 10% reduction to the state's identified allocation amount. This amount then will be shared by those states which have enacted such legislation.

Briefing Paper
CSHB 109(JUD)
Page 2

For the State of Alaska to continue to receive its entire Drug Control and System Improvement allocation, avoid reducing its current drug control effort, and avoid providing 10% of its allocation to other states, passage of HIV testing legislation is necessary this session.

With a reduction of ten percent, or \$187,000, to the State's annual grant revenue allocation, it will be necessary to fund ten percent of the law enforcement and prosecution effort currently addressing the State's drug control problem through State general funds and municipal revenues.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO: CS HB109

Revision Date: 3/17/93 Dept. Affected: Public Safety
 Title: "An act relating to blood tests for persons charged with sex offenses: " BRU: Alaska State Troopers
 Component: Detachments
 Sponsor: Representative Kott
 Requestor: House Judiciary COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

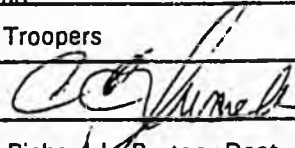
POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY 93) impact: \$ _____

ANALYSIS: (Attach a separate page if necessary.)

Passage of this legislation will prevent the loss of 10% of Federal Funds received by AST on a yearly basis from the Crime Control Act (Drug Control and System Improvement Grants). See Briefing Paper.

Prepared By: Francis C. Allan Phone: 269-5691
 Division: Alaska State Troopers Date: 3/17/93
 Approved by Commissioner:  Date: 3/17/93
 Agency: Richard L. Burton, Dept. of Public Safety

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Representative Pete Kott

SPONSOR STATEMENT

HB 109 – Blood Tests for Sex Crime Perpetrators

The purpose of HB 109 is to provide an avenue of relief for victims of sexual assault. The threat of HIV infection and of infection from other sexually transmitted diseases is a serious complicating side-effect of being victimized by sexual assault. The state has a compelling interest in assuring innocent victims of crime timely relief from the anxiety that may result from sexual assault.

HB 109 allows the victim of a sexual assault to petition the court to require a blood test on the defendant. The bill also provides that the state must make available to both the victim and the alleged perpetrator, upon their request, counseling relating to HIV and AIDS which is medically appropriate for those persons, and referrals for medical and support services.

Finally, HB 109 is designed to minimize the cost to the state of implementing this program. If the defendant is convicted, he or she must reimburse the state for the cost of the test. The court may order the Department of Corrections to provide for the reimbursement through garnishment.

The Federal Crime Control Act of 1990 specified that states must have a law such as that proposed by HB 109 or lose part of their law enforcement assistance grants. The deadline established by Congress is October, 1993. If we fail to pass this bill during the current session, Alaska's Department of Public Safety will lose approximately \$185,000 in FY94.

This bill can satisfy the Federal requirement and simultaneously form an integral part of an effort by the state of Alaska to ensure that victims of crime in our state are afforded every opportunity to receive appropriate relief.



Bill No. CSHB 109(JUD)

Date: March 31, 1993

Contact: Joanne F. Lopez
Executive Director
465-4356

Title: "An Act relating to blood tests for persons charged with sex offenses..."

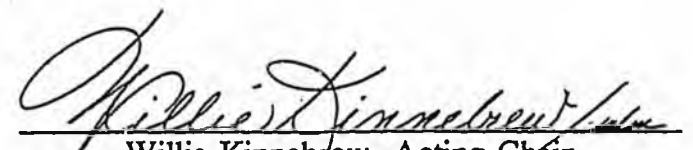
A total of 530 rapes were reported in 1991. Rapes account for 15.5% of all violent crimes. There are concerns for victims who may become infected with human immunodeficiency virus (HIV). Cases have been reported.

The Council on Domestic Violence and Sexual Assault supports the concept of a bill that would allow a victim of sexual assault to learn if her/his assailant is infected with HIV.

The Council recommends that the victim be informed that because the offender's blood test is negative, it does not mean that they are safe. The nature of HIV is such that there is an incubation/latency period of six to eight months during which a carrier's blood will not reveal the presence of HIV but they can transmit the virus. Victims need to be aware that they should be (re)tested six to eight months later. The Council would like to see funding for the Department of Health & Social Services to pay for victim testing.

The Council also believes that the legislation should specify how the information will be transmitted to the victim. The Council recommends that the information should be provided to the victim only if the victim (or the victim's legal custodian, if the victim is a minor) wants the information. The information should never be transmitted by letter and the victim, or victim's legal custodian if the victim is a minor, should be allowed to name a designee to receive the information if the victim doesn't want to learn of it directly.

The Council recommends that counseling of victims concerning the results of the alleged offender's blood test need to be handled sensitively. A counseling brochure does not meet this standard. A trained counselor or nurse or other appropriate service provider needs to be available to help the victim deal with the situation and to counsel the victim on safe sex and protection of their partner due to the potential exposure.


Willie Kinnebrew, Acting Chair
Council on Domestic Violence & Sexual Assault

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 17, 1993

SUBJECT: Blood Testing of Sex Offenders - CSHB 109(HES) (Work Order No. 8-LS0462\K)

TO: Representative Cynthia Toohey
Attn: Lynne Smith

FROM: Jerry Luckhaupt *JLB*
Legislative Counsel

FEB 17 1993

Enclosed is the final committee substitute you requested for the above-referenced bill. I have a few comments about the changes that were made.

1. On page 2, line 1, of the committee substitute, the committee added that "the parent or guardian" may file a petition for a blood test of a defendant. The language the committee adopted would seemingly permit a parent to seek a petition for a test even if the victim of the offense, their child, has reached the age of majority. It would probably be better to use language similar to that used on page 2, lines 16 - 17, such as "or if the alleged victim is a minor or incompetent, the alleged victim's parents or guardian."

2. On page 2, lines 3 - 9, the court is required to make a determination that probable cause exists to believe that a crime for which a test may be ordered was committed and that sexual penetration took place. The committee added language that in making this determination the court may rely on evidence presented before the grand jury or at any preliminary hearing. My concern is that the present language could be interpreted so as to not give a court the authority to hold a hearing if it chose to do so. While the language in the CS uses the permissive term "may" in allowing the court to rely on the evidence adduced at earlier proceedings, and this could be regarded as implicitly giving the court the authority to hold a hearing, it would be better to explicitly state that the court may hold a hearing or may rely on previously presented evidence, or that the court may rely on previously presented evidence or if that evidence is insufficient the court may hold a hearing.

3. On page 5, lines 8 - 12, of the bill draft, the committee removed the criminal penalty for unauthorized disclosure of the results of a test conducted under the bill,

and substituted in that any unauthorized disclosure may be punished as contempt of court. Contempt of court is provided for in AS 09.50.010 - 09.50.060.^{1/} Presumably, this contempt would be criminal contempt, as opposed to civil contempt, as one who has disclosed test results is being punished for past conduct and to vindicate the order and authority of the court, and any contempt order would not be conditioned on any future or remedial action of the person facing the contempt charge - that is a civil contempt order usually tries to coerce compliance with a court order and a person found in civil contempt is given the opportunity to purge the contempt charge by doing something the court was commanding the person to do.^{2/} See Stadler v. State, 813 P.2d 270 (Alaska 1991); Johansen v. State, 491 P.2d 759 (Alaska 1971).

Further, though the committee was advised that contempt only carries a possible punishment of a fine of \$300 or less, actually the potential punishment could be substantially greater than \$300. An unauthorized disclosure of test results would be a violation of a court order which is provided for in AS 09.50.010(5). The penalty for most forms of contempt, including AS 09.50.010(5), is only \$100. AS 09.50.020. But if by the contempt the "right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt" the penalty is "by fine of not more than \$300 or by imprisonment for not more than six months." AS 09.50.020. It would appear that the unauthorized disclosure of the test results of the person whose blood was tested would result in the person's right or privilege in not having those results disclosed being defeated or prejudiced. Consequently, I believe a person that discloses test results in an unauthorized manner would be subject to a \$300 fine or six months in jail.^{3/} Since the committee's rationale for adopting this change appeared to be based upon the concerns of the Department of Law that an alleged victim could be subjected to a jail sentence this change does not accomplish that goal.

^{1/} Criminal contempt is punishable as provided for in civil contempt proceedings. AS 12.80.010.

^{2/} In a sense the contempt could be considered to be civil, in that any unauthorized disclosure could be considered to have occurred to the detriment of the person whose blood was tested and the person who made the disclosure could be ordered to compensate the person whose blood was tested for any damage sustained by the unauthorized disclosure. See AS 09.50.040 and Stadler, infra, at 272 - 273. But since there is no way the person making the disclosure can purge the contempt - the person cannot take back the unauthorized disclosure - it seems reasonable to assume that any contempt proceeding in this situation would be criminal contempt.

^{3/} In Siggelkow v. State, 731 P.2d 57 (Alaska 1987), the Alaska Supreme Court found that a woman's right to be "left alone" by her ex-husband who constantly harassed her in violation of a no-contact order issued as part of the parties' divorce decree was such a right that authorized the increased penalty provisions of AS 09.50.020. I do not believe that it is a great reach from that decision to say that a person's right, under the bill, not to have their test results disclosed is such a right or privilege that the defeat or prejudice of that right by unauthorized disclosure would authorize the increased penalty provision of AS 09.50.020.

Representative Cynthia Toohey
February 17, 1993
Page 3

I am also concerned about the removal of the criminal penalty for unauthorized disclosures and how it may affect a court's review of the constitutionality of the entire blood testing scheme. It must be remembered that the Alaska Constitution contains an explicit right of privacy provision that does not exist under the United States Constitution or most other state constitutions. Providing for a certain level of confidentiality of the identifiable test data as is done in the bill and a provision that unauthorized disclosure is a crime provides a court at least some support in finding that this testing scheme is constitutional. While punishment of unauthorized disclosures as criminal contempt does not harm the bill vis-a-vis a constitutional challenge, the removal of any criminal sanction would weaken the bill if its constitutionality were under attack.

Finally, I am concerned about how someone not a party to the petition for testing could be prosecuted for contempt. How would the person have received notice that the test results could not be disclosed if they were not served with the original court order? If a person were aware that testing might be ordered and they might want to disclose the results for whatever personal reason they might have, if they were able to obtain the results by hook or crook, how could the person intervene in the criminal proceeding if they were not the victim or the state? I don't have answers to these questions, but if a criminal penalty is provided for unauthorized disclosure I don't believe that these questions would be implicated.

If you have any questions, please contact me at your convenience.

GPL:mi
93-026.mai

Enclosure

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

P.O. BOX 110610
JUNEAU, ALASKA 99811-0610
PHONE: (907) 465-3090

February 17, 1993

Honorable Pete Kott, Member
House HESS Committee
Alaska State Legislature
State Capitol
Juneau, AK 99811

Dear Representative Kott,

At the House hearing of HB 109 (Blood testing on individuals accused of sexual assault) on 9/16/93 I made an error in a statement on the disease, Hepatitis B. I wish to take this opportunity to correct that misunderstanding and to apologize for any confusion that the statement may have created.

Contrary to my statement, although the primary method of transmission is through the blood route, Hepatitis B is considered to be a sexually transmitted disease.

Hepatitis B is a highly infectious virus that is very stable and can exist over a month in the dried state. It is not transferred in the fecal, oral route but is transmitted through blood and the sexual process. It can also be transmitted from an infected mother at the birthing and through the saliva of an infected person. The later is considered one reason for the high incidence of hepatitis B in institutions that cared for children who were severely mentally retarded.

Hepatitis B immune globulin is available for those who have high risk exposures but the preventions of hepatitis B is not definite. A Hepatitis B vaccine is available for preventing the disease if given before exposure. The vaccine is given in combination with the globulin at times after the exposure to maximize the possibility of preventing the disease.

In view of the transmission of hepatitis B through sexual practices it would be reasonable that testing for this disease be included in the blood tests mandated under C.S. for H.B. 109.

Thank you for giving me the opportunity to correct any misinformation that may have been provided earlier.

Sincerely,



Peter M. Nakamura M.D., M.P.H.
Director, Division of Public Health.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P. O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 W. 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 10, 1993

The Honorable Pete Kott
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99801-1182

Re: CSHB 109(HES) (Relating to blood tests for persons charged with sex offenses)

Dear Representative Kott:

By letter dated February 26, 1993, you have asked us to review CSHB 109(HES), relating to blood tests for persons charged with sex offenses. In particular, you wish to know whether there are potential due process problems in allowing the court to order a blood test without holding a hearing on the matter at which the defendant may be present.

We do not believe that this provision presents any constitutional problems. Proposed AS 18.15.300(c) authorizes the superior court to order a defendant to provide a blood sample for testing if the court determines that there is probable cause to believe that the defendant committed one of the enumerated offenses and that sexual penetration with the victim took place.

The "probable cause" standard set forth in this bill is the same standard that is used for the issuance of search warrants. Search warrants are uniformly issued at ex parte proceedings; the defendant is neither present nor has any right to be heard before the warrant is issued and executed. Search warrants per force involve an invasion of the subject's privacy. The sufficiency of the probable cause standard to support search warrants is highly indicative of the sufficiency of that same standard for the issuance of an order requiring a charged defendant to submit a blood sample for testing. Similarly, the permissibility of obtaining search warrants in ex parte proceedings is highly indicative that an order requiring the production of a blood sample may be issued without providing the defendant an opportunity to be heard on the issue.

Proposed AS 18.15.300(c) further states: "In making the [probable cause] determination, the court may rely on the evidence presented at a grand jury proceeding or

preliminary hearing."¹ At a preliminary hearing, the prosecution bears the burden of establishing that there is probable cause to believe that the alleged offense was committed by the defendant. Criminal Rule 5.1(h). The defendant has the right to be present at this hearing and may cross-examine the witnesses against him. Criminal Rule 5.1(b). Thus, to the extent that the court relies upon evidence that was presented at a preliminary hearing, the defendant had the opportunities to be present and confront the evidence against him at that hearing; a second such opportunity need not be provided.

The defendant does not have the opportunity to be present at a grand jury proceeding. Our constitution, however, provides alternative safeguards to secure defendants' rights. Thus, a grand jury, which is comprised of eighteen persons, hears the evidence against the defendant and applies a standard at least as strict as the "probable cause" standard used in preliminary hearings (whether "all of the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant"). Criminal Rule 6(q). To the extent that this proceeding is sufficient to justify the maintenance of felony charges against the defendant, with the appreciable loss of liberty entailed throughout those proceedings, we believe that it is also sufficient to justify an order requiring the defendant to provide a blood sample for testing.

Finally, we note that proposed AS 18.15.310(f) specifies that "the results of tests ordered under AS 18.15.300 -- 18.15.330 are not admissible evidence in a criminal or juvenile proceeding." Although we do not believe that this provision is constitutionally required, it further reduces any concerns that may exist regarding the lack of a new evidentiary hearing on the issue of whether a blood test should be ordered. A defendant would have a greater interest in challenging an order to provide a blood sample if that sample could be used as evidence against him.²

In summary, we find no constitutional impediment to this bill's provision authorizing the court to rely upon a preliminary hearing and/or grand jury proceedings in making the factual determination that there is probable cause to believe that the defendant committed one of the enumerated offenses and that sexual penetration with the victim took place.

You also wish to know whether the defendant's privacy interests are sufficiently safeguarded by providing that unauthorized disclosure is punishable by contempt of court. We

¹ We would like this sentence to be amended to explicitly acknowledge that the court may rely *exclusively* on such evidence.

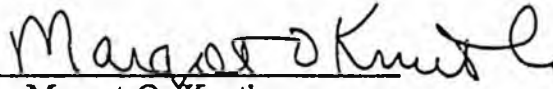
² We note that there is nothing in this bill that would prevent a prosecuting attorney from obtaining an independent order for the provision of a blood sample under Criminal Rule 16.

believe that this is sufficient. To the extent that the circumstances justify the invasion of the defendant's privacy rights in the first instance by requiring the production of a blood sample for testing, the defendant's additional privacy interests in restricting the disclosure of the test results are adequately protected by the provision in this bill prohibiting unauthorized disclosures. We do not believe that the defendant's right of privacy is appreciably affected by whether a violation of that prohibition is treated as contempt of court or is made a new criminal offense.

If you have further questions or if we may be of assistance in any other manner, please feel free to contact us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Margot O. Knuth
Assistant Attorney General

cc: Charles Cole
Attorney General

Deborah Behr
Department of Law

Kris Lethin
Legislative Liaison

Richard Burton, Commissioner
Department of Public Safety

Dr. Ted Mala
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Lloyd Rupp
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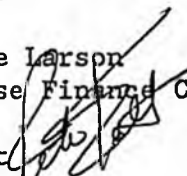
DURING SESSION:
STATE CAPITOL
JUNEAU, AK 99811
PHONE (907) 465-3777

Representative Pete Kott

MEMORANDUM

DATE: March 17, 1993

TO: Representative Larson
Co-chair, House Finance Committee

FROM: Rep. Pete Kott 

RE: Request for hearing
HB 109, Blood Tests for Sex Crime Perpetrators

Please schedule HB 109 for a hearing before the House Finance Committee as soon as possible.

HB 109 is a victims rights bill which allows the victim of a sexual assault to petition the court to have the defendant tested for the presence of HIV antibodies and indications of other sexually transmitted diseases. The bill also provides that if the defendant is convicted, he must reimburse the state for the cost of the test.

The following items are attached:

Sponsor statement
Attorney General's opinion
Letter from Dr. Peter Nakamura
Department of Public Safety briefing paper
Letter of support from Alaska Women's Commission
Fiscal notes:
Public Safety
Department of Law
DHSS, Laboratories
DHSS, Nursing
Corrections

If you have any questions on this bill, please call me or my Legislative Assistant, Jack Phelps, at 465-3777.

cc: Rep. Hanley
Rep. Maclean



DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 27, 1993

SUBJECT: Sectional Summary of CSHB 109(JUD)
(Work Order No. 8-LS0462\O)

TO: Representative Pete Kott
Attn: Jack Phelps

FROM: Jerry Luckhaupt *JLB*
Legislative Counsel

You have requested a sectional summary of the above described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 18.15 by adding new sections AS 38.15.300 - 38.15.320.

AS 38.15.300 provides that a defendant or a juvenile charged with a violation of AS 11.41.410 - 11.41.440 that includes sexual penetration as an element of the offense may be ordered to submit to a blood test for indications of exposure to or infection by HIV and other sexually transmitted diseases. Copies of the results of the test shall be provided to the defendant or juvenile, the victim, and if the defendant or juvenile is detained, the officer in charge and the chief medical officer of the institution detaining the defendant or juvenile. The section provides procedures for ordering the test and sets limitations on when a test may not be ordered.

AS 18.15.310 provides procedures for conducting the test and issuance of the results. This section also provides that a court may order everyone receiving the results, other than the defendant or juvenile, not to release the results.

AS 18.15.320 provides that the cost of performing a test shall be borne by the Department of Health and Social Services. If a defendant for whom a test has been conducted is convicted the sentencing court is required to order the defendant to reimburse the Department of Health and Social Services for the cost of the test and the Department of Corrections is authorized to deduct the cost of the test from any pay the inmate receives under AS 33.30.201.

Section 2 of the bill provides an effective date.

GPL:lmb
93-087.lmb

Back-up

ALASKA CIVIL LIBERTIES UNION

P. O. Box 201844 Anchorage, AK 99520-1844
Phone: 907-258-0044 Fax: 907-258-0288
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March 23, 1993

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Randall P. Burns
Executive Director

Dear Representatives Larson and MacLean:

I am writing to you regarding House Bill 109. HB 109 would require persons arrested for alleged sex offenses involving penetration to have their blood tested to ensure that they are not HIV positive or infected with AIDS virus or other communicable or sexually transmitted diseases. This bill would allow, under fairly stringent confidentiality provisions, the alleged victims of sex offenses involving penetration to discover if they could have contracted any disease from the alleged sex offender.

Although the Alaska Civil Liberties Union (AkCLU) appreciates the desires of the sponsors of this bill to inform alleged victims of sex offenses of the likelihood of future serious -- even life-threatening -- health risks associated with the violence perpetrated against them, it opposes -- for the reasons outlined below -- the approach taken by this bill.

Page Two - Representatives Larson and MacLean - March 23, 1993

First, HB 109 would allow blood samples to be taken from an alleged offender *before* he or she has been found guilty of a crime. Under the bill, however, blood cannot be sampled until a judge finds "probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant or minor and the alleged victim." This requirement, while putting in place a procedural protection not presently in place for defendants (which the AkCLU supports), poses hardships on both the alleged victim and the defendant.

The bill will require a probable cause hearing before the actual trial itself, requiring the alleged victim to potentially have to appear in court twice, once for the hearing and once at the trial itself. Court appearances in these cases are understandably difficult for the victim and adding a potential second appearance seems very troublesome. In addition, a finding of probable cause by a judge will certainly leave the public with the impression that the defendant is guilty even before he or she has had a full and fair trial on the matter of the offense. This assumption of guilt would potentially deny alleged offenders due process of law by denying them both the right to not incriminate themselves and the right to a presumption of innocence until *proven* guilty.

Secondly, this bill would perpetuate the dangerous misperception that information about a sex offender's (e.g., rapist, incest perpetrator, child molester) HIV status is critical to the victim's health, *when in fact such knowledge is useless*. The knowledge of the health status of an alleged sex offender is of no import when determining the future health of the victim of a sex offense. Though the offender may test positive for HIV (or other sexually transmitted or communicable diseases), there is no guarantee that the victim will develop the disease.

More importantly, even if the alleged offender tests negative at the time of the blood test, there is no guarantee that the victim will *not* develop the disease. We know that the incubation period for the AIDS virus ranges from two weeks to six months and is peculiar to each individual. Therefore, a survivor of a sex offense may improperly rely on a negative result and forgo testing or prophylactic treatment if the accused tests negative.

A much more effective method of determining whether the victim develops such a disease is to *monitor the health of the victim*, not that of the alleged offender. The AkCLU opposes mandatory HIV testing of people accused of sex

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offenses specifically because such tests do not provide the victims of sex offenses with timely or reliable information which they can use to properly evaluate their level of risk and make informed decisions about their health care. Testing the accused cannot tell the survivor whether she or he has been infected and thus does not preclude the need for survivors to be tested themselves.

Assuming that the underlying purpose of this bill is provide information necessary for the provision of appropriate health care to a victim of sexual assault, testing the defendant for the presence of HIV shortly after the date of the alleged assault will not provide reliable or conclusive information to the victim. A positive test could just as likely reflect that the accused had been exposed to HIV during the period of time after the alleged assault (if the accused is out on bail, for instance) as any exposure prior to the alleged offense.

Furthermore, if there is reasonable evidence to suspect exposure to HIV and treatment is available, it should begin as soon after exposure as possible. This again speaks to the need for testing, treatment, and counseling, if necessary, of the victim without regard to any test result of the accused. Indeed, by six to twelve months after the date of the offense, the survivor's own test result is *the* most reliable source of information regarding her or his health status.

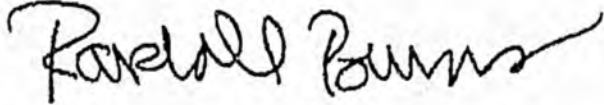
Finally, mandatory testing, even with the protection of a probable cause hearing, is an intrusive medical procedure. The AkCLU is concerned that the alleged perpetrator's individual right to privacy will be infringed upon under this bill. Only in the most extreme of circumstances should any medical procedure be performed upon a person without that person's consent. Given that the test is more accurate when taken from the victim, there is no reason for the state to impose mandatory blood testing on a defendant in a sex offense case.

The AkCLU agrees that sex offenses are terrible crimes. Nevertheless, we also believe that the rights of victims and the rights of the accused must be balanced. The rights of one group should not take precedence over the rights of another. Should HB 109 pass, however, the rights of victims will be granted precedence over the rights of *accused* offenders, while failing to truly offer the victims of sexual offenses the kind of surety about their health that only comes with proper testing of and counseling for the victim.

Page Four - Representatives Larson and MacLean - March 23, 1993

Should you have questions, or if we may be of assistance to you in this matter, please do not hesitate to contact this office.

Sincerely,



Randall P. Burns
Executive Director

cc: Representative Kott
Alaska AIDS Assistance Association
Cindy Smith
Sherry Goll

Position Paper

*Alaska Women's Commission
Post Office Box 82977
Fairbanks, Alaska 99708*

*Approval By Alaska Women's Commission
House Bill 109*

This bill would require blood tests from persons charged with sexual offenses and provide an avenue for victims of the sexual assault to receive the results of those tests.

HB 109 provides victims of sexual assault a means to determine whether they have been exposed to communicable diseases. At the present time privacy laws prohibit this testing of alleged perpetrators of sexual assault or disclosure of test results. Victims have no recourse to determine if they have contracted a sexually transmitted disease. This bill would provide that recourse.

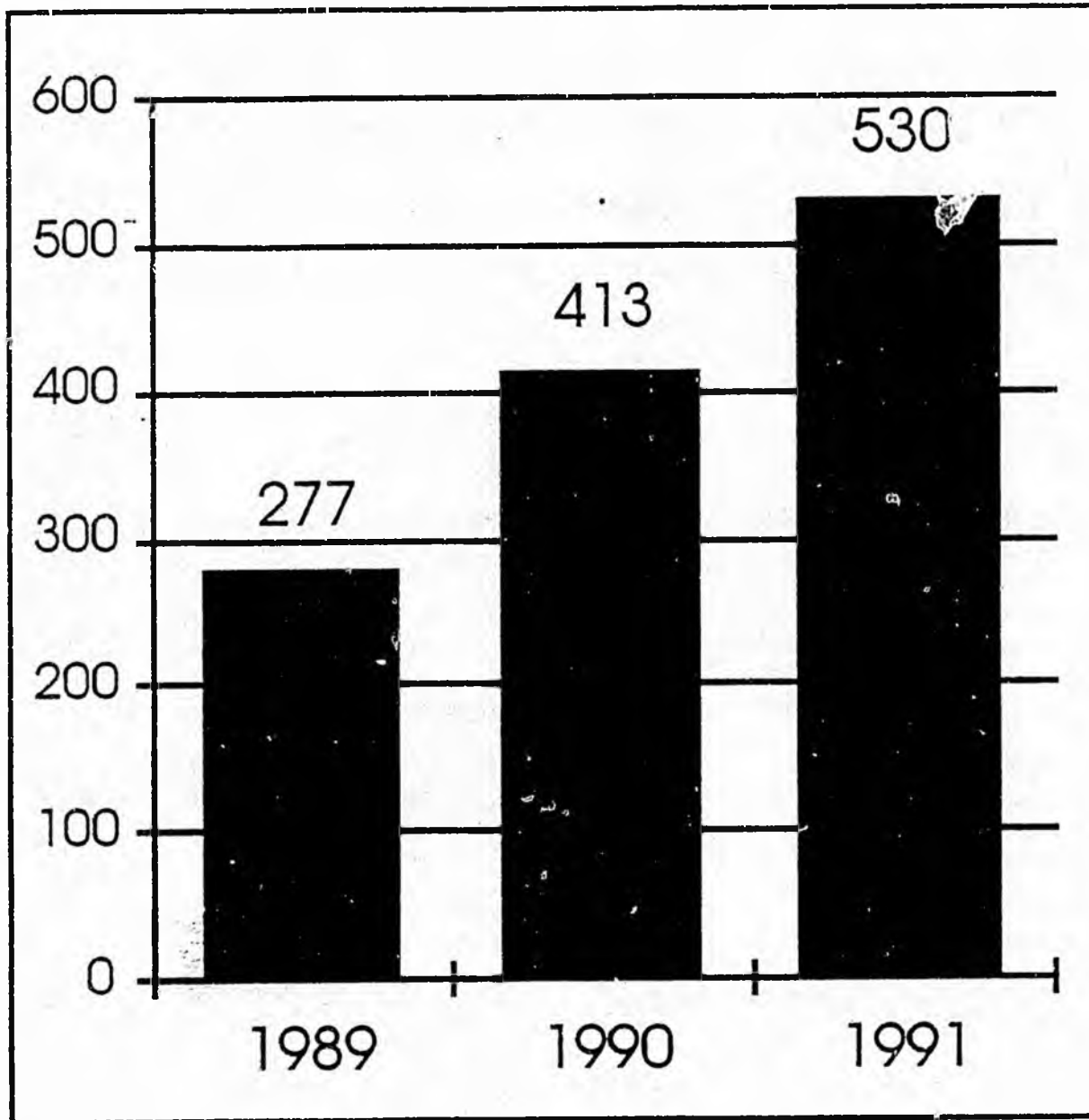
The Alaska Women's Commission supports HB 109. Victims of sexual assault are innocent people whose person and whose own right to privacy have been violated. The statutes should provide them access to the medical information about their attacker necessary to determine any medical treatment needed to preserve their physical - and mental - health. Sexual assault victims need a great deal of help and support for recovery. HB 109 provides an important remedy without compromising legitimate protection of the alleged attacker's rights.

The proposed bill appears to adequately address both the necessary protections and practical means of achieving the desired results. The Alaska Women's Commission supports HB 109 as written.

Alaska Women's Commission

Barbara B. Fyndall
Barbara B. Fyndall
Chair

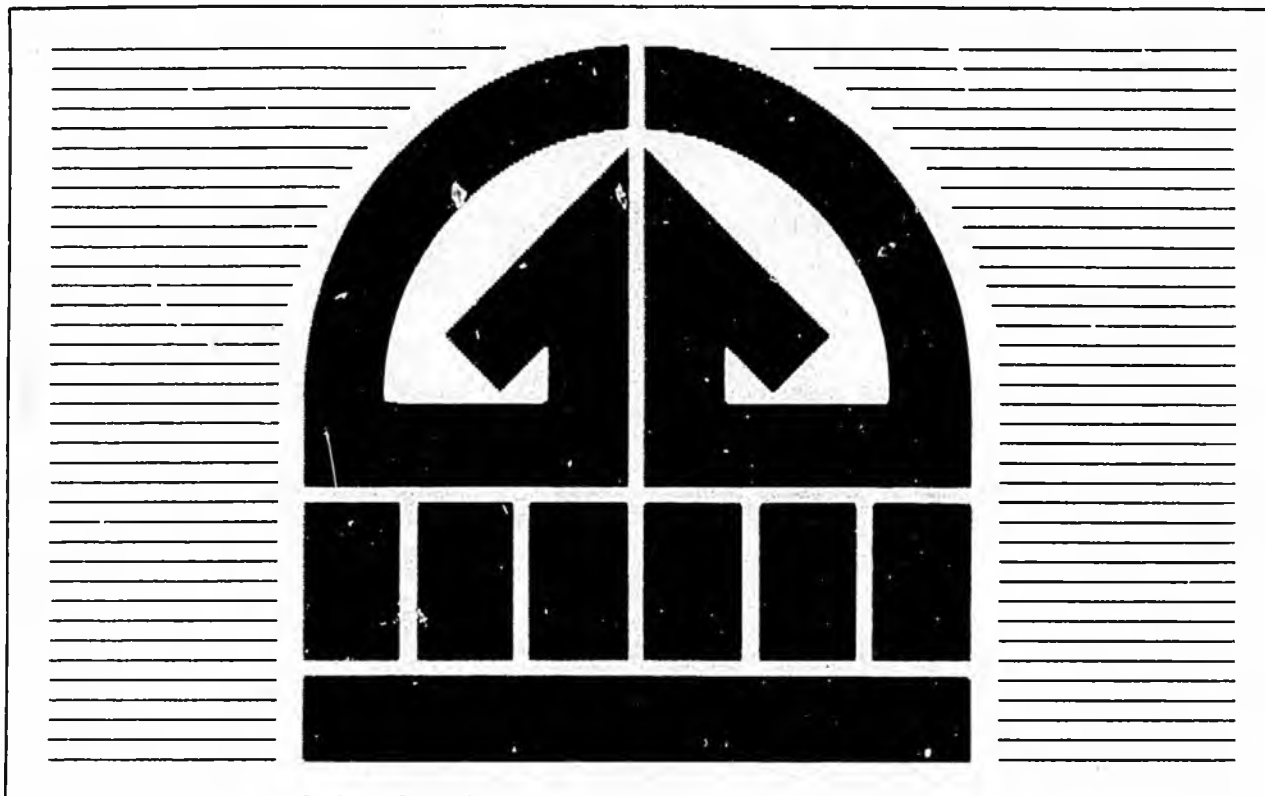
Reported Rapes in Alaska 1989 through 1991



Provided by The Network on Domestic Violence and Sexual Assault
Source: Department of Public Safety

HB 109
Rep Kott
2/8/93

STATE LEGISLATIVE REPORT



TESTING SEX OFFENDERS FOR HIV

by

Lucinda L. Bryant
HIV/AIDS Consultant
and

Tracey A. Hooker
HIV/AIDS Policy Specialist

Vol. 16, No. 7 September 1991

An Information Service of the National Conference of State Legislatures
1560 Broadway, Suite 700, Denver, Colorado 80202. William T. Pound, Executive Director

TESTING SEX OFFENDERS FOR HIV

"The public good to be achieved must be balanced against the costs of the policy."
Larry Gostin, *The Politics of AIDS*, 1989

INTRODUCTION

In the United States each year between 1973 and 1987 some 155,000 women reported they had been raped. (1, p. 7) Although rape is not solely a crime against women, national statistics on homosexual rape are not available. All victims of sexual assault (or survivors, the term some advocacy groups such as the Center for Women Policy Studies prefer) suffer physical and emotional trauma. (2) When the fear of being infected with the human immunodeficiency virus (HIV) is added, the emotional burden increases. Because the victims not only have been assaulted but also possibly threatened with a deadly disease, they often want to know if their assailant is infected with HIV, and public sentiment tends to support requiring the accused to undergo HIV testing.

States feel pressure to respond with legal remedies. One option is to require offenders to be tested for HIV infection (the presence of HIV antibodies) so that victims may have the information. Federal legislation passed in 1990, the Martin amendment to the Comprehensive Crime Control Act of 1990 (P.L.101-647), pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funds.

Still, questions exist about the usefulness of testing and the legality of mandatory testing. Being infected with HIV is not a crime; infection only becomes relevant to criminal proceedings in the cases involving reckless endangerment, such as assault with intent to infect or deliberate transmission of the virus.

The states have the task of balancing the rights of victims and defendants. To do so, legislators need to conduct careful research about the issues and involve rape victim assistance groups, other relevant community organizations and public health agencies, as well as legal counsel. As Larry Gostin, executive director of the American Society of Law and Medicine, asserts, "The public good to be achieved must be balanced against the costs of the policy [including] . . . the invasion of human rights, the financial cost or the practical burdens of the policy." (3, p. 1020) This report examines some of those policy costs, focusing on issues for legislators to consider regarding HIV testing. The issues include both practical and legal questions about requiring HIV tests for sex offenders.

PRACTICAL CONSIDERATIONS ABOUT HIV TESTING

Tests for HIV infection screen for antibodies produced by the immune system's response to HIV, not for the virus itself. The usual testing procedure is to screen with the ELISA (enzyme-linked immunosorbent assay) and then to confirm positive results with the more labor intensive Western blot test. (4, p. 261-2) Testing sex offenders for HIV raises a number of questions, including the small risk of transmission, the reliability of the tests, the usefulness of the information and the cost.

The risk of transmission of HIV from a single sexual assault. HIV is transmitted through the transfer of body fluids such as semen and blood. The risk of HIV transmission from a single sexual encounter is relatively low. Currently available data suggest at most a 1-in-500 chance of

HB 109
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TESTING SEX OFFENDERS FOR HIV

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INTRODUCTION

In the United States each year between 1973 and 1987 some 155,000 women reported they had been raped. (1, p. 7) Although rape is not solely a crime against women, national statistics on homosexual rape are not available. All victims of sexual assault (or survivors, the term some advocacy groups such as the Center for Women Policy Studies prefer) suffer physical and emotional trauma. (2) When the fear of being infected with the human immunodeficiency virus (HIV) is added, the emotional burden increases. Because the victims not only have been assaulted but also possibly threatened with a deadly disease, they often want to know if their assailant is infected with HIV, and public sentiment tends to support requiring the accused to undergo HIV testing.

States feel pressure to respond with legal remedies. One option is to require offenders to be tested for HIV infection (the presence of HIV antibodies) so that victims may have the information. Federal legislation passed in 1990, the Martin amendment to the Comprehensive Crime Control Act of 1990 (P.L.101-647), pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funds.

Still, questions exist about the usefulness of testing and the legality of mandatory testing. Being infected with HIV is not a crime; infection only becomes relevant to criminal proceedings in the cases involving reckless endangerment, such as assault with intent to infect or deliberate transmission of the virus.

The states have the task of balancing the rights of victims and defendants. To do so, legislators need to conduct careful research about the issues and involve rape victim assistance groups, other relevant community organizations and public health agencies, as well as legal counsel. As Larry Gostin, executive director of the American Society of Law and Medicine, asserts, "The public good to be achieved must be balanced against the costs of the policy [including] . . . the invasion of human rights, the financial cost or the practical burdens of the policy." (3, p. 1020) This report examines some of those policy costs, focusing on issues for legislators to consider regarding HIV testing. The issues include both practical and legal questions about requiring HIV tests for sex offenders.

PRACTICAL CONSIDERATIONS ABOUT HIV TESTING

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The risk of transmission of HIV from a single sexual assault. HIV is transmitted through the transfer of body fluids such as semen and blood. The risk of HIV transmission from a single sexual encounter is relatively low. Currently available data suggest at most a 1-in-500 chance of

infection from a single male-to-female exposure if the male is infected. (5, p. 2429 and 6) Risk may be somewhat higher if tissue damage occurs, as may be likely in cases of forcible rape. Of those who died from AIDS-related illness between 1981 and 1990, only 3.5 percent (3,587) were infected through heterosexual contact. (7) The most recent Centers for Disease Control data attribute 10,011 (6 percent) of all known AIDS cases in the United States to heterosexual contact. (8) No cases of HIV transmission from rape have been reported in the United States and only one in Great Britain. (9, p. 36 and 10, p. 2)

Reliability of HIV tests. Most individuals with detectable antibodies are assumed capable of transmitting infection. Current tests are quite reliable, but no test is 100 percent so. (4, p. 260) Especially in low-risk populations, there are significant problems with false positive results (positive tests when the virus is not present) and false negative results (negative tests when the virus is actually present). (4, p. 263) Test results vary among laboratories and are vulnerable to subjective interpretation. Most infected people test HIV-positive within four to six weeks after exposure, but some may not test positive for up to six months, possibly longer, because tests monitor antibodies produced in response to the virus rather than the actual presence of the virus. There is hope for more reliable tests in the future.

Usefulness of testing information. Sexual assault victims might want information about the accused offender's HIV status for two primary reasons: concern for their own health and concern for the health of their sex partners. The victims and their sex partners would be relieved to know if the offender did not test HIV-positive. If the offender tested HIV-positive, victims would want to know quickly to initiate preventive medical action and to protect their partners. A pregnant woman or a woman considering pregnancy has a particularly compelling need to know the offender's HIV status so she can make informed decisions about the health of her future children. Testing the victim will not give useful, reliable information immediately after the assault, because the virus can have an incubation period of six months or more.

A victim might request treatment with AZT (zidovudine), which is used to delay the progression from HIV infection to full-blown AIDS and to increase the length and quality of life of infected patients. Some physicians recommend immediate administration of AZT as a prophylaxis to healthcare workers who have been exposed to HIV, but no studies to date have proven the effectiveness of AZT as a preventive measure. The U.S. Public Health Service recommends that physicians and exposed individuals (but not specifically victims of sexual assault) make decisions about the use of AZT based on risk of infection, time elapsed since exposure, and counseling about the risk of toxicity and the uncertainty about the effectiveness of the medication as a preventive measure. (11, p. 7)

Time also is an issue. Because early intervention may be more effective (if AZT intervention is beneficial at all), testing and communication of test results to the victim need to be completed as quickly as possible after the assault. Waiting until conviction, which can take up to three years, decreases the usefulness of the information to the victim. Testing all accused offenders may solve this problem but raises legal questions. If the offender is not tested promptly, then testing the victim provides at least as much useful information to the victim, because it may show the actual presence or absence of the virus. (12, p. 264)

Cost and payment of mandatory or court-ordered testing. Testing costs vary widely, depending on whether testing is done in bulk, as through a state health department, or individually, by private physicians. Costs also depend on the number of tests required, determined by preliminary test results and the individual's risk factor(s). Costs for tests in bulk are estimated at \$3 to \$15 for the ELISA and \$25 to \$40 for the Western blot assay. Individual tests are substantially more expensive, averaging \$50 to \$75, and can cost as much as \$200.

Only a few states have laws that provide for paying for testing, and none unconditionally pays for a victim's testing. Florida draws on general revenue funds. Kansas, Ohio, South Carolina and Virginia demand repayment from the convicted offender, either directly or as part of the court's judgment. If the defendant is indigent, then the state, municipality or county pays. Oregon uses Crime Victim Compensation funds. Missouri's Department of Health pays for the victim's test if the defendant tests HIV positive, and Idaho pays only to the extent that the Legislature appropriates specific funds.

LEGAL CONSIDERATIONS ABOUT HIV TESTING

The Fourth and Fourteenth Amendments to the U.S. Constitution raise two major issues concerning mandatory testing of offenders and non-voluntary disclosure of test results to victims and others. The Fourth Amendment guarantees protection of the individual from unreasonable searches and seizures and requires that search warrants be based on probable cause. The Fourteenth Amendment is concerned with personal liberty, restrictions on state action and the right to privacy.

Reasonable search. Obtaining a blood sample for HIV testing is a "search" under federal law. The U.S. Supreme Court's interpretation is that the reasonableness of a search is determined "by balancing the government's need to conduct the search against the invasion which the search entails." (13) Warrantless administrative searches may be allowed in non-criminal proceedings when the government's interest in protecting public safety outweighs the individual's privacy interest. (14) The uncertainty surrounding HIV test accuracy and the decreasing usefulness of the offender's test results over time may weaken the case that testing protects public safety in terms of sexual assault victims.

Privacy. Discrimination against HIV-infected individuals is a serious problem. There are concerns about fairness of trials and treatment in correctional facilities. Knowledge that an individual was tested, regardless of the results, can be damaging. Perhaps more important, if the defendant is tested before conviction, it may prejudice the presumption of innocence. On the other hand, if testing is restricted only to convicted sex offenders, it fails to allow for early medical intervention and provides little physical or emotional benefit to the victim.

Court-ordered testing. If a court receives the defendant's written, informed consent to test, or if a court weighs the need for testing against the right of the defendant and finds cause to test, then there are fewer constitutional constraints on testing. A Connecticut law (S.B. 812, 1989), although not specifically directed at sex offenders, is an example of legislation that balances public need and legal protection. Before a court may issue an order for testing, it must find clear and imminent danger to the public health or the health of another person. In addition, the person requesting testing must demonstrate a compelling need that cannot be met by other means. To assess "compelling need," the court must weigh the need for the test result against the test subject's privacy interests and the public interest, which may be poorly served by involuntary testing. (15, p. 61) The problem with these procedures is how long they take.

OPTIONS OTHER THAN HIV TESTING OF THE OFFENDER

The Presidential Commission on the HIV Epidemic and others concerned with the needs of assault victims have recommended focusing on the victim's needs and health status, providing HIV and rape counseling, and making medical care available. (2,16,17,18)

When reason exists to suspect HIV transmission from an assault, testing the victim, and retesting over the period of incubation, is the most reliable source of information. (19, p. 1632) In

addition, the victim may better benefit from an immediate assessment of the risk status of the accused offender, with or without HIV testing, to the extent possible within the legal limits of confidentiality. The victim also needs to know the latest information about preventive measures, such as AZT treatment.

The Centers for Disease Control recommend that pre-test counseling include information about:

- ▶ The risk of infection;
- ▶ The limitation of the test results;
- ▶ The consequences of a positive test result, such as concerns about insurance, employment and housing discrimination; and
- ▶ Measures to prevent the spread of the virus.

STATE RESPONSES

As of May 1991, at least 23 states had passed laws concerning HIV testing of sexual offenders. In addition, at least 70 bills about this issue were proposed in 26 states during the 1991 legislative sessions.

States have taken different approaches to concerns about sex assault. Some have emphasized the rights of victims, others the rights of defendants. California's and New York's laws tend to illustrate the range.

California (S.B. 1007, 1988 and S.B. 2643, 1989) places greater emphasis on victims' rights. One law mandates HIV testing of convicted sex offenders. Another requires the court to issue a search warrant to obtain a blood sample for HIV testing from a person charged with sexual assault when there is probable cause to believe there was a transfer of body fluids. Counseling for both the victim and the accused is required. If the test is positive and confirmed, the victim is notified. The victim is immune from civil liability for disclosing the information as necessary to protect the health and safety of self, sex partner(s) and family. (12, p. 244 and 16, p. 1625)

New York's AIDS Testing and Confidentiality Law [NY PUB. HEALTH LAW 2781.1], which does not specifically address testing sex offenders, protects the rights of the defendant while weighing the needs of the victim. It does not give the victim the right to have the defendant tested. The person to be tested must give written, informed consent unless the test is authorized by law. The court must weigh the victim's needs against the defendant's privacy interests and find "clear and imminent danger" to the victim's life or health before ordering testing or disclosure of test results to the victim. Any further disclosure or redisclosure is prohibited. (12, p. 259 and 16, pp. 1627-29)

The Appendix contains a chart of state laws concerning HIV testing of sex offenders and their provisions on the issues addressed in this report. The following is a summary of the provisions:

- ▶ **Testing Requirements:** fourteen states (CO, FL, ID, IL, IN, MS, MO, NV, ND, OH, OR, SC, TN, WV) require testing for convicted or, in some cases, charged sex offenders; 11 states (AK, AZ, CA, FL, GA, KS, MI, OR, TX, VA, WA) require a court order, some only after failure to get the accused's consent.

- ▶ **Timing:** At least nine states (CA, CO, FL, GA, ID, NV, OH, TX, VA) allow testing at the time of arrest or after charges have been filed, as opposed to after conviction. Four of them require the victim to first request the testing.
- ▶ **Access to Test Results:** Almost all states with testing laws make results available to the victim and the accused as well as to public health authorities. In some states the court and penal system also have access to the results.
- ▶ **Penalties for Unauthorized Disclosure:** Three states (AZ, KS, OR) consider it a misdemeanor to reveal test results to anyone not legally authorized to have access. Penalties include fines.
- ▶ **Counseling:** Laws in 14 states (AK, AZ, CA, FL, GA, IN, KS, MI, MN, OH, OR, VA, WA, WV) include provisions for counseling the victim and/or the accused.
- ▶ **Funding:** Nine states (FL, GA, ID, KS, MO, OH, OR, SC, VA) have included methods of paying for testing in their laws. In Ohio and South Carolina the accused is charged for testing; Kansas and Virginia pay for testing and then include restitution through the convicted person's court costs. Florida draws on general revenue funds, and Oregon uses crime victim compensation funds.

Legislation proposed in 1991 continued to focus on mandatory testing for convicted sex offenders and mandatory or permitted testing of individuals arrested for sex offenses. Other issues under consideration included victim counseling and methods of paying for testing and counseling.

COURT RESPONSES

State laws concerning HIV testing of sex offenders are relatively new and have undergone little court scrutiny. Michael Stoy, Idaho deputy attorney general, says of his state's law that requires testing of anyone charged with a sex offense, "I keep waiting for our own law to be challenged constitutionally . . . but there has not yet been a definitive nationwide statement as to whether someone can be tested against their will. It's a Fourth Amendment privacy right balanced against a public health situation." (9, p. 38)

CONCLUSION

Requiring HIV testing is one highly visible legislative response to the problems of sexual assault and AIDS. State policymakers are faced with constitutional issues of balancing both the rights of victims and defendants and with practical concerns about risks, reliability, usefulness and costs of testing. So far, at least 23 states have responded with a variety of legislative provisions concerning testing: mandatory vs. court ordered, before or after conviction, with or without compulsory counseling, and with various notification procedures. Testing, by itself, may not best serve policymakers' intent to assist victims. It may provide some relief to victims, but programs that include counseling, monitoring of victims' own health status, and emphasis on their own well-being may generate greater long-term benefits. States will continue to be involved in addressing this highly emotional and legally difficult issue. Legislators may want to consult with legal counsel, rape victim assistance groups, other relevant community organizations and public health personnel when considering appropriate responses.

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APPENDIX

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Arizona 1990, Chap. 335 (HB 2173)		✓ (1)			✓	• Victim • Accused • Dept. of Health Services	Class 3 misdemeanor (Fine ≤ \$5,000)	• Victim • Accused	
Arkansas 1989, Act 614 (HB 1496)		✓				• Victim		• Victim	
California 1989, Chap. 1360 (SB 2643) [Penal Code 1524.1] 1988, Chap. 1597 (SB 1007) 1988, Chap. 1582 (AB 3255)	✓	✓ (1)		✓	✓	• Victim • Accused • Those victim "deems necessary"	\$1,000 - \$10,000	• Victim • Accused	
Colorado 1988, Act 18-3-415 (SB 8)	✓			✓ (2)		• Victim (1) • Court			
Florida 1990, Chap. 90-210 (HB 1115)	✓ (5)	✓ (1)		✓	✓	• Victim (1) • Accused • Dept. of Health & Rehab.		• Victim • Accused	General Revenue Fund
Georgia 1988, Act 1440 (HB 1281) 1991, Act 411 (HB 554)		✓ ✓ (1) ✓ (15)			✓ (3) ✓	• Victim • Court • Penal Facility • Dept. of Human Res.		• Victim	Victim or arrested person, at court's discretion

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

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State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Idaho 1988, Chap. 45 (HB 432) 1990, Chap. 310 (HB 638)	✓			✓		• Victim (1) • Public health authorities (5) • Court • Victim (5)			State (4)
Illinois 1987, P.A. 85-935 (HB 2044)	✓				✓	• Judge			
Indiana 1988, P. Law 88-123 (SB 9)	✓				✓	• Victim • Accused • Probation Officer • Board of Health		• Victim • Accused	
Kansas 1988, Chap. 230 (HB 2659)		✓			✓ (6)	• Victim • Accused • Victim's health care provider • Secty. of Health & Env. • Secty. of Corrections	Class C Misdemeanor	• Victim	State (7)
Michigan 1988, P.A. 471 (HB 4008) 1988, P.A. 488 (HB 5189)		✓			✓	• Victim • Accused • Corrections Department • Health Department	\$1,000 - \$5,000	• Accused • Victim, after test	
Minnesota 1990, Chap. 436 (SB 2046)								• Victim	

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
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	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Mississippi 1991, Chap. 425 (HB 492)	✓				✓	• Rape victim & spouse • Accused & spouse			
Missouri 1989, Section 191.226 (SB 138)	✓ (8)				✓				Department of Health (9)
Nevada 1989, Chap. 138 (SB 73)	✓			✓		• Victim		(10)	
North Dakota 1989, Chap. 181 (SB 2048)	✓				✓				
Ohio 1989, Vol. 143 (SB 2)	✓			✓	✓ (6)	• Accused • Victim (1) • Penal facility • Court		• Anyone tested	Accused (11)
Oregon 1989, Chap. 568 (HB 2030)		✓ (12)	✓		✓ (6)	• Victim • Accused • Victim's health care provider • Health Division	Class C Misdemeanor	• Victim • Accused, at arrest (13)	Crime Victim Compensation
1987, Chap. 600 (HB 2067)	✓				✓				
South Carolina 1988, Ratification No. 547 (HB 2807)	✓				✓ (14)	• Victim • Accused • Department of Health			• Accused (11)
Tennessee 1991, Public Chap. 25 (HB 52)	✓ (1)				✓	• Victim			

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
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- (12) If defendant does not consent and after victim has been tested
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- (15) If defendant does not consent
- (16) Sentencing judge
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State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent Of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Texas 1987, Chap. 55 (SB 66-XX)		✓ (1)		✓ (17)		• Victim • Local Health Authority			
Virginia 1990, Chap. 957 (HB 815)		✓ (15) ✓	✓	✓	✓	• Victim • Accused • Department of Health		• Accused	State (7)
Washington 1988, Chap. 206 (SB 6221)		✓ (16)			✓			• Accused, pre- and post-test	
West Virginia 1988, Chap. 16 (HB 303)	✓				✓	• Victim (5)		• Accused	

- (1) At request of victim guardian
 (2) After preliminary hearing
 (3) Within 45 days of guilty verdict, guilty plea or no contest plea
 (4) Only to extent of funding and appropriations

- (5) By court order
 (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
 (7) Restitution by convicted offender (court costs)

- (8) All prisoners
 (9) For victim if defendant tests HIV positive
 (10) Treatment of accused required
 (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
 (13) After conviction if HIV positive
 (14) Within 15 days
 (15) If defendant does not consent
 (16) Sentencing judge
 (17) After indictment

Source: Intergovernmental Health Policy Project, George Washington University:

A Synopsis of State AIDS Laws Enacted During the 1983-1987 Legislative Sessions.

A Summary of AIDS Laws from the 1988 Legislative Sessions.

A Summary of AIDS Laws from the 1989 Legislative Session.

A Summary of the HIV/AIDS Laws from the 1990 State Legislative Sessions.

Preliminary 1991 information as of May 30, 1991.

HIV/AIDS Information and Education Project for State Legislators

NCSL works in partnership with the Centers for Disease Control (CDC) to educate and inform state legislatures on HIV and AIDS trends. Continued funding from the CDC enables NCSL's HIV/AIDS Project to serve legislators and their staff as an information resource and a forum to communicate with legislative colleagues, experts, and government officials around the country.

Legislators and legislative staff of the nation's 50 states, its commonwealths and territories are encouraged to request assistance from NCSL's HIV/AIDS Project. The following services are available at no cost to legislators and staff:

- o information clearinghouse
- o technical assistance
- o publications
- o meetings and workshops

The project is funded through a cooperative agreement with the U.S. Centers for Disease Control. For further information contact Tracey Hooker, policy specialist, at NCSL's Health Services Program (303/830-2200).

The Difference Between HIV and AIDS

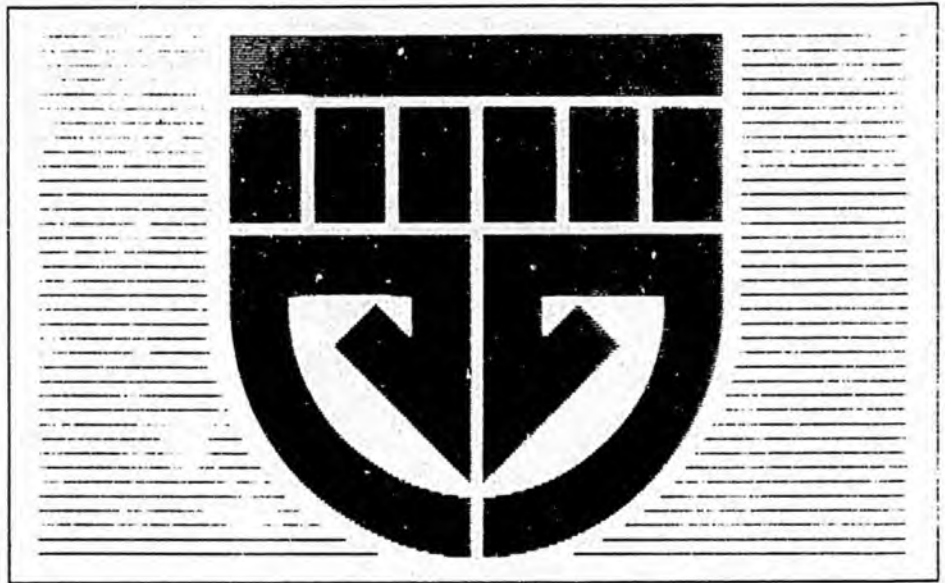
It is important for legislators to understand the distinction between the terms "HIV" and "AIDS" when they formulate policies. There is an immense difference between being infected with HIV and being diagnosed as having AIDS.

HIV is the term for the virus that damages the immune system and may eventually cripple the body's ability to fight disease. AIDS is the end result of HIV infection. People infected with HIV are diagnosed as having AIDS if they develop certain serious diseases or conditions, such as Kaposi's sarcoma (a rare skin cancer), pneumocystis carinii pneumonia, or HIV dementia.

Many more people are infected with HIV than have developed AIDS. An estimated one million individuals are believed to be infected. Many HIV-infected people experience no symptoms of illness for up to 10 years or more. "HIV infection" more correctly defines the scope of the public health problem that legislators face today.

Some of the most regularly misunderstood phrases related to HIV:

Misleading	More Accurate
Infected with AIDS	HIV infection
AIDS virus	HIV (human immunodeficiency virus)
HIV virus	HIV
AIDS test	HIV antibody test
AIDS antibodies	HIV antibodies
Positive AIDS test	Positive test for HIV antibodies
AIDS transmission	HIV transmission
AIDS victim	PWA (person with AIDS) or PLWA (person living with AIDS)
High risk groups	High risk behaviors



STATE
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Bill would allow AIDS testing of rape suspects

By IAN MADER

THE ASSOCIATED PRESS

Sexual assault victims would be able to find out whether their suspected attacker carries the virus that causes AIDS, under legislation introduced in the House.

Victims could petition the court to have the suspect tested for the human immunodeficiency virus, known as HIV. If the court found probable cause that bodily fluids were exchanged, it would have to order the test.

The bill is a rewrite of legislation that died last year. More than a dozen states have passed such laws. To protect the rights of suspects, some states require a conviction before the test can be or-

dered.

No conviction is required under House Bill 109, but if the suspect were convicted, he or she would have to pay for the test. Otherwise, the Department of Health and Social Services would pay.

Rep. Pete Kott, R-Eagle River and sponsor of the bill, said a negative HIV test could alleviate fear for a traumatized victim. If the suspect carried the virus, the victim would know of the risk and could seek prompt medical treatment, Kott said.

The House Judiciary Committee is among the panels that will review the bill. Rep. Brian Porter, R-Anchorage and committee chairman, said testing suspects

may be an unnecessary expense.

A negative test for a suspect is no guarantee that HIV was not passed to the victim, said Porter, a former police chief. An attacker could recently have contracted the virus, but may not be testing positive yet.

"A victim would have to get tested themselves anyway," Porter said. "Anyone, including victims of sex crimes, can obtain free testing in Alaska."

The state will lose \$200,000 in federal aid without such a law, but administering the program may cost more than that, Porter said.

Among other measures introduced in the Legislature recently:

- HB91 and HB107, which would issue general obligation bonds to pay for public school construction and equipment. HB91 would issue \$414 million in bonds for rebuilding schools throughout the state.

CS HB 109(JUD)
Rep. Kott
3/25/93

Appendix

Worksheet

For Fiscal Year 1994, States and other Jurisdictions (for convenience hereafter referred to as States) must be in compliance with the HIV mandatory testing standards for certain offenders established by Sec. 1804 of the Crime Control Act of 1990, 42 U.S.C. § 3756(f) (hereafter referred to as Section 1804) in order to receive continued full funding under the Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program.

The purpose of this worksheet is to assist the States in providing a self-assessment of their compliance with Section 1804. It need not be returned.

1. Victim Request.

Does the State statute require an HIV testing procedure at the request of any victim of a sexual act for which the person to be tested was convicted in State court (or make such a test mandatory for *all* persons thus convicted regardless of victim request)?

Yes No HB 109 exceeds this standard by providing for such testing on charged defendants.

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

2. Administration of the Test.

Does the State statute require an agency of the State (such as a court, health department, correctional authority, etc.) to direct that a test be administered in such cases?

Yes No

Does the State statute specifically require testing in these cases for the presence of acquired immune deficiency syndrome (AIDS) or its precursor, human immunodeficiency virus (HIV).

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300(d)

AS 18.15.310(b)

3. The Person to be Tested.

Does the State statute require persons to be tested who have been convicted under State law of a defined sexual act?

Yes, in all cases Yes, but only at the request of a victim No

Does this either specifically or by definitional inclusion encompass persons found guilty of the offense by a jury or court, as well as those entering a pleas of guilty? (Note: Because Question 6 below concerns the definition of juveniles as persons "convicted," please disregard that issue for Question 3).

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300 (cf. AS 11.41.410 - 11.41.440)

4. Disclosure of the Test Results.

Does the State statute provide for disclosure of the test results to ~~the~~ both the victim and the person tested?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300(e)

5. Victim Services.

Does the State statute provide for making the following services available to the victims of these sexual acts at their request:

1. Counseling regarding HIV disease?

Yes No

2. HIV testing in accordance with applicable law?

Yes No

3. Referral for appropriate health care and support services?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.310(h)

What are the sources of the funds to pay for these services?

Alaska Department of Health + Social Services

(test paid by defendant by order of the court
if the defendant is found guilty.)

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.310(h)

AS 18.15.900

AS 18.15.320

6. Definition of the term "convicted" as including Juveniles.

Does the State statute require HIV testing for juveniles who have been adjudicated under State law of committing sexual acts as it does with adults?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

7. Definition of the term "Sexual Act."

Does the State statute define "sexual act" as having the meaning (either literal or approximate) as that given the term in 18 U.S.C. § 2245(2)(A) or (B)? (See Division 7 of the "Guide for the States").

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 11.41.410 - 11.41.440

AS 11.81.900(b)(54)